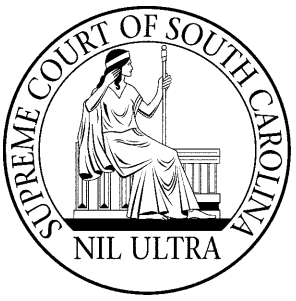

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20
May 21, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Amendment of Rule 404 of the South Carolina Appellate Court Rules

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ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 404 of the South Carolina Appellate Court Rules is amended to read as shown in the attachment to this order. This amended rule shall be effective immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

May 14, 2014

RULE 404
ADMISSION PRO HAC VICE AND APPEARANCES BY NON-SOUTH CAROLINA LAWYERS IN ARBITRATION, MEDIATION OR OTHER ALTERNATIVE DISPUTE RESOLUTION PROCEEDINGS IN SOUTH CAROLINA

(a) Motion for Admission Pro Hac Vice; Tribunal Defined. Upon written motion, an attorney who is not admitted to practice law in South Carolina and who is admitted and authorized to practice law in the highest court of another state or the District of Columbia may be admitted pro hac vice in any action or proceeding before a tribunal of this state. Except as provided by Rule 244(d), a person may not be admitted pro hac vice unless a regular member of the South Carolina Bar in good standing is associated as attorney of record with that person. The motion shall be filed with a completed application form specified in (d) below (including the certificate of good standing). For the purpose of this rule, a "tribunal" includes any court of this state, the South Carolina Administrative Law Court and any South Carolina agency authorized to hear and determine contested cases as defined under S.C. Code Ann. § 1-23-310.

(b) Action on Motion. The tribunal in its discretion may hold a hearing on the motion and shall enter an order granting or denying the motion. The motion, however, shall not be considered by the tribunal until the certification by the Clerk of the Supreme Court under (e) below is received. If the motion is denied, the tribunal shall state its reasons.

(c) Continuing Effect. If the motion to appear pro hac vice is granted, the authority to appear pro hac vice shall continue through the remainder of the action or proceeding, including any appellate proceedings, unless permission is withdrawn as provided in (h) below. When an action or proceeding moves from one tribunal to another, the attorney admitted pro hac vice shall immediately provide the new tribunal with a copy of the order granting the pro hac vice admission, and with the name and South Carolina Bar Number of the associated regular member of the South Carolina Bar.

(d) Application for Admission Pro Hac Vice. The Application for Admission Pro Hac Vice shall be on a form approved by the Supreme Court and shall contain the following information:

(1) the applicant's residence and office addresses;

(2) the state and federal courts to which the applicant has been admitted to practice and the dates of admission;

(3) whether the applicant is a member in good standing in those courts, and a certificate of good standing of the Bar of the highest court of the state or the District of Columbia where the applicant regularly practices law;

(4) whether the applicant is currently suspended or disbarred in any court, and if so, a description of the circumstances under which the suspension or disbarment occurred;

(5) whether the applicant has been formally notified of any complaints pending before a disciplinary agency in any jurisdiction and, if so, provide a detailed description of the nature and status of any pending disciplinary complaints;

(6) an identification of all law firms with which the applicant is associated and a description of all the applicant's pending pro hac vice appearances in South Carolina to include the name and address of the tribunal;

(7) the names of each case or proceeding in South Carolina in which the applicant has filed an application to appear as counsel pro hac vice, the name and address of the tribunal, the date of each application, and whether it was granted;

(8) the name, address, telephone number, and South Carolina Bar Number of the regular member(s) of the South Carolina Bar who is (are) the attorney(s) of record; and

(9) an affirmation that the applicant will comply with the applicable statutes, law and procedural rules of the State of South Carolina; be familiar with and comply with the South Carolina Rules of Professional Conduct; and submit to the jurisdiction of the South Carolina courts and the South Carolina disciplinary process.

The attorney shall be under a continuing duty to promptly update the information provided in the application until the tribunal has ruled on the motion for admission pro hac vice. Further, if the motion is granted, the attorney shall be under a continuing duty to promptly update the information provided in the application as long as the attorney continues to appear pro hac vice in the action or proceeding. Any updated information shall be provided to both the tribunal that granted the motion and to the tribunal in which the action or proceeding is pending.

(e) Admission Fee and Certification; Record of Appearances Pro Hac Vice. Prior to making a motion to be admitted pro hac vice, a copy of the application shall be submitted to the South Carolina Supreme Court Office of Bar Admissions along with an admission fee of $250. The fee shall not be required for pro hac vice admissions sought under Rule 244(d), SCACR. Upon receipt of the application, the Clerk of the South Carolina Supreme Court shall certify to the tribunal in which a pro hac vice appearance has been requested that the application form and fee, if applicable, has been received. The Office of Bar Admissions shall maintain a record of all pro hac vice applications as a public record.

(f) Prohibitions on Admission Pro Hac Vice. An attorney may not appear pro hac vice if the attorney is regularly employed in South Carolina, or is regularly engaged in the practice of law or in substantial business or professional activities in South Carolina, unless the attorney has filed an application for admission under Rule 402, SCACR. Notwithstanding any other provision herein, an attorney who files more than six applications for admission pro hac vice in a calendar year, including applications for purposes of Rule 404(k), is considered regularly engaged in the practice of law in South Carolina.

(g) Conduct of Attorney Appearing Pro Hac Vice. An attorney appearing pro hac vice is subject to the jurisdiction of the South Carolina courts with respect to South Carolina law governing the conduct of attorneys to the same extent as an attorney admitted to practice law in this state. The attorney shall comply with the South Carolina Rules of Professional Conduct and is subject to the disciplinary jurisdiction of the Supreme Court of South Carolina.

(h) Withdrawal of Permission. The tribunal in which an attorney is appearing pro hac vice or the Supreme Court of South Carolina may withdraw permission for the attorney to appear pro hac vice based on a violation of South Carolina law; a violation of the South Carolina Rules of Professional Conduct; a violation of a court order or the rules of the tribunal; the submission of an Application for

Admission Pro Hac Vice which contains false, misleading or incomplete information; the pendency of a lawyer disciplinary proceeding or the imposition of a suspension, disbarment or other lawyer disciplinary sanction in this or another jurisdiction; the withdrawal or suspension of permission to appear pro hac vice in this or another jurisdiction; the failure to have associated South Carolina counsel if required; or other good cause.

(i) Responsibilities of Attorney of Record for Attorney Appearing Pro Hac Vice. The South Carolina attorney of record shall at all times be prepared to go forward with the case; sign all papers subsequently filed; and attend all subsequent proceedings in the matter, unless the tribunal specifically excuses the South Carolina attorney of record from attendance.

(j) Non-South Carolina Lawyers Appearing in an Arbitration, Mediation or Other Alternative Dispute Resolution Proceeding in South Carolina. Pursuant to Rule 5.5(c)(3) of the Rules of Professional Conduct, Rule 407, SCACR, a lawyer admitted to practice law in another jurisdiction may perform legal services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's pre-existing representation of a client in a jurisdiction in which the lawyer is admitted to practice.

(k) Limitations on Provision of Legal Services Pursuant to Rule 5.5(c)(3). A lawyer who is not admitted to practice in South Carolina who seeks to provide legal services pursuant to Rule 5.5(c)(3) in more than three matters in a calendar year shall be presumed to be providing legal services on a regular, not temporary, basis.

(l) Fee; Record of Provision of Legal Services Pursuant to Rule 5.5(c)(3). For each matter in which a lawyer seeks to provide legal services pursuant to Rule 5.5(c)(3), the lawyer shall file a verified statement with the South Carolina Supreme Court Office of Bar Admissions stating that the lawyer has not filed more than three statements pursuant to this rule in a 365-day period. The statement shall be accompanied by a $250 fee and shall be served on opposing counsel, if known.

If opposing counsel is not known at the time the verified statement is filed, the statement shall be filed on opposing counsel within ten days of learning the identity of opposing counsel.

The Supreme Court of South Carolina

In the Matter of Samuel Robert Drose, Respondent.

Appellate Case No. 2014-001044

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

s/ Jean H. Toal C.J.

FOR THE COURT

Columbia, South Carolina

May 19, 2014

The Supreme Court of South Carolina

In the Matter of Samuel Robert Drose, Respondent.

Appellate Case No. 2014-001065

ORDER

By order dated May 19, 2014, the Court placed respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The Office of Disciplinary Counsel petitions the Court to appoint the Receiver, Peyre T. Lumpkin, pursuant to Rule 31, RLDE, to protect the interests of respondent's clients.

IT IS ORDERED that Mr. Lumpkin is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

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

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

May 20, 2014

The Supreme Court of South Carolina

In the Matter of Edwin Donald Givens, Respondent.

Appellate Case No. 2014-001032

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

s/ Jean H. Toal C.J.

FOR THE COURT

Columbia, South Carolina

May 15, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Arthur Teeter, III, Appellant,

v.

Debra M. Teeter, Respondent.

Appellate Case No. 2012-212565

Appeal From Lexington County
Deborah Neese, Family Court Judge

Opinion No. 5203
Heard December 11, 2013 – Filed March 5, 2014
Withdrawn, Substituted and Refiled May 21, 2014

AFFIRMED AS MODIFIED AND REMANDED

Jean P. Derrick, of Lexington, for Appellant.

C. Vance Stricklin, Jr., of Moore, Taylor & Thomas, P.A., of West Columbia, and Katherine Carruth Goode, of Winnsboro, for Respondent.

KONDUROS, J.: James Arthur Teeter, III (Husband) appeals the family court's rulings regarding the valuation and classification of property in this divorce action. He also argues the family court erred in excluding information obtained from the e-mail account of Debra Teeter (Wife) regarding her relationship with another man. We affirm as modified and remand.

FACTS/PROCEDURAL HISTORY

Husband and Wife married in November 1996.[1] At that time, Husband was employed as a stock broker for Prudential Securities. He owned several parcels of real estate including his residence, the Indian Creek property, and three rental properties. During the marriage, Husband changed employers and went to work for Legg Mason as a stock broker. He eventually founded his own investment firm, Apex Investment Advisors, LLC, in 2003. Wife became a certified fraud examiner during the marriage. At the time of the temporary hearing in May 2009, Husband claimed gross annual income of $71,000 and Wife claimed $78,756. At the time of the final hearing, in 2011, Husband claimed gross annual income of $116,000 and Wife claimed $97,000.[2] Husband and Wife always maintained separate checking accounts, and Husband put all his regular income, rental income, and proceeds from real estate transactions into his single account.

In 1998, Husband sold the Indian Creek property, and the parties bought their dream home (Bob White property). Husband generally made the mortgage payment on the property and paid for utilities and repairs, while Wife bought groceries and paid for childcare and other miscellaneous expenses. During the marriage, Husband purchased additional rental properties. The division of some of those properties is at issue on appeal, and the details of those transactions are set forth below. Generally, Husband claims he sold or mortgaged nonmarital rental properties for a portion of the newly acquired properties and borrowed the rest in the form of a mortgage on the properties, which were self-supporting.

The parties agreed that after the birth of their second child in 2001, they began to grow apart. After the parties separated in 2008, Husband suspected Wife was involved with another man. He testified he saw Wife's e-mail password written on a sheet of paper that was lying on top of her open purse while he was visiting the marital home to see the children. Husband also testified he installed spyware on Wife's computer but indicated it did not produce any relevant information, only a couple of "garbled" screen shots. Husband read some of Wife's e-mails, which

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[1] Two children were born to Husband and Wife but all issues related to the children have been settled by agreement.

[2] Wife waived alimony prior to the final hearing.

revealed she had been in contact with a former colleague. In one series of e-mails from 2009, Wife attempted to convince the man to meet her in Myrtle Beach. Additionally, Wife admitted at trial she had lied to Husband about attending a class reunion in Nashville and instead went to see the former colleague in Arizona in 2010. Wife never admitted to committing adultery. Husband admitted to committing post-separation adultery.

The family court had previously granted the parties' divorce based on one year's continuous separation. With respect to equitable apportionment, the family court determined the division of marital assets should be 55%/45% in Husband's favor. The family court excluded evidence of Wife's e-mails and the evidence flowing therefrom on the basis that their interception violated the Electronic Communications Privacy Act. However, the family court emphasized that Wife's alleged adultery had no impact on its division of assets.

The family court determined the Glenn Street properties, rental properties purchased by Husband during the marriage, were marital property. The court further determined Husband's business was marital property and assigned it a value of $74,775.32 based upon a balance sheet prepared by Husband in 2011. The family court assigned equity of $12,600 to the Garner Lane property acquired by an LLC Husband created during the marriage to lease the property to Apex Investors. As part of the division of assets, the parties were to sell the Bob White property, where Wife had been living with the children since the parties separated. Wife was to pay 45% of the mortgage and Husband was to pay 55% until the property sold. Finally, the family court awarded Wife $15,000 in attorney's fees, reasoning Husband's dispute over the Glenn Street properties and his activities concerning Wife's e-mails had generated a large portion of Wife's attorney's fees. Husband's request for attorney's fees and private detective's fees was denied. This appeal followed.

STANDARD OF REVIEW

"In reviewing the decision of the family court, an appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence." *S.C. Dep't of Soc. Servs. v. Sarah W.*, 402 S.C. 324, 333-34, 741 S.E.2d 739, 744 (2013). "While this [c]ourt retains its authority to make its own findings of fact, we recognize the superior position of the family court in making credibility determinations." *Id.* at 334, 741 S.E.2d at 744. "Moreover, consistent with our constitutional authority for *de novo* review, an appellant is not relieved of his

burden to demonstrate error in the family court's findings of fact." *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). Therefore, "the family court's factual findings will be affirmed unless appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court." *Id.* (internal quotation marks omitted).

LAW/ANALYSIS

I. Exclusion of Emails

Husband contends the family court erred in concluding he violated the Electronic Communications Privacy Act, 18 U.S.C.A. § 2515 (2000), based on a lack of credibility in his testimony that he accessed Wife's e-mails by means other than spyware.[3] He further maintains the family court erred by interpreting the statute to preclude all the evidence of Wife's alleged adultery except the actual e-mails. We disagree.

The family court did not find Husband's testimony that he stumbled onto Wife's password to be credible. Husband admitted he installed spyware on Wife's computer for the purpose of monitoring her e-mails. The determination of credibility lies largely within the province of the family court. The record supports the family court's factual finding in light of Wife's testimony that she had not written down her password and would have left it in her planner at work had she done so. The only way Husband knew to investigate Wife's out-of-town trip was by accessing her e-mail account. Without further argument or testimony that Husband's installation of the spyware did not violate the Act, Husband has not demonstrated the family court erred by excluding all the evidence related to Wife's relationship with her former colleague. *See Rickenbaker v. Rickenbaker*, 226 S.E.2d 347, 352-53 (N.C. 1976) (holding all evidence regarding the wife's adulterous conduct derived by the husband's interception of her phone calls inadmissible under the Act).

[3] 18 U.S.C.A. § 2515 provides "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . ."

Even if the family court erred in excluding evidence of the relationship, the court explicitly stated in its order that neither Wife's conduct nor Husband's post-separation adultery were considered in the equitable division of assets.[4] The court determined Husband and Wife grew apart as a consequence of not communicating after the birth of their second child. While Wife's post-separation contact with her former colleague was not completely irrelevant, the family court determined it did not impact the break-up of the marriage nor deplete the marital assets. That is a finding well-within the family court's purview, and Husband has not met his burden of proving the family court erred.

II. Glenn Street Properties

Husband argues the family court erred in determining the Glenn Street properties, purchased or created during the marriage, were marital assets. We disagree.

Husband purchased 951 Glenn Street in 1998 for approximately $60,000. He testified he used $11,726 in proceeds from the sale of the Indian Creek property as a down payment. HUD statements support that Husband sold the Indian Creek property, received approximately $34,000 in proceeds, and purchased 951 Glenn Street two weeks later with an $11,726 down payment. Husband financed the remainder of the purchase price with a mortgage on the property, and the record shows 951 Glenn Street generated enough rent to cover the mortgage payments. Wife testified she did not know the source of the funding to buy 951 Glenn Street.

In March 2001, Husband mortgaged a nonmarital property (the Wellington property) and netted $29,524. Husband testified that in November 2001, he used those funds to subdivide 951 Glenn Street into two additional lots, 947 and 955, and make improvements to them. Husband made total improvements of $87,543 to the two new lots utilizing personal credit lines to pay for the remainder of the improvements. When the work was completed, Husband mortgaged 947 Glenn Street and 955 Glenn Street for $111,800. He paid off the credit lines with the mortgage loan and the rent generated covered the mortgage payments.

Generally, property acquired during a marriage is considered marital property regardless of how title is held. S.C. Code Ann. § 20-3-630(A) (Supp. 2012). Two

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[4] *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

exceptions to this general rule include property acquired before the marriage or property acquired in exchange for nonmarital property. *Id.* "The burden to establish an exemption under section [20-3-630] is upon the one claiming that the property is not marital property." 13 S.C. Jur. *Divorce* § 57 (1992).

> The nonmarital character of . . . property may be lost if "the property becomes so commingled as to be untraceable; is utilized by the parties in support of the marriage; or is titled jointly or otherwise utilized in such manner as to evidence an intent by the parties to make it marital property."

Myers v. Myers, 391 S.C. 308, 319, 705 S.E.2d 86, 92 (Ct. App. 2011) (quoting *Hussey v. Hussey*, 280 S.C. 418, 423, 312 S.E.2d 267, 270-71 (Ct. App. 1984)). "The phrase 'so commingled as to be untraceable' is important because the mere commingling of funds does not automatically make them marital funds." *Id.* (quoting *Wannamaker v. Wannamaker*, 305 S.C. 36, 40, 406 S.E.2d 180, 182 (Ct. App. 1991)).

"'For purposes of equitable distribution, a marital debt is a debt incurred for the joint benefit of the parties regardless of whether the parties are legally liable or whether one party is individually liable.'" *Schultze v. Schultze*, 403 S.C. 1, 8, 741 S.E.2d 593, 597 (Ct. App. 2013) (quoting *Wooten v. Wooten*, 364 S.C. 532, 546, 615 S.E.2d 98, 105 (2005)). "There is a rebuttable presumption that a debt of either spouse incurred prior to the beginning of marital litigation is marital and must be factored in the totality of equitable apportionment." *Id.*

In this case, because the Glenn Street properties were purchased or created during the marriage, Husband bears the burden of establishing the properties were nonmarital. The family court concluded Husband failed to meet this burden because the nonmarital funds used to purchase and improve the properties were so commingled into Husband's checking account as to be untraceable. Furthermore, the family court noted the properties were primarily acquired with debt incurred during the marriage.

We conclude the family court correctly determined 951 Glenn Street was a marital asset. Husband testified he used $11,726 from the sale of the nonmarital Indian Creek property as a down payment. The remainder of 951 Glenn Street was

acquired through a mortgage on the property. While the record demonstrates the property generated enough income to cover the mortgage payment, the debt was incurred during the marriage and the rental income from the property was used to benefit both parties. Husband testified excess rental proceeds were used in support of the marriage, and the rental payments were always deposited into Husband's general checking account. Therefore, we affirm the family court's determination that 951 Glenn Street constituted marital property.

However, applying our *de novo* standard of review, we find Husband was able to establish nonmarital funds contributed to the initial purchase of 951 Glenn Street. His down payment of $11,726 was sufficiently traceable to the sale of the Indian Creek property. Wife did not dispute Husband's testimony regarding his use of the Indian Creek funds, and the HUD statements from the closing of the Indian Creek sale and Glenn Street purchase support Husband's testimony.[5] Additionally, the sale of the Indian Creek property and the purchase of Glenn Street occurred only two weeks apart. *See Myers*, 391 S.C. at 319-20, 705 S.E.2d at 92-93 (finding Husband's truck was nonmarital property when he inherited $60,000, deposited the funds into a joint account holding his general income, wrote a check for the truck the following day, and Wife could not dispute that the inheritance was the source of funds for the truck).

Although Husband is entitled to recognition of this nonmarital contribution, we decline to modify the family court's equitable division ratio of the marital estate. Husband is not entitled to a "refund" of his down payment contribution.[6] That contribution is merely to be considered a factor in the overall equitable distribution between the parties. The family court acknowledged that Husband had made a larger direct financial contribution to the acquisition of marital assets — 65%. Husband's down payment contribution is not significant enough to warrant modification of the family court's otherwise well-reasoned equitable distribution of 55% of the marital assets to Husband and 45% to Wife.

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[5] Wife did not contend at trial the Indian Creek property had been transmuted.

[6] *See Barrow v. Barrow*, 394 S.C. 603, 614, 716 S.E.2d 302, 308 (Ct. App. 2011) ("[A]ny special equity . . . in the marital home was not to be apportioned separately but was to be considered as a factor in equitable distribution." (citing *Dawkins v. Dawkins*, 386 S.C. 169, 173-74, 687 S.E.2d 52, 54 (2010), *abrogated on other grounds by Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011))).

With respect to the division and improvements that created 947 and 955 Glenn Street, we agree with the family court that Husband's contribution from the Wellington property was not sufficiently traceable. The Wellington mortgage was secured six months prior to the expenditures on the Glenn Street lots, and the funds were routed through Husband's single checking account. Furthermore, the remainder of the improvements was ultimately paid for with a mortgage on the properties themselves. Accordingly, we affirm the family court's determination that all of the Glenn Street properties were marital property.

III. Valuation of Garner Lane Property

Next, Husband maintains the family court erred in determining the value of and equity in the Garner Lane property. We disagree.

The Garner Lane property is a commercial space purchased by JJ&M, LLC, an entity formed by Husband for the purpose of purchasing the property. Husband's business, Apex Investors, leases it for office space. JJ&M purchased the property for $129,900 in 2005. Wife testified she believed the current fair market value of the property at the time of the final hearing was $130,000. Husband testified the value of the property had gone down based on the declining real estate market and valued the property at $108,000. Neither party had the property appraised for trial because of the expense. We affirm the family court's valuation of the Garner Lane property as it was within the range of values presented at trial. *See Reiss v. Reiss*, 392 S.C. 198, 205, 708 S.E.2d 799, 802 (Ct. App. 2011) (holding the family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented).

Furthermore, the family court found $12,600 in equity in the property. The parties do not dispute that rental payments from Apex Investors to JJ&M are what reduced the mortgage and created any equity in the property. However, Husband contends because his business was the tenant, he should be credited with the creation of that equity. This argument is without merit, and we affirm the family court's ruling.

IV. Valuation of Husband's Business

Husband contends the family court erred in valuing his investment business closer in time to the final hearing than the dating of filing. We agree.

"In South Carolina, marital property subject to equitable distribution is generally valued at the divorce filing date. However, the parties may be entitled to share in any appreciation or depreciation in marital assets occurring after a separation but before divorce." *Burch v. Burch*, 395 S.C. 318, 325, 717 S.E.2d 757, 761 (2011) (citations omitted); *see also* S.C. Code Ann. § 20-3-630(A). The party seeking a deviation from the statutory filing date bears the burden of proof. *Burch*, 395 S.C. at 329, 717 S.E.2d at 763. "Passive appreciation refers to enhancement of the value of property due solely to inflation, changing economic conditions, or market forces, or other such circumstances beyond the control of either spouse. [A]ctive appreciation, on the other hand, refers to financial or managerial contributions of one of the spouses." *Id.* at 325-26, 717 S.E.2d at 761 (citations, emphasis, and internal quotation marks omitted).

> "It is fairer to value a passive asset at or near the time of the final hearing, because both parties are equally deserving to share in any increase or decrease . . . . [On the other hand,] active assets should be valued at the time of commencement [or filing] of the marital litigation, to enable the person who causes the change in value to receive the benefits of his or her labor and skills or, conversely, to prevent the person who controls the assets from manipulating the value downward during litigation."

Id. at 326, 717 S.E.2d at 761 (alterations in *Burch*) (quoting Roy T. Stuckey, *Marital Litigation in South Carolina* 310 (3rd ed., 2001)).

Burch had not been published at the time of the final hearing in this action. However, the passive/active analysis generally applied by our courts prior to *Burch* and specifically adopted therein is the proper approach for valuing Husband's business. The family court valued Apex Investors at $74,775.32 based upon a balance sheet prepared by Husband in 2011. Husband argues the correct valuation would have been reflected on the balance sheet he prepared at the time of filing in 2008, which showed a value of negative $784.56.[7, 8]

[7] Neither Husband nor Wife presented expert testimony at trial as to the value of Husband's business.

In determining whether using the 2011 figure was appropriate, we must consider whether the change in value of the business was passive appreciation or active appreciation based upon Husband's efforts. The change was, according to Husband's own testimony, a reflection of the changing stock market. Although the business is not a publicly owned company, the fact that it is an investment company means the stock market will affect the transactions clients make and the commission or profit generated for Apex Investors. In that sense, the business could be positively affected by a change in the stock market. However, Husband's expertise and efforts were required to take advantage of these changes to benefit Apex Investors. Had Husband not advised clients to make certain transactions at certain times, any benefit of the change in the market would not have been realized within the business. Based on the record before us, we cannot conclude Wife met her burden of establishing the change in the value of Apex Investors was passive appreciation. Therefore, the family court erred in valuing it based on the 2011 balance sheet and should have valued it based on the 2008 balance sheet. After calculating the difference this valuation makes in the overall marital estate, we conclude Wife was overawarded $31,751.95. We remand this issue to the family court to determine how the distribution of marital assets shall be modified to reflect this adjustment.

V. Credit for Occupying Marital Residence

Husband contends the family court abused its discretion in not crediting him with the value of Wife's use and possession of the Bob White property. We disagree.

Prior to the family court's final order, the parties had agreed Husband would pay $700 and Wife would pay $1,400 of the $2,100 monthly mortgage. At the final hearing, the family court determined the parties should pay the mortgage in the ratio of their equitable distribution. The parties agreed Wife would remain in the marital home. She pays the utilities and is responsible for making any improvements or changes recommended by the realtor to assist in selling the property. Additionally, Wife must maintain and make the home available for showings. Husband has substantially more income-generating assets than Wife

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[8] In his brief, Husband acknowledges the existence of a $5,000 note payable to shareholder that should be included in the 2008 value of the business. Therefore, the valuation of the business in 2008 would be $4,215.44.

and will be entitled to a larger equity in the proceeds from the sale of the home based on the 55%/45% distribution. Furthermore, Husband cites no authority to support his argument, rendering anything other than a general fairness argument abandoned on appeal. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned when appellant fails to provide arguments or supporting authority for his assertion). We find no error in the family court's ruling and affirm.

VI. Attorney's and Detective's Fees

Husband asserts the family court abused its discretion in awarding Wife $15,000 in attorney's fees and in denying Husband's request for attorney's and detective's fees. We disagree.

"The decision to award attorney's fees is within the family court's sound discretion, and although appellate review of such an award is de novo, the appellant still has the burden of showing error in the family court's findings of fact." *Lewis v. Lewis*, 400 S.C. 354, 372, 734 S.E.2d 322, 331 (Ct. App. 2012). In deciding whether to award attorney's fees and costs, the court should consider the following factors: (1) the ability of the party to pay the fees; (2) beneficial results obtained; (3) the financial conditions of the parties; and (4) the effect a fee award will have on the party's standard of living. *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

The family court thoroughly addressed each factor in determining whether to award attorney's fees. The record supports that Husband has the greater ability to pay attorney's fees and absorb that cost into his standard of living. Wife successfully established the Glenn Street properties were marital in nature and prevented Husband from introducing evidence related to her alleged adulterous relationship. On appeal, Husband established the family court erred in valuing Apex Investors. However, this determination does not render the beneficial results between the parties so much in Husband's favor that the decision on attorney's fees should be disturbed. Accordingly, the family court did not abuse its discretion in awarding Wife a portion of her attorney's fees and denying Husband's request.

CONCLUSION

Based on our review of the record, we affirm the family court's decision to exclude evidence of Wife's alleged adultery and the determination that all three Glenn Street properties are marital in nature. Furthermore, we affirm the family court's determinations as to the equity in the Garner Lane property, Husband's entitlement to a credit for Wife's occupation of the marital home, and attorney's fees. We modify the family court's ruling as to the value of Husband's business and remand to the family court to modify the distribution of assets to reflect this change.

AFFIRMED AS MODIFIED AND REMANDED.

FEW, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Centennial Casualty Co., Inc., Respondent,

v.

Western Surety Company, d/b/a CNA Surety, Appellant.

Western Surety Company, d/b/a CNA Surety, Defendant/ Third-Party Plaintiff,

v.

Charleston Auto Auction, A3 Auto Center, LLC, and Wylie Mickle, Third-Party Defendants.

Appellate Case No. 2013-001381

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

Opinion No. 5231
Heard May 7, 2014 – Filed May 21, 2014

REVERSED

S. Markey Stubbs, of Baker Ravenel & Bender, LLP, of Columbia, for Appellant.

Ian S. Ford, of Ford Wallace Thomson LLC, of Charleston, for Respondent.

LOCKEMY, J.: Western Surety Co., d/b/a CNA Surety, argues the circuit court erred in (1) finding Charleston Auto Auction (CAA) and its insurance carrier, Centennial Casualty Co. (Centennial), were "legal representatives" pursuant to section 56-15-320(B) of the South Carolina Code; (2) finding section 56-15-320(B) applies when fraud is committed by either the seller or the purchaser of a motor vehicle; and (3) failing to address whether CAA was also the legal representative for the purchasing dealer, and if so, was a participant in the fraud. We reverse.

FACTS/PROCEDURAL BACKGROUND

CAA is a wholesale auctioneer that facilitates the sale and purchase of automobiles among dealers. According to its general manager, CAA (1) acts as the agent and legal representative for dealerships in the transactions; (2) collects and conveys the funds for the automobiles; and (3) conveys, but does not assume, the title to the automobiles between the parties. Section 56-15-320(B) of the South Carolina Code requires motor vehicle wholesalers and dealers to obtain a bond in order to indemnify

> for loss or damage suffered by an owner of a motor vehicle, *or his legal representative*, by reason of fraud practiced or fraudulent representation made in connection with the sale or transfer of a motor vehicle by a licensed dealer or wholesaler or the dealer's or wholesaler's agent acting for the dealer or wholesaler or within the scope of employment of the agent or loss or damage suffered by reason of the violation by the dealer or wholesaler or his agent of this chapter.

S.C. Code Ann. § 56-15-320(B) (Supp. 2013) (emphasis added). Before CAA will facilitate sales of automobiles, dealers must enter into an agreement with CAA stating CAA is their legal representative in the transaction.

In March 2008, A3 Auto Center (A3), an automobile dealer, purchased three vehicles using CAA. Each vehicle's bill of sale stated: "Seller and Buyer each appoint [CAA] as their agent and legal representative for the purpose of processing this transaction through [CAA] . . . ." Pursuant to the requirements of section 56-15-320(B), A3 obtained a surety bond from CNA Surety.

A3 paid for the vehicles with three checks, all of which were returned for insufficient funds. CAA sought reimbursement from Centennial, its insurance carrier, for A3's bad checks. Centennial paid CAA's claim in the amount of $35,305. Centennial subsequently demanded payment from CNA Surety under the bond. CNA Surety refused to pay, arguing neither Centennial nor CAA were the owner or legal representative who suffered a loss or damage pursuant to section 56-15-320(B).

Centennial filed a summons and complaint against CNA Surety on October 19, 2009. In its complaint, Centennial alleged: (1) it was subrogated to the rights of CAA; (2) CAA was an owner or legal representative who suffered a loss or damage; and (3) Centennial was entitled to payment under the terms of the bond. In its answer, CNA Surety admitted it was the surety for the bond at issue, but denied that Centennial was the proper party to seek indemnification, or that the loss was covered under section 56-15-320(B). CNA Surety filed a third-party complaint against CAA alleging CAA was the real party in interest, but denying CAA was entitled to seek reimbursement under the bond pursuant to section 56-15-320(B).

On July 8, 2010, Centennial and CAA filed a motion for summary judgment. CNA Surety filed a cross-motion for summary judgment on September 22, 2010. The circuit court denied both motions. Thereafter, CNA Surety and Centennial agreed to a joint stipulation of facts. Both parties stipulated that pursuant to the statutory cap in section 56-15-320(B), the maximum amount in controversy was $30,000. The parties submitted the stipulation, legal briefs, and proposed orders to the circuit court in lieu of oral arguments.

The circuit court ruled in Centennial's favor, holding CAA was the legal representative of the sellers, and thus, CAA and Centennial, as CAA's subrogee, were entitled to reimbursement under section 56-15-320(B). The circuit court subsequently denied CNA Surety's motion to reconsider. This appeal followed.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

CNA Surety argues the circuit court erred in finding CAA and Centennial, as CAA's subrogee, were legal representatives pursuant to section 56-15-320(B) of the South Carolina Code. We agree.

Pursuant to section 56-15-320(B):

> Each applicant for licensure as a dealer or wholesaler shall furnish a surety bond in the penal amount of thirty thousand dollars . . . . The bond must be conditioned upon the applicant or licensee complying with the statutes applicable to the license and as indemnification for loss or damage suffered by an owner of a motor vehicle, *or his legal representative*, by reason of fraud practiced or fraudulent representation made in connection with the sale or transfer of a motor vehicle by a licensed dealer or wholesaler or the dealer's or wholesaler's agent acting for the dealer or wholesaler or within the scope of employment of the agent or loss or damage suffered by reason of the violation by the dealer or wholesaler or his agent of this chapter.

S.C. Code Ann. § 56-15-320(B) (Supp. 2013) (emphasis added). "An owner or his legal representative who suffers the loss or damage has a right of action against the dealer or wholesaler and against the dealer's or wholesaler's surety upon the bond and may recover damages as provided in this chapter." *Id.* Pursuant to *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996), "when [section] 56-15-320 is read in its entirety, it is clear the legislature intended to provide only the owner of a motor vehicle, or the owner's legal representative, with a cause of action against the surety on a bond issued pursuant to that statute."

Here, three dealers (the Sellers) sold vehicles to A3 using CAA. The Sellers and A3 signed purchase agreements which stated:

> Seller and Buyer each appoint [CAA] as their agent and *legal representative for the purpose of processing this transaction through Auction Company, including transfer of title*. However, they agree [CAA] is merely

> performing an auction service and [CAA] disclaims all express and implied warranties, including merchantability and fitness, except for the warranty of title described below.
>
> Seller and Buyer indemnify and hold [CAA] harmless from any liability, loss, costs, damages or expenses, including attorney's fees which arise directly or indirectly from this transaction, including, but not limited to, all matters relating to odometer mileage, odometer mileage disclosure, and vehicle history even if Seller and Buyer are not at fault.

(emphasis added).

CNA Surety argues CAA was merely an agent or legal representative for facilitating the transactions and did not stand in the shoes of the Sellers. It contends that if the legislature intended to include auction houses in section 56-15-320(B), it would have done so. Centennial argues each of the purchase agreements explicitly made CAA the Sellers' legal representative. Centennial contends CNA Surety incorrectly argues the term "legal representative" has a different, narrow meaning that excludes some legal representatives and includes other legal representatives, depending on the circumstances.

We find CAA and Centennial were not legal representatives of the Sellers. According to the purchase agreements signed by the parties, CAA was tasked with "processing [the] transaction[s]" through CAA. Therefore, unlike an executor or conservator, CAA acted only as a processor and did not stand in the shoes of the Sellers.

Section 56-15-520 of the South Carolina Code specifically addresses vehicle auction houses:

> When a transfer of title is made as a result of a transaction at a wholesale motor vehicle auction, the reassignment of title or bill of sale must note the name and address of the wholesale motor vehicle auction. However, *the wholesale motor vehicle auction is not deemed to be the owner, seller, transferor, or assignor of title of a motor vehicle* by reason of its name appearing

> on a reassignment of title or bill of sale or by reason of its payment of a guarantee of payment to a seller, receipt of payment from a purchaser, or the reservation of a lien or security interest for the purpose of securing payment from a purchaser.

S.C. Code Ann. § 56-15-520 (2006) (emphasis added). Section 56-15-520 clearly states an auto auction's actions do not convert it into an owner, seller, transferor, or assignor of title of vehicles. Here, the Sellers maintained their status as owners and CAA acted only as their agent in processing the vehicles through the auction. We find CAA's inclusion of the term "legal representative" in the purchase agreements did not give CAA the same rights as the Sellers.

Based upon our decision to reverse the circuit court as to this issue, we need not address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address any remaining issues if the disposition of a prior issue is dispositive).

CONCLUSION

We reverse the circuit court's finding that CAA and Centennial were legal representatives of the Sellers.

REVERSED.

WILLIAMS and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Clarence Williams Jenkins, Appellant.

Appellate Case No. 2012-211588

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

Opinion No. 5232
Heard May 6, 2014 – Filed May 21, 2014

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Melody Jane Brown, all of Columbia; and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

GEATHERS, J.: Appellant Clarence Williams Jenkins seeks review of his convictions for kidnapping and murder. Appellant argues the trial court's refusal to provide the jury with the circumstantial evidence instruction quoted in *State v.*

Edwards[1] violated his right to require the prosecution to prove his guilt beyond a reasonable doubt. Appellant also challenges the trial court's failure to strike the testimony of the State's fingerprint expert, or, in the alternative, to grant a mistrial, arguing the prosecution withheld evidence material to the testimony in question. We affirm.

FACTS/PROCEDURAL HISTORY

On the morning of April 7, 2008, Sue Bostic discovered a garbage bag with unknown contents sitting on her front porch and a threatening note under the windshield wiper of her automobile.[2] Bostic contacted the Greenville City Police Department, and Officer Scott Odom responded to the call. Officer Amber Allen also arrived at the scene and spoke with Bostic while Officer Odom took the garbage bag to the back of his vehicle to inspect the bag's contents. Officer Odom discovered a severed human foot and hand and several severed toes. Officer Michael Petersen, who was employed with the forensic division of the Greenville County Department of Public Safety, then arrived to assist in processing the crime scene and collecting the evidence. Officers Allen and Petersen were informed that a similar note and garbage bag containing severed body parts had been left at the residence of Judon Burnside. They later proceeded to this residence to collect the evidence.

Officer Petersen took the garbage bags and their contents to the morgue and rolled fingerprint impressions from the severed hands. Captain Jackie Kellet, of the forensic division of the Greenville County Department of Public Safety, examined the fingerprints processed by Officer Petersen and matched them to fingerprints on file for Mekole Harris (Victim).

On April 10, 2008, police arrested Appellant and his wife, Carmen Jenkins (Wife), for the murder of Victim. On November 18, 2008, the Greenville County Grand Jury indicted Appellant for murder. In December 2008, the State filed a Notice of Intent to Seek the Death Penalty against Appellant and Wife. In September 2009,

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[1] 298 S.C. 272, 274–76, 379 S.E.2d 888, 889 (1989), *abrogated by State v. Cherry*, 361 S.C. 588, 595–606, 606 S.E.2d 475, 478–82 (2004).

[2] The facts of this case are horrific; however, it is necessary to discuss them to give context to Appellant's arguments regarding circumstantial evidence and to explain the relevance of Appellant's arguments regarding the fingerprint identification of the victim.

Wife advised investigators of the location of Victim's remains in exchange for the State's withdrawal of its Notice of Intent to Seek the Death Penalty against Wife.

On March 9, 2011, Wife entered into a plea agreement with the State, requiring her truthful testimony in Appellant's trial in exchange for the State's subsequent request for a reduction in Wife's sentence. On September 13, 2011, the Grand Jury indicted Appellant for the kidnapping of Victim. On March 27, 2012, Wife pled guilty to the murder of Victim and was sentenced to fifty years of imprisonment. On this same day, the State withdrew its Notice of Intent to Seek the Death Penalty against Appellant.

Appellant's trial took place on April 9 through 13, 2012. Captain Kellet, who had matched the fingerprints from the severed hands to Victim's fingerprints, was qualified as an expert in fingerprint analysis, and she explained the process she went through in identifying Victim's fingerprints. The first step was entering the unknown fingerprints into the Automated Fingerprint Identification System (AFIS), a computerized database maintained by the South Carolina Law Enforcement Division (SLED). She explained that AFIS "sends back a list of respondents," and in this case "we ask for the top 25 people." Here, Victim's "State ID number"[3] was the first number on the list of respondents. Captain Kellet then pulled a fingerprint card for Victim from her agency's records and visually compared, point by point, Victim's prints to the unknown prints. Once she determined the known and unknown fingerprints matched, she felt no need to examine any other fingerprints from the AFIS list of respondents.

The State also presented the testimony of Wife, who testified about Appellant's alleged plan to intimidate a former housemate, Grace Davis, into returning to their home and continuing to live with them. According to Wife, during the time Davis lived with Appellant and Wife, Davis developed an intimate relationship with both of them. Eventually, the Department of Social Services removed Davis's children from the home and notified her that she could not regain custody of her children as long as she was living with Appellant and Wife. Therefore, Davis left the home. A few days later, Appellant told Wife that Davis "needed to come back to [their] relationship because she was a partner in [their] relationship" and "she knew too much about the organization that he was in." Appellant also told Wife "the organization would kill all of [them] if she didn't come back." Wife testified that she had never heard about this organization until that day.

[3] The State ID number "is assigned to you by SLED if you've ever been fingerprinted."

Appellant began executing his plan to intimidate Davis by mailing threatening letters to her and to members of her family. Next, on the evening of Friday, April 4, 2008, Appellant brought home Victim, a prostitute, and handcuffed her to a bed. Appellant told Victim that he and Wife were police officers and that Victim was "under arrest for prostitution and possession of crack." Appellant also told Victim that the only way she would get out of those charges was for her to help Appellant and Wife with a "case." The "case" Appellant referenced was his plan to intimidate Davis into returning to their home.

After Victim agreed to cooperate, Appellant removed the handcuffs. Appellant wrote out a script for Victim to read over a telephone to members of Davis's family. Appellant then handcuffed Victim again and gave the script to her to memorize. Sometime around midnight, Appellant, Wife, and Victim went to a pay telephone at a nearby gasoline station, and Appellant dialed the telephone numbers for Davis's mother, Judon Burnside, and Davis's aunt, Sue Bostic. During each telephone call, Victim recited the material from the script written by Appellant. Appellant and Wife then took Victim back to their home, and Appellant handcuffed Victim to a chair for the remainder of the day on Saturday.

On Saturday night, Appellant crushed up "some Tylenol PM and some other sleeping medicine," mixed it into some ice cream, and gave it to Victim. However, Victim only ate a small amount of the ice cream. On the next day, Sunday, April 6, 2008, Appellant ordered Wife to kill Victim, who was still handcuffed to the chair. Wife attempted to strangle Victim with a cable cord, but as Victim struggled against Wife, Wife lost control of the cord. Appellant then tied the cord to the back of the chair, placed a plastic bag over Victim's head, and suffocated her.

Appellant and Wife took Victim's body to the bathroom and placed her body in the shower. Later that day, Appellant dismembered Victim's body, forcing Wife to participate, and placed the dismembered parts in the couple's freezer. Appellant and Wife disposed of Victim's body near a golf course on Paris Mountain and returned to their residence, where Appellant placed the dismembered parts into two separate garbage bags.

After midnight, Appellant and Wife went to Bostic's apartment. Appellant "dropped [Wife] off right at the entrance of the apartments . . . ." Wife took one of the garbage bags and threw it onto Bostic's front porch. Wife then left a threatening letter on the windshield of Bostic's car. Next, Appellant drove Wife to

Burnside's residence. Wife placed a second threatening letter in Burnside's mailbox and placed the second garbage bag on Burnside's front porch.

Robin Taylor, a SLED employee, also testified at Appellant's trial. Taylor described the DNA analysis she performed on a swab from the severed hand. Taylor matched the DNA from this swab to the DNA from swabs of blood collected from (1) a wall near the ceiling in a bathroom at Appellant's residence; (2) a wall on the right side of the medicine cabinet in Appellant's bathroom; (3) a latex glove found on the floor of Wife's van; and (4) the p-trap of the shower drain in Appellant's bathroom.[4]

The jurors deliberated for over four hours. The foreperson then sent a note to the trial court indicating the jurors were unable to reach a unanimous decision on one of the charges against Appellant. The trial court sent the members of the jury home for the night. The next morning, the trial court provided the jury with an *Allen* instruction before they resumed their deliberations.[5] A little over one hour later, the jury returned a verdict of guilty on both charges against Appellant. The trial court sentenced Appellant to life in prison. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court's refusal to provide the jury with the circumstantial evidence instruction quoted in *State v. Edwards* violate Appellant's right to require the prosecution to prove his guilt beyond a reasonable doubt?

2. Did the trial court err in failing to strike the testimony of Captain Kellet, the State's fingerprint expert, or, in the alternative, to grant a mistrial, where Appellant's counsel did not receive a copy of Captain Kellet's file prior to trial?

3. Did the trial court err in declining to grant Appellant enough recess time to hire an expert to review Captain Kellet's file?

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[4] The record does not indicate when the swabs were taken from Appellant's bathroom and Wife's van.

[5] *See Allen v. United States*, 164 U.S. 492, 501 (1896) (finding no error in a jury instruction admonishing jurors to give due deference to the opinions of their fellow jurors).

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

I. Jury Instruction

Appellant maintains the trial court's rejection of his proposed circumstantial evidence instruction, based on the instruction approved in *State v. Edwards*,[6] violated his right to require the prosecution to prove his guilt beyond a reasonable doubt. Appellant argues the instruction given confused the jury regarding how to evaluate circumstantial evidence. We find no reversible error.[7]

"In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." *State v. Logan*, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (citation omitted). "A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* at 90-91, 747 S.E.2d at 448. "A jury charge that is substantially correct and

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[6] 298 S.C. 272, 274–76, 379 S.E.2d 888, 889 (1989), *abrogated by State v. Cherry*, 361 S.C. 588, 595–606, 606 S.E.2d 475, 478–82 (2004).

[7] The State asserts Appellant failed to preserve his argument that the trial court's circumstantial evidence instruction violated a constitutional right. The State argues trial counsel's request to provide the jury with the *Edwards* instruction was based on state law rather than constitutional law. Given the constitutional foundation on which our state's circumstantial evidence jurisprudence is based, it is likely that trial counsel's reference to recent case law developments sufficiently apprised the trial court of the constitutional component of his request for the *Edwards* instruction. Further, any doubt concerning whether Appellant's "reasonable doubt" argument was preserved for review should be resolved in favor of finding the argument preserved. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (recognizing "it may be good practice for [the appellate court] to reach the merits of an issue when error preservation is doubtful"); *id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring) ("[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.").

covers the law does not require reversal." *Id.* (citation and quotation marks omitted). "Jury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error." *Id.* at 94 n.8, 747 S.E.2d at 449 n.8. (citation omitted). "Generally, the trial judge is required to charge only the current and correct law of South Carolina." *State v. Brown*, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct. App. 2004). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.* at 262, 607 S.E.2d at 95.

In *Edwards*, our supreme court quoted the circumstantial evidence standard "to be charged for use by the jury in its deliberation." 298 S.C. at 275, 379 S.E.2d at 889.

> Under this test, the jury may not convict unless:
>
> every circumstance relied upon by the State be proven beyond a reasonable doubt; and . . . all of the circumstances so proven be consistent with each other and taken together, *point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis*. It is not sufficient that they create a probability, though a strong one and if, assuming them to be true they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed.

Id. (emphasis added) (quoting *State v. Littlejohn*, 228 S.C. 324, 328, 89 S.E.2d 924, 926 (1955)). However, in *State v. Grippon*, the court recommended that once a proper reasonable doubt instruction is given, the following instruction be given:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of

> circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1997).

In *State v. Cherry*, 361 S.C. 588, 597, 606 S.E.2d 475, 480 (2004), our supreme court held that in cases relying, in whole or in part, on circumstantial evidence, South Carolina courts **must** use the jury charge recommended in *Grippon*. *Cherry* also eliminated the "reasonable hypothesis" language found in the *Edwards* instruction. *Cherry*, 361 S.C. at 601, 606 S.E.2d at 482 ("[T]he reasonable hypothesis charge merely serves to confuse juries by leading them to believe that the standard for measuring circumstantial evidence is different than that for measuring direct evidence when, in fact, it is not."). Notably, other language from the *Edwards* instruction was recently reaffirmed, slightly modified, and recommended in future jury instructions. *See State v. Logan*, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013) ("[T]o the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused *beyond a reasonable doubt*. . . . *If these circumstances merely portray the defendant's behavior as suspicious*, the proof has failed.") (emphases added).

In *Logan*, the court set forth the following instruction to be given to the jury, in addition to a proper reasonable doubt instruction, when so requested by a defendant:

> There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.
>
> Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, *all of the circumstances must be consistent with*

> *each other*, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. *If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed*.
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. at 99, 747 S.E.2d at 452 (emphases added). The court hastened to add: "This holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant's objection." *Id.* at 100, 747 S.E.2d at 452-53. Nonetheless, the *Logan* court ultimately concluded any error in the trial court's jury instructions was harmless beyond a reasonable doubt because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." *Logan*, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8. (citations omitted).

In the instant case, the trial court gave the following jury instruction on circumstantial evidence:

> Now, there are two types of evidence which are generally presented during a trial. And they are known as direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eye witness [sic]. It is evidence which immediately establishes the main fact sought to be proven. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of the main fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of

> certainty required of circumstantial evidence than of direct evidence. *You should weigh all of the evidence in the case. After weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, then you should find the Defendant not guilty*.

(emphasis added). This instruction is virtually identical to the *Grippon* instruction. 327 S.C. at 83–84, 489 S.E.2d at 464.

The State argues that at the time of Appellant's trial, the "relevant precedent dictated that only the *Grippon* charge be used." The State points out that the *Logan* opinion was published while the appeal in this case was pending. In response, Appellant maintains that *Logan* applies retroactively to his trial, citing *State v. Belcher*, 385 S.C. 597, 612–13, 685 S.E.2d 802, 810 (2009) and *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), for the proposition that a new rule for the conduct of criminal prosecutions must be applied retroactively to all cases pending on direct review or not yet final. We agree that *Griffith* requires the application of *Logan* to cases pending on appeal at the time the *Logan* opinion was published. Nevertheless, this court is constrained to affirm the trial court's denial of Appellant's request to give the *Edwards* instruction for two reasons.

First, Appellant's proposed instruction contains the following language: "[Y]ou may not convict a defendant unless . . . all of the circumstances . . . taken together, point conclusively to the guilt of the accused *to the exclusion of every other reasonable hypothesis*." Our supreme court has cautioned against using this language in jury instructions. *See Logan*, 405 S.C. at 98, 747 S.E.2d at 451–52 ("[R]equiring a jury to inquire as to whether there is any other reasonable explanation other than the defendant's guilt comes perilously close to shifting the burden of proof from the State to the defendant." (citation omitted)).

Second, any error in the omission of certain language from the *Logan* instruction was harmless beyond a reasonable doubt because the trial court's instruction, as a whole, properly conveyed the applicable law. The trial court provided the following instruction as to the State's burden of proof:

> Now, Clarence Jenkins has pled not guilty to these indictments. And that plea puts the burden on the State to provide [sic] the Defendant guilty. A person charged with committing a criminal offense in South Carolina is

> never required to prove themselves innocent. And I charge you that it is a cardinal and important rule of the law that a defendant in a criminal trial will always be presumed to be innocent of the crime for which an indictment has been issued unless and until guilt has been proven by evidence satisfying you of guilt beyond a reasonable doubt.
>
> Now, reasonable doubt is the kind of doubt which would cause a reasonable person to hesitate to act. And reasonable doubt may arise from the evidence which is in the case or from the lack or absence of evidence in the case. And you, the jury, must determine whether or not reasonable doubt exists as to the guilt of this Defendant. The State has the burden of proving each and every element of a crime beyond a reasonable doubt. And any reasonable doubt that you may have in your deliberations should be resolved in favor of the Defendant.

We find this reasonable doubt instruction to be a correct statement of the law. *See State v. Jones*, 343 S.C. 562, 578, 541 S.E.2d 813, 821 (2001) (holding a jury instruction explaining, "A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act" was "a correct statement of South Carolina law."). Further, the trial court's instruction on circumstantial evidence immediately followed the reasonable doubt instruction. As our supreme court ultimately concluded in *Logan*, we conclude the trial court's instructions in the present case, as a whole, properly conveyed the applicable law. *See Logan*, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8 ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied." (citation omitted)); *id.* (concluding any error in the trial court's jury instructions was harmless because the trial court "clearly instructed the jury regarding the reasonable doubt burden of proof" and its jury instruction, "as a whole, properly conveyed the applicable law." (citations omitted)). Therefore, we affirm the denial of Appellant's request to provide the *Edwards* instruction.

II. Withholding of Evidence

Appellant challenges the trial court's refusal to grant him relief based on the prosecution's failure to produce Captain Kellet's file documenting her identification of Victim's fingerprints, citing Rule 5 of the South Carolina Rules of Criminal

Procedure.[8] Appellant argues this alleged Rule 5 violation compromised his ability to fully impeach the credibility of Captain Kellet's testimony, and, thus, the trial court should have stricken her testimony or granted a mistrial. We disagree.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Tennant*, 383 S.C. 245, 254, 678 S.E.2d 812, 816 (Ct. App. 2009), *modified on other grounds*, 394 S.C. 5, 21, 714 S.E.2d 297, 305 (2011) (citation and quotation marks omitted). Likewise, "[t]he granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court[,] and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627–28 (2000) (citation omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Tennant*, 383 S.C. at 254, 678 S.E.2d at 816 (citation and quotation marks omitted).

To warrant either a mistrial or reversal based on an evidentiary ruling, the complaining party must prove both the error of the ruling and the resulting prejudice. *Id.* at 254, 678 S.E.2d at 816–17 (as to the admission or exclusion of evidence); *Harris*, 340 S.C. at 63, 530 S.E.2d at 628 (as to a mistrial). "To prove prejudice, the complaining party must show there is a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." *Tennant*, 383 S.C. at 254, 678 S.E.2d at 817 (citation and quotation marks omitted).

The record shows that for approximately four years prior to trial, Appellant's defense team was aware that fingerprints from the severed hands had been run through AFIS. Thus, the defense team was also aware of the possible existence of

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[8] Rule 5(a)(1)(C), SCRCrimP states:

> Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

AFIS-related documents. Yet, nothing in the record indicates that defense counsel attempted to interview Captain Kellet or review any AFIS-related documents prior to trial. In any event, Appellant did not contest Victim's identity at trial—defense counsel referenced Victim's name several times while cross-examining Wife. Therefore, we find the trial court's failure to grant the requested relief did not result in any unfair prejudice to Appellant. *See State v. Sweet*, 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct. App. 2000) ("A criminal defendant is entitled to a fair trial, not a perfect one.").

Based on the foregoing, the trial court properly declined to strike Captain Kellet's testimony or declare a mistrial. *See Tennant*, 383 S.C. at 254, 678 S.E.2d at 816 ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." (citation and quotation marks omitted)); *Harris*, 340 S.C. at 63, 530 S.E.2d at 627–28 ("The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court[,] and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." (citation omitted)).

III. Lengthy Recess

Alternatively, Appellant argues the trial court should have granted him a long recess or short continuance to obtain the assistance of an expert qualified to evaluate the documents in Captain Kellet's file. We disagree.

Because the defense team was aware of Captain Kellet's fingerprint analysis and the possible existence of AFIS-related documents for years prior to trial, the trial court properly declined to grant any further delay in the trial. *See State v. Patterson*, 367 S.C. 219, 230, 625 S.E.2d 239, 245 (Ct. App. 2006) ("The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion.").

CONCLUSION

Accordingly, Appellant's convictions are

AFFIRMED.

SHORT, J., and CURETON, A.J., concur.