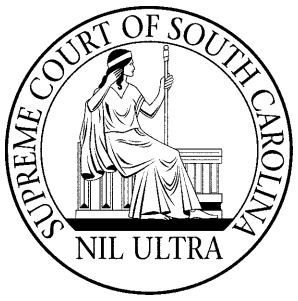

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 18

May 6, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wells Fargo Bank, NA, as trustee for the benefit of the certificate holders of asset-backed pass-through certificates series 2004-WCWI Respondents,

v.

Barbara S. Turner, Defendant

Richard S. Freeman, Foreclosure Bidder Appellant.

Appeal From Bamburg County
Richard B. Ness, Special Referee for Bamburg County

Opinion No. 4376
Submitted March 1, 2008 – Filed April 23, 2008

AFFIRMED

R. Bentz Kirby, of Orangeburg, and Glenn Walters, of Orangeburg, for Appellant.

Jason L. Branham, of Lexington, for Respondents.

HEARN, C.J.: Richard Freeman appeals the special referee's order setting aside a judicial sale. Freeman contends Wells Fargo Bank, NA (the Bank) failed to meet its burden of proof to vacate the sale because it failed to present evidence as to the value of the property. We affirm.

FACTS

The Bank obtained a mortgage from Barbara Turner in the amount of $82,025 on real property located in Bamberg County, South Carolina. When Turner failed to make her payments, the Bank sought foreclosure of the mortgage, and the case was referred to a special referee. In July of 2005, the referee held a hearing on the merits, as evidenced by a written transcript of testimony submitted in the record. Turner did not attend the hearing, and was ultimately found in default. The referee found the debt due to the Bank totaled $86,565.13, and ordered the property sold at public auction.

At the public auction, Freeman submitted the highest, and ultimately successful bid of $3,000 for the property. Thereafter, the Bank served Freeman with a Motion to Set Aside and Vacate Sale. The Bank argued the sale should be set aside because: (1) the Bank's attorney failed to take all necessary steps to ensure the Bank would have a representative present and prepared to bid at the sale; and (2) the successful bid of $3,000.00 was so low as to shock the conscience of the court.

The special referee granted the Bank's motion, concluding Freeman's bid of $3,000 amounted to only 3.65% of the property value, and therefore, constituted a grossly inadequate sale price that shocks the conscience under the test set forth in Poole v. Jefferson Standard Life Ins. Co., 174 S.C. 150, 157, 177 S.E. 24, 27 (1934). The referee declined to address the Bank's other arguments, including the existence of "circumstances warranting court interference," finding it was unnecessary to do so, given the gross inadequacy of the sale price. Subsequently, Freeman filed a Rule 59(e), SCRCP, motion

to alter or amend the judgment. The special referee denied the motion, and this appeal followed.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity. Our scope of review of a case heard by a master who enters a final judgment is to determine facts in accordance with our own view of the preponderance of the evidence." E. Sav. Bank, FSB v. Sanders, 373 S.C. 349, 354, 644 S.E.2d 802, 805 (2007) (quoting Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). However, the determination of whether a judicial sale should be set aside is a matter left to the sound discretion of the trial court. Investors Sav. Bank v. Phelps, 303 S.C. 15, 17, 397 S.E.2d 780, 781 (Ct. App. 1990).

LAW/ANALYSIS

Freeman asserts the special referee erred in finding the Bank had met its burden of proof in order to vacate the foreclosure sale. Specifically, Freeman asserts the Bank failed to prove the value of the property. We disagree.

A judicial sale will be set aside when either: (1) the sale price "is so gross as to shock the conscience[;]" or (2) the sale "is accompanied by other circumstances warranting the interference of the court." Poole, 174 S.C. at 157, 177 S.E. at 27. In Poole, the court set aside a sale on the ground that the highest bid price, which amounted to approximately 12.5% of the property value, was so grossly inadequate that it shocked the court's conscience. Since the opinion in Poole, our courts have continued to set aside judicial sales based on "grossly inadequate" sales prices. See Investors Sav. Bank v. Phelps, 303 S.C. 15, 397 S.E.2d 780 (Ct. App. 1990) (stating that sales prices amounting to 4.2%, 4.4%, and less than 10% of the property value all fall within the percentage range of a grossly inadequate sales price).

In the case before us, the special referee found the original amount of the foreclosed note and mortgage was $82,025, and that the total debt due to the Bank under the note and mortgage, as of July 7, 2005, was $86,563.13. As a result, the court concluded Freeman's high bid of $3,000 was only 3.65% of the original principal amount of the foreclosed note and mortgage. This, the court found, constituted a grossly inadequate sale price that shocked the conscience under the Poole test.

The amount of the foreclosed note and mortgage are evidence of the property's value. Investors Savings Bank v. Phelps, 303 S.C. 15, 18-19, 397 S.E.2d 780, 782 (Ct. App. 1990). Although the note and mortgage were not presented as evidence at the hearing on the motion to set aside the sale, they were admitted into evidence at the initial hearing regarding the default proceedings against Turner, and they were attached to the original summons and complaint instituting the action. A purchaser at a judicial sale is deemed to have notice of all things disclosed by the record. See Ex parte Keller, 185 S.C. 283, 293, 194 S.E. 15, 19 (1937) (Even though judicial sale purchaser was not a party to the action originally, as a purchaser at the sale, he made himself a party to the suit, and is assumed to have notice of all things disclosed by the record.). Additionally, the sale and terms of a foreclosure are ordered and dictated by the Judgment of Foreclosure and Notice of Sale, which are both a matter of public record.

Moreover, Freeman testified at the hearing on the motion to set aside the sale that he was prepared to bid up to $75,000.00 for the property. Fair market value is the amount at which property would change hands between a willing buyer and willing seller. Black's Law Dictionary 597 (6th ed. 1990). Therefore Freeman's testimony is also evidence of the value of the property.[1]

[1] Freeman also asserts the lower court applied the wrong legal standard because it did not require the Bank to prove excusable neglect. However, a party does not have to prove excusable neglect if the judicial sale is found to shock the conscience; rather a showing of excusable neglect is only required when a party is seeking to have a judicial sale set aside based on the second prong of the Poole test. Poole, 174 S.C. at 157, 177 S.E. at 27. Here, we

CONCLUSION

We hold the record contains sufficient evidence of the value of the property to support the decision of the special referee that Freeman's bid was so grossly inadequate as to shock the conscience. Accordingly, the order of the special referee is

AFFIRMED.[2]

PIEPER, J., and CURETON, A.J., concur.

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need not address Freeman's remaining arguments because we find the sale was properly set aside based on the first prong of Poole. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

2003-CP-10-00140

Jamia Hoard, a minor under the age of fourteen years, by Karen Elizabeth Hoard, her mother, Appellant,

v.

Roper Hospital, Inc.; Carolina Care Alliance; Karen Johnson; Robert H. Smith, M.D.; Marshall Goldstein, M.D.; and John Doe and Mary Roe, representing one or more unknown parties, Defendants,

of whom:

Robert H. Smith, M.D., is the Respondent.

2003-CP-10-00142

Karen Elizabeth Hoard and William Dwight, Appellants,

v.

Roper Hospital, Inc.; Carolina Care Alliance; Karen Johnson; Robert H. Smith, M.D.; Marshall Goldstein, M.D.; and John Doe and Mary Roe, representing one or more unknown parties, Defendants,

of whom:

Robert H. Smith, M.D., is the Respondent.

Appeal From Charleston County
J. C. "Buddy" Nicholson, Jr., Circuit Court Judge

Opinion No. 4377
Heard March 5, 2008 – Refiled April 24, 2008
Formerly Unpublished Opinion No. 2008-UP-209
Heard March 5, 2008 – Filed March 27, 2008

REVERSED

Coming B. Gibbs, Jr., Cameron Marshall, and Paul N. Uricchio, all of Charleston, for Appellants.

Andrew F. Lindemann, of Columbia, M. Dawes Cooke, Jr., and P. Gunnar Nistad, both of Charleston, for Respondents.

PER CURIAM: In this medical malpractice action, Jamia Hoard and her parents, Karen Elizabeth Hoard and William Dwight (collectively the Hoards), appeal the trial court's grant of summary judgment to Dr. Robert H. Smith on their cause of action for medical malpractice. The Hoards assert they provided evidence Dr. Smith was a proximate cause of Jamia's injuries. We reverse.

FACTS

Jamia was born on March 30, 2002, at Roper Hospital (the Hospital) in Charleston. Shortly thereafter, she developed a respiratory condition and was transferred to a level II nursery,[1] where Dr. Marshall Goldstein, a neonatologist,[2] was her primary physician. Jamia's condition necessitated an intravenous line to administer medication and fluids. Because the nursing staff was unable to start a peripheral intravenous line, Dr. Goldstein ordered Karen Johnson, a certified neonatal nurse practitioner, to place an umbilical intravenous line.[3] Johnson placed the line on the afternoon of March 30, 2002. When inserted eleven to thirteen centimeters, the optimal location for such a catheter, the line would not draw[4] blood. Nurse Johnson then placed

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[1] Nurseries can be distinguished based on the needs of an infant and the abilities of a facility. Level II nurseries provide care for infants who need more help or closer monitoring than a Level I nursery can provide. Infants in Level II nurseries may need intravenous fluids or medications, assistance to maintain their body temperature, feeding assistance, or monitoring for sleep apnea. Level III nurseries or newborn intensive care units (NICUs) provide even greater care to infants, including subspecialty services, the use of ventilators, close observation of infants whose condition is unstable, and care following surgery.

[2] Neonatology is a subspecialty of pediatric medicine, concerning the care and treatment of newborns.

[3] An umbilical intravenous line is a catheter that is placed in the vein of the umbilical cord.

[4] A catheter "draws" when you exert negative pressure on the catheter and blood flows out of the body through the catheter.

the line at fourteen centimeters. Following the Hospital's protocol, a chest x-ray was taken on March 30 to confirm the position of the line.

The next morning, Dr. Smith, a radiologist, reviewed Jamia's chest x-ray and prepared a report stating, "An umbilical vein catheter has been placed. The tip terminates high within the right atrium. There are persistent bilateral coarse infiltrates essentially unchanged compared with the prior one. No pneumothorax is seen." Dr. Smith's report was approved at 10:34 a.m. and sent to Jamia's floor. At 2 p.m. that afternoon Dr. Goldstein reviewed Dr. Smith's report. He did not adjust the placement of the line.

At 4:15 a.m. on April 1, Jamia went into cardiac arrest. Jamia was transferred to the neonatal intensive care unit[5] of the Medical University of South Carolina (MUSC) where it was determined the wall of the right atrium was perforated allowing blood and intravenous fluid to fill the pericardial sac around the heart, effectively causing tamponade.[6] MUSC physicians ascertained that the umbilical intravenous line most likely eroded the wall of the heart a few hours prior to the cardiac arrest, and as a result Jamia suffered severe brain damage.

Jamia and her parents separately filed professional negligence actions against the Hospital; Carolina Care Alliance, the owner and operator of the Hospital; Nurse Johnson; Dr. Smith; and Dr. Goldstein. The Hoards asserted Dr. Smith violated his standard of care by failing to note in his x-ray report the line was improperly placed and this failure was a proximate cause of Jamia's injuries. The Hoards claimed Dr. Goldstein may not have known the line was improperly placed and if Dr. Smith had alerted him to the placement, Dr. Goldstein would have moved the line, and prevented the cardiac arrest.

In his deposition, Dr. Paul Koenigsberg, a radiologist from Florida, testified that Dr. Smith violated the standard of care by failing to note on the chart or notify someone the line was improperly placed. Dr. Goldstein testified he knew the line was not optimally placed but chose not to reposition

[5] MUSC's neonatal intensive care unit is the region's Level III care facility.
[6] Tamponade is the restriction of heart function by fluid in the pericardial sac.

it for several reasons, including the line's proven efficacy over twenty-two hours and the possibility of moving a blood clot that may have formed at the tip of the line. Dr. Anne Hansen, an assistant professor at Harvard University Medical School, described Dr. Goldstein's reasons for not moving the line as a non-valid concern.

The Hoards settled their claims with the Hospital, Carolina Care Alliance, Nurse Johnson, and Dr. Goldstein. Dr. Smith made a motion for summary judgment. The trial court granted the motion, finding the Hoards did not provide evidence Dr. Smith was a proximate cause of Jamia's injuries. The Hoards' motion for amendment of judgment was denied. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). If evidentiary facts are not disputed but the conclusions or inferences to be drawn from them are, summary judgment should be denied. Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991).

LAW/ANALYSIS

The Hoards contend the trial court erred in granting Dr. Smith's motion for summary judgment because they provided evidence Dr. Smith was a proximate cause of Jamia's injuries. The Hoards assert a jury could have disregarded Dr. Goldstein's testimony and found Dr. Smith's failure to alert Dr. Goldstein of the line's position was a proximate cause of Jamia's injuries. We agree.

"Medical malpractice lawsuits have specific requirements that must be satisfied in order for a genuine factual issue to exist." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Specifically, a plaintiff alleging medical malpractice must provide evidence showing: (1) the generally recognized and accepted practices and procedures that would be followed by average, competent practitioners in the defendant's field of medicine under the same or similar circumstances, and (2) the defendant departed from the recognized and generally accepted standards. Jones v. Doe, 372 S.C. 53, 61, 640 S.E.2d 514, 518 (Ct. App. 2006). Additionally, the plaintiff must demonstrate the defendant's departure from such generally recognized practices and procedures proximately caused the plaintiff's alleged injuries and damages. David, 367 S.C. at 248, 626 S.E.2d at 4.

If the subject matter does not lie within common knowledge but requires special learning to evaluate the conduct of the defendant, then the plaintiff must offer expert testimony to establish both the required standard of care and the defendant's failure to conform to that standard. Id. Because "many malpractice suits involve ailments and treatments outside the realm of ordinary lay knowledge, expert testimony is generally necessary." Ellis v. Oliver, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996). When plaintiffs rely solely upon medical expert testimony as the only evidence of proximate cause, the medical expert must, with reasonable certainty, state it is their opinion the injuries complained of most probably resulted from the defendant's negligence. Id. The testimony "must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." Id.

For this court to reverse grants of summary judgment, plaintiffs must have provided some evidence for each element of their claims. In the present case, the Hoards must have presented evidence Dr. Smith violated the standard of care and that violation was a proximate cause of Jamia's injuries.

1. The Hoards presented evidence regarding a radiologist's standard of care and violations of that standard. Dr. Koenigsberg testified radiologists have a duty and standard of care to immediately convey urgent information to the person who ordered the film. He also testified it would be outside a

radiologist's standard of care to not directly communicate to the treating physician or his nurses that an umbilical venous line was not properly positioned. Another radiologist from Florida, Dr. Rodan, testified that when a radiologist sees a line high in the right atrium, to be within the standard of care, he should state his impression there is a deviation from the normal placement of a line. Dr. Rodan further stated "if there is a malposition it needs to be stated in such language that the referring physician knows that it's in an inappropriate location and that they should consider doing something such as repositioning the catheter."

Accordingly, the Hoards provided evidence to support their assertion Dr. Smith violated the standard of care, and we turn our examination to whether there is evidence Dr. Smith was a proximate cause of Jamia's injuries.

2. The Hoards claim Dr. Smith's failure to alert Dr. Goldstein to the position of the line was a proximate cause of Jamia's injuries. Dr. Smith asserts the Hoards did not provide any evidence of proximate cause because Dr. Goldstein testified he knew the line was not optimally positioned. However, a jury could have chosen not to believe Dr. Goldstein's testimony. Simply because testimony is uncontradicted does not render it undisputed. Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991). The question of the inherent probability of the testimony and the credibility of the witness remains. Id. Even when evidence is not contradicted, the jury may believe all, some, or none of the testimony and the matter is properly left to the jury to decide. Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000).

When asked if Dr. Smith's alleged failure to communicate orally with Dr. Goldstein in any way caused the cardiac arrest, Dr. Koenigsberg explained if there was a delay between the placement of the line and the time at which the treating physicians realized the line was in an abnormal position, that could have caused the pericardial effusion. Dr. Koenigsberg also stated he believed Dr. Smith was negligent for failing to call someone responsible for Jamia's care and inform them the tip of the catheter was in an abnormal position. Dr. Koenigsberg testified if Dr. Goldstein knew of the line's

placement prior to the line perforating the wall of the heart and had the opportunity to pull the line back before injury occurred, Dr. Smith did not cause the pericardial effusion.[7] However, Dr. Koenigsberg also responded affirmatively when asked, "Is it your opinion that Dr. Smith's alleged failure to orally communicate with Jamia Hoard's health care personnel, caused her to have a pericardial effusion?"

In addition, Dr. Rodan testified, "I think the lack of completeness of [Dr. Smith's] report did contribute to the complications that occurred to the patient." Assuming Dr. Goldstein did not know the location of the catheter's tip was outside the standard of care, Dr. Rodan testified Dr. Smith's failure to point out the deviation from the standard of care was "a contributing cause to the complications that occurred." Dr. Rodan believed "some of the complications that… occurred may be a direct responsibility of the radiologist because of his inadequate report."

An examination of the record shows the Hoards provided evidence supporting their assertion Dr. Smith was a proximate cause of Jamia's injuries. Accordingly, the order of the trial court is

REVERSED.

ANDERSON and SHORT, and THOMAS, JJ., concur.

[7] Pericardial effusion is an accumulation of fluid in the pericardial sac.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amy Bailey Thomson, Respondent,

v.

Colin Andrew Thomson, Appellant.

Appeal From Spartanburg County
Gerald C. Smoak, Jr., Family Court Judge

Opinion No. 4378
Submitted March 3, 2008 – Filed April 25, 2008

AFFIRMED

J. Benjamin Stevens, of Spartanburg, and John S. Nichols, of Columbia, for Appellant.

Richard H. Rhodes, of Spartanburg, for Respondent.

HEARN, C.J.: Colin Thomson (Husband) appeals from the final order of the family court granting Amy Thomson (Wife) a divorce on the ground of physical cruelty and ordering him to pay: (1) $99 per week in child support; (2) one-half of accumulated marital debt; (3) thirty-six percent of the

children's future uninsured medical bills; and (4) $5,000 toward Wife's attorneys' fees. Husband also appeals the court's declaration that Wife owned all the property in her possession. We affirm.[1]

FACTS

In February 2004, Husband and Wife met on a dating website. Wife held a master's degree and worked as a college swim coach and teacher. She owned a furnished home in Spartanburg, South Carolina. Husband, a Canadian citizen, worked in furniture sales. Prior to their marriage, Wife agreed to sponsor Husband's application for a visa. After their August 2004 marriage, Husband moved into Wife's home. Wife worked two jobs; however, Husband delayed submitting his visa application until February 2005 and, consequently, remained unemployed until May 2005.

Shortly after their marriage, Wife became pregnant. Her pregnancy was considered "high-risk" because she was thirty-seven years old and expecting twins. The children were born six weeks prematurely and remained in the newborn intensive care unit for twelve days. After Wife returned to work, wife's mother Carrie Bailey, who had moved from Michigan to the home to help care for the children, remained in the home to provide child-care.

On August 18, 2005, Wife filed a complaint seeking: (1) a divorce on the ground of physical cruelty; (2) sole custody of the children; (3) equitable division of marital debt; (4) child support; and (5) attorneys' fees. While Wife and the children were attending a function at Wife's school, Husband vacated the home and removed numerous items of Wife's personal property. Based upon Wife's motion for emergency relief, wherein she claimed Husband had become "volatile and irrational," the family court issued an ex parte order that mutually restrained Husband and Wife from interaction, temporarily restrained Husband from contact with the children, and granted Wife temporary custody.

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

At a subsequent hearing, the family court, finding Husband was not an immediate threat to the children or a flight risk, granted him unsupervised visitation. Further, the family court ordered Husband to pay child support of $133 per week, to return the personal property he removed from Wife's home, and it imposed a mutual restraining order.

Ultimately, the family court issued a final order granting Wife a divorce on the ground of physical cruelty, sole custody of the children, and $5,000 toward her attorneys' fees. Husband was awarded visitation within the United States, and was ordered to pay child support of $99 a week, in addition to thirty-six percent of the children's future medical bills that were not covered by insurance. The court also ordered Husband and Wife to divide their accumulated marital debt and the children's unpaid medical bills. Additionally, the court declared Wife owned all of the property in her possession as well as the property the court had previously ordered Husband return to her. Husband's appeal followed.

STANDARD OF REVIEW

A divorce action is a matter in equity heard by the family court judge; on appeal, the court's scope of review extends to the finding of facts based on its own view of the preponderance of the evidence. McLaughlin v. McLaughlin, 283 S.C. 404, 405-06, 323 S.E.2d 781, 782 (1984). However, our broad scope of review does not require us to disregard the findings of the family court or to ignore the fact that the trial judge saw and heard the witnesses and was in a better position to evaluate their credibility and assign comparative weight to their testimony. Tinsley v. Tinsley, 326 S.C. 374, 380, 483 S.E.2d 198, 201 (Ct. App. 1997).

LAW/ANALYSIS

A. Physical Cruelty

Husband contends the family court erred in granting Wife a divorce on the ground of physical cruelty. We disagree.

Physical cruelty is "actual personal violence, or such a course of physical treatment as endangers life, limb or health, and renders cohabitation unsafe." Brown v. Brown, 215 S.C. 502, 508, 56 S.E.2d 330, 333 (1949). In considering what acts constitute physical cruelty, the court must consider the circumstances of the particular case. Gibson v. Gibson, 283 S.C. 318, 322, 322 S.E.2d 680, 682 (Ct. App. 1984).

In Gibson, the husband appealed a family court order denying him a divorce on the ground of physical cruelty after his intoxicated wife allegedly locked herself in the bedroom and shot a rifle into the closed door. The husband claimed a splinter from the door struck him in the face; however, his wife claimed he was in a different room when she fired the gun. Id. at 322, 322 S.E.2d at 682. The family court held that because the husband was not physically injured, the wife's conduct did not constitute physical cruelty. Id. at 322, 322 S.E.2d at 683.

Prior to Gibson, no South Carolina case directly addressed whether it was necessary for a spouse to prove bodily injury when seeking a divorce on the ground of physical cruelty. Id. at 323, 322 S.E.2d at 683. On appeal, the Gibson court conducted an extensive review of the applicable case law and held:

> [I]f the wrongful act involves actual violence directed by one spouse at the other, "bodily injury" is not required in order to find "physical cruelty." A single assault by one spouse upon the other spouse, then, can constitute a basis for a divorce on the ground of physical cruelty; however, the assault must be life threatening or it must be either indicative of an intention to do serious bodily harm or of such a degree as to raise a reasonable apprehension of great bodily harm in the future.

Id. at 323, 322 S.E.2d at 683 (emphasis in original).

The Gibson court found that although the wife committed a single act of "actual violence" by firing the rifle, it was unclear whether her act was one of "actual personal violence" directed against Husband. Id. at 323-24, 322 S.E.2d at 683. The Gibson court remanded the case to the family court for findings regarding the credibility of the parties and the circumstances surrounding the wife's firing the gun. Id. at 324, 322 S.E.2d at 683-684. See Lucas v. Lucas, 279 S.C. 121, 302 S.E.2d 863 (1983) (finding it difficult to fathom the reason the family court did not grant wife a divorce on the grounds of physical cruelty, but finding no abuse of discretion in the court's decision to grant the divorce on the ground of one year's separation); see also McDowell v. McDowell, 300 S.C. 96, 99-100, 386 S.E.2d 468, 470 (Ct. App. 1989) (affirming the family court's grant of a divorce to a husband on the ground of physical cruelty where the court found his wife's single act of "accidentally" shooting him was life threatening, indicative of her intention to do serious bodily harm, and totally out of proportion to his attempt to recover a vehicle from her).

Here, Wife testified Husband first physically abused her in February 2005, when she was pregnant with twins. Wife stated she and Husband argued over their finances, and she had gone into the bedroom to calm down when "he came in there and I mean basically pulled me off the bed three times by my legs." Husband, meanwhile, testified Wife kicked him as he tried to retrieve bills from under the bed, and he admitted he responded by pulling her off the bed by her legs. After this altercation, Husband and Wife separated briefly; however, Wife said Husband returned a week later, "against [her] wishes."

Wife also testified Husband "roughed her up" on her wrist and breast and shattered a glass picture on her stomach; however, the record does not indicate when these alleged acts of physical violence occurred. Husband admitted "[t]here was an incredible amount of physical violence in the house" and contended Wife physically abused him by throwing juice at him and punching him in the stomach. Wife admitted throwing juice at Husband after he told her he never wanted to marry her, but she denied ever hitting him.

Where issues relate to proof regarding which party, if either, is entitled to a divorce, and the evidence is in conflict and susceptible to different inferences, "it becomes the duty of the trial judge to determine not only the law of the case but the facts as well" because the judge observed the witnesses and could "attach[] to each one's testimony such credence as was due." Anders v. Anders, 285 S.C. 512, 514, 331 S.E.2d 340, 341 (1985). Here, the family court's final order noted its "particular attention to the demeanor of the party [testifying] and the substance of that testimony" and stated concerns regarding the credibility of Husband's testimony and the testimony of Husband's only witness, his brother. By contrast, the court's order did not express concerns regarding Wife's credibility.

Given Wife's condition at the time of the alleged act of physical violence, Husband's acknowledgement that there was a great deal of physical violence in the home, and the fact that the family court judge had the opportunity to observe the demeanor of the parties, we find sufficient evidence in the record to support the family court's decision to grant Wife a divorce on the ground of physical cruelty.

B. Condonation

Husband claims that even if his acts rose to the level of physical cruelty, the evidence shows Wife condoned his misconduct when she allowed him to move back into the marital residence. We disagree.

"Ordinarily condonation is an affirmative defense that must be pleaded." McLaughlin v. McLaughlin, 244 S.C. 265, 272, 136 S.E.2d 537, 540 (1964). However, the issue of condonation in a divorce proceeding may be raised for the first time on appeal. Id. But see Doe v. Doe, 286 S.C. 507, 511, 334 S.E.2d 829, 832 (Ct. App. 1985) (suggesting McLaughlin "may have been superseded by the subsequent adoption of Family Court Rule 11 which expressly provides that 'recrimination and condonation shall be pleaded as affirmative defenses.'"); Rule 8(c), SCRCP (stating when pleading to a preceding pleading, a party must set forth the affirmative defense of condonation).

Here, Husband raises the affirmative defense of condonation for the first time on appeal. He acknowledges the family court's order does not address condonation, yet he asks this court to examine the record and find condonation. We decline to do so because this issue was neither pled nor raised to the family court judge.

C. Child Support

Husband asserts the family court abused its discretion in ordering him to pay child support of $99 per week. Specifically, Husband contends the family court made no findings to support this award. We disagree.

When an order from the family court fails to make specific findings of fact in support of the court's decision, the appellate court may remand the matter to the family court or, "where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence." Badeaux v. Davis, 337 S.C. 195, 203, 522 S.E.2d 835, 839 (Ct. App. 1999). Additionally, the South Carolina Child Support Guidelines (Guidelines) allow a court to impute potential gross income to a parent who is unemployed or underemployed. See 27 S.C. Code Ann. Regs. § 114-4720 (Supp. 2007).

While the family court's written order minimally complies with Rule 26(a), SCRCP, the record is sufficient for this court to make findings on this issue which support the family court order.[2] Husband testified he received a letter from the Immigration and Naturalization Service (INS) in November 2005, stating that because Wife had withdrawn her sponsorship of his visa application, he was no longer eligible to work in the United States, and must leave the country by April 22, 2006. The court's order found Husband planned to return to Halifax, where he had a job offer paying $13 per hour to work forty hours per week. Wife submitted a financial declaration showing gross monthly income of $3,916 and a monthly expense of $153 for the children's health insurance. Although the family court's order did not state that it had imputed income to Husband based on his testimony, or had applied

[2] Husband's testimony revealed the financial declarations he submitted to the family court were inaccurate.

the Guidelines, we find the record contained the facts needed for the court to compute Husband's child support obligation pursuant to the Guidelines.

Based on the record before us, we project monthly wages of $2,080 to Husband. Accordingly, the family court did not abuse its discretion by ordering Husband to pay $99 per week in child support.

D. Equitable Division of Marital Debt

Husband argues the family court erred in finding marital debt of $36,560 and ordering Husband to pay one-half ($18,280) to Wife at a rate of $300 per month. Specifically, Husband argues Wife did not sufficiently document that the debt incurred during the marriage was related to expenses in support of the marriage. We disagree.

"For purposes of equitable distribution, 'marital debt' is debt incurred for the joint benefit of the parties regardless of whether the parties are legally jointly liable for the debt or whether one party is legally individually liable." Hardy v. Hardy, 311 S.C. 433, 436-37, 429 S.E.2d 811, 813 (Ct. App. 1993) (emphasis in original). The same rules of fairness and equity that apply to the equitable distribution of marital property also apply to the equitable division of marital debts. Id. at 437, 429 S.E.2d at 814. "[T]he burden of proving a spouse's debt as nonmarital rests upon that party who makes such [an] assertion." Id. at 437, 429 S.E.2d at 814. It is a "rebuttable presumption that a debt of either spouse incurred prior to the beginning of marital litigation is a marital debt and must be factored in the totality of equitable apportionment." Wooten v. Wooten, 364 S.C. 532, 546, 615 S.E.2d 98, 105 (2005).

Wife testified she expected Husband to be unemployed during the ninety-day visa application process, and she had accepted a second job coaching three evenings a week to get them through this period. Husband testified he sold his assets before he left Canada and arrived in the United States with only a leased car, personal effects, and between $2,000 and $6,000. Husband agreed he was totally dependent on Wife during that time.

Husband did not begin working until May 2005, nine months after their marriage. Wife testified Husband did not contribute financially to their

marriage, even after he began earning approximately $1,800 a month working at Ashley Furniture. She testified his only financial contribution to their marriage was $150.[3] Husband did not dispute Wife's trial testimony and agreed he had not paid any medical bills or contacted the children's health care providers to negotiate a payment plan. Additionally, Husband did not contradict Wife's testimony that she made monthly payments on Husband's outstanding Canadian debts, paid Husband's INS application fee of $1,000, paid his speeding tickets, and gave him money to open a checking account. Husband stated they dined frequently at restaurants, took short vacations together, and purchased nursery furniture. Husband also testified he "spent many nights in motels just trying to get away . . . ."

Wife presented documentation showing her credit card debt had increased from $4,500 at the time she married Husband to $36,560 when they separated a year later. Wife testified her savings of $8,500 were depleted by paying bills related to their household expenses. Wife additionally testified they borrowed $4,500 from her mother and $5,460 from her aunt to pay their bills. Husband testified he was aware of these loans. At trial, Wife presented a summary showing $36,560 in marital debt, exclusive of unpaid medical bills. Wife introduced this summary into evidence without objection. Husband did not challenge Wife's statement of marital debt at trial.

Accordingly, we find the family court did not abuse its discretion in adopting Wife's summary of $36,560 in marital debt, and ordering Husband and Wife to evenly divide the debt with Husband paying $300 per month to Wife until his $18,280 obligation is satisfied. See Honea v. Honea, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987) ("The trial court's findings come to us with a presumption of correctness. The burden is on [Appellant] to demonstrate the family court committed reversible error. . . . [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.").

[3] Wife stated Husband gave her $150 to pay a bill after their marriage counselor told him to make a contribution to the marriage.

E. Equitable Division of the Marital Estate

Husband argues the family court failed to properly apportion the marital estate. We disagree.

Section 20-7-473 of the South Carolina Code (Supp. 2007) defines marital property as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation." However, the statute specifically excludes from marital property, "property acquired by either party before the marriage," and states "[t]he court does not have jurisdiction or authority to apportion nonmarital property." Id.

"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). Property which is nonmarital at the time of its acquisition may be transmuted into marital property "(1) if it becomes so commingled with marital property as to be untraceable; (2) if it is titled jointly; or (3) if it is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property." Johnson v. Johnson, 296 S.C. 289, 295, 372 S.E.2d 107, 110 (Ct. App. 1988).

Wife testified she owned her Spartanburg home and its furnishings prior to her marriage. She testified no marital property was acquired during the marriage. Husband did not challenge Wife's testimony. The record contains no facts to support transmutation of Wife's separate property into marital property. Moreover, Husband did not offer evidence showing any marital property was acquired. Accordingly, the family court did not abuse its discretion in declaring the property in Wife's possession, including the home she purchased prior to her marriage, to be nonmarital property.

F. Children's Future Medical Bills

Husband contends the family court erred in ordering him to pay thirty-six percent of the children's future medical bills that are not covered by

health insurance. While Husband does not dispute the court's authority to determine a parent's contribution towards medical costs, he contends "the figure of 36% appears from thin air." We disagree.

As stated above, based upon testimony concerning his prospective employment in Canada, we projected monthly gross income to him of $2,080. Wife's gross monthly income is $3,916, from which $153 a month is deducted for the children's health insurance. As a result, Husband's imputed income of $2,080 comprises thirty-six percent of the $5,843 total monthly gross income available to Husband and Wife. Accordingly, we find the family court properly determined Husband's share of the children's future uninsured medical bills.

G. Attorneys' Fees.

Husband contends the family court erred in ordering Husband to pay $5,000 towards Wife's attorneys' fees. We disagree.

An award of attorneys' fees will not be overturned absent an abuse of discretion. Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988). "In deciding whether to award attorneys' fees, the family court should consider the parties' ability to pay their own fee, the beneficial results obtained by counsel, the respective financial conditions of the parties, and the effect of the fee on each party's standard of living." Arnal v. Arnal, 363 S.C. 268, 290, 609 S.E.2d 821, 833 (Ct. App. 2005), aff'd as modified, 371 S.C. 10, 636 S.E.2d 864 (2006). When the family court finds an award of attorneys' fees is justified, the amount of fees should be determined by considering: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) counsel's professional standing; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Wife's attorney submitted a fee affidavit documenting fees of $8,481 in this action. Based on the beneficial results obtained by Wife and the time necessarily devoted to the case, we find no abuse of discretion in the court's

decision to order Husband to pay $5,000 toward Wife's attorneys' fees. Accordingly, the order of the family court is

AFFIRMED.

KITTREDGE and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Clyde and Nancy Madren, Respondents,

v.

Thomas H. Bradford, Appellant.

Appeal From Dorchester County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4379
Heard March 5, 2008 – Filed April 28, 2008

AFFIRMED

John S. Nichols, of Columbia, W. Scott Palmer, of Santee, for Appellant.

Max G. Mahaffee, of Charleston, for Respondents.

THOMAS, J.: Thomas Bradford appeals the trial court's finding he breached a real estate contract with Clyde and Nancy Madren and the

resulting award of $55,000. Bradford also appeals the trial court's finding that Clyde Madren is not barred from bringing suit under South Carolina licensing statutes. We affirm.

FACTS

In 2002, Clyde and Nancy Madren purchased a tract of land in St. George for $82,000. The Madrens divided the tract into three parcels with houses on two of the parcels while the third parcel was a vacant lot. A house at 703 Raysor Street was situated on one of the three parcels. The Madrens were remodeling the Raysor Street house (House) in August 2002 when Thomas and Miriam Bradford approached them about purchasing the House.

The Madrens and Bradfords entered into a Buy and Sell Residential Real Estate Contract (Contract) on August 31, 2002. The Contract specified October 15, 2002, as the closing date. The Contract was subject to the Bradfords obtaining $120,000 in financing. In order for the Bradfords to secure the necessary financing, the bank required a home appraisal. The Bradfords believed the Madrens would complete several home renovations before a closing could take place. Thomas Bradford and Nancy Madren communicated numerous times through phone calls and emails regarding renovations, when appraisers could look at the House, and when the closing could occur. Such communications continued past the Contract's October 15 closing date.

On October 31, 2002, the Madrens notified the Bradfords renovations were complete and the House was ready for a "walk-through." Five days later Thomas Bradford responded with an e-mail stating he and his wife no longer intended to purchase the House. According to Thomas Bradford, they chose not to purchase the House because they did not want to extend the closing date any further.

On December 31, 2002, the Madrens brought an action for breach of contract and specific performance[1] against the Bradfords. Bradford[2] moved

[1] The Madrens later abandoned their specific performance claim because the House was in foreclosure.

to dismiss the Madrens' claim on the grounds that Clyde Madren did not have a contractor's license. The trial court denied the motion to dismiss. The trial court found the parties had entered into a binding contract in which time was not of the essence. Due to his emails, the trial court found Thomas Bradford waived compliance with the Contract's closing date. In addition to finding the Bradfords breached the Contract, the trial court further held the Bradfords could not defend their breach based on the parties' failure to meet the agreed closing date. The trial court awarded the Madrens $55,000 in damages. Bradford appealed.

STANDARD OF REVIEW

On appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law. Epworth Children's Home v. Beasley, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). The judge's findings are equivalent to a jury's findings in a law action. King v. PYA/Monarch, Inc., 317 S.C. 385, 389, 453 S.E.2d 885, 888 (1995). Questions regarding credibility and weight of evidence are exclusively for the trial judge. Sheek v. Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). The appellate court will not disturb the trial court's findings of fact as long as they are reasonably supported by the evidence. Epworth, 365 S.C. at 164, 616 S.E.2d at 714.

LAW / ANALYSIS

I. Contractor's License

Bradford argues the trial court erred in denying his motion to dismiss based on Section 40-11-30 of the South Carolina Code (2006). Specifically, Bradford argues the Contract should not be enforced because Clyde Madren, in his sole proprietorship, did not possess a contractor's license. We find this affirmative defense was not appropriately pled.

[2] Miriam Bradford passed away before the trial of this action.

Approximately one month before the trial commenced, Bradford filed[3] a motion to dismiss arguing Clyde Madren did not possess a contractor's license as required by South Carolina Code Section 40-11-30, et seq. (1976). Bradford further argued the Madrens' action was barred under South Carolina licensing statutes that state, "[a]n entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract." S.C. Code Ann. § 40-11-370 (1976). Bradford had filed his answer and counterclaim a year and nine months prior with no mention of any licensing statute. Bradford did not file an amended answer asserting any affirmative defenses in the interim. At the beginning of the trial, the trial court denied Bradford's motion to dismiss based on the lack of a contractor's license. A post-trial Rule 59(e) motion to reconsider was also denied.

A party, in replying to a preceding pleading, shall affirmatively set forth his defenses to the opposing party's complaint. Rule 8(c), SCRCP. "Every defense, in law or fact, to a cause of action in any pleading… shall be asserted in the responsive pleading thereto...." Rule 12(b), SCRCP. Generally, affirmative defenses to a cause of action in any pleading must be asserted in a party's responsive pleading. Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007) (citing Wright v. Craft, 372 S.C. 1, 20-21, 640 S.E.2d 486, 497 (Ct. App. 2006)). Statutory prohibition is in the nature of an affirmative defense precluding enforcement of a contract and should be pled. Costa and Sons Const. Co. v. Long, 306 S.C. 465, 469, 412 S.E.2d 450, 453 (Ct. App. 1991) (citing Rule 8(c), SCRCP).

"The failure to plead an affirmative defense is deemed a waiver of the right to assert it." Whitehead v. State, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002). Rule 15(b), SCRCP, provides an exception to the waiver rule by permitting a party to amend his pleadings to conform to the evidence. No such motion was ever made by Bradford. We find Bradford should not be able to argue for a potential benefit from an affirmative defense without his being required to affirmatively plead it. See Parrish v. Allison, Op. No. 4322 (S.C. Ct. App. Filed Dec. 19, 2007) (Shearouse Adv. Sh. No. 43 at 58), 656

[3] Bradford's counsel at trial differed from his counsel on appeal.

S.E.2d 382 (Ct. App. 2007). We affirm the trial court's denial of the motion on this basis.[4]

II. Extension of Closing Date

Bradford next contends the trial court erred in ruling that by his action, conduct, and written word, Bradford agreed to extend the closing date beyond October 28, 2003. We disagree.

"A written contract may be modified by the parties thereto in any manner they choose, notwithstanding, agreement prohibiting its alteration except in a particular manner." Evatt v. Campbell, 234 S.C. 1, 6-7, 106 S.E.2d 447, 450 (1959). Additionally:

> It is well established in this state that time is not of the essence of a contract to convey land unless made so by its terms expressly or by implication. When the contract does not include a provision that "time is of the essence," the law implies that it is to be done within a reasonable time. In equity, strict compliance with time limits contained in a contract will not ordinarily be enforced, except with regard to option contracts.

Faulkner v. Millar, 319 S.C. 216, 219-20, 460 S.E.2d 378, 380 (1995) (citations omitted).

The determination of whether Bradford's actions constituted waiver is a question of fact. See Hobgood v. Pennington, 300 S.C. 309, 314, 387 S.E.2d 690, 693 (Ct. App. 1989) ("Where time is not originally of the essence, it may be made so by one party giving notice to the other that he will insist on performance by a certain date, provided the time allowed by the notice is reasonable, which is a question of fact for the jury depending on the

[4] This court may affirm the trial court based on any grounds found in the record. Rule 220(c), SCACR; I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000).

circumstances of the particular case."); Atkinson v. Atkinson, 279 S.C. 454, 455, 309 S.E.2d 14, 15 (Ct. App. 1983) (stating a finding of fact depends on a court's decision of "whether a certain event either did or did not occur or that a particular circumstance either did or did not exist.") Therefore, the issue before us is whether the trial court's finding, that Bradford's conduct waived strict compliance, is reasonably supported by evidence contained in the record. Epworth Children's Home v. Beasley, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). We find the record contains such support.

Although the Contract stated the "Closing Date shall be October 15, 2002," it did not indicate time was of the essence. Additionally, the Contract stated, "[b]uyer shall notify Seller or listing agent in writing, by 12:00 noon 10 days from date Buyer is notified house is complete of any deficiencies revealed by inspection." The Bradfords entered into the Contract understanding a lot of work still needed to be completed on the House. Furthermore, Clyde Madren testified he told the Bradfords, "[W]ith any renovation, when you get into it, you don't know what you're going to find beyond the next wall, and there, there could be some slow downs." From the beginning the Bradfords knew the completion of the renovations would actually set the closing date.

Numerous emails between the parties also evidence the agreed upon changes in the closing dates. In one particular example, on October 21, 2002, seven days after the closing date of the Contract, Bradford emailed Nancy Madren after his mortgage company's appraiser had not finished the appraisal. Bradford wrote, "[i]n light of this, doesn't look like we can close this week. Monday the 28th is the earliest target." In another email Bradford wrote, "[w]hen you have a schedule for finishing the remaining items, please furnish it, and your estimated closing date so we can set up another." (emphasis added). On October 31, 2002, the Madrens notified Bradford the renovations were complete and the house was ready for a walk-through. In response, Bradford sent an email stating he and his wife decided against purchasing the House. By this time, the Madrens had complied with Bradford's many renovation requests. Consequently, Bradford's own requests further delayed the closing date.

We hold the aforementioned evidence reasonably supports the trial court's finding that Bradford's conduct modified the closing date in his real estate contract with the Madrens. Accordingly, we affirm the trial court's ruling.

III. Amount of Damages

Bradford contends the trial court erred in awarding damages of $55,000 to the Madrens. Bradford argues the figure was not supported by sufficient evidence and was instead based on surmise and speculation. We disagree.

When calculating damages for breach of contract, damages should place a nonbreaching party in the position he would have enjoyed had the contract been performed. Collins Entm't., Inc. v. White, 363 S.C. 546, 559, 611 S.E.2d 262, 268-69 (Ct. App. 2005). Generally, damages will consist of "(1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id. at 559, 611 S.E.2d at 269. Though a party need not prove damages with mathematical certainty, the evidence should allow a court to reasonably determine an appropriate amount. Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000). Furthermore, an amount of damages cannot be left to conjecture, guess, or speculation. Collins, 363 S.C. at 559, 611 S.E.2d at 269.

In the present action, Clyde Madren testified the couple invested $40,000 of labor and materials into the home. Madren also testified he and his wife purchased the entire tract of land for $82,000 and subdivided it into three separate parcels, one of which contained the House. Of the $82,000 originally spent to purchase the single tract, Madren attributed $25,000 of the purchase price to the Raysor Street house. The trial court's order explained the $55,000 in damages was calculated by subtracting the Madrens' original purchase price for the House ($25,000) and the Madrens' estimated cost of labor and materials ($40,000) from the Contract's purchase price of the House ($120,000).

Additionally, Bradford argues Clyde Madren arbitrarily assigned the $25,000 purchase price to the Raysor Street home, and consequently the

$55,000 in damages is without basis. However, Bradford offered no evidence for the value of the House when it was purchased by the Madrens, so he cannot now protest the trial court's adoption of Madren's value, as it was the only value offered to the court. Hough v. Hough, 312 S.C. 344, 347, 440 S.E.2d 387, 389 (Ct. App. 1994) (holding a husband who failed to present any evidence on issue of valuation of marital estate could not complain on appeal that trial court erred in its valuation of the estate).

We find the trial court properly calculated damages based on the criteria set forth in Collins, 363 S.C. at 559, 611 S.E.2d at 268-9. Additionally, we believe Clyde Madren's testimony amounted to evidence from which the trial court could reasonably determine an appropriate damage award under Yadkin, 339 S.C. at 646, 529 S.E.2d at 767. "In a law case tried without a jury, questions regarding credibility and weight of evidence are exclusively for the trial judge." Sheek v. Crimestoppers Alarm Systems, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). We therefore defer to the trial court's decision to believe Clyde Madren's testimony regarding financial figures and use those figures in calculating damages.

Accordingly, the order of the trial court is

AFFIRMED.

HEARN, C.J., and KITTREDGE J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Vortex Sports & Entertainment, Inc., Respondent/Appellant,

v.

R. David Ware; Ware & Associates, Inc.; Constangy, Brooks & Smith, L.L.C.; and CSMG, Inc., Defendants,

of whom:

CSMG, Inc., is the Appellant/Respondent.

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4380
Heard April 8, 2008 – Filed April 28, 2008

AFFIRMED

Frank R. Ellerbe, III, and Rachel G. Peavy, both of Columbia; Sonya D. Naar and Steven Hunter, both of Chicago, for Appellant/Respondent.

A. Camden Lewis, Keith M. Babcock, and Ariail E. King, all of Columbia, for Respondent/Appellant.

SHORT, J.: In this cross-appeal from a tort action, CSMG, Inc., appeals the trial court's (1) failure to grant its directed verdict motions; (2) admission of expert testimony; and (3) admission of speculative damages evidence. Vortex Sports & Entertainment, Inc., (Vortex) appeals the trial court's set-off of its award with its settlement with R. David Ware. We affirm.

FACTS

Vortex, formed in 2000 in Columbia, South Carolina, is a sports agency corporation. Ware and Bralyn Bennett each owned one-third of Vortex, and Terry Williams and Walt Gee each owned one-sixth. Ware was the President of Vortex's Team Sports Division and served as Vortex's attorney. Vortex did not issue any stock or formalize the corporation in writing. Vortex's clients were primarily National Football League (NFL) players to whom it provided financial, legal, and marketing assistance. The owners agreed Bennett would be the only paid employee and the other owners would be paid once Vortex made a profit.

In the NFL, sports agents and players enter into Standard Representation Agreements (SRAs). SRAs permit an agent to negotiate on the player's behalf. Under NFL policy, SRAs can only be signed by the agent. Industry custom includes agents who verbally assign their SRAs to the companies with whom they are affiliated. An SRA generally includes a "compensation for service" clause entitling the agent to a certain percentage of the player's compensation in exchange for the agent's services in negotiating the contract. The NFL limits the agent's maximum compensation to three percent. A player may terminate an SRA with five days' notice to the agent. NFL teams do not give players guaranteed contracts, and thus, agents' fees are not guaranteed.

Bennett and Ware were Vortex's sports agents. When Vortex began operating, Bennett represented three players and Ware represented one player. When those players were paid, Vortex would receive the agent's fees. Vortex pledged the income stream from all of its SRAs as collateral for its bank loans.

In 2001, Vortex signed five new clients. By spring of 2003, Vortex had twenty clients, including Terence Newman of the Dallas Cowboys and Clinton Portis of the Washington Redskins. Vortex anticipated earning $400,000 to $500,000 solely from Newman's contract. Vortex, however, was still a fledging company with a substantial amount of debt to service. It was not yet profitable and Bennett no longer received an annual salary.

In 2003, Ware began negotiating, on Vortex's behalf, with CSMG, an Illinois sports agency that was considering acquiring Vortex. Vortex believed CSMG would provide marketing services for Vortex's clients but Vortex would continue providing contract negotiations. However, this never came to fruition. Unbeknowst to Vortex, CSMG began negotiating with Ware for him to leave Vortex and join CSMG with his Vortex clients. Ultimately, Ware began working for CSMG while he was still an officer, shareholder, and attorney for Vortex.

CSMG agreed to pay Ware a signing bonus of $200,000 and an annual salary of $150,000. Additionally, Ware would receive half of the revenues collected from players with whom he had signed SRAs. Once Ware left Vortex for CSMG, less than half of Vortex's twenty clients stayed with Vortex, while the others left for CSMG or other agencies.

Vortex filed suit against: (1) Ware; (2) CSMG; (3) Constangy, Brooks & Smith, Ware's law firm for the majority of the time he served as Vortex's attorney; and (4) Ware and Associates, Ware's law firm when he first became Vortex's attorney. The causes of action against CSMG included aiding and abetting a breach of fiduciary duty and tortious interference with a contract. Prior to trial, Vortex settled with all parties except CSMG.

At trial, CSMG moved for directed verdicts on aiding and abetting a breach of fiduciary duty and tortious interference with a contract. The trial court denied the motions. Ultimately, the jury found for Vortex on both of those causes of action.[1] The jury awarded Vortex $2,200,000 in actual damages and $500,000 in punitive damages. The trial court reduced Vortex's award by the settlements received from the other defendants. This appeal followed.

LAW/ANALYSIS

I. CSMG's Appeal

A. Directed Verdict

CSMG argues the trial court erred in denying its directed verdict motions. We disagree.

When ruling on a directed verdict motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). This court must follow the same standard. Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). "If more than one reasonable inference can be drawn or if the inferences to be drawn from the evidence are in doubt, the case should be submitted to the jury." Chaney v. Burgess, 246 S.C. 261, 266, 143 S.E.2d 521, 523 (1965). This court will only reverse the circuit court when no evidence supports its ruling. Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

1. Aiding and Abetting a Breach of Fiduciary Duty

CSMG argues the trial court erred in denying its motion for a directed verdict on Vortex's aiding and abetting a breach of fiduciary duty cause of

[1] The jury found for CSMG on Vortex's cause of action for civil conspiracy.

action because Vortex offered no evidence from which a jury could find CSMG knowingly assisted and participated in Ware's breach. We disagree.

The elements for the cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages. Future Group, II v. Nationsbank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." Id.

The trial court ruled Ware owed Vortex a fiduciary duty. Vortex presented evidence CSMG encouraged Ware not to pay Vortex the money he received on SRAs he signed before he left for CSMG. Ware emailed David Schwartz, CSMG's senior vice-president and general counsel, stating:

> I realize that our deal is a little different since CSMG wants all my clients and the fees due to me but is not assuming the debt of VORTEX. Although I don't wholly own VORTEX I still have to pay the debt but I have no problem giving CSMG any fees that I am entitled to.

Schwartz responded: "I have added language which will, in a sense, give your guarantee that you will make CSMG whole if there are third-party claimants to the fees paid or owed by your clients, so we're willing to dump the whole asset purchase agreement." The language Schwartz referred to was a clause in CSMG's employment agreement with Ware, which stated:

> As consideration for entering into this Employment Agreement, [CSMG] expects to receive the fees currently owed to [Ware] by the clients set forth on Exhibit A [Vortex's Clients], as well as future fees that will be owed by such clients. . . . [Ware] agrees that if any fees due to be paid . . . are diminished or delayed because a third party claims entitlement to such fees, or because the client contends the fees are

> owed to a third party, then [Ware] shall promptly pay to [CSMG] an amount that would make [CSMG] whole . . . ."

Marty Pereira, CSMG's Executive Vice-President and Chief Financial Officer, stated in an email: "After having a couple of conversations with [Ware], I think I have [him] convinced that he should not pay off the loan, in any manner, until some kind of agreement is reached with Vortex." We note CSMG originally approached Vortex seeking to acquire the entire company, and later, enter into a collaborative venture, but ultimately decided only to hire Ware, who held the majority of Vortex's SRAs.

CSMG argues it had no actual knowledge of Ware's breach of fiduciary duties to Vortex nor did it substantially assist Ware with the breach. However, Vortex presented evidence CSMG knew Ware was one of several partners and the attorney for Vortex, not simply an employee. There is also evidence CSMG knew Ware had certain financial obligations to Vortex, even if he was no longer an employee. Therefore, there is evidence CSMG had actual knowledge Ware owed a fiduciary duty to Vortex. Further, there is evidence CSMG knowingly encouraged Ware to breach that duty because there is evidence it encouraged Ware to withhold the SRA fees from Vortex. Accordingly, because Vortex presented evidence CSMG aided and abetted in a breach of fiduciary duty, the trial court did not err in denying the directed verdict motion.

2. Tortious Interference with a Contract

CSMG next contends the trial court erred in denying its motion for a directed verdict on Vortex's tortious interference with a contract action because Vortex presented no evidence CSMG: (1) knew of Vortex's contract with Ware; (2) knew hiring Ware interfered with that contract; or (3) lacked justification to hire Ware. We disagree.

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of

justification; and (5) resulting damages." Camp v. Springs Mortgage Corp., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993).

There is evidence CSMG knew Ware was responsible for debt repayment. Further, the inclusion of the clause in the employment contract providing that Ware would be responsible for any fees from clients in which a third party demanded an interest is evidence CSMG anticipated Vortex might claim entitlement to the fees. We also note CSMG had previously convinced Fletcher Smith, III, an attorney and CSMG's executive vice-president of sports, to leave the law firm where he was employed to work for CSMG. CSMG knew Smith's former law firm required him to pay the law firm money received under SRAs Smith signed while working for the law firm. Although Ware was an at-will employee of Vortex, and thus, free to leave at any time, he also had certain obligations to Vortex in his positions as shareholder, vice-president, and general counsel. Furthermore, Ware had an agreement with Vortex to forward to Vortex the income from his SRAs. Clearly, as acknowledged by CSMG's emails, it had some knowledge that income from Ware's SRAs would go to the outstanding debt of Vortex. Accordingly, we find Vortex presented evidence for each of the elements of tortious interference with a contract, and thus, the trial court did not err in denying CSMG's directed verdict motion on the cause of action.

B. Expert Witness

CSMG maintains the trial court erred in admitting Professor Freeman's expert testimony. We disagree.

John Freeman is a professor of law at the University of South Carolina School of Law and teaches, inter alia, business, agency and partnership, and legal ethics. Professor Freeman was qualified as an expert "in the field of duties owed by corporate lawyers, officers, or shareholders in connection with transactions involving business in a South Carolina closed corporation." Before Professor Freeman testified, the trial court conducted a hearing to determine the admissibility of his testimony. CSMG argued Professor Freeman should not be allowed to testify because he would be making a legal conclusion as to whether Ware owed Vortex a fiduciary duty. The trial court

determined the issue of the existence of the fiduciary duty was for the court and ruled Ware owed Vortex a fiduciary duty. The trial court ruled Professor Freeman could "testify as to what occurred as far as breach of duties are concerned."

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. When expert testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative value. Small v. Pioneer Mach., Inc., 329 S.C. 448, 470, 494 S.E.2d 835, 846 (Ct. App. 1997). Generally, expert testimony pertaining to issues of law is inadmissible. Dawkins v. Fields, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003). "A trial court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion." Mizell v. Glover, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002).

CSMG relies on Dawkins, in which the supreme court found an affidavit by Professor Freeman inadmissible. 354 S.C. at 66-67, 580 S.E.2d at 437. In Dawkins, the supreme court found most of the document was legal argument regarding why the trial court should deny summary judgment. Id. The supreme court stated: "Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment." Id. at 65, 580 S.E.2d at 437. However, the supreme court noted an opinion is not objectionable simply because it embraces an ultimate issue to be decided by the trier of fact. Id. The supreme court also found the affidavit contained "some helpful, factual information," such as, Professor Freeman's opinion on the value of stock and that selling it for significantly less than that value was improper. Id. at 66, 580 S.E.2d at 437.

In the present case, the trial court ruled on the legal issue of whether Ware owed Vortex a fiduciary duty. See Clearwater Trust v. Bunting, 367 S.C. 340, 346, 626 S.E.2d 334, 337 (2006) (noting the existence of a fiduciary duty is a question of law for the court). Professor Freeman's

testimony consisted of specific acts Ware committed and how those acts constituted a breach of his fiduciary duty. Specifically, Professor Freeman testified Ware participated in self-dealing by sacrificing Vortex's interests for Ware's own interest. Additionally, Professor Freeman testified Ware was deceptive to Vortex. Professor Freeman noted the lack of documents detailing Vortex's agreements and policies and testified Ware, as Vortex's general counsel, would have been responsible for preparing such agreements and his failure to do so should not entitle him to a "free pass."

We find Professor Freeman's testimony consisted of specialized knowledge that assisted the trier of fact to understand the evidence or to determine a fact in issue. He was qualified as an expert, and thus, was allowed to testify as to his opinion relating to those facts. He did not make improper legal conclusions or instructions but simply opined regarding acts Ware committed that breached his fiduciary duty. Accordingly, the trial court did not abuse its discretion in admitting Professor Freeman's expert testimony.

C. Damages

CSMG argues the trial court erred in admitting speculative evidence of damages consisting of Vortex's lost revenue from renegotiated contracts. We disagree.

The trial court is vested with considerable discretion over the amount of a damages award, and our review of the amount of damages is limited to the correction of errors of law. Austin v. Specialty Transp. Servs, Inc., 358 S.C. 298, 310-11, 594 S.E.2d 867, 873 (Ct. App. 2004). In reviewing a damages award, we do not weigh the evidence, but determine if any evidence supports the award. Id. at 311, 594 S.E.2d at 873.

When the tortious conduct of a defendant causes a plaintiff to lose prospective profits, the plaintiff may recover such profits when he can prove: (1) it is reasonably certain that such profits would have been realized except for the tort; and (2) such lost profits can be ascertained and measured from the evidence produced with reasonable certainty. Petty v. Weyerhaeuser

Co., 288 S.C. 349, 355, 342 S.E.2d 611, 615 (Ct. App. 1986). Certainty means the damages may not be left to mere speculation or conjecture. Id. However, the law does not require absolute certainty of lost profits but only reasonable certainty that the damages are not purely speculative and there exists a fairly accurate method to estimate the lost profits. Id.

We find Vortex's damages were not merely speculative. The trial court admitted damages for players who actually renegotiated their contracts after leaving Vortex. The trial court excluded testimony regarding players who may possibly renegotiate their contracts in the future. Prior to Ware's departure, no player had left Vortex. Based on these facts, it is not mere speculation to determine players would have stayed with Vortex absent CSMG's actions. Accordingly, we find the trial court did not abuse its discretion in admitting damages consisting of Vortex's lost revenue from renegotiated contracts.

II. Vortex's Appeal

Vortex contends the trial court erred in setting off the verdict by the amount of its settlement with Ware. Vortex contends the settlement with Ware was based on different causes of action than those it prevailed on against CSMG and the injury caused by CSMG was not the same as that caused by Ware. We disagree.

Section 15-38-50 of the South Carolina Code (2005) provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
> (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the

> consideration paid for it, whichever is the greater; and
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

S.C. Code Ann. § 15-38-50 (2005).

In Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 272 (Ct. App. 1999), the plaintiff brought negligence causes of action against a hospital and similar causes of action including wrongful death against a doctor. The plaintiff appealed the trial court's set-off of her award from the doctor with her settlement with the hospital. Id. The plaintiff contended because the measure of damages was different for the two causes of action, then two different injuries occurred. Id. at 113, 515 S.E.2d at 272. This court noted the plaintiff's "claims against Richland Memorial and Dr. Oliver arose out of the same factual scenario" and found the plaintiff "confuse[d] the concept of damages with the meaning of the word injury as used in the statute. Injury, as used in the statute, is broad enough to include all damages." Id.

In the present case, we likewise find the claims against CSMG and Ware arose out of the same factual scenario. "Section 15-38-50 grants the court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." Id. This court has previously recognized "a strict application of the statute may lead to unintended results; however, this is a matter for the legislature to correct if our interpretation is contrary to its intent." Id. Accordingly, we find the trial court did not err in setting off Vortex's award with its settlement from Ware.

CONCLUSION

We find the trial court did not err in denying CSMG's directed verdict motions. Additionally, the trial court did not err in admitting Professor Freeman's expert witness testimony. Further, the trial court did not err in allowing damages regarding contracts of Vortex's former clients that were

actually renegotiated. Finally, the trial court did not err in setting off Vortex's jury award with its settlement with Ware. According, the trial court is

AFFIRMED.

ANDERSON and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Eddie J. Posey and Belinda Posey, **Appellants,**

v.

Proper Mold & Engineering, Inc., Autegra, Inc., and Tyge Dremann, **Respondents.**

Appeal From Anderson County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 4381
Heard April 8, 2008 – Filed April 29, 2008

AFFIRMED

John R. Peace, of Greenville, for Appellants.

Kurt M. Rozelsky and Zandra L. Johnson, both of Greenville, for Respondents.

ANDERSON, J.: Eddie and Belinda Posey appeal the circuit court's order granting Proper Mold & Engineering, Inc., Autegra, Inc. (PME/Autegra), and Tyge Dremann's motion to dismiss. We affirm.

FACTUAL/PROCEDUAL BACKGROUND

Tiger Transport Service, Inc. (Tiger) employed Eddie Posey (Eddie) as a truck driver. Eddie owned his own tractor and trailer, which he leased to Tiger. PME/Autegra is a manufacturer of plastic injection products for the automotive industry. Additionally, PME/Autegra offers serial production molding and mold services, including mold repair.

At the time this action was filed, PME/Autegra owned a commercial tractor, a twenty-eight foot flat-bed trailer, and a fifty-three foot dry van. Two truck drivers holding South Carolina Commercial Drivers Licenses were employed by PME/Autegra. The tractor and trailers were used to deliver plastic injection molds and parts to customers and to pick up and return plastic molds needing repair. When PME/Autegra's own employees are unavailable for pick up or delivery, PME/Autegra contracts with common carriers to provide supplemental transportation services.

On January 16, 2004, PME/Autegra contracted with Tiger to provide supplemental transportation, and Tiger dispatched the request to Eddie. This particular job required him to make two trips to pick up different molds and deliver them to PME/Autegra for repair. Previously, Eddie had made deliveries to PME/Autegra and had assisted PME/Autegra in the unloading process. According to PME/Autegra, a truck driver making a delivery must assist in unloading the injection molds. Upon Eddie's arrival to PME/Autegra, an employee of PME/Autegra, Tyge Dremann, began the process of unloading the mold. Eddie and Dremann worked together to screw eyebolts into the mold and attach hooks to the mold in preparation for lifting and unloading the mold. As Dremann began operating the crane to move the mold, a hook attached to the crane came loose and struck Eddie in the head.

Eddie was granted workers' compensation benefits by Tiger. Subsequently, the Poseys filed a negligence action against PME/Autegra and Dremann. The circuit court, finding Eddie was a statutory employee of PME/Autegra, granted PME/Autegra and Dremann's motion to dismiss. In dismissing the Poseys' claims, the circuit court found that Eddie was a statutory employee of PME/Autegra and his exclusive remedy was in Workers' Compensation.

STANDARD OF REVIEW

Coverage under the Workers' Compensation Act depends on the existence of an employment relationship. Edens v. Bellini, 359 S.C. 433, 439, 597 S.E.2d 863, 866 (Ct. App. 2004). Gray v. Club Group, Ltd., 339 S.C. 173, 184, 528 S.E.2d 435, 441 (Ct. App. 2000), explicates: "Before provisions of the Workers' Compensation Act can apply, an employer-employee relationship must exist; this is an initial fact to be established." Workers' Compensation awards are authorized only if an employer-employee relationship exists at the time of the injury. Edens, 359 S.C. at 440, 597 S.E.2d at 867; Dawkins v. Jordan, 341 S.C. 434, 438, 534 S.E.2d 700, 703 (2000).

Whether or not an employer-employee relationship exists is a jurisdictional question. Nelson v. Yellow Cab Co., 349 S.C. 589, 594, 564 S.E.2d 110, 113 (2002); S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc., 318 S.C. 546, 548, 459 S.E.2d 302, 303 (1995); see also Lake v. Reeder Constr. Co., 330 S.C. 242, 247-48, 498 S.E.2d 650, 653 (Ct. App. 1998) (stating the existence of an employer-employee relationship is a jurisdictional question; an injured worker's employment status, as it affects jurisdiction, is matter of law for decision by the court and includes findings of fact which relate to jurisdiction).

The determination of whether a worker is a statutory employee is jurisdictional and, therefore, the question on appeal is one of law. Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999); Glass v. Dow Chem. Co., 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997). As a result, this court has the power and duty to review the entire record and

decide the jurisdictional facts in accord with its view of the preponderance of the evidence. Harrell, 337 S.C. at 320, 523 S.E.2d at 769; Glass, 325 S.C. at 202, 482 S.E.2d at 51; see also Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 132 S.E.2d 18 (1963), overruled in part on other grounds, Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002) (holding the existence or absence of an employment relationship is a jurisdictional fact which the court must determine based on its review of all the evidence in the record). Where the issue involves jurisdiction, the appellate court can take its own view of the preponderance of the evidence. Nelson, 349 S.C. at 594, 564 S.E.2d at 112. It is the policy of South Carolina courts to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act. Dawkins, 341 S.C. at 439, 534 S.E.2d at 703.

The court may consider affidavits on a question of law in a jurisdictional motion without converting the motion into one for summary judgment. Baird v. Charleston County, 333 S.C. 519, 528, 511 S.E.2d 69, 74 (1999). The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCP, rather than a motion for summary judgment pursuant to Rule 56, SCRCP. Woodard v. Westvaco Corp., 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995), overruled on other grounds, Sabb, 350 S.C. 416, 567 S.E.2d 231. If a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction, the trial court should treat the motion as if it were a Rule 12(b)(1) motion to dismiss. Edens, 359 S.C. at 439, 597 S.E.2d at 866.

LAW/ANALYSIS

I. Statutory Employee

The Poseys maintains the circuit court erred in concluding Eddie was a statutory employee of PME/Autegra. We disagree.

Coverage under the Workers' Compensation Act is generally dependent on the existence of an employer-employee relationship. Edens v. Bellini, 359 S.C. 433, 442-43, 597 S.E.2d 863, 868 (Ct. App. 2004); Tillotson

v. Keith Smith Builders, 357 S.C. 554, 557, 593 S.E.2d 621, 623 (Ct. App. 2004). There are certain statutory exceptions to this general rule. Edens, 359 S.C. at 442-43, 597 S.E.2d at 868. One of these exceptions is found in section 42-1-410 of the Workers' Compensation Act which, under some circumstances, imposes liability on an employer or contractor for the payment of compensation benefits to a worker not directly employed by the contractor. Id. The Workers' Compensation Act specifically provides statutory employees are included within the scope of the Act:

> When any person, in this section and §§ 42-1-420 to 42-1-450 referred to as "contractor," contracts to perform or execute any work which is not a part of the trade, business or occupation of such other person and contracts with any other person (in this section and §§ 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, the contractor shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42-1-410 (1985).

Three tests are applied to determine whether the activity of an employee of a subcontractor is sufficient to make him a statutory employee of the contractor within the meaning of section 42-1-410: (1) Is the activity an important part of the contractor's business or trade? (2) Is the activity a necessary, essential, and integral part of the contractor's trade, business, or occupation? or (3) Has the identical activity previously been performed by the contractor's employees? Edens, 359 S.C. at 443, 597 S.E.2d at 868; Olmstead v. Shakespeare, 354 S.C. 421, 425, 581 S.E.2d 483, 486 (2003); Boone v. Huntington and Guerry Elec. Co., 311 S.C. 550, 553, 430 S.E.2d 507, 509 (1993); Riden v. Kemet Elec. Corp., 313 S.C. 261, 263-64, 437 S.E.2d 156, 157-58 (Ct.App.1993); see also Meyer v. Piggly Wiggly No. 24, Inc., 338 S.C. 471, 473, 527 S.E.2d 761, 763 (2000) (holding there are three

tests used to determine whether an employee was "engaged in an activity that is part of the owner's trade, business, or occupation"); Smith v. T.H. Snipes & Sons, Inc., 306 S.C. 289, 292, 411 S.E.2d 439, 441 (1991) (listing the three factors of the statutory employee test); Revels v. Hoechst Celanese Corp., 301 S.C. 316, 318, 391 S.E.2d 731, 732 (Ct. App.1990) (finding the test used to determine if one is a statutory employee is "whether or not [the work] being done is or is not a part of the general trade, business or occupation of the owner"). If the activity at issue meets even one of these three criteria, the worker qualifies as the statutory employee of the owner. Edens, 359 S.C. at 443, 597 S.E.2d at 868; Olmstead, 354 S.C. at 421, 581 S.E.2d at 483. Any doubts as to a worker's status should be resolved in favor of including him or her under the Workers' Compensation Act. Edens, 359 S.C. at 443, 597 S.E.2d at 868; Riden, 313 S.C. at 263, 437 S.E.2d at 158.

The Poseys argue that PME/Autegra is a mere recipient of goods delivered by a common carrier, and their primary business is not transportation. Our supreme court in Abbot v. The Limited, Inc., 338 S.C. 161, 526 S.E.2d 513 (2000), and Olmstead v. Shakespeare, 354 S.C. 421, 581 S.E.2d 483 (2003), addressed statutory employment in the common carrier context. The Poseys' argument relies upon these precedents.

In Abbot, a truck driver employed by a common carrier brought a negligence action against a retail clothing store for injuries sustained while unloading boxes inside the retailer's business. After this court ruled the prompt and efficient delivery of goods to stock its stores was an integral part of the retailer's business, our supreme court reversed and inculcated:

> The fact that it was important to Retailer to receive goods does not render the delivery of goods an important part of Retailer's business. 'The mere fact that transportation of goods to one's place of business is essential for the conduct of the business does not mean that the transportation of the goods is a part or process of the business.' Caton v. Winslow Bros. & Smith Co., 309 Mass. 150, 154, 34 N.E.2d 638, 641 (1941). We conclude that the mere recipient of goods delivered by a common carrier is not the statutory employer of the common carrier's employee.

Abbot, 338 S.C. at 163-64, 526 S.E.2d at 514.

In Olmstead, the plaintiff was an owner-operator of a tractor and trailer who leased his equipment to an employer. Olmstead was sent by the employer to pick up a load of utility poles from the defendant for delivery to its customers. The truck was loaded by the defendant's employees and Olmstead strapped it down. When Olmstead was later asked to unstrap the load in order for the defendant to address a quality control problem, he was injured by falling poles.

After Olmstead brought a tort action, the defendant sought to distinguish its case from Abbott by arguing delivery of the poles was essential to its business because delivery completed sales. Our supreme court disagreed stating, "Abbott is not limited to receipt of goods cases, but applies equally to delivery of goods cases as long as the transportation of goods is not the primary business of the company to whom or from whom goods are being delivered." Olmstead, 354 S.C. at 425, 581 S.E.2d at 485. The court further explained, "Abbott merely establishes that transportation of goods is important to nearly all businesses, and, that transportation of goods by a common carrier alone without something more, does not qualify as 'part of [the owner's] trade, business, or occupation' under any of the three established tests for statutory employment." Olmstead, 354 S.C. at 426, 581 S.E.2d at 485. Specifically, the supreme court found the defendant in Olmstead designed and manufactured poles. But, "[i]t is not in the transportation business; it did not own any delivery trucks and none of its employees participated in the delivery of its products beyond the loading stage." Id. Consequently, the delivery of poles was not part or process of the defendant's manufacturing business. Id. (quoting Abbott, 338 S.C. at 164, 526 S.E.2d at 514).

Unlike the facts of Olmstead, PME/Autegra owned a tractor and two trailers, and its employees participated in loading and transporting its products. Thus, PME/Autegra is more than a mere recipient or shipper of goods. The circuit court in its first order properly determined:

This Court finds that the delivery and return of goods via transfer trucks was an important part and a necessary, essential and integral part of PME/Autegra's business. In order to ensure prompt and efficient delivery of its mold repair services and overall operation of mold manufacturing, maintenance and repair business, Defendant PME/Autegra owned and operated its own trucks through the employ of highly trained and specially licensed commercial truck drivers.

…

This Court also finds that Plaintiff was injured while performing a job that was identical to the job performed by PME/Autegra's direct employees on a regular basis. At the time of his injury, Plaintiff Eddie J. Posey was helping Defendant Dremann attach hooks to a plastic injection mold that Plaintiff had delivered. This activity was one that was routinely performed by Defendant PME/Autegra's own truck drivers, as well as other employees of PME/Autegra.

This Court finds no merit in Plaintiff's argument that the inability to transport the subject mold due to equipment limitations renders the work performed by Eddie Posey "substantively different" from that performed by PME/Autegra's own truck driver. At the time of the accident, PME/Autegra's company trick drivers were being utilized to pick-up and deliver molds for repair, and the use of Plaintiff was only in supplement of those drivers. It was routine practice for PME/Autegra to pick up its own molds and deliver its own molds. In fact, common carriers were used only when its own truck was already in use and unavailable or when it went beyond the capacity of its own truck. The activity being performed by Plaintiff at the time of the accident was that of a truck driver delivering a mold and assisting in the unloading of the same. Because Defendants PME/Autegra employed truck drivers with job duties of loading and unloading, the third method of proving statutory employment is satisfied.

> This Court finds that both the delivery of the mold and the unloading of trailers, including assisting with the attaching hooks to molds delivered, and activities being performed by Plaintiff at the time of his injury, are an important part of the trade or business of PME/Autegra's direct employees. As such, Plaintiff is a statutory employee of Defendant's PME/Autegra and his exclusive remedy is in workers' compensation.

Following the Poseys' motion to alter or amend the order, the circuit court issued a second order which "supplement[ed] and amend[ed] its original order but DENIE[D] the Plaintiff's motion to alter or amend." The order stated:

> "For the Plaintiff to be deemed a statutory employee of the Defendant, the work being performed at the time of the injury must be either (1) an important part of the owner's trade or business; (2) a necessary, essential, and integral part of the owner's business, or (3) has previously been performed by the owner's employees." [Olmstead] at 432, 354 S.E.2d at 485. The Court determined that the work performed by the Plaintiff met all three of the criteria but intended to find that only the third criteria applies in this case. Thus, the original order of the Court is hereby amended to reflect that the work performed by the Plaintiff was of the type that "has been previously performed by the owner's employees," and that the first and second criteria enumerated in Olmstead are not applicable in this case. Because the Court finds that work being performed by the Plaintiff at the time of his injury meets the third criteria in Olmstead, he is a statutory employee of the Defendant PME/Autegra and his exclusive remedy is workers' compensation.

It is undisputed Eddie is not a direct employee of PME/Autegra. However, at the time of his injuries, PME/Autegra had contracted with Tiger

to provide supplemental transportation because PME/Autegra's own employees were unavailable for pick up or delivery. PME/Autegra's own employees, including truck drivers, routinely assist unloading plastic injection molds. At the time of Eddie's injury, he was helping Dremann attach hooks to the plastic injection mold, an activity routinely performed by PME/Autegra's employees. Under these facts, the circuit court did not err in finding Eddie was PME/Autegra's statutory employee because the identical activity was previously performed by PME/Autegra's own employees.

II. Subject Matter Jurisdiction

The Poseys maintain the circuit court erred in granting PME/Autegra and Dremann's motion to dismiss pursuant to Rule 12(b)(1), SCRCP. We disagree.

Subject matter jurisdiction is "the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Sabb, 350 S.C. at 423, 567 S.E.2d at 234; see also Dove v. Gold Kist, Inc., 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994); Bank of Babylon v. Quirk, 192 Conn. 447, 449, 472 A.2d 21, 22 (1984); accord Balcon, Inc. v. Sadler, 36 N.C.App. 322, 244 S.E.2d 164 (1978) (citing 21 C.J.S. Courts § 23, pp. 36-37).

The Poseys' tort action clearly falls into general cases which a court of common pleas ordinarily has subject matter jurisdiction to hear. Furthermore, the circuit court had subject matter jurisdiction to determine whether Eddie was a statutory employee of PME/Autegra. Hernandez-Zuniga v. Tickle, 374 S.C. 235, 252, 647 S.E.2d 691, 699 (Ct. App. 2007) ("The question of whether a worker is a statutory employee is jurisdictional and is therefore a question of law for the court."); see also Riden v. Kemet Elec. Corp., 313 S.C. 261, 263, 437 S.E.2d 156, 157 (Ct. App. 1993). If a worker is properly classified as a statutory employee, his sole remedy for work-related injuries is to seek relief under the Workers' Compensation Act. Edens, 359 S.C. at 445, 597 S.E.2d at 869; Hancock v. Wal-Mart Stores, Inc., 355 S.C. 168, 173, 584 S.E.2d 398, 400 (Ct. App. 2003). A statutory employee may not maintain a negligence cause of action against his direct employer or his statutory employer. Edens, 359 S.C. at 445, 597 S.E.2d at

869; Neese v. Michelin Tire Corp., 324 S.C. 465, 478, 478 S.E.2d 91, 98 (Ct. App. 1996), overruled on other grounds, Abbott v. The Limited, Inc., 338 S.C. 161, 526 S.E.2d 513 (2000). The exclusivity provision of the Act applies to "direct" employees and "statutory employees." Carter v. Florentine Corp., 310 S.C. 228, 231, 423 S.E.2d 112, 113 (1992), overruled on other grounds, Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994). Because Eddie is PME/Autegra's statutory employee, the circuit court lacks subject matter jurisdiction, which lies exclusively with the Workers' Compensation Commission.[1]

The General Assembly has vested the South Carolina Workers' Compensation Commission with exclusive original jurisdiction over employees work-related injuries. Sabb, 350 S.C. at 423, 567 S.E.2d at 234. The South Carolina Workers' Compensation Act contains an "exclusivity provision." Edens, 359 S.C. at 441, 597 S.E.2d at 867; see also Sabb, 350 S.C. at 422, 567 S.E.2d at 234 ("Because Sabb's claims, as employee of University, arose out of and in the course of her employment, the Workers' Compensation Act . . . provides the exclusive remedy for her.").

The exclusivity provision is found at section 42-1-540:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

[1] In Sabb v. S.C. State Univ., 350 S.C. 416, 424, 567 S.E2d 231, 235 (2002), the supreme court reiterated, "the exclusivity provision does not involve subject matter jurisdiction." However, cases since Saab have used Rule 12(b)(1), SCRCP to dismiss worker compensation cases. See Edens v. Bellini, 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004).

S.C. Code Ann. § 42-1-540 (1985).

Thus, the Workers' Compensation Act provides the exclusive remedy against an employer for an employee's work-related accident or injury. Edens, 359 S.C. at 441, 597 S.E.2d at 867; Fuller v. Blanchard, 358 S.C. 536, 541, 595 S.E.2d 831, 833 (2004); see also Strickland v. Galloway, 348 S.C. 644, 646, 560 S.E.2d 448, 449 (Ct. App. 2002) ("In circumstances in which the South Carolina Workers' Compensation Act covers an employee's work-related accident, the Act provides the exclusive remedy against the employer."). The exclusivity provision of the Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury. Edens, 359 S.C. at 442, 597 S.E2d at 868; Tatum v. Med. Univ. of S.C., 346 S.C. 194, 552 S.E.2d 18 (2001).

"The exclusive remedy doctrine was enacted to balance the relative ease with which the employee can recover under the Act: the employee gets swift, sure compensation, and the employer receives immunity from tort actions by the employee." Edens, 359 S.C. at 442, 597 S.E2d at 868; Strickland, 348 S.C. at 646, 560 S.E.2d at 449. The immunity is conferred not only on the direct employer but also on co-employees. Edens, 359 S.C. at 442, 597 S.E.2d at 868. Under the exclusivity provision, a Workers' Compensation action is the exclusive means to determine claims against an individual's employer for work-related accidents and injuries.

It is apparent the General Assembly intends for employees to seek a remedy from employers for their work-related injury only through the Worker's Compensation Commission and not through the circuit courts. The circuit court's original subject matter jurisdiction was divested after it determined Eddie was PME/Autegra's statutory employee. Because Eddie was deemed a statutory employee of PME/Autegra, the Workers' Compensation Commission has exclusive original jurisdiction to hear the Poseys' claims. The sole recourse against PME/Autegra for Eddie's accidental workplace injuries is a Workers' Compensation recovery.

CONCLUSION

Based upon the foregoing, the circuit court's order finding Eddie was a statutory employee of PME/Autegra and granting PME/Autegra and Dremann's motion for dismissal under Rule 12(b)(1), SCRCP is

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Zurich American Insurance Company, Respondent,

v.

Tony Fitzgerald Tolbert and Tonesha Tolbert Appellants.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4382
Heard March 5, 2008 – Filed May 2, 2008

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Matthew Christian, of Greenville, for Appellants.

J.R. Murphy and Jeffrey C. Kull, both of Columbia, for Respondent.

HEARN, C.J.: Tony Fitzgerald Tolbert (Tolbert) and Tonesha Tolbert (collectively Appellants) appeal the circuit court's grant of summary judgment to Zurich American Insurance Company in this declaratory

judgment action to determine Appellants' entitlement to Underinsured Motorist (UIM) Coverage. We affirm in part, reverse in part, and remand.

FACTS

Tolbert is an employee of BMW Manufacturing in Greer, South Carolina. As a part of a lease program for BMW employees, Tolbert leased a 2003 BMW 325. BMW contracted with Zurich to provide business automobile insurance to its employees through its insurance policy (Policy), which, in addition to liability insurance, contained two endorsements providing UIM coverage to the leasing employees in certain circumstances.

On a Saturday in 2003, Tolbert picked up his son from a friend's house in Greenwood, South Carolina. At the time, Tolbert was driving a 1989 Honda Accord registered and titled in his name, instead of the BMW he was leasing from his employer. The Honda was insured under a policy with Southern United Fire Insurance Company purchased by Tolbert; however, Tolbert had chosen to reject UIM coverage under the Honda policy. On the return trip from Greenwood to Greenville, South Carolina, Tolbert was involved in an accident caused by William Humbert. Tolbert was severely injured, and missed nearly eleven months of work, while accumulating over $136,000 in medical expenses. In a separate proceeding, Tolbert settled with Humbert for the minimum liability limits of $15,000 Humbert carried on his automobile.

Thereafter, Zurich filed this declaratory judgment action against Appellants, seeking a determination that Tolbert did not qualify as an insured for the purposes of UIM coverage under the Policy. Both parties filed motions for summary judgment, and a hearing was scheduled shortly thereafter. At the hearing, Appellants argued that, in addition to being a Class I insured under the Policy, they were entitled to UIM coverage because two separate, included endorsements extended coverage beyond the Policy. Appellants maintained one of the endorsements purportedly made the Honda a temporary substitute of the leased BMW, and thus qualified Appellants for coverage. In support of this assertion, Appellants submitted an affidavit

stating the leased BMW was inoperable at the time of the accident because it was in need of servicing.

The circuit court granted Zurich's motion for summary judgment, holding the plain language of the Policy explicitly excluded the portability of UIM coverage in the circumstances of the accident. Appellants filed a Rule 59(e), SCRCP, motion for reconsideration, which was denied. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E2d 437, 443 (Ct. App. 2005). Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

LAW/ANALYSIS

I. Tolbert as a Class I Insured

Appellants first contend Tolbert was a named or Class I insured[1] under the Policy. We believe the circuit court correctly determined he was not.

The "Common Policy Declaration" page supplies the named insured to be used throughout the entire Policy, and provides only BMW of North

[1] The two classes of insureds are: (1) the named insured, his spouse, and relatives residing in his household; and (2) any person using, with the consent of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicle. Garris v. Cincinnati, 280 S.C. 149, 156, 311 S.E.2d 723, 727 (1984).

America, LLC, in the given space. Below this provision, when given the opportunity to describe the named insured, the "Corporation" box is checked. Furthermore, on the "Business Auto Coverage Form" page, the Policy provides: "Throughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations. The words 'we', 'us' and 'our' refer to the Company providing this insurance." We therefore find Tolbert was neither a named insured nor a Class I insured of BMW's basic Policy. See Concrete Servs., Inc. v. U.S. Fid. & Guar. Co., 331 S.C. 506, 511, 498 S.E.2d 865, 867 (1998) (adopting the majority view that a corporation cannot have a spouse or family members that qualify as Class I insureds).

II. Policy in Conflict With Insurance Laws of South Carolina

Appellants next contend Zurich's exclusion of UIM coverage is in conflict with the insurance laws of South Carolina. We disagree.

Appellants maintain UIM coverage cannot be retracted once offered and accepted, and that UIM is personal and portable at all times. To this end, Appellants rely principally on our court's opinion in Burgess v. Nationwide Mutual Insurance Company, which was subsequently reversed. 361 S.C. 196, 201 S.E.2d 861 (Ct. App. 2004), rev'd 373 S.C. 37, 644 S.E.2d 40 (2007). Burgess is a case similar to the one before us, where an insured was injured in a motorcycle accident while operating a motorcycle which he owned, but on which he carried no UIM coverage. The policy at issue in Burgess restricted UIM coverage, allowing it to be excess coverage if the vehicle involved in the accident was one owned by the insured, but limited it to the amount of UIM coverage the insured carried on the vehicle involved. The supreme court distinguished voluntary UIM coverage, from Uninsured Motorist (UM) coverage, which is a mandatory part of all automobile insurance policies. See S.C. Code Ann. § 38-77-150 (2002). While the Burgess court agreed with our court's determination that UIM coverage is personal and portable, the supreme court expressly held "public policy is not offended by an automobile insurance policy provision which limits the portability of basic 'at-home' UIM coverage when the insured has a vehicle involved in the accident." Burgess, 373 S.C. at 42, 644 S.E.2d at 43.

The Policy in the case before us differs from the policy at issue in Burgess, because here, the basic Policy completely eliminates UIM coverage from Zurich if the vehicle involved in the accident is owned by the insured. Rather, it is the two separate endorsements discussed below which would under certain circumstances provide UIM coverage to BMW employees leasing under the program. Nevertheless, the analysis under Burgess remains the same. Tolbert was driving his own vehicle on which he had the ability to decide whether to purchase voluntary UIM coverage. Tolbert made the decision not to obtain UIM coverage when he insured the Honda. As a result, we hold the Policy's limitation on UIM coverage portability neither offends public policy, nor is in conflict with the insurance laws of South Carolina.

III. Coverage Under the Endorsements

Finally, Appellants contend the circuit court erred in failing to find two separate endorsements contained within the Policy extended UIM coverage to Tolbert.

A. Drive Other Car Coverage Endorsement

Appellants first maintain the endorsement entitled "Drive Other Car Coverage – Broadened Coverage for Named Individuals" (DOCC) extended UIM coverage under the Policy to Tolbert. As its name indicates, the DOCC endorsement provides for certain extensions of coverage from the basic Policy; specifically, the schedule provides that "[a]ny employee furnished with a company car" is entitled to a limit of one million dollars of UIM coverage. However, the Policy specifically excludes the type of coverage Appellants seek in a qualification contained in the following DOCC endorsement, Section C:

> Changes in Auto Medical Payments and Uninsured and Underinsured Motorists Coverages
> The following is added to Who is An Insured:
>
> Any individual named in the Schedule and his or her "family members" are "insured" while "occupying"

> or while a pedestrian when being struck by any "auto" you don't own except:
>
> Any "auto" owned by that individual or by any "family member."

Appellants maintain this qualification cannot restrict the endorsement extension of UIM coverage to Tolbert without adding several operable words that are not included in a responsible reading of Section C. We disagree, and hold that Section C is neither vague nor open to multiple interpretations, and expressly excludes Tolbert from recovering UIM in the very situation that occurred.

Given the express instructions listed above from the Business Auto Coverage Form, the only tenable reading of this provision is that: any individual named in any schedule (Tolbert) and his or her family members are insured while occupying . . . any auto you (BMW) don't own except: any auto owned by that individual (Tolbert) or by any family member (of Tolbert). Essentially Section C allows for the portability of UM and UIM coverages to Tolbert in any accident in which he is a passenger or a pedestrian, except accidents involving an auto owned by Tolbert or one of his family members. Because Tolbert was driving a vehicle that he owned at the time of the accident, Section C prohibits him from recovering UIM coverage under this endorsement. Accordingly, the circuit court did not err in granting Zurich's motion for summary judgment as to this issue.

B. South Carolina Underinsured Motorists Coverage Endorsement

Appellants next maintain a second endorsement, entitled "South Carolina Underinsured Motorists Coverage," (SC UIM) also extends UIM coverage under the Policy to Tolbert. This endorsement provides for the payment of UIM coverage to "insured[s]" when involved in an accident and continues to define who is an insured according to whether the named insured is designated in the Declarations as: (1) an individual; or (2) a partnership, limited liability company, corporation, or any other form or organization. As discussed above, the named insured designated in the "Common Policy

Declaration" page is BMW of North America, LLC. Accordingly, section (B)(2) of this endorsement applies. This subsection provides:

> B. Who Is An Insured
>
> If the Named Insured is designated in the Declarations as:
>
> 2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":
>
> a. Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, 'loss' or destruction.

Appellants contend the Honda qualified as a temporary substitute for the covered BMW because the BMW needed of servicing at the time of the accident. In support of this claim, Appellants tendered an affidavit to the court stating "[t]he reason that [Tolbert was driving] the [Honda] . . . was due to the fact that the BMW was in need of service and an oil change and could not be driven."[2]

[2] The circuit court's order granting Zurich's motion for summary judgment failed to address Appellants' affidavit. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2009) (stating if a party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review). Despite Appellants raising this issue in a Rule 59(e) motion, the circuit court did not rule on it. Therefore, the issue is preserved for our review. Pye v. Estate of Fox, 369 S.C. 555, 566, 633 S.E.2d 505, 510 (2006) (finding once an issue has been properly raised by a Rule 59(e) motion, it is preserved, and a second motion is not required if the court does not specifically rule on the issue raised).

Zurich contends Appellants' Honda could not serve as a temporary substitute to the BMW because as an owned vehicle of Appellants, there was nothing temporary in the nature of Tolbert's use of it. See Nationwide Mut. Ins. Co. v. Douglas, 273 S.C. 243, 255 S.E.2d 828 (1979) (finding the use of an alleged substitute automobile must be temporary in order for coverage under a substitution provision to be extended). However, unlike the DOCC endorsement, nothing in the SC UIM endorsement excludes an owned vehicle from being a temporary substitute under proper circumstances. Moreover, we do not find Douglas controlling. There, a husband purchased his wife a Pontiac he knew was stolen, replacing an Oldsmobile which had UIM coverage. She thereupon began driving the "hot" automobile as her primary vehicle. Subsequently, wife was killed in an accident while driving the stolen Pontiac. In an action to determine whether the deceased was entitled to the benefit of UIM coverage from the Oldsmobile, the supreme court held the Pontiac could not qualify as a temporary substitute. In Douglas, there was no allegation, as here, that the Oldsmobile was out of service. Instead, we find the facts of this case more similar to those of Foremost Insurance Company v. Motorists Mutual Insurance Company, where the Ohio court found that under a similar employer's insurance provision, an employee's owned motorcycle could serve as a temporary substitute to employer's out of service automobile. 854 N.E.2d 552 (2006).

While Appellants will bear the ultimate burden at trial of proving the BMW was out of service due to its breakdown, repair, servicing, loss, or destruction, at this stage of the litigation, we find Appellants' affidavit creates a genuine issue of material fact in that regard, sufficient to survive Zurich's motion for summary judgment. See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 305 (Ct. App. 1999) (stating "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law"); Hall v. Fedor, 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct. App. 2002) (finding "[e]ven when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied").

CONCLUSION

We hold the grant of summary judgment was proper as to Tolbert's status as an insured, the Policy's adherence to the insurance laws of this state, and the DOCC endorsement. However, Appellants' affidavit in support of the Honda's use as a temporary substitute for the BMW at the time of the accident created a genuine issue of fact, sufficient to survive Zurich's motion for summary judgment on the SC UIM endorsement. The decision of the circuit court is accordingly

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

PIEPER, J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Theresa H. Camp and William James Camp, Respondents,

v.

James Scott Camp, Appellant.

Appeal From Lexington County
C. David Sawyer, Jr., Family Court Judge

Opinion No. 4383
Heard March 6, 2008 – Filed May 2, 3008

APPEAL DISMISSED

G. Waring Parker, of Summerville, for Appellant.

William E. Hopkins, Jr., of Columbia, for Respondents.

CURETON, A.J.: In this domestic action, James Scott Camp (Father) appeals the family court's order requiring him to pay a pro rata share of the college expenses for William James Camp (William), a pro rata share of

Theresa H. Camp's (Mother's) Federal Parent Loan (PLUS), and $4,000 in attorney's fees. We find this appeal is untimely and, therefore, dismiss.

FACTS

Father and Mother are the parents of William, who was born September 22, 1987. Father and Mother divorced in 2003. Father earns $98,000 per year as a pharmacist, and Mother earns $40,000 per year as a paralegal. William earns approximately $13,000 per year.[1]

In 2005, William began attending the University of South Carolina. William received a Life scholarship in the amount of $5,000 per year, which is renewable annually if he maintains a grade-point average of 3.0 or better. To pay the remaining college tuition and expenses, William received an unsubsidized Stafford Loan in the amount of $2,625, which is renewable annually in the amounts of $3,500 the second year and $5,500 the third and fourth years. Mother and William obtained a Palmetto Assistance Loan in the amount of $5,000, which is not renewable. In addition, Mother obtained a PLUS loan in the amount of $3,175, which is not renewable. William completed his freshman year of college with a grade point average above 3.0.

William's yearly college expenses total $18,254, including "tuition, fees, books, meal plan, meals outside of plan, housing, supplies, incidental expenses, and other associated or related expenses such as transportation, auto insurance, health insurance, gas and parking." Father stated he would have calculated William's expenses differently, but he accepted the family court's calculation of William's expenses. In addition to these expenses, in 2005, William used $4,000 of his earnings to purchase a replacement used car to drive to school and work.

[1] William's 2005 W-2 statement indicates his gross earnings were $5,746 for that year. However, William testified he works forty hours per week during the summer and approximately thirty hours per week during the school year at a rate of $8.50 per hour. Assuming twelve weeks of full-time summer work and thirty-six weeks of part-time school-year work, William's gross income is approximately $13,260 per year.

The divorce decree did not address the issue of the parties' financial responsibilities for William's college education. William is over the age of eighteen and therefore no longer a "child" under South Carolina law. S.C. Code Ann. § 20-7-30(1) (1985). Although Mother and William contacted Father seeking assistance with funding for William's education, Father paid only $230 and declined to help further. Mother and William filed suit seeking financial contributions from Father toward William's college education, and attorney's fees. On July 26, 2006, the family court ordered Father to pay seventy percent of "the difference between the total of [William's] education, including incidental expenses, and the loans, grants and scholarships"; seventy percent of the amount of Mother's PLUS loan; and $4,000 in attorney's fees.

On August 11, 2006, Father filed a motion for reconsideration that read, in its entirety:

> PLEASE be advised that the Defendant through his undersigned attorney, will move before the Honorable David Sawyer, Jr., to reconsider the ruling in his Order dated July 26, 2006, in awarding [William's] college expenses and costs.
>
> This motion hearing is set to be heard on the 18th day of October, 2006, at 3:45 o'clock, p.m.
>
> Please be present to defend if so minded.

Mother and William filed a response memorandum to this motion on October 16, 2006. Father, in turn, faxed a memorandum in support of his motion to Mother and William's counsel on October 17, 2006. Father filed his memorandum on October 18, 2006, approximately two hours before the hearing. The family court heard and denied Father's motion for reconsideration on October 18, 2006. This appeal followed.

LAW/ANALYSIS

This appeal raises the novel question of whether a motion for reconsideration that is insufficient under Rule 7(b)(1), SCRCP, stays the time for appeal. We believe it does not. Consequently, Father's appeal is untimely.

A motion presented in writing "shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion." Rule 7(b)(1), SCRCP. "A motion to alter or amend the judgment shall be served not later than [ten] days after receipt of written notice of the entry of the order." Rule 59(e), SCRCP. Within ten days of filing a motion under Rule 59, the movant shall provide a copy of the motion to the judge. Rule 59(g), SCRCP.

A party wishing to appeal an order of the family court must serve a notice of appeal on all respondents "within thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203(b)(1) and (3), SCACR. A timely Rule 59(e) motion to alter or amend judgment stays the time for appeal until the appellant receives "written notice of entry of the order granting or denying such motion." Rule 203(b)(1), SCACR; Rule 59(f), SCRCP. An untimely notice of appeal shall be dismissed. Rule 203(d)(3), SCACR. The clerk shall dismiss the appeal of a party who fails to comply with the Rules, and the case "shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties." Rule 231, SCACR. Timeliness of an appeal is a jurisdictional matter. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 17, 602 S.E.2d 772, 776 (2004). An appellant's failure to comply with the procedural rules for appeal deprives the court of appellate jurisdiction but not of subject matter jurisdiction. State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004).

The question whether a motion to reconsider, alter, or amend judgment under Rule 59(e) that is insufficient under Rule 7(b)(1), SCRCP, stays the

time for appeal is novel in South Carolina. However, the federal courts may guide us on this issue.[2] Rule 7(b)(1) is substantially similar to its federal counterpart, Rule 7(b)(1), FRCP. Rule 59(e), SCRCP, is identical to its federal counterpart, Rule 59(e), FRCP.

The United States Court of Appeals for the Seventh Circuit addressed this precise question as it relates to appeals under the Federal Rules in Martinez v. Trainor, 556 F.2d 818 (7th Cir. 1977). There, the defendant filed a timely motion under Rule 59(e), FRCP. Id. at 819. The motion requested the district court to "'alter, amend, or vacate'" its prior judgment. One week later, the defendant moved for leave to file a memorandum supporting the motion. Plaintiff objected. The district court accepted defendant's memorandum nonetheless and subsequently denied defendant's Rule 59(e) motion. When defendant later appealed the ruling, the plaintiff moved to dismiss the appeal as untimely. Id. The appellate court found the abbreviated motion complied with Rule 7(b)(1), FRCP, by adequately identifying the "relief or order sought." However, it failed to satisfy the additional requirement of stating "with particularity the grounds therefor." Id. at 820; Rule 7(b)(1), FRCP. According to the appellate court, the language at issue "failed to state even one ground for granting the motion." 556 F.2d at 819. The defendant argued in the alternative the memorandum he filed a week after the motion amended the motion itself. The appellate court declined to permit what would, in effect, be an extension of time under Rule

[2] Both federal courts and other state courts have contemplated this issue and other related issues. See Allender v. Raytheon Aircraft Co., 439 F.3d 1236, 1238 (10th Cir. 2006) (insufficient post-trial motion under Rule 59(e), FRCP, did not toll time to appeal in spite of circuit court's improper extension of time to file supporting memorandum); People v. Collins, 127 Ill.App.3d 236, 240, 468 N.E.2d 1343, 1346 (1984) (insufficiently specific post-trial motion did not preserve issues for review); N.C. Alliance for Transp. Reform v. N.C. Dep't of Transp., 645 S.E.2d 105, 108-09 (N.C. App. 2007) (appeal of final order was untimely where insufficient post-trial motion under Rule 59(e), N.C.G.S. § 1A-1, did not toll time to appeal, and only issues ruled upon in the post-trial motion were preserved).

6(b), FRCP,[3] stating "if a party could file a skeleton motion and later fill it in, the purpose of the time limitation would be defeated." Id.

The instant case, in its essentials, is analogous to Martinez. Following the family court's adverse ruling, Father filed a motion under Rule 59(e), SCRCP. Though timely, Father's motion failed to comply with Rule 7(b)(1), SCRCP. Whereas the motion in Martinez failed only the particularity requirement of the federal rule, Father's motion satisfied neither the particularity nor the relief-sought requirement of the South Carolina rule. Father neither identified an error of law by the family court nor stated a single ground on which the family court might grant him relief, thus failing the particularity requirement. Furthermore, in requesting only that the family court "reconsider [its] ruling," Father failed to identify the relief he sought through his motion. Mother and William objected to the insufficiency of Father's motion in their response memorandum, and, as in Martinez, Father later filed a memorandum purporting to elaborate on his motion.[4] Like the Martinez trial court, the family court accepted the late memorandum and eventually denied the motion, and the movant appealed.

Our ruling that an insufficient motion under Rule 59(e), SCRCP, does not stay the time for appeal comports with federal law on point as well as with prior South Carolina decisions on a closely related issue. In Elam, our supreme court traced the history of judicial treatment of successive Rule 59(e) motions. 361 S.C. at 15, 602 S.E.2d at 775. Elam confirmed

[3] Rule 6(b), FRCP, is also substantially the same as Rule 6(b), SCRCP.

[4] One notable difference between Martinez and this case is the timing of the objections to the Rule 59(e) motions and memoranda. In Martinez, the defendant moved for leave to file his memorandum at the hearing on his motion, which occurred before his initial appeal period expired. Id. at 819. Plaintiff also objected during that period, thereby placing defendant on notice that his motion was insufficient. Id. Here, Father's hearing date was set well beyond the initial appeal period. As a result, Mother and William's objection, and Father's subsequent memorandum supporting his motion, were all filed after the initial appeal period had expired. However, we do not believe this difference renders Martinez distinguishable.

successive post-trial motions that raise no new issues do not stay the time for appeal and noted this ruling reflected the "prevailing view among federal courts." Id. at 18, 602 S.E.2d at 777. The purposes of insufficient and successive post-trial motions appear to be the same: both attempt to buy time without asserting a meritorious claim. These tactics further neither justice nor efficiency, and we cannot facilitate their use.

Our rules clearly state the requirements for motions and for appeals. Permitting a post-trial motion that identifies neither the grounds on which it relies nor the relief sought to stay the time for appeal under Rule 59(e), SCRCP, would undermine our procedural rules. Moreover, it would encourage parties to file baseless post-trial motions with the expectation of "filling in the blanks" at a later date. Consequently, we find Father's appeal is untimely, and we dismiss.

CONCLUSION

We find Father's Rule 59(e) motion for reconsideration was insufficient and failed to stay the time for appeal. Consequently, Father's appeal was untimely, and we do not have jurisdiction to hear this appeal. Accordingly, Father's appeal is

DISMISSED.

HEARN, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Murrells Inlet Corporation, **Respondent,**

v.

Iva Mae Ward, **Appellant.**

Appeal from Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 4384
Submitted May 1, 2008 – Filed May 2, 2008

AFFIRMED

William Isaac Diggs, of Myrtle Beach, for Appellant.

Natasha M. Hanna, of Myrtle Beach, for Respondent.

ANDERSON, J.: Iva Mae Ward (Ward) appeals the master-in-equity's order finding Ward created a fifty foot easement by recording a plat depicting the easement and requiring Ward to: (1) refrain from interference

with the easement and (2) remove all encroachments from the easement. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

Appellant Ward and other heirs inherited a 6.86 acre tract near Stevens Cross Road in Little River, South Carolina. In 1987, Ward became the sole owner of the entire tract. In 1990, Ward divided the land into five lots for the purpose of transferring portions of the property to her children.

When Ward subdivided the property, she granted a fifty foot right-of-way to the lots to allow access from Highway 57, as evidenced in a plat prepared for Ward by C.B. Berry R.L.S. and recorded in the Horry County Register of Deeds. In the pleadings, Ward admitted she provided the fifty foot easement pursuant to the Horry County Zoning and Planning Regulations. However, Ward now claims the surveyor included the road on the plat under the erroneous belief that the regulations required the easement for the creation of a subdivision. Additionally, Ward avers she was unaware the plat included a fifty foot roadway and only intended for the existing driveway to remain as a shared private drive.

Ward owns a house located on Lot A. She has resided and continues to reside at this address since the subdivision of the property. Lot A is the closest lot to the access point for the subdivision off of Highway 57.

After subdividing the property, Ward conveyed Lot 4 to her son Michael, who constructed a house on the property. Lot 4 is located behind the other lots and is the farthest from Highway 57. Access to Lot 4 is provided by a right-of-way running across one side of Ward's property. Michael used this right-of-way for access to his portion of the tract.

In 2003, Michael defaulted on a mortgage on the property and went into foreclosure. In 2005, Respondent Murrells Inlet Corporation (MIC) purchased Lot 4, including the house and any improvements thereon and the

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

accompanying right-of-way. MIC then began using Lot 4 as rental property and presently has tenants residing in the home.

MIC purchased the property with the understanding that there was a fifty foot right-of-way providing access to the lot. The right-of-way is an unpaved dirt road that runs from Highway 57 through the edge of Ward's property, passing alongside each of the lots in the tract, and ending at Lot 4. It consists of two dirt ruts which allow only a single vehicle at a time to access the lots.

The right-of-way is currently in poor condition. Several encroachments in the right-of-way add to the difficulties inherent in traveling the road in its current state and prevent any improvements to the road from being completed. Because of the road's present condition and the encroachments, the tenants residing at Lot 4 have a hard time getting to and from their home and have expressed concerns that it may be impossible for an emergency vehicle to reach Lot 4. MIC has repeatedly objected to Ward about the obstruction of the right-of-way to no avail.

MIC filed a Petition for an Order to Remove Encroachments and a Rule to Show Cause against Ward and a hearing was held. In issuing the order, the master concluded that Ward granted and dedicated an easement to Lot 4 when the tract was subdivided and Ward was not allowed to interfere with the use of the granted easement.

In the Order to Remove Encroachments, the master noted that Ward and her family placed the following encroachments in the right-of-way: an old truck filled with trash and debris, a rusty water heater, wooden poles, a wooden storage shed, a garden, various scrap metal, mattress springs, lawnmowers, and some other miscellaneous trash and debris. The master found that Ward's misuse of the easement deprives MIC of the concurrent use of the easement for the purposes of ingress and egress to Lot 4.

The master ordered:

> [Ward] shall not block the easement or use the easement for any purpose other than as a private driveway. [Ward] shall, within

> fourteen days, remove those items that are within the fifty-foot right of way which encroaches upon the easement. If [Ward] does not remove those items within the time allowed, [MIC] may remove said items and [Ward] shall pay the cost of the removal. [Ward] shall also pay [MIC] the costs of this action and must pay the pro-rata share of any further improvements to the road.

Following the decision of the master, Ward filed a Motion for Reconsideration. The motion was denied.

ISSUE

Does a plat recorded when property is subdivided confer an easement to the subsequent grantees of the property to the extent the easement is delineated in the plat?

STANDARD OF REVIEW

The determination of the existence of an easement is a question of fact in a law action and is subject to the any evidence standard of review when tried by a judge without a jury. Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998); Goodwin v. Johnson, 357 S.C. 49, 52, 591 S.E.2d 34, 35-36 (Ct. App. 2003); Pittman v. Lowther, 355 S.C. 536, 540, 586 S.E.2d 149, 151 (Ct. App. 2003); Revis v. Barrett, 321 S.C. 206, 208, 467 S.E.2d 460, 462 (Ct. App. 1996); Smith v. Commissioners of Pub. Works, 312 S.C. 460, 465, 441 S.E.2d 331, 334 (Ct. App. 1994); see also Jowers v. Hornsby, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987) ("The decision of the trier of fact as to whether or not an easement exists will be reviewed by this Court as an action at law."). In an action at law tried without a jury, the judge's findings of fact will not be disturbed on appeal unless there is no evidentiary support for the judge's findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

While the determination of the existence of an easement is a question of fact in a law action, the question of the extent of an easement is an action in equity. Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997); Plott v. Justin Enters., 374 S.C. 504, 510, 649 S.E.2d 92, 95 (Ct.

App. 2007); Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. South Island Pub. Serv. Dist., 355 S.C. 529, 532, 586 S.E.2d 146, 147 (Ct. App. 2003); Eldridge v. City of Greenwood, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998); Smith, 312 S.C. at 465, 441 S.E.2d at 334. "[In] an action in equity referred to a master for final judgment, we may find facts in accordance with our own view of the preponderance of the evidence." Van Blarcum v. North Myrtle Beach, 337 S.C. 446, 450, 523 S.E.2d 486, 488 (Ct. App. 1999); accord Stackhouse v. Cook, 271 S.C. 518, 521, 248 S.E.2d 482, 484 (1978); Settlemeyer v. McCluney, 359 S.C. 317, 320, 596 S.E.2d 514, 516 (Ct. App. 2004); Thomas v. Mitchell, 287 S.C. 35, 37-38, 336 S.E.2d 154, 155 (Ct. App. 1985); see also Tupper, 326 S.C. at 323, 441 S.E.2d at 190 (finding since it is an action in equity, the Court may take its own view of the evidence); Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 67, 558 S.E.2d 902, 907 (Ct. App. 2001) ("The scope of an easement is an equitable matter in which a reviewing court may take its own view of a preponderance of the evidence."). "Our broad scope of review, however, does not require this Court to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." Plott, 374 S.C. at 510-511, 649 S.E.2d at 95; accord Thomas, 287 S.C. at 38, 336 S.E.2d at 155.

LAW/ANALYSIS

Ward contends the master-in-equity erred by recognizing a fifty foot easement across Ward's property and requiring her to refrain from interference or encroachment on the easement. We disagree.

" 'An easement is a right which one person has to use the land of another for a specific purpose.' " Frierson v. Watson, 371 S.C. 60, 67, 636 S.E.2d 872, 875 (Ct. App. 2006) (quoting Steele v. Williams, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944)); accord Forest Land Co. v. Black, 216 S.C. 255, 261, 57 S.E.2d 420, 423 (1950); Smith, 312 S.C. at 465, 441 S.E.2d at 335. " 'A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands.' " Frierson, 371 S.C. at 67, 636 S.E.2d at 875 (quoting Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965)); accord Douglas v. Medical Investors, Inc.,

256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971). "[W]here a deed describes land as is shown as a certain plat, such becomes a part of the deed." Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975); accord Lynch v. Lynch, 236 S.C. 612, 623, 115 S.E.2d 301, 307 (1960); Frierson, 371 S.C. at 67, 636 S.E.2d at 876. "Both deeds and easements are valid to subsequent purchasers without notice when they are recorded." Frierson, 371 S.C. at 67, 636 S.E.2d at 876 (citing S.C. Code Ann. § 30-7-10 (Supp. 2005)). "The purpose of the recording statute is to protect a subsequent buyer without notice." Frierson, 371 S.C. at 67, 636 S.E.2d at 876 (emphasis omitted) (citing Burnett v. Holliday Bros., 279 S.C. 222, 225, 305 S.E.2d 238, 240 (1983)).

"Where land is subdivided, platted into lots, and sold by reference to the plats, the buyers acquire a special property right in the roads shown on the plat. If the deed references the plat, the grantee acquires a private easement for the use of all streets on the map." Davis v. Epting, 317 S.C. 315, 318, 454 S.E.2d 325, 327 (Ct. App. 1994); accord Carolina Land, 265 S.C. at 105, 217 S.E.2d at 19; Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 118, 145 S.E.2d 922, 925 (1965); Corbin v. Cherokee Realty Co., 229 S.C. 16, 25, 91 S.E.2d 542, 546 (1956); Newton v. Batson, 223 S.C. 545, 549-550, 77 S.E.2d 212, 213 (1953); Outlaw v. Moise, 222 S.C. 24, 30, 71 S.E.2d 509, 511 (1952); Cason v. Gibson, 217 S.C. 500, 508-509, 61 S.E.2d 58, 61 (1950); Billings v. McDaniel, 217 S.C. 261, 265, 60 S.E.2d 592, 593-594 (1950); Van Blarcum, 337 S.C. at 451, 523 S.E.2d at 488; Giles v. Parker, 304 S.C. 69, 73, 403 S.E.2d 130, 132 (Ct. App. 1991). The easement referenced in the plat is dedicated to the use of the owners of the lots, their successors in title, and to the public in general. Carolina Land, 265 S.C. at 105, 217 S.E.2d at 19; Blue Ridge, 247 S.C. at 118, 145 S.E.2d at 925. As to the grantor, who conveyed the property with reference to the plat, and the grantee and his successors, the dedication of the easement is complete at the time the conveyance is made. Newington Plantation Ests. Assns. v. Newington Plantation Ests., 318 S.C. 362, 365, 458 S.E.2d 36, 38 (1995); Immanuel Baptist Church of North Augusta v. Barnes, 274 S.C. 125, 130-131, 264 S.E.2d 142, 145 (1980); Carolina Land, 265 S.C. at 105, 217 S.E.2d at 19; Outlaw, 222 S.C. at 30, 71 S.E.2d at 511; Pittman, 355 S.C. at 542, 586 S.E.2d at 152.

The grantee receives a private easement at the time of conveyance in any streets referenced in the plat. Carolina Land, 265 S.C. at 105-106, 217 S.E.2d at 19; Blue Ridge, 247 S.C. at 119, 145 S.E.2d at 925; Giles, 304 S.C. at 73, 403 S.E.2d at 132.; see Newington Plantation, 318 S.C. at 365, 458 S.E.2d at 38 ("While dedication for public use is significant to the creation of a public easement, it is irrelevant to the determination whether a private easement exists."). " '[W]here lands are platted and sales are made with reference to the plat, the acts of the owner in themselves merely create private rights in the grantees entitling the grantees to the use of the streets and ways laid down on the plat or referred to in the conveyance.' " Vick v. S.C. Dep't of Transp., 347 S.C. 470, 478, 556 S.E.2d 693, 697 (Ct. App. 2001) (quoting Outlaw, 222 S.C. at 31, 71 S.E.2d at 512). "Absent evidence of the seller's intent to the contrary, a conveyance of land that references a map depicting streets conveys to the purchaser, as a matter of law, a private easement by implication with respect to those streets, whether or not there is a dedication to public use." Newington Plantation, 318 S.C. at 365, 458 S.E.2d at 38. Recordation of a plat containing an easement may be sufficient to show that the owner intended to dedicate that easement. Van Blarcum, 337 S.C. at 450, 523 S.E.2d at 488 (citing McAllister v. Smiley, 301 S.C. 10, 15, 389 S.E.2d 857, 861 (1990) (Toal, J., dissenting)).

Recently, in an excellent academic writing, our Supreme Court explicated the law of implied easements in Inlet Harbour v. S.C. Dep't of Parks, Recreation and Tourism, Op. No. 26459 (S.C. Sup. Ct. filed March 17, 2008) (Shearouse Adv. Sh. No. 11 at 15, 20-21):

> The creation of an implied easement generally requires that the facts and circumstances surrounding the conveyance, the property, the parties, or some other characteristic demonstrate that the objective intention of the parties was to create an easement. 25 Am. Jur. 2d Easements and Licenses § 19 (2004); 28A C.J.S. § 62. Courts have, over time, developed various presumptions regarding the creation of implied easements in certain circumstances. One such presumption arises when an owner subdivides his land and has the land platted into lots and streets. This Court has recognized the general rule that when an owner conveys subdivided lots and references the plat in the

deed, the owner grants the lot owners an easement over the streets appearing in the plat. See, eg., Blue Ridge Realty Co., 247 S.C. at 118, 145 S.E.2d at 924-925.

. . .

As a starting point, we note that the intentions of the parties to the transaction are the overriding focus when examining implied easements. McAllister v. Smiley, 301 S.C. 10, 16, 389 S.E.2d 857, 862 (1990) (Toal, J. dissenting); 28A C.J.S. §§ 82, 149; 17A Am. Jur. §§ 40, 116; 25 Am. Jur. 2d. § 19. Thus, the Department over-reads Blue Ridge considerably in suggesting that the case stands for the proposition that an easement created by reference to a plat is presumptively an easement of a particular scope. The rule applied in Blue Ridge is nothing more than a presumption that when a grantor conveys property with reference to a plat showing streets or other ways of passage, the grantor intends to allow the grantee the use of the delineated streets and ways of passage. McAllister, 301 S.C. at 11-12, 389 S.E.2d at 858. The case Cason v. Gibson, 217 S.C. 500, 61 S.E.2d 58 (1950), explained the policy underlying this presumption in terms of estoppel. In that case, this Court explained that when a grantor conveys land abutting a street, he is estopped from denying the street's existence and the right of the grantee to its use. Id. at 507, 61 S.E.2d at 61. This approach is reasonable, and it is also reasonable that when an owner conveys property that has been subdivided for residential purposes, the grantor presumably intends for grantees to have access to the abutting subdivision streets for normal residential purposes. But the property at issue here is not subdivided residential property and abuts no road. This demonstrates the problems that might occur if we were to apply a rigid presumption based solely upon particular geography or land division. Our guidepost must be what the parties intended, and the best evidence of the parties' intentions are the facts and circumstances surrounding the conveyance.

The existence of an easement is **NOT** an issue in this case. Only, the extent and scope of the easement is contested. Because we are proceeding in equity, we may find facts in accordance with our own view of the preponderance of the evidence.

The evidentiary record is imbued with intransigence and arrogance on the part of Ward. Her belated activity in emasculating the easement by placing encroachments in the right-of-way is both unappealing and unavailing. The factual finding by the master in regards to Ward's misuse of the easement is supported by the testimony. To allow Ward's intent to override the original grant of a fifty foot easement would result in a travesty of justice. Her demonstrated intent to eliminate a reasonable easement belies common sense.

In the instant case, when Ward subdivided the property and recorded a plat referencing a fifty foot right-of-way, it may be inferred that she intended the right-of-way to be a private easement dedicated to the use of the lot owners, their successors in title, and the public. The deed and the recorded plat in this case are controlling notwithstanding an "intent" analysis. By recording the easement on the plat, Ward evidenced an intention to grant that easement to any future lot owners in the subdivision. When Ward originally conveyed Lot 4 with reference to the recorded plat, her grantees and any subsequent purchasers acquired the right to use this easement to the full extent that it is indicated in the plat. MIC relied upon the recorded plat when it purchased Lot 4. The dedication of the private easement was complete when Ward originally conveyed the lot. It would now be unfair to deny MIC the right to the full use and enjoyment of the easement as indicated in the plat, regardless of what Ward now argues were her intentions at the time the plat was recorded. Subsequent purchasers are entitled to rely on recorded deeds and plats to determine their rights in respect to property.

CONCLUSION

Juxtaposing the Blue Ridge rule, the holding in Inlet Harbour, and the parties' intentions, we come to the ineluctable conclusion that MIC is entitled to use of the fifty foot easement in order to access Lot 4 and this right-of-way

should not be encroached upon or obstructed. ACCORDINGLY, the order of the master is

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.

The Supreme Court of South Carolina
P. O. Box 11330
Columbia, South Carolina 29211