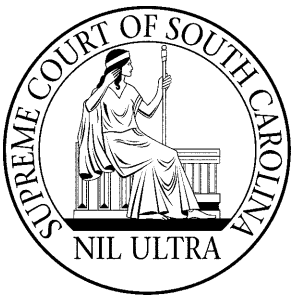

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

June 1, 2004

ADVANCE SHEET NO. 22

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

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Denene, Inc., d/b/a Trio Club,
L.C. Entertainments, LLC, d/b/a
Club Tango, and Let's Eat, Inc.,
d/b/a Port Side Cafe Uptown, Appellants,

v.

City of Charleston, Respondent.

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 25829
Heard April 7, 2004 - Filed May 24, 2004

AFFIRMED

John F. Martin, of Charleston, for Appellants.

William B. Regan and Francis I. Cantwell, both of Regan & Cantwell, of Charleston, for Respondent.

JUSTICE WALLER: Appellants filed a declaratory judgment action seeking to invalidate an ordinance requiring that all commercial establishments within the city of Charleston, which serve alcohol for on-site consumption, close at 2 a.m. Both appellants and the City of Charleston (City) moved for summary judgment. The trial court denied appellants'

motion for summary judgment and granted City's motion. We affirm.

FACTS

On July 18, 2000, City enacted an ordinance requiring that:

> Commercial establishments which allow for the on-premises consumption of beer, ale, porter and/or wine shall be prohibited from operating between the hours 2 a.m. and 6 a.m. on Mondays through Saturdays.

Prior to voting on the ordinance, the Charleston City Council (Council) offered public debate on the issue. A number of citizens complained about noise, vandalism, crime, litter, lewd acts, public urination, and general quality of life, and believed closing the bars at 2 a.m. would diminish those problems. A number of other citizens spoke against the ordinance.

After the ordinance was ratified, appellants, who own several bars in Charleston, filed a declaratory judgment action challenging the ordinance. The complaint alleged that: the ordinance was preempted[1] by state law; the ordinance violated appellants' equal protection rights; the ordinance violated appellants' right to due process; and, the ordinance was a taking in violation of Article I, § 13, of the South Carolina Constitution.

ISSUES

1. Did the trial court err in finding that the ordinance does not violate appellants' equal protection rights?

2. Did the trial court err in finding that the ordinance does not violate appellants' due process rights?

3. Did the trial court err in finding that the ordinance is not a regulatory

[1] The trial court originally granted summary judgment in favor of appellants on the preemption issue and this Court reversed. Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002). This appeal concerns the remaining issues.

taking without compensation?

1. EQUAL PROTECTION

Appellants argue the trial court erred in finding that the ordinance is subject to review under the rational basis standard. Appellants also claim the ordinance is invalid because it is selectively enforced. We disagree.

a. Proper Standard of Review

Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny. 16B Am. Jur. 2d Constiutional Law § 812 (1998). If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439-40 (1985). "When social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." Id. (internal citations omitted).

Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis. Fraternal Order of Police v. South Carolina Dep't of Rev., 352 S.C. 420, 430, 574 S.E.2d 717, 722 (2002); Gary Concrete Products, Inc. v. Riley, 285 S.C. 498, 504, 331 S.E.2d 335, 339 (1985).

The record clearly indicates the ordinance was passed to alleviate problems caused by intoxicated people in Charleston during the proscribed hours. Mayor Riley testified that the growth of bars and restaurants serving alcohol after 2 a.m. in Charleston created an intolerable burden on the citizens of the city. Riley stated that Council passed the ordinance because of noise and other problems late at night, and that Council felt it was appropriate to require commercial establishments that serve alcohol to close at a more

reasonable hour. Further, Mayor Riley noted that residential areas are in close proximity to bars and nightclubs in Charleston, and that Council was simply trying to establish a "reasonable zone of peace and quiet in our town and for our citizens."

Henry Fishburne, president of the Charles Towne Neighborhood Association and a Council member, testified that Council had numerous complaints about late night activities, which led Council to consider the ordinance. Fishburne also went on a "ride along" with Charleston police, and testified he saw large numbers of people partying, littering, and urinating in the streets and outside of bars late at night.

Lieutenant Charles Hawkins, of the Charleston City Police Department, testified that he observed drinking, noise, public urination, and vandalism in the late night hours in Charleston. Hawkins also testified that the problems related to late night drinking prevented officers from responding to more serious crimes in the area.

Citing City of Myrtle Beach v. Juel P. Corp. & Gay Dolphin, Inc, 344 S.C. 43, 543 S.E.2d 538 (2001), appellants argue that the ordinance should be strictly construed because it is in derogation of their "common law right to use private property so as to realize its highest utility." However, appellants stretch the language they cite in Gay Dolphin, which involved a Myrtle Beach ordinance prohibiting abandoned and obsolete signs. While the Court in Gay Dolphin did hold that ordinances in derogation of the natural rights of a person over their property are to be strictly construed, the case did not involve equal protection and did not involve the health, safety, or welfare of the general population.

A municipality has the power to enact regulations for the purpose of preserving the health, safety, welfare, and comfort of dwellers in urban centers, particularly in regard to alcohol. City of Charleston v. Esau Jenkins, 243 S.C. 205, 209, 133 S.E.2d 242, 244 (1963). As this Court stated in Main v. Thomason:

> [t]he government is empowered by the state and

> federal constitutions with the authority to legislate for the protection of the public health, welfare, and morals. Courts will not interfere with the enforcement of regulations designed for the protection of health, welfare, and safety of citizens unless they are determined to be unreasonable. The exercise of police power is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose.

342 S.C. 79, 86-7, 535 S.E.2d 918, 922-23 (2000) (internal citations omitted); see also Gary v. City of Warner Robins, Ga., 311 F.3d 1334, 1338-39 (11th Cir. 2002) (ordinance that barred persons under the age of twenty-one from entering or working at any establishment selling alcohol, but not food, for on-premises consumption, was subject to rational basis review rather than strict scrutiny in an equal protection challenge); Other Place of Miami, Inc. v. City of Hialeah Gardens, 353 So.2d 861, 863 (Fla. 3rd App. Dist. 1977) (ordinances curtailing the closing hours for the sale of alcoholic beverages from 3:00 a.m. to 1:00 a.m. were a valid exercise of the city's police powers).

We find the ordinance is rationally based and reasonably related to furthering a legitimate government purpose. Council, after allowing debate and public input, determined that the operation of bars between 2 a.m. and 6 a.m. had detrimental effects on the quality of life of residents and upon the city in general. Council legitimately sought to address those problems by enacting the ordinance. Based on the undisputed disruptions and other problems residents encountered from patrons of bars between the hours of 2 a.m. and 6 a.m., as well as law enforcement difficulties in controlling the problems through enforcement of existing ordinances, we find that Council's actions were rationally based. Accordingly, we hold, the ordinance is a valid exercise of City's police powers and does not affect a fundamental right.

Additionally, appellants, as the owners of bars in Charleston, are clearly not members of a suspect class, which has been defined by the U.S. Supreme Court as a class "saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or relegated to such a position of

political powerlessness as to command extraordinary protection from the majoritarian political process." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).

Accordingly, we hold the trial court correctly applied the rational basis test.[2]

b. Selective Enforcement

Appellants also contend they have received disparate treatment because other commercial establishments that have on-premises permits, such as hotels and hospitals,[3] are not being forced to cease all business operations during the proscribed hours. We disagree.

The trial court found appellants' argument that the City was not equally enforcing the ordinance because it was not forcing hotels or hospitals to physically close their doors was without merit. The trial court ruled that interpreting the ordinance to require hotels to cease operating from 2 a.m. to 6 a.m. would require a strained reading of the ordinance. The trial court ruled it was clear the ordinance was directed to establishments where on-premises consumption of alcohol occurs, and in the context of hotels or hospitals, "that means the public drinking areas, i.e. the bars and restaurants." The trial court further found that the ordinance could not apply to the confines of privately rented rooms in hotels or hospitals simply because those rooms exist in a commercial setting, and that a room within a hotel or hospital is akin to a home, apartment, or dormitory.

The trial court also found that all the evidence in the record demonstrated the ordinance was being enforced in other establishments where on-premises consumption of alcohol is allowed because the bars and other public drinking areas of those establishments are required to close at 2 a.m. Additionally, the trial court found there was adequate testimony in the

[2] Appellants do not contend the trial court misapplied the rational basis test, only that the trial court should have applied the strict scrutiny test.

[3] The Medical University of South Carolina (MUSC) has an on-premises beer and wine permit from the Department of Revenue, which it uses for receptions for faculty members.

record from law enforcement that, if hotel room service includes the sale of alcohol during the proscribed hours, hotels will be cited for violating the ordinance.

Appellants argue before this Court that they, as bar owners, are denied equal protection in violation of the United States and South Carolina Constitutions because the ordinance is being selectively enforced. Appellants contend that, although the ordinance applies to all commercial establishments that sell alcohol to be consumed on the premises, there is evidence in the record that other commercial establishments with on-premises permits, such as hotels and hospitals, are not required to cease operating from 2 a.m. to 6 a.m.

Randall McBreyer, head of vice for the city of Charleston Police Department, did testify in deposition that he was told to limit enforcement of the ordinance to food and beverage operations. However, while McBreyer testified that he would not require a hotel such as Charleston Place to entirely close its doors, he testified that he would cite the hotel and shut down any portion of the hotel that served alcohol if it operated during the proscribed hours.

Paul Stacey, manager of the Charleston Place Hotel, testified at deposition that the hotel did not sell any alcoholic beverages in the hotel or by room service between 2 a.m. and 6 a.m.

City also submitted an affidavit from Joseph C. Good, Jr., general counsel for MUSC. Good averred that, while MUSC had a bar and held a beer and wine permit for receptions, MUSC did not operate events with alcohol between the hours of 2 a.m. and 6 a.m.

We hold that it is unreasonable to interpret the ordinance so as to require hotels and hospitals to cease operating entirely during the proscribed hours simply because they happen to allow on-premises consumption of alcohol. The sale of alcohol within hotels or hospitals is only ancillary to their operation as commercial establishments. All the evidence in the record indicates that hotels and hospitals do not serve alcohol during the proscribed

hours, that hotels close down the portions of their businesses that do serve alcohol, and that City is enforcing the ordinance against hotels and hospitals.

Further, even assuming City is not enforcing the ordinance equally, the fact that there is some unequal treatment does not necessarily rise to the level of a constitutional equal protection violation. In Oyler v. Boles, 368 U.S. 448, 456, (1962), the U.S. Supreme Court held that, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," provided the selection is not "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." See also Waters v. Gaston County, North Carolina, 57 F.3d 422, 427 (4th Cir. 1995); Butler v. Cooper, 554 F.2d 645, 646 (4th Cir. 1977) (before a claim of unlawful discrimination in the enforcement of criminal laws can be established, the plaintiff must allege and prove deliberate selective process of enforcement based upon race or other arbitrary classification).

We hold that even if there is evidence in the record of unequal enforcement, any such evidence only rises to the level of "the exercise of some selectivity in enforcement" of the ordinance. Oyler v. Boles, 368 U.S. at 456. Further, as noted previously, appellants are not members of a protected class. Accordingly, we hold the trial court correctly found no equal protection violation.

2. DUE PROCESS

Appellants contend the ordinance violates due process because it deprives them of a protected property right to conduct business. We disagree.

No person shall be deprived of property without due process of law. U.S. Const. amend XIV, § 1; S.C. Const. art. I, § 3. In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004). The standard for reviewing all substantive due process challenges to state statutes or municipal ordinances, including economic and

social welfare legislation, is whether the ordinance bears a reasonable relationship to any legitimate interest of government. Id. at 430, 593 S.E.2d at 470.

Appellants cite Painter v. Town of Forest Acres, 231 S.C. 56, 97 S.E.2d 71 (1957) in support of their argument that the ordinance violates their due process rights. In Painter, Forest Acres passed an ordinance that prohibited any business located within the town from operating between the hours of midnight and 6 a.m. Id. at 58, 97 S.E.2d at 71. The ordinance stated that the noise of automobile traffic, lights, and other problems that arose in the usual course of carrying on a business where the public is being served constituted a nuisance. Id. at 58, 97 S.E.2d at 72. The business owner who challenged the suit was the owner of a drive-in restaurant. She claimed the ordinance would cost her fifty percent of her business. Id. at 59, 97 S.E.2d at 72.

This Court held that a municipal corporation could not "make a business a nuisance merely by declaring it as such." The Court found that the ordinance would seriously impair, if not destroy, many lawful businesses. Further, the Court noted the ordinance seemed to be directly aimed at destroying Painter's business. Accordingly, the Court held the ordinance was so unreasonable as to be unlawful on its face. Id. at 61, 97 S.E.2d at 73.

Despite appellants' arguments to the contrary, Painter does not stand for the proposition that City may never restrict the operating hours of a business within its jurisdiction. No one has an unfettered right to pursue a business detrimental to the public health, safety, and welfare. See Greenville County v. Kenwood Enterprises, Inc., 353 S.C. 157, 170-71, 577 S.E.2d 428, 435 (2003) (county ordinance requiring a 1,500-foot setback for sexually oriented businesses based on the rationale of combating secondary effects of those businesses was constitutional); Curtis v. State, 345 S.C. 557, 573, 549 S.E.2d 591, 599 (2001) (statute making it unlawful to defraud a drug test furthers the public purpose of ensuring a drug-free workplace, which is a legitimate exercise of the State's police powers in regulating public safety and welfare, and outweighs any legitimate interest of the business); Conway v. City of Greenville, 254 S.C. 96, 101, 173 S.E.2d 648, 650 (1970) (while not unlimited, a municipality does have the authority in the exercise of the

police power to enact zoning ordinances restricting the use of privately owned property).

As this Court held in City of Charleston v. Esau Jenkins, a municipal corporation has the power to "regulate any trade, occupation or business, the unrestrained pursuit of which might affect injuriously the public health, morals, safety or comfort; and in the exercise of the power particular occupations may be . . . required to be conducted within designated limits. . . ." 243 S.C. at 210-11, 133 S.E.2d at 244. We agree with the trial court's ruling that the ordinance is a limited measure designed to curb the deleterious effects of the appellants' operation of their establishments during the early morning hours. The ordinance is designed to maintain peace, quietude, safety, order, and quality of life in Charleston, while still allowing appellants to operate their businesses twenty hours a day.

We hold the trial court correctly found that the ordinance bears a reasonable relationship to City's legitimate interest in preserving the health, morals, safety, and comfort of Charleston.

3. TAKING

Appellants claim the ordinance amounts to a partial regulatory taking without compensation. We disagree.

Private property shall not be taken for a public use without just compensation. U.S. Const. amend. V; S.C. Const. art. I, § 13. There are two main categories of takings: (1) where state law authorizes a permanent physical occupation of property; and, (2) where state law so regulates property that it has lost all economic value. Sea Cabins on Ocean IV Homeowners Ass'n., Inc. v. City of North Myrtle Beach, 345 S.C. 418, 430, 548 S.E.2d 595, 601 (2001); Main v. Thomason, id. at 87, 535 S.E.2d at 933 (2000).

Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (citing Penn

Central Transp. Co. v. City of York, 438 U.S. 104, 124 (1978)). In determining whether the public benefit from a regulation outweighs the private harm, the Court will consider: (1) the economic impact of the regulation; (2) its interference with reasonable investment-backed expectations; and, (3) the character of the governmental action. Penn Central, 438 U.S. at 124-25; Rick's Amusement, Inc. v. State, 351 S.C. 352, 357, 570 S.E.2d 155, 157 (2001); Westside Quik Shop, Inc. v. Stewart, 341 S.C. 297, 305, 534 S.E.2d 270, 274 (2000).

The trial court found that the ordinance had a negative economic impact on appellants and interfered with their investment-backed opportunities. However, the trial court found that appellants' right to do business is, and always has been subject to the State's police powers, and that the ordinance was a reasonable exercise of those police powers. Accordingly, the trial court ruled that the ordinance did not constitute a compensable taking under the United States or the South Carolina Constitutions.

We agree with the trial court's ruling. While appellants suffered losses as a result of the ordinance, they are still free to operate twenty hours a day, except Sundays, if they so choose. The ordinance appears to be designed for the legislative purpose of maintaining peace, quietude, safety, order, and quality of life in Charleston. Quantifying peace, quietude, safety, order, and quality of life in a community is a normative decision best left to a legislative body. As noted by City, the operation of a bar has always been subject to the state's police powers. See S.C. Code Ann. § 61-2-80 (the State is the sole and exclusive authority empowered to regulate the operation of all locations authorized to sell beer, wine, or alcoholic liquors, except as it relates to hours of operation more restrictive than those set forth in this title); § 61-4-120 (it is unlawful for a person to sell or offer for sale wine or beer in this State between the hours of twelve o'clock Saturday night and sunrise Monday morning).

We hold the ordinance is a legitimate exercise of City's police power and does not amount to a compensable taking.

CONCLUSION

We affirm the trial court's grant of summary judgment in favor of City.

AFFIRMED.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice John W. Kittredge, concur.

The Supreme Court of South Carolina

In the Matter of Todd Anthony Strich, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, because he has been indicted for conspiracy to distribute cocaine in violation of S.C. Code Ann. § 44-53-370(b)(1) (1985). The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that the petition is granted and respondent is suspended, pursuant to Rule 17, RLDE, Rule 413, SCACR, from the practice of law in this State until further order of the Court.

IT IS FURTHER ORDERED that Paul Daniel Schwartz, Esquire, 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. Schwartz shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Schwartz 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.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Paul Daniel Schwartz, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Paul Daniel Schwartz, 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. Schwartz's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

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

Columbia, South Carolina
May 20, 2002

The Supreme Court of South Carolina

In the Matter of Damon
Eugene Cook, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, because he has been indicted for conspiracy to distribute cocaine in violation of S.C. Code Ann. § 44-53-370(b)(1) (1985). Respondent consents to the interim suspension.

IT IS ORDERED that the petition is granted and respondent is suspended, pursuant to Rule 17, RLDE, Rule 413, SCACR, from the practice of law in this State until further order of the Court.

IT IS SO ORDERED.

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

Columbia, South Carolina
May 20, 2004

The Supreme Court of South Carolina

In the Matter of Tara
Anderson Thompson, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, because she has been indicted for conspiracy to distribute cocaine in violation of S.C. Code Ann. § 44-53-370(b)(1) (1985).

IT IS ORDERED that the petition is granted and respondent is suspended, pursuant to Rule 17, RLDE, Rule 413, SCACR, from the practice of law in this State until further order of the Court.

IT IS FURTHER ORDERED that this Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s).

IT IS SO ORDERED.

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

Columbia, South Carolina
May 20, 2004

The Supreme Court of South Carolina

In the Matter of Tara
Anderson Thompson, Respondent.

ORDER

By order dated May 20, 2004, respondent was placed on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR. The Office of Disciplinary Counsel seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that R. Spencer Roddey, Jr., Esquire, 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. Roddey shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Roddey 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.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that R. Spencer Roddey, Jr., Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that R. Spencer Roddey, Jr., 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. Roddey's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

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

Columbia, South Carolina

May 21, 2004

The Supreme Court of South Carolina

In the Matter of Robert
Barnwell Clarkson, Respondent.

ORDER

By order dated February 20, 2003, the Court issued a rule to show cause why respondent should not be held in contempt of court for practicing law without a license. Thereafter, the Court appointed a special referee to take evidence and issue a report containing proposed findings and a recommendation. After a hearing, the special referee filed his report finding respondent had engaged in the unauthorized practice of law and recommending respondent be found in contempt of court. Respondent has filed exceptions to the special referee's report.

After review and consideration of the hearing transcript, the special referee's report, respondent's exceptions and his motion to dismiss, and the parties' oral arguments, the Court finds respondent has engaged in the unauthorized practice of law and holds that respondent is guilty of criminal contempt. As fully discussed below, the Court

renders this conclusion based upon the undisputed testimony and/or exhibits and the applicable law.

FACTS

In 1978, respondent was disbarred from the practice of law. In the Matter of Clarkson, 271 S.C. 5, 244 S.E.2d 512 (1978). He has not been reinstated.

Respondent is the executive director of the Patriot Network and he admits he is responsible for the content of materials which are placed on the Patriot Network website. The website has referred to respondent as an "attorney" or "lawyer." Respondent has produced publications in which he refers to himself as an "attorney and tax procedure expert," "a tax procedure lawyer," or "a constitutional attorney, an expert on tax procedural law . . .". Respondent agrees that use of the terms "attorney" or "lawyer" to describe himself is improper, however, he testified "[w]hat I normally say is I graduated from law school and let people draw their own conclusions."

In at least one of respondent's brochures, "Removing Tax Liens and Levies, A Clarkson Report," respondent invites readers to "call" him and "follow [his] advice," and he offers alternatives and

recommendations for handling tax liens. The Patriot Network provides members with access to the Patriot Advisory Service, "an advisory, consulting service whereby subscribers can call [respondent] and other knowledgeable experts. . .". The Patriot Advisory Service states "[a]dvice will mainly cover subjects as . . . FOIA-Privacy Act, . . . , Summons, . . . , civil right [sic] suits (Section 1984), Privacy Act Suits for damages, . . ., illegal disclosure suits, etc."

The Patriot Network website contains legal forms, often with accompanying instructions and/or advice. For example, respondent authors pages entitled "How to Draft Interrogatories," "How to Serve FOIA-PA suits," and "Interrogatories Explained" in which he discusses the benefits of interrogatories over other discovery methods.

A witness for respondent testified respondent has helped others submit documents in court. The witness stated, "strictly on an advisory basis based on his training as an attorney and his experience while he was still a practicing attorney, [respondent] makes suggestions and gives advice as to how [others] might proceed in court, in as far as filings, pleadings, memos, that kind of things are concerned."

Respondent denied preparing legal documents for other people. He testified, however, if someone contacted him with regard to a legal problem, he would provide the appropriate legal document and would explain "why to use [the legal form], the law behind it, and what to write."

Respondent testified he assisted a Patriot Network member with an information summons as part of a tax audit. He stated that, in September 2002, he advised the member to file a motion to quash in federal court and then extensively instructed the member after the motion was filed. Respondent admitted dictating pleadings which were filed by the Patriot Network member and sitting at counsel's table during the court hearing.

DISCUSSION

A. Unauthorized Practice of Law

The South Carolina Supreme Court has the authority to regulate the practice of law in this State. S.C. Const. art. V, § 4. This Court had held that the practice of law:

> . . . is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings, and other

> papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition, conveyancing, the preparation of legal instruments of all kinds and, in general, all advice to clients, and all action taken for them in matters connected with the law. An attorney at law is one who engages in any of these branches of the practice of law.

In re Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909).

Applying this definition, the Court has held preparation of a deed or other legal documents for another individual by one who is not a licensed attorney constitutes the unauthorized practice of law. State v. Despain, 319 S.C. 317, 460 S.E.2d 576 (1995); In re Easler, 75 S.C. 400, 272 S.E.2d 32 (1980). While the sale or lease of blank legal forms does not constitute the practice of law, instructing others in the manner in which to prepare and execute blank documents is the practice of law. State v. Despain, supra. The practice of law also includes the preparation of pleadings and the management of court proceedings on behalf of clients. Housing Authority of City of Charleston v. Key, 352 S.C. 26, 572 S.E.2d 284 (2002).

Respondent has engaged in the unauthorized practice of law. He held himself out as a lawyer on a website for which he admits responsibility and he has published materials in which he states he is an

attorney. Moreover, respondent has provided advice on selection of legal forms and how to complete the forms. Respondent has drafted pleadings and, on at least one occasion, managed court proceedings on behalf of another individual. All of this conduct has previously been defined as the practice of law by this Court.

B. Contempt of Court

"Willful disobedience of an Order of the Court may result in contempt." Spartanburg County Dept. of Social Servs. v. Padgett, 296 S.C. 79, 82, 370 S.E.2d 872, 874 (1988). "A willful act is defined as one 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done: that is to say, with bad purpose either to disobey or disregard the law." Id. at 82-3, 370 S.E.2d at 874. "Contemptuous behavior is conduct that tends to bring the authority and administration of the law into disrespect." Ex parte Stone v. Reddix-Smalls, 295 S.C. 514, 516, 369 S.E.2d 840 (1980). Contemptuous intent is subjective rather than objective. State v. Bowers, 270 S.C. 124, 241 S.E.2d 409 (1978).

Respondent's conduct, practicing law without a license, was clearly willful. It is undisputed respondent knew he had been disbarred from the practice of law. In spite of this knowledge, respondent nevertheless identified himself as an attorney or, at minimum, stated he graduated from law school and "let people draw their own conclusions . . . .". Respondent willfully managed court proceedings for at least one individual, drafted pleadings, and provided instructions and advice to individuals in completing legal forms. Respondent's behavior demonstrates a clear disrespect for this Court, its orders, and the practice of law and, beyond a reasonable doubt, is contemptuous. Accordingly, we hold respondent in criminal contempt.

We hereby sentence respondent to imprisonment for a term of six (6) months, suspended for a period of five (5) years upon the following three conditions: 1) within thirty (30) days of the date of this order, respondent and the Office of Disciplinary Counsel shall submit to this Court an agreed-upon disclaimer which states respondent is not an attorney and is not licensed to practice law in South Carolina or in any other state; 2) within sixty (60) days of the date of this order,

respondent shall file an affidavit averring the disclaimer has been prominently and permanently placed on any and all of his websites, including the Patriot Network website, and on all literature authored and/or published by respondent; and 3) that respondent no longer engage in the unauthorized practice of law.[1] Failure to comply with the conditions imposed by this order shall result in respondent's arrest and immediate incarceration.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

May 25, 2004

[1] Respondent's motion to dismiss is denied.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Helen Marie Douglas, Appellant.

Appeal From Colleton County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3772
Heard December 10, 2003 – Filed April 5, 2004
Withdrawn, Substituted and Refiled May 21, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jack B. Swerling, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; David Michael Pascoe, Jr. and Jonathan S. Gasser, both of Columbia, for Respondent.

CURETON, A.J.: Helen Marie Douglas was convicted of murder and armed robbery. She received concurrent sentences of life imprisonment for murder and thirty years imprisonment for armed robbery. Douglas appeals. We affirm in part, reverse in part, and remand.

FACTS

Douglas and her husband, Ronnie Douglas, owned two houses in Colleton County. Douglas was in the habit of staying at the river house, and Ronnie usually stayed at the house in town. On the morning of November 3, 1997, Douglas knocked on a neighbor's door across the street from the town house, explaining that something had happened to Ronnie. The neighbor called 911 and went with Douglas to the town house, which she stated appeared to be ransacked. The neighbor also testified that Ronnie's head was surrounded by blood and he did not have a pulse. Douglas and the neighbor then left the house, and the neighbor called Douglas's two sons. Police arrived at the scene and determined there was no evidence of forced entry. A treating paramedic testified that Ronnie was dead and appeared to have a gunshot wound to the head. [1]

Douglas gave two statements to police in the days following Ronnie's murder. On each occasion, officers advised Douglas of her Miranda[2] rights before openly tape-recording her statements. Douglas later called Investigator Stanfield, the investigating officer, and asked him to come speak to her at the river house. The officers decided to send Stanfield out to the house with a hidden tape recorder. When he met with Douglas he did not advise her of her Miranda rights. Though Douglas did not make any incriminating comments about Ronnie's murder, she did admit that she had

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[1] It was subsequently determined by the medical examiner that Ronnie had sustained five gunshot wounds to the head.

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

lied to the police about having an extramarital affair at the time of Ronnie's death. Though finding the secret tape-recording a "very, very, very poor practice," the trial judge allowed admission of a redacted version of the recording at trial.

Douglas's son, Ronald, testified that Douglas gave her house keys to his brother, Tony, when she was arrested. Ronald testified that he made a copy of these keys without informing either Tony or Douglas. Ronald stated he used these keys to enter the river house at least three times – once by himself and twice with his ex-wife. He said he wanted to retrieve his video camera, his daughter's clothing, and some of his father's personal possessions. During one of these searches, Ronald's ex-wife discovered a bag of .25-caliber bullets and an empty box containing a receipt for a .25-caliber pistol. Ronald took several items from the house to the police, explaining he was searching for his father's wallet. Ronald also told police that, in the course of searching the pool pump house, he cut off the lock and threw it into the creek. Investigator Stanfield stated, "we told [Ronald] if anything came up with the investigation that needed our attention, please bring it to our attention."

Approximately eighteen months after Ronnie's murder, some homeowners found a garbage bag in the creek in their backyard. Douglas's river house was located on the nearby river. The bag contained rocks and a brick. A second bag, which was within the first bag, contained surgical gloves, two shirts, and a pair of jeans. One of Douglas's daughters-in-law testified one of the shirts was Douglas's, and that the jeans were in Douglas's size. However, the only hair sample found on the clothing did not match Douglas. After these items were turned over to police, the police conducted an underwater search of the creek. Police found a cinder block used to weigh down Ronnie's wallet and a .25-caliber handgun.[3]

In further support of its theory that Douglas killed her husband, the State presented testimony from an insurance agent, Gary Wayne Walker.

[3] Forensic tests later identified the .25-caliber handgun as the murder weapon.

Walker testified that he ran into Douglas at the river house in September 1997. Walker stated Douglas was interested in purchasing a life insurance policy on Ronnie's life. Walker advised Douglas that he could not issue such a policy without Ronnie's consent. Walker later discussed prices with Douglas, but did not actually give her the quotes.

At the close of the State's case, Douglas moved for a directed verdict on the murder charge, arguing the State's case was purely circumstantial in nature. The trial judge denied the motion. Douglas also moved for a directed verdict on the armed robbery charge, arguing the State had not proved the essential elements of the offense. The trial judge denied the motion. The jury subsequently found Douglas guilty of both murder and armed robbery. Douglas renewed her motions for a directed verdict after the verdict was handed down. The trial judge denied these post-trial motions. The trial judge levied a life sentence on the murder charge and a concurrent sentence of thirty years imprisonment for armed robbery. Douglas appeals both of her convictions as well as her sentence for murder.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted).

DISCUSSION

I. Admission of Evidence

Douglas argues the trial judge erred in allowing the admission of several types of evidence. She states the following should not have been admitted at trial: (1) Walker's testimony about Douglas's interest in an

insurance policy; (2) the secretly-taped statement given to Investigator Stanfield; (3) the items found by Ronald during his searches of the river house; and (4) the items found in the creek.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). To warrant reversal, an appellant must show not only an alleged error, but also resulting prejudice. State v. Thompson, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991) (stating the admission and exclusion of evidence is largely a matter of the trial judge's discretion, and the judge's rulings will not be overturned on appeal unless the judge committed a manifest abuse of discretion and the defendant suffered prejudice as a result).

A. Insurance Testimony

Douglas contends the trial judge erred in admitting the testimony of Gary Wayne Walker. She asserts the probative value of the testimony was outweighed by the unfairly prejudicial effect.

Walker testified he had known Douglas and her husband since the early 1970's. In September of 1997, approximately two months before the murder, Walker came in contact with Douglas. He stated he was in the area near Douglas's river house looking at property when he saw Douglas near the road. Walker stopped and spoke with Douglas. During the conversation, Douglas inquired whether Walker was still employed at the fire department. Walker told Douglas he had left the fire department and gotten into the insurance business. Walker testified Douglas asked about types of insurance

and, then, "from there the conversation led to she was interested in some insurance on Ronnie, asked me if I could get her a quote on some insurance, which I did." Walker acknowledged that in order to issue an insurance policy he would have needed Ronnie's permission. Walker stated that some time after this conversation he again came in contact with Douglas. At that time, Walker informed Douglas that he had the insurance quotes. Walker testified he never gave these quotes to Douglas.

Our Supreme Court has consistently held that evidence of a life insurance policy on the victim in a homicide case may be admissible to establish a defendant's motive. To be admissible, however, the evidence must show that the defendant would derive some benefit from the proceeds of the policy. See, e.g., State v. Needs, 333 S.C. 134, 150, 508 S.E.2d 857, 865 (1998) (holding evidence that defendant carried a life insurance policy on the victim may be admissible to show defendant's motive for the homicide); State v. Williams, 321 S.C. 327, 339, 468 S.E.2d 626, 633 (1996), cert. denied, Williams v. South Carolina, 519 U.S. 891 (1996) (finding evidence that defendant had substantially increased life insurance benefits for wife and son immediately prior to the homicides constituted some circumstantial evidence of defendant's motive); State v. Vermillion, 271 S.C. 99, 100, 245 S.E.2d 128, 129 (1978) (holding "it is not necessary to show that the defendant was the beneficiary under a policy of life insurance on the life of the deceased in order to render it relevant and admissible if there is some showing that the defendant would derive some benefit from the proceeds of the policy").

Here, there was no policy from which Douglas could derive some benefit. Instead, the testimony only established that Douglas inquired about a policy and never followed through with confirming the quotes and obtaining her husband's approval. Motive cannot be established through the non-purchase of an insurance policy. To hold otherwise, we would significantly extend the established precedent that requires the existence of a policy. Moreover, Douglas was clearly prejudiced by the inference that she was attempting to purchase additional insurance on her husband's life without his knowledge just prior to his death. As such, we find the judge erred in

admitting Walker's testimony. Accordingly, we reverse and remand for a new trial.[4]

B. Tape-Recorded Statement

Douglas argues the trial judge erred in admitting her statement that was surreptitiously recorded by Investigator Stanfield while she spoke with him at her home.

During a pre-trial conference, Douglas's counsel objected to the admission of the taped statement primarily on the ground that the prejudicial value of its admission outweighed the probative value. Counsel contended the investigator believed Douglas was the only suspect and was trying to get her to confess even though she had not done so on two prior occasions when she had given statements. The judge took the motion under advisement, but indicated "the Miranda issue [is] a lot stronger than the one party tape issue."

At trial, Douglas's counsel again asserted Douglas was entitled to a Miranda warning at the time the statement was taped because she was a suspect and had been given her Miranda rights when she gave the earlier two statements. In response, the State argued Miranda was inapplicable given Douglas was not "in custody" at the time the statement was made. The judge continued the discussion, asking counsel to analyze the issue "in terms of Miranda" and "privacy." Ultimately, the judge allowed the tape, in a redacted form, to be played for the jury. The judge indicated he had problems with the privacy aspect, but he did not believe it rose to the level of being inadmissible.

Miranda warnings are required only when a suspect "'has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997) (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)). "In determining whether a suspect is 'in custody,' the totality of the circumstances, including

[4] Because issues have been raised which may arise again on re-trial, we address several questions in order to aid the trial court.

the individual's freedom to leave the scene and the purpose, place and length of the questioning must be considered." Id. The relevant inquiry is whether a reasonable person in the suspect's position would have believed herself to be in custody. Id. at 128, 489 S.E.2d at 621.

In the instant case, we find Douglas was not in custody when she was secretly tape-recorded by Investigator Stanfield. Several days after receiving Miranda warnings and giving two formal statements to police, Douglas called Stanfield and asked to speak with him at her river house. Stanfield testified that she stated she "needed to tell [him] something" and asked him to "come alone." While she did not know she was being tape-recorded, Douglas was undoubtedly aware she was speaking to the investigating officer about her husband's murder. As the conversation took place at Douglas's residence, and at her request, she was clearly in control of the conversation. Further, given the circumstances under which the conversation took place, we fail to see why Douglas would not have felt free to leave the scene. Upon examining the totality of the circumstances surrounding the tape-recording incident, it is clear – under the reasonable person standard – that Douglas would not have believed she was in police custody when she had her conversation with Stanfield. Because Douglas invited Investigator Stanfield to her home, she was not in custody and, therefore, Miranda would not be applicable.

Moreover, the fact that Douglas was considered a suspect or that she had previously been apprised of her Miranda rights is not dispositive given she was not in custody. See State v. Neely, 271 S.C. 33, 41, 244 S.E.2d 522, 527 (1978) ("'[A] noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977))); Id. ("'But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.'"); State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996) (finding the fact that an investigation

focuses on the suspect does not trigger the Miranda warnings unless he or she is in custody).

Finally, we disagree with Douglas's contention that the prejudicial value of the evidence outweighed its probative effect. During the statement, Douglas repeatedly stated that she did not want her affair with Webster to get out to her sons or become public knowledge. In response, Investigator Stanfield indicated there was nothing he could do because Webster had already given a statement in which he admitted to the affair. Douglas asked Stanfield to say it was just a rumor and have the document "just disappear." Stanfield refused to help hide the affair. Given the State's case was entirely circumstantial, the evidence was clearly probative. A jury could have inferred from the evidence that Douglas wanted Investigator Stanfield to destroy her paramour's statement, which revealed inconsistent statements she made regarding her plans the morning of the murder, her affair with Webster, as well as Ronnie's request for a divorce the night before the murder.

In any event, regardless of whether Douglas was in custody at the time of the interrogation, any error in the failure to suppress her statement was harmless given the substance of the conversation was cumulative in nature. See State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). The redacted conversation that was read into evidence at trial did not contain any incriminating statements about Ronnie's murder. Rather, the conversation appeared to concern Douglas's initial denial of having engaged in an extramarital affair, and her subsequent fear that news of the affair would be made public.

Our decision should in no way be interpreted that we condone the procedure employed by law enforcement. However, given the facts of this case and the specific arguments raised on appeal, we must affirm the trial judge's decision to admit the redacted version of Douglas's tape-recorded

statement into evidence.[5]

C. Private Search and Seizure

Douglas asserts the trial judge erred in admitting evidence that was obtained in a course of illegal searches and seizures. Specifically, Douglas contends that Ronald was acting for the State when he repeatedly searched her home.

"[A]n analysis of whether a private citizen's search and seizure is attributable to the State requires an inquiry into the totality of the circumstances." State v. Cohen, 305 S.C. 432, 436, 409 S.E.2d 383, 386 (1991), cert. denied, Cohen v. South Carolina, 503 U.S. 942 (1992). "Factors to be considered include: the citizen's motivation for the search or seizure; the degree of governmental involvement, such as advice, encouragement, knowledge about the nature of the citizen's activities, and the legality of the conduct encouraged by the police." Id. "The Fourth Amendment does not bar a search and seizure, even an arbitrary one, effected by a private party on his own initiative." State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000), cert. denied, Brockman v. South Carolina, 530 U.S. 1281 (2000). "It does, however, bar evidence arising from such intrusions if the private party acted as an instrument or agent of the government." Id. "The party challenging admission of evidence has the burden to show sufficient government involvement in the private citizen's conduct to warrant fourth amendment scrutiny." Cohen, 305 S.C. at 434, 409 S.E.2d at 385.

We find the evidence collected by Ronald at the river house and subsequently turned over to the police was the product of private searches. Ronald testified that he went to Douglas's river house several times for

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[5] We note at trial Douglas consistently relied on the Miranda argument as the basis for excluding this evidence. Although at one point Douglas mentions that "[o]ur state constitution sets a higher standard of privacy and entitlement to be free from this kind of conduct by the State," she does not argue in her brief that this evidence should be excluded based on a violation of a constitutional right to privacy.

general upkeep purposes and in order to retrieve personal items, which included his video camera, his father's tools, and his daughter's clothing. Ronald's ex-wife confirmed that, on the two occasions she accompanied him to the river house, they were picking up personal possessions. When asked whether anyone told him to go out to the river house, Ronald stated he "[d]id it on [his] own." As a result of these three searches, Ronald took insurance papers, plats, deeds, and the bag containing the bullets and receipt for the .25-caliber pistol to Stanfield, the investigating officer. Stanfield testified that he told Ronald "if anything came up with the investigation that needed our attention, please bring it to our attention." In our view, the testimony provided by both Ronald and Stanfield supports the State's proposition that Ronald was not acting as an agent or instrumentality of the State when he searched Douglas's river house. It is clear that, in visiting the river house to retrieve personal property, Ronald undertook searching his mother's house of his own accord.

Based upon both the totality of the circumstances and the Cohen factors, Ronald's searches of the river house were not State-endorsed and, thus, not barred by the Fourth Amendment. Therefore, the trial judge did not err in admitting items seized by Ronald from the river house.

D. Items Found in the Creek[6]

Douglas argues the trial judge erred in refusing to suppress the items found in the creek near her river house. She asserts the State failed to present any evidence connecting her to these items. As such, she contends the items were not relevant.

Police were informed a plastic bag containing several items was found in a local creek approximately eighteen months after Ronnie's murder. After finding the bag wedged against their dock, the homeowners opened the bag to

[6] As Douglas does not specify whether she is challenging the items in the plastic bag or the items in the cinder block, we will address all the evidence retrieved from the creek area.

discover it was weighted down with a brick and some rocks and contained a second bag. The inner bag contained the following: surgical gloves, two shirts, and a pair of jeans. As previously discussed, several of these items were identified as either Douglas's, or similar to an item owned by Douglas. After securing this identification, police divers went to the creek and found a sunken cinder block, with the murder weapon and Ronnie's wallet stuffed into the block's holes.

We find this evidence was relevant and properly admitted by the trial judge. The plastic bag and the cinder block were located in the same vicinity in the creek. Further, the creek was located in the same area as Douglas's river house. Though this evidence was circumstantial, it was substantial in nature. As Douglas's shirt was found in the vicinity of the murder weapon and the victim's wallet, the items found in the creek tended to increase the probability that Douglas was involved in Ronnie's murder. Thus, this evidence was clearly relevant. See Rule 401, SCRE (stating relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). Accordingly, the trial judge did not err in admitting into evidence the items found in the creek near Douglas's river house.

II. Directed verdict

A. Murder

Douglas argues the trial judge erred in denying her motion for a directed verdict as to the murder charge. She asserts that, as the State's case was entirely circumstantial in nature, there was insufficient evidence to convict her of murder.

On an appeal from the trial judge's denial of a motion for a directed verdict, the appellate court may only reverse the trial judge if there is no evidence to support the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). When ruling on a motion for a directed

verdict in a criminal case, the trial judge is concerned with the existence or non-existence of evidence, not its weight. State v. Morgan, 282 S.C. 409, 411, 319 S.E.2d 335, 336 (1984). In reviewing the denial of a motion for a directed verdict, the evidence is viewed in the light most favorable to the State. State v. Fennell, 340 S.C. 266, 270, 531 S.E.2d 512, 514 (2000). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury. State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001).

"'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998).

We find the State presented substantial circumstantial evidence sufficient to allow Douglas's murder charge to go to the jury. While the town house appeared to be ransacked, there was no evidence of forced entry. Aside from Ronnie, Douglas had the only other set of keys to the town house. Further, Douglas was the last person to see Ronnie alive, and she was the person who discovered his body before 7:00 a.m. the next morning. Douglas told police she arrived at the town house at such an early hour because she wanted to go hunting with Ronnie. However, Ronnie's brother testified that Ronnie was not going hunting that morning because the two of them were going to a car sale that day. Douglas contradicted her own statement that she and Ronnie were going hunting, as she told her paramour, Jay Webster, that she planned on working in the yard at the river house that day. Webster also testified that Douglas came to his house the night before Ronnie's murder and told him Ronnie wanted to get a divorce. Douglas repeatedly lied to police about her relationship with Webster before finally admitting they were having an extramarital affair.

Douglas's two sons each testified that Ronnie had purchased a .25-

caliber pistol for Douglas's use. While Douglas told police the couple owned a .357 Magnum revolver and a .22 derringer, she did not initially mention the .25-caliber pistol. A .25-caliber pistol, along with Ronnie's wallet, was recovered from the bottom of the creek and subsequently identified as the murder weapon. A plastic bag containing surgical gloves, two shirts, and a pair of jeans was also recovered from the creek. One of Douglas's daughters-in-law identified one of the shirts as Douglas's and stated the jeans were Douglas's size. The daughter-in-law also stated the surgical gloves were similar to those used in Douglas's beauty parlor.

In sum, the evidence presented at trial constituted substantial circumstantial evidence that reasonably tended to prove Douglas's guilt. Thus, the trial judge did not err in denying the motion for a directed verdict as to the murder charge.

B. Armed Robbery

Douglas argues the trial judge erred in denying her motion for a directed verdict as to the armed robbery charge. She asserts the State failed to prove the required elements of armed robbery. Specifically, she contends there was no evidence that the perpetrator took the wallet by force or intimidation or that the victim was alive at the time of the taking. She further asserts there was no evidence that the taking of the wallet and the shooting occurred at the same time by the same person.

"Robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear." State v. Parker, 351 S.C. 567, 570, 571 S.E.2d 288, 289 (2002). "Armed robbery occurs when a person commits robbery while armed with a deadly weapon." Id. at 570, 571 S.E.2d at 290; S.C. Code Ann. § 16-11-330(A) (2003). More specifically, "[r]obbery is the crime of larceny accomplished with force, while larceny is the 'felonious taking and carrying away of the goods of another' against the owner's will or without his consent. Thus, asportation is an element of robbery and armed robbery." State v. Keith, 283 S.C. 597,

598, 325 S.E.2d 325, 325-26 (1985) (quoting State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979)) (citations omitted).

While there is no evidence the wallet was taken before Ronnie's death, it is not essential the victim in an armed robbery must be alive when the robbery occurs. However, in order to be guilty of armed robbery in conjunction with a homicide, the State must prove the victim's death and the taking are part of a continuous chain of events so interconnected as to be inseparable. See 67 Am. Jur. 2d Robbery § 14 (2003) ("[A] taking from the body of one already dead is a taking 'from the person' if the death and the taking are so connected as to form a continuous chain of events."); 77 C.J.S. Robbery § 9 (1994) ("Although, as an abstract principle of law, one ordinarily cannot be guilty of robbery if the victim is a deceased person, this principle does not apply where a robbery and homicide are a part of the same transaction and are so interwoven with each other as to be inseparable. If the taking was made possible by an antecedent assault, the offense is robbery regardless of whether the victim died before or after the taking of the property."); see, e.g., Jones v. State, 652 So. 2d 346, 350 (Fla. 1995), cert. denied, Jones v. Florida, 516 U.S. 875 (1995) (finding violent murders and taking of victims' property were part of continuous acts and therefore supported robbery convictions); Oglesby v. State, 256 S.E.2d 371, 374 (Ga. 1979) (affirming trial judge's denial of directed verdict for armed robbery where defendant contended the taking of the victim's property did not occur until after the victim either was comatose or dead); State v. Fields, 337 S.E.2d 518, 524-25 (N.C. 1985) (holding, in a case involving convictions for first-degree murder, armed robbery, felony murder, and second-degree burglary, "[a]ll that is required is that the elements of armed robbery occur under circumstances and in a timeframe that can be perceived as a single transaction"); People v. Childs, 615 N.Y.S.2d 972, 975 n.3 (N.Y. Sup. Ct. 1994) (discussing jurisdictions that have upheld robbery convictions concerning dead victims); cf. State v. Damon, 285 S.C. 125, 129, 328 S.E.2d 628, 631 (1985), cert. denied, Damon v. South Carolina, 474 U.S. 865 (1985), overruled in part on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding in a death penalty case that murders were committed "while in the commission of" armed robbery or larceny with the use of a deadly weapon where property belonging to the deceased individuals

was stolen in a continuous sequence of criminal acts at the time of the murders).

We find the State presented sufficient evidence to support the armed robbery charge. Ronnie was shot five times in the head. His house appeared to be ransacked and his wallet was missing. The wallet was found in the bottom of the creek with the murder weapon and in the same vicinity as the items identified as belonging to Douglas. Furthermore, given the violent nature of Ronnie's death, it could be inferred that the force used to commit the homicide also facilitated the taking. Thus, there is substantial circumstantial evidence that Ronnie's murder and the taking of the property were part of a single transaction or continuous sequence of events.

Viewing the evidence in the light most favorable to the State, as we are required to do, the evidence reasonably tends to prove Douglas's guilt. Accordingly, the trial judge properly submitted the armed robbery charge to the jury.

III. Sentencing

Douglas argues the trial judge erred in levying the sentence of life imprisonment for her murder conviction. She states the trial judge made an incorrect statement of law when discussing sentencing options.

During sentencing the trial judge stated, "the sentence of the Court with regard to murder, and I will tell the open courtroom there is [sic] only two choices. It's either thirty years or life, period." While Douglas argues this phrasing omits the option of levying a sentence of less than thirty years imprisonment, there was no contemporaneous objection at trial. As such, this issue is not preserved for our review. See State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 424 (1999) (holding an objection to a sentence exceeding the maximum allowable by law does not raise a question of subject matter jurisdiction and cannot be raised for the first time on appeal); State v. Garner, 304 S.C. 220, 222, 403 S.E.2d 631, 632 (1991) (stating failure to object to sentence at time of its imposition constitutes a waiver of the issue

on appeal); State v. Shumate, 276 S.C. 46, 47, 275 S.E.2d 288, 288 (1981) (finding defendant's failure to timely object to or seek modification of his sentence in the trial court precludes him or her from presenting an objection for the first time on appeal).

IV. Motion for a New Trial

Douglas argues the trial judge erred in denying her motion for a new trial. She claims the circumstantial nature of the State's case, coupled with the cumulative effect of the admission of several items into evidence, was highly prejudicial.

We reverse the trial judge's decision to admit testimony concerning Douglas's inquiry about insurance on her husband. Because we remand for a new trial as to the charge of murder and because the charge of armed robbery is so closely intertwined, we also remand for a new trial on the armed robbery charge.

CONCLUSION

We reverse the trial judge's decision to admit the testimony concerning insurance. We affirm the judge's denial of Douglas's motion for a directed verdict as to the charges of murder and armed robbery, but for the reasons noted above, remand for a new trial on both charges. Because Douglas's remaining issues may arise during the next trial, we affirm the judge's decision to admit the following: (1) the tape-recorded statement; (2) the evidence procured through private searches; and (3) the items found in the creek.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

ANDERSON, J., concurs and GOOLSBY, J., dissents in part and concurs in part in a separate opinion.

GOOLSBY, J. (dissenting in part and concurring in part): I respectfully dissent from that portion of Judge Cureton's opinion that holds the admission of insurance agent Gary Wayne Walker's testimony of his discussion with the defendant about her obtaining a quote on life insurance for her husband constituted reversible error. I also dissent from that portion of Judge Cureton's opinion that reverses the defendant's convictions for murder and for armed robbery because of the admission of this evidence. In view of the other evidence against the defendant, I regard any error in the admission of the evidence of an inquiry about an insurance quote as "harmless beyond a reasonable doubt." See State v. Tench, 353 S.C. 531, 536, 579 S.E.2d 314, 317 (2003) (admission of challenged evidence deemed harmless). Moreover, I simply fail to see how her inquiring about the purchase of insurance on her husband proves anything, particularly when the evidence does not show the defendant actually bought the insurance or otherwise benefited from it.

I otherwise concur in Judge Cureton's opinion and would affirm the defendant's sentences and convictions.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William L. Cline,	Respondent,
v.	
J.E. Faulkner Homes, Inc., Mascot Homes, Inc., and Modular Home Sets, Inc.,	Defendants,
of whom Modular Home Sets, Inc., is	Appellant.

Appeal From Fairfield County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 3798
Submitted April 6, 2004 – Filed May 24, 2004

REVERSED

Charles E. Carpenter, Jr., S. Elizabeth Brosnan and David A. Anderson, all of Columbia, for Appellant.

John K. Koon and M. Catherine Smith, both of Winnsboro, for Respondent.

HEARN, C.J.: After his newly purchased modular home was damaged during a delivery accident, Respondent William Cline brought suit against Appellant Modular Home Sets, Inc., as well as other defendants. The

jury awarded Cline actual and punitive damages. Modular Home appeals, arguing the trial court erred by failing to dismiss Cline's action as barred by the statute of limitations. We reverse.

FACTS

On July 7, 1997, Cline purchased a modular home from J.E. Faulkner Homes, a modular home dealer in Rock Hill, South Carolina. Setup of the home required it be delivered in two sections, both of which would be raised by crane and set upon a preexisting foundation at the delivery site. To facilitate the on-site placement, Faulkner Homes contracted with Modular Home to take responsibility for rigging the home. Anthony Crane Rental supplied the crane for the job.

On September 8, 1997, Faulkner Homes delivered the two sections of the home to the site. Clayburn "Red" Barnette, the president and sole officer of Modular Home, positioned the cables around the first section of the home, which was lifted and set into place on the foundation. Barnett then rigged the remaining section. When the crane began to lift the second section—the heavier of the two because it contained all of the home's plumbing fixtures—one of the rigging cables cut through a structural beam in the home. Cline was at the site at the time and saw the damage occur.

As a result of the accident, Cline initiated a negligence action against Faulkner Homes, Mascot Homes Sales Center, Stan Taylor Insurance Agency, and Anthony Crane Rental on December 3, 1999. Notably, Cline did not name either Barnette or Modular Home as a defendant. Cline amended his complaint in May 2000 and again in June 2000, both times changing the named defendants, but on neither occasion adding Barnette or Modular Home.

According to Cline, he first learned that Barnette was not an employee of Faulkner Homes when he received interrogatory answers from Faulkner Homes on November 7, 2000. Even with this revelation in hand, Cline did not amend his complaint to include Barnette until August 14, 2001. Cline once again amended his complaint on December 6, 2001, naming Modular Home as a defendant. When Cline finally served Modular Home with the

Second Amended Complaint on December 14, 2001, over four years had passed since the accident.

In its answer to Cline's complaint, Modular Home asserted the statute of limitations as an affirmative defense and also moved for summary judgment on the same grounds at the start of trial. The trial court denied the motion and the matter proceeded to the merits. Again on the grounds that the statute of limitations had expired, Modular Home moved for a directed verdict at the close of Cline's case. The court denied the motion.

The jury returned a verdict against both Modular Home and Faulkner Homes, awarding $75,000.00 actual damages[1] and $25,000.00 punitive damages against the former, and $25,000.00 actual and $15,000.00 punitive against the latter. Modular Home appeals.

LAW/ANALYSIS

Statute of Limitations

Modular Home argues the trial court erred in determining Cline's negligence action against it was not barred by the statute of limitations. We agree.

Section 15-3-530 of the South Carolina Code (Supp. 2003) sets forth a three-year statute of limitations for negligence actions. Under the discovery rule, the statutory period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. Smith v. Smith, 291 S.C. 420, 426, 354 S.E.2d 36, 40 (1987). Under this objective test, one is charged with discovery when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim might exist. Austin v. Conway Hosp., Inc., 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct. App. 1987).

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[1] Because the jury's cumulative actual damages award exceeded the established maximum value of the home, the trial judge reduced this amount to $50,000.00.

The parties agree that the accident occurred on September 8, 1997, and that Cline was present and knew of the incident on that date. To avoid the statute of limitations, Cline argues he did not know Modular Home was an independent contractor until November 2000 when he received answers to Cline's interrogatories.[2] However, under South Carolina law, the date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations. Such was the explicit holding of our supreme court in Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994):

> [T]he focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer: The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of another alleged wrongdoer. If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury.

Here, the statute of limitations began to run in September of 1997, when Cline discovered his home was damaged. Because three years had expired by the time Cline named Modular Home as a defendant, his negligence claim against Modular Home was barred by the statute of limitations. Accordingly,

[2] Cline also argues that his addition of Modular Home should relate back to his original pleading under Rule 15(c), SCRCP. However, relation back applies only when an existing party is changed, not when a new party is added to a complaint. See Jackson v. Doe, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000) ("The language of Rule 15(c) clearly speaks to a *change* in party, not the *addition* of a defendant to an already existing defendant." (emphasis in original)).

we find the trial court erred in failing to grant Modular Home's motions for directed verdict.[3]

REVERSED.

ANDERSON and BEATTY, JJ., concur.

[3] Because we find the statute of limitations has run, we need not address Modular Home's other argument on appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Michelle Burnell, Appellant,

v.

John Burnell, Respondent.

Appeal From Charleston County
Frances P. Segars-Andrews, Family Court Judge

Opinion No. 3799
Heard April 8, 2004 – Filed May 24, 2004

REVERSED

Veronica G. Small, of Charleston, for Appellant.

Jennifer Lee North, of Sullivan's Island, for Respondent.

HEARN, C.J.: The family court found Michelle Burnell (Mother) in contempt of court for violating the terms of its previous order awarding her and John Burnell (Father) joint custody of their minor child. Mother appeals. We reverse.

FACTS

Mother and Father married in 1994 and had a son, born March 12, 1997. On February 24, 2000, Mother filed for divorce on the grounds of "habitual drunkenness, physical cruelty, and/or adultery." The family court scheduled a hearing on the issues of divorce, property settlement, and custody for May 9, 2001. Immediately prior to the hearing, the parties informed the family court that they had reached an agreement on all outstanding issues through mediation, though the agreement had not yet been reduced to writing. As a consequence, the bulk of the hearing consisted of the mediator, Susan Dunn, reciting the agreement's terms followed by judicial inquiries directed at each party to assure the agreement had been validly entered into. Of particular importance to this dispute is the following description as to how the parties were to make decisions affecting their minor child:

> The parties have also agreed that all major decisions concerning the child's life will deserve a good faith effort to reach a mutual decision. That major decisions [sic] shall include, but not be limited to choice of schools, non-emergency medical and dental treatment, sports team commitments. Both parents shall have free access to the child at day-care and school. Both will provide the other with current address and telephone numbers and the parent—either parent when traveling with or without the child will provide the other with contact information so they could be reached if they were needed.

With the agreement on the record, the family court granted a divorce based on one year of separation without cohabitation and awarded the parties joint custody of their minor child. A final written order, containing slightly different requirements, was filed on July 31, 2001.

By letter dated June 16, 2001, Mother informed Father that their child would be moving from the La Petite daycare facility in West Ashley to the La Petite daycare in Ashley Phosphate. The new location was more convenient

to Father's workplace and Mother's home. Father did not respond to this letter, and Mother transferred the child on July 10, 2001. However, Father refused to pick the child up from the Ashley Phosphate location because he believed Mother's decision to change the location of their child's daycare violated the family court's order. Father also refused to discuss the matter with Mother, and on August 6, 2001, Mother returned the child to the West Ashley location in order to ensure that their child would not be deprived of seeing Father.

Father also accused Mother of violating the court order on May 20, 2001, when she completed an application for the child to be enrolled at the Garrett Academy Child Development Center for the following school year. Father complains that Mother did not inform him of this application until August 14, 2001, two days before school was to begin.

Father further argued that Mother violated the court order when she took their child to his annual physical examination and his first dentist appointment without conferring with him, though Mother contended the appointments had been scheduled prior to the May 9, 2001 hearing. Finally, Father argued Mother violated the order by not keeping him informed of her address and by traveling to Baltimore, Maryland for a week in July without informing him of the trip.

Citing the above violations, Father filed a rule to show cause on August 15, 2001. The court found Mother in contempt of the oral and written orders. Specifically, the court found Mother had failed to keep Father informed of the child's whereabouts, failed to consult with Father in making educational decisions, failed to inform Father of vacation plans out of state, and failed to adequately inform Father regarding medical and dental appointments. For these violations, the court ordered Mother to serve one-year confinement or to pay $2,000.00 of Father's attorney's fees. This appeal follows.

STANDARD OF REVIEW

On appeal from the family court, this court has jurisdiction to find facts in accordance with our own view of the preponderance of the evidence.

Murdock v. Murdock, 338 S.C. 322, 328, 526 S.E.2d 241, 244-45 (Ct. App. 1999). However, a finding of contempt should not be reversed on appeal unless it is without evidentiary support or amounts to an abuse of discretion. Stone v. Reddix-Smalls, 295 S.C. 514, 369 S.E.2d 840 (1988).

LAW/ANALYSIS

Mother contends the family court erred in finding her in contempt because her ostensibly contemptuous conduct occurred before the written order was entered into and her behavior did not violate the mandates of the oral order. We agree.

In a proceeding for contempt, the moving party must show the existence of a court order and the facts establishing noncompliance with the order. Eaddy v. Oliver, 345 S.C. 39, 41, 545 S.E.2d 830, 831 (Ct. App. 2001). Before a party may be found in contempt, the record must clearly and specifically show the contemptuous conduct. State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994).

In the present case, the oral order required the parties to make a good faith effort to reach a mutual decision on all major decisions concerning the child's life, including choice of schools and non-emergency medical or dental treatment. The evidence on the record shows that Mother sent Father a letter before changing the location of their child's daycare. When Father did not respond to the letter after three weeks, Mother brought the child to the new location. While this unilateral action may have violated the later written order, which requires the parties to consult and agree on all major decisions, her behavior did not violate the oral order because she made a good faith effort to consult with Father. Furthermore, by merely filling out an application to enroll their child in four-year-old kindergarten at Garrett Academy, Mother did not violate the court's order because she had not yet made any decision on behalf of the child. Although the written order had been entered into requiring the parties to actually agree on all choice-of-school decisions by the time Mother informed Father of the Garrett Academy application, Father filed this contempt action before the child ever changed schools.

Next, Father argues that Mother failed to provide him with contact information when she and the child traveled to Baltimore in July. According to the oral order, when the parties traveled out of town, they were required to "provide the other with contact information so they could be reached if they were needed."[1] Although Mother did not give Father the address of where she was staying, Father did have Mother's cell phone number, which would have enabled him to contact her if she or the child were needed.

Father also argues Mother violated the court order by failing to inform him of their child's annual doctor's appointment and his first dental appointment. However, the oral order only required the parties to make mutual decisions on all medical or dental *treatment*. Because the order was unclear whether the parties needed to consult each other for routine medical or dental *check-ups*, Mother's failure to inform Father of these appointments does not amount to a willful violation of the court order. See Welchel v. Boyter, 260 S.C. 418, 421, 196 S.E.2d 496, 497 (1973) ("One may not be convicted of contempt for violating a court order which fails to tell him in definite terms what he must do and the language of the commands must be clear and certain rather than implied.").

Finally, Father argues Mother failed to keep him informed of her home address. In its order finding Mother in contempt, the family court found as a fact that:

> [Mother] failed to inform [Father] of her address and phone number. Documentary evidence admitted into the record by both parties reflects that the Garrett Academy application and the La Peitite application completed on June 20, 2001, contain the North Charleston address at which [Mother] presently resides. . . . [Mother] testified that she did not advise

[1] The written order required the parent in custody of the child to notify the other of the child's general whereabouts; however, Mother traveled to Baltimore with the child before the written order was filed. The oral order did not contain this requirement.

> [Father] that she had moved or give him her North Charleston address until July 10, 2001. She had been living there for approximately two weeks at that time.

Mother testified that although she had planned to move to her North Charleston mobile home before the month of July, she did not actually move there until July 9, the day before she gave Father her new address. Corroborating her testimony, Mother submitted to the court the contract she signed for the mobile home, which was dated July 9, 2001. Thus, despite the fact that Mother wrote the North Charleston address on the child's school applications in June, there is no evidence in the record to support the family court's finding that Mother had moved into the mobile home by June 20, 2001 and then waited two weeks before telling Father about her move. Rather, the evidence indicates Mother did not move until July 9.

Accordingly, we reverse the family court order finding Mother in contempt.[2]

REVERSED.

ANDERSON and BEATTY, JJ., concur.

[2] Because we reverse the family court order finding Mother in contempt, we need not address Mother's other arguments on appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: T. Alexander Beard, Appellant,

In Re:

Keith Watkins, Plaintiff,
v.
Newsome Management Company, Newsome Auto World, John H. Newsome, Jr.,and John H. Newsome, III, Defendants

of whom Keith Watkins is, Respondent.

Appeal From Richland County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 3800
Heard March 11, 2004 – Filed May 24, 2004

AFFIRMED

T. Alexander Beard, of Mt. Pleasant, for Appellant.

A. Camden Lewis, of Columbia, for Respondent.

BEATTY, J.: Attorney T. Alexander Beard appeals an order of the trial court denying his motion for sanctions brought under the Frivolous Civil Proceedings Sanctions Act ("the FCPSA"), S.C. Code Ann. § 15-36-10, et

seq. (Supp. 2003) and Rule 11, SCRCP. The trial court found that Beard's motion was time barred under the FCPSA and that the court had no jurisdiction to grant the requested relief. Alternatively, the trial court allowed the motion under Rule 11 and found that the actions at issue were done in good faith and did not constitute sanctionable behavior. We affirm.

FACTS

The initial dispute resulting in this action arose over the operation and ownership of two limited liability companies. Keith Watkins worked for a substantial period of time for John Newsome, Jr., a car dealership owner. Due to various federal tax problems, Newsome was unable to retain sole ownership of four car dealership franchises. Newsome attempted to transfer their ownership to his wife and son, but the manufacturers rejected that attempt because his wife and son were not acceptable as car dealers. Newsome then suggested Watkins. The manufacturers accepted Watkins because of his experience in the field.

In 1996, Newsome transferred the four dealerships to two newly formed L.L.C.s, Imports of Florence and Newsome Automotive. As required by the manufacturers, Watkins was made "dealer-operator" of both companies and given a 15% ownership interest in each. The L.L.C. operating agreements ("the original agreements") called for contributions from Watkins of $40,050 and $13,418. Beard did not represent any of the parties in connection with the original agreements.

In 1997, the parties apparently reached a new agreement and Newsome decided to memorialize that new agreement. Beard drafted the new L.L.C. agreements ("the new agreements"). The new agreements reflected that Watkins had a 15% voting interest and a 1% interest in profits and losses. The new agreements also gave the L.L.C.s the right to redeem Watkins's interests for $1,000 each. In February 1998, all of the changes were underlined in red and sent to the parties for their signature. Accompanying the new agreements was a letter from Beard which included the following explanation:

> Everyone needs to know and understand that I am representing you [Newsome] and your interests and not the interests of the LLC members. My limited information indicates that everyone is in agreement with whatever you want to do. To avoid any conflicts of interest or possible misunderstandings, I strongly suggest, by copy of this letter, that the LLC members have their own professionals review these materials.

Watkins understood that Beard was never his personal attorney and was not representing his interest in this matter. He contacted a local attorney about the new agreements, but that attorney had a conflict of interest. Watkins then contacted a second attorney, who recommended a third local attorney and sent the new agreements to his office. That third attorney in fact represented Watkins in the 1998 transactions. Watkins signed the redrafted L.L.C. operating agreements in April 1998.

Eight months later, Watkins was notified that the L.L.C.s were exercising the option to purchase his interests. Watkins consulted his attorney. He then signed both assignment and indemnity agreements and cashed both $1,000 checks. Soon after the buy-back from Watkins, Newsome entered into an asset purchase agreement with Sonic Automotive, Inc. for the purchase of several dealerships owned by the Newsome family, including those owned by the two L.L.C.s at issue. Watkins demanded $250,000 consideration to consent to the purchase. Sonic and Newsome determined that Watkins had no interest in the dealerships and that they did not need his authorization or consent to go forward with the sale. The sale was closed in May 1999. Watkins filed suit in January 2000 against Newsome and the L.L.C.s, claiming, among other things, fraud and unfair trade practices. Beard represented the defendants in that matter.

In January 2001, Watkins's attorneys, Richard J. Breibart and Richard A. Harpootlian, filed a motion to amend the complaint, attempting to name Beard as a defendant. The amended complaint alleged malpractice and breach of fiduciary duty on the part of Beard. Those allegations were supported by an expert's affidavit from Professor Gregory B. Adams of the University of

South Carolina School of Law. He opined that a special relationship and confidence existed between Beard and Watkins, creating an attorney-client relationship. Professor Adams also concluded that Beard had breached that relationship. The trial court denied the motion to amend the complaint on February 6, 2001. In August 2001, the parties reached a settlement and the action was dismissed with prejudice.

On February 4, 2002, Beard filed a motion seeking attorneys' fees under the FCPSA[1] and Rule 11, SCRCP. He also filed a motion to enlarge the ten-day limitation for filing under the FCPSA since that time had expired. Beard claimed that the attempt to name him as a party defendant was for improper purposes and that Breibart and Harpootlian did not reasonably believe the facts upon which the claim was based. Beard alleged that Breibart and Harpootlian admitted that they moved to amend their complaint "because [they] believed they could get more from Beard in a deposition if he were a party and to 'drive a wedge' between Beard and his client."

In September 2002, the trial court issued an order denying Beard's motions on the grounds that it did not have jurisdiction to grant the requested relief after ten days under the FCPSA. Alternatively, the court ruled that the attorneys had acted in good faith and therefore Rule 11 sanctions were unwarranted. This appeal followed.

ISSUES

I. Did the trial court err in applying the ten-day limitation for a motion brought under the Frivolous Proceedings Act?
II. Did the trial court err in not ruling on Appellant's motion for enlargement of time under Rule 6?
III. Did the trial court err in finding that the claims against Appellant were made to secure a proper purpose?
IV. Did the trial court err in finding that Respondent's attorneys acted in good faith?

[1]S.C. Code Ann. §15-36-10, et seq. (Supp. 2003).

V. Did the trial court err in not considering the issue of an attorney's immunity vis-a-vis a third party?

STANDARD OF REVIEW

An action for attorneys' fees is one in equity. Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997). In an action in equity tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Id.; see also Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, following the determination of facts, an appellate court applies an abuse of discretion standard in reviewing the decision to award sanctions and the specific sanctions awarded. Father v. SCDSS, 353 S.C. 254, 261, 578 S.E.2d 11, 14 (2003).

LAW / ANALYSIS

I & II. Frivolous Civil Proceedings Sanctions Act

Beard argues that his motion is permissible under the FCPSA since the FCPSA does not specify a statute of limitation. However, Watkins contends that the general ten-day limitation for post-trial motions applies here and bars the action. We agree with Watkins.

This Court addressed the timing of post-trial motions for sanctions in Pitman v. Republic Leasing Co., 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002). In that case, the defendant moved for sanctions two months after summary judgment had been granted in his favor. The Court vacated the award of attorneys' fees. It held that a trial court cannot entertain a motion for sanctions under the FCPSA where that motion was filed more than ten days after the judgment. Pitman analogized a motion under the FCPSA to post-trial motions under Rules 59(d) and (e), SCRCP, which provide: "[n]ot later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason . . . "; and "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."

Beard maintains that those are merely rules of limitation and do not affect the jurisdiction of the court. Additionally, Beard argues that the proper time limit in this case is three years, since this is an action for a penalty upon a statute. See S.C. Code Ann. § 15-3-540 (1976). In essence, Beard mounts a direct challenge to Pitman and asks us to overrule that decision.

We agree that the rules limiting post trial motions are rules of limitation, not of jurisdiction. See Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26 n.1, 410 S.E.2d 18, 20 n.1 (Ct. App. 1991) ("The ten day requirement of Rule [59] is, however, a rule of limitation, not a rule of jurisdiction… [and] does not affect the jurisdiction of the court."). However, the argument that these are rules of limitation cannot be used to defeat the jurisdictional limit of trial courts. See Rule 82(a), SCRCP, ("These rules shall not be construed to extend or limit the jurisdiction of any court of this State . . . ."). The established case law is that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed. Pitman, 351 S.C. at 432, 570 S.E.2d at 189; Ness v. Eckerd Corp., 350 S.C. 399, 402, 566 S.E.2d 193, 195 (Ct. App. 2002) ("Although trial judges retain jurisdiction to alter judgments on their own initiative for ten days if a Rule 59(e), SCRCP, motion is filed, after ten days that jurisdiction is lost.").

While the general time limit for an action upon a statute is three years, that limit does not apply if "the statute imposing [the action] prescribes a different limitation." S.C. Code Ann. § 15-3-540 (1976). And the statute creating the action need not expressly provide a different limitation; it can do so by plain implication. See, e.g., Earle v. Owings, 72 S.C. 362, 365, 51 S.E. 980, 982 (1905). Beard's argument that a three-year limitation period applies is therefore not persuasive. Under the FCPSA, "[t]he entitlement of the aggrieved person must be determined by the trial judge at the conclusion of a trial upon motion of the aggrieved party. . . ." § 15-36-30 (emphasis added). This language clearly implies a time limitation for motions under the FCPSA even though the FCPSA did not expressly establish one. We find that the trial court was correct to dismiss Beard's motion as untimely.

Beard next argues that the trial court erred in failing to rule on his Rule 6 motion to extend the time to file for sanctions under the FCPSA. The trial

court, contrary to Beard's assertion, did rule on the motion. In its October 30, 2002 order, the court clearly stated: "[b]y implication, the Court denied the Motion to enlarge the time as to the filing under provisions of [the FCPSA] . . . ." Beard insists that Rule 6 permits a trial court to enlarge the time for sanctions under the FCPSA. Assuming, *arguendo*, that Beard is correct, such permission is, by its very language, at the discretion of the trial judge: "the court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done." Rule 6(b), SCRCP, (emphasis added).

In Pitman, the action was time barred even though the delay was only two months. Here, Beard filed his motion almost one full year after the trial court denied Watkins's motion to amend his complaint to include Beard as a defendant and nearly six months after the underlying case was settled. The only "good cause" offered for the one-year delay is ignorance as to the proper time limitation under the FCPSA.[2] While recognizing that the FCPSA may lack specificity, we find that the phrase "at the conclusion of a trial upon motion by the aggrieved party" plainly requires some degree of urgency on the part of an aggrieved party to file a motion upon settlement or judgment of the underlying case. Without a more specific showing of "good cause" for the delay by Beard, we cannot say that the trial judge abused his discretion in denying Beard's Rule 6(b) motion for enlargement.

III & IV. Rule 11

Its ruling concerning the FCPSA notwithstanding, the trial court allowed Beard's motion seeking attorneys' fees and other costs against Watkins and his attorneys under Rule 11, SCRCP.[3] Thus, Beard advanced

[2]At the conclusion of the underlying case, Pitman had yet to be decided.

[3]Rule 11, SCRCP, reads in part, "[t]he signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay . . . If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an

two arguments on the merit of his motion. Beard first argued that the claims against him were not made for a proper purpose. Beard also argued that Breibart and Harpootlian did not act in good faith. The trial court ruled against Beard, reasoning that Breibart and Harpootlian had good grounds for their motion.[4] Beard maintains that the trial court's ruling was based on erroneous assumptions and therefore must be overturned. We disagree.

At the outset, we note that Beard raises on appeal the proper purpose issue under the FCPSA, not under Rule 11. Though we have found that the trial court correctly dismissed Beard's motion under the FCPSA as untimely, we address the merit of Beard's arguments since the "criteria for Rule 11 sanctions are essentially the same as those for sanctions under the [FCPSA]." The Father v. South Carolina Dep't of Soc. Servs., 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001).

Breibart and Harpootlian based their decision to sue Beard on an affidavit provided by their expert, Professor Adams, but Beard asserts that Breibart and Harpootlian decided to "give [Professor Adams] selected facts and omit other facts." Specifically, Beard contends that Professor Adams was told that Beard had drafted the original L.L.C. agreement and that Watkins "had always relied on Mr. Beard as lawyer for the two LLCs." However, in his affidavit of April 2002, Professor Adams declared that he had reviewed Beard's February 20, 1998 letter to Watkins, which, among other things, advised Watkins to retain his own legal counsel. Based on that letter, Professor Adams concluded that a fiduciary relationship existed between Beard and Watkins and that Beard breached that duty. Professor Adams also

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order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee."

[4]The trial court's order speaks of "good ground" while Beard frames the issue as one of "good faith" or "bad faith." That semantic difference is of no legal import since Rule 11 has been interpreted to include actions done in bad faith. See Runyon v. Wright, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996) ("The party and/or attorney may also be sanctioned [under Rule 11] for filing a pleading, motion, or other paper in bad faith . . .) (citation omitted).

stated that he talked to both Beard and Beard's attorney, but neither was able to change his opinion. We need not determine whether Professor Adams's conclusion was correct – and we do not do so. It is sufficient that Breibart and Harpootlian relied on his expert opinion in bringing the action against Beard.

V. Attorney's Immunity

Beard argues that the trial court should have ruled that an attorney's immunity concerning a third party precluded the motion to add Beard as a party. The trial court refused to consider that issue at the Rule 59(e) hearing because Beard had not raised it at the hearing for sanctions. The record does not indicate, and Beard does not contend, that Beard argued the immunity issue before the trial court's ruling. Therefore, the issue was not preserved. See Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial."); Barr v. City of Rock Hill, 330 S.C. 640, 644, 500 S.E.2d 157, 159 (Ct. App. 1998) (refusing to entertain an issue on appeal because it was not argued before the trial court) (citing A. Lassberg & Co. v. Atlantic Cotton Co., 291 S.C. 161, 165, 352 S.E.2d 501, 503 (Ct. App. 1986)).

CONCLUSION

Based on the foregoing, the decision of the trial court is

AFFIRMED.

HEARN, C.J., and GOOLSBY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hugh McIntyre Smith, Respondent,

v.

Mary Elizabeth Dixon Smith, Appellant.

Appeal From York County
Henry T. Woods, Family Court Judge

Opinion No. 3801
Submitted April 6, 2004 – Filed May 24, 2004

AFFIRMED

Carolyn R. Hills, of Myrtle Beach, for Appellant.

James B. Richardson, Jr., of Columbia and James R. Honeycutt, of Fort Mill, for Respondent.

HEARN, C.J.: Mary Elizabeth Dixon Smith ("Wife") filed an order and rule to show cause seeking to hold Hugh McIntyre Smith ("Husband") in contempt for failing to pay alimony. The trial judge declined to hold Husband in contempt, finding Husband did not willfully disobey the court order. We affirm.

FACTS

Husband and Wife divorced on January 19, 1998. Their settlement agreement provided that Wife would receive $3,000 per month in alimony. However, the agreement acknowledged that Husband was nearing retirement and that his retirement would constitute a change in circumstances for the purpose of computing alimony. Specifically, the order stated: "In the event the Husband so retires, the parties acknowledge that this shall constitute a change in circumstances and the Court shall review the financial condition of the parties to determine what, if any, sum of alimony will be appropriate thereafter." The agreement also provided that Husband would pay, after his retirement, a portion of his Social Security benefit each month to Wife.

Upon his retirement in August 1999, Husband stopped paying the $3,000 per month in alimony and has not paid any further alimony, except for a portion of what he receives in Social Security benefits pursuant to the settlement agreement. In addition, while the order acknowledged Husband's retirement would be a sufficient change of circumstances to warrant review of his alimony obligation, no review had occurred, nor had Husband filed an action for review by any court concerning the amount of alimony he should be paying. On November 20, 2001, Wife filed an order and rule to show cause seeking to hold Husband in contempt for failing to pay alimony since August 1999. The trial judge found that because the language in the order requires the court's review of the financial condition of the parties upon Husband's retirement and does not specify which party should seek review, Husband was not in contempt. At the hearing, the judge stated:

> I find that because the language within the Order is mandatory, that there is sufficient information or sufficient doubt as to whether or not there was responsibility on either party, other than what they both acknowledge was, in fact, the change of circumstances as anticipated in the Order.

> The Order says the Court "shall" review the financial condition of the parties. What we have is a delay in that review, obviously, but the language is mandatory that the review should take place upon the retirement from his then place of employment that was anticipatory.

Based on his findings, the judge declined to hold Husband in contempt and gave him ten days in which to file an appropriate motion to seek modification of the alimony award. The trial judge declined to award attorney's fees, but ruled the issue could be raised at the merits hearing. Wife appeals.

STANDARD OF REVIEW

A determination of contempt lies within the sound discretion of the trial judge. Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 607, 567 S.E.2d 514, 519 (Ct. App. 2002). "A determination of contempt is a serious matter and should be imposed sparingly; whether it is or is not imposed is within the discretion of the trial judge, which will not be disturbed on appeal unless it is without evidentiary support." Haselwood v. Sullivan, 283 S.C. 29, 32-33, 320 S.E.2d 499, 501 (Ct. App. 1984) (citation omitted).

LAW/ANALYSIS

I. Contempt

Wife argues the trial court erred in failing to find Husband in contempt of the order requiring him to pay $3,000 per month in alimony. We disagree.

"It is well settled that contempt results from willful disobedience of a court order; and before a person may be held in contempt, the record must be clear and specific as to acts or conduct upon which the contempt is based." Cheap-O's Truck Stop, Inc., 350 S.C. at 612, 567 S.E.2d at 522 (quoting State v. Bevilacqua, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct.

App. 1994)). A willful act is "one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law." Id. (citations omitted).

Therefore, our focus is on whether the trial judge abused his discretion in finding that Husband did not willfully disobey the order requiring him to pay alimony. We agree with the trial judge that the mandatory language in the order stating, "In the event the Husband so retires, the parties acknowledge that this shall constitute a change in circumstances and the Court shall review the financial condition of the parties . . ." was ambiguous as to who was to initiate review of the financial position of the parties. Because the order did not specify which party was responsible for bringing an action for review, we find the trial judge did not abuse his discretion by declining to hold Husband in contempt for failing to file an action for modification.

Wife also argues that a new action was necessary to modify Husband's alimony obligation and therefore the trial judge erred in ordering Husband to merely file a motion seeking court review of his finances. We disagree. Section 20-3-170 of the South Carolina Code (1976 and Supp. 2003) provides that "either party may apply to the court which rendered the judgment for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments . . . ." While filing a new action for a modification may be preferable, section 20-3-170 does not mandate this approach. Moreover, Wife does not argue and we fail to discern any prejudice by the trial judge's ruling on this issue.

II. Attorney's Fees

Wife claims the trial judge erred in failing to award her attorney's fees. However, the trial judge did not grant or deny Wife's request for an award of attorney's fees in the contempt order; instead, he deferred consideration of an award until the final hearing on the merits of modification. We find this issue is not immediately appealable.

An intermediate or interlocutory order is immediately appealable only if it involves the merits of the case or affects a substantial right. S.C. Code Ann. § 14-3-330 (1976 and Supp. 2003). The trial judge's decision regarding Wife's request for attorney's fees is not immediately appealable because it does not involve the merits of the case nor does it affect any of Wife's substantial rights. See Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002) ("Pursuant to section 14-3-330(2), this Court may not review an order that 'does not prevent a judgment from being rendered in the action, and [from which the] appellant can seek review . . . in any appeal from [the] final judgment.'"). Therefore, we do not reach this issue. See also Neville v. Neville, 278 S.C. 411, 411, 297 S.E.2d 423, 423 (1982) ("We are of the opinion that the interests of justice will be served best if appeals from *pendente lite* orders are held in abeyance until the final order is entered in the family court.").

Accordingly, the decision of the trial judge is

AFFIRMED.

ANDERSON and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sharon B. Roberson, Respondent,

v.

Willie Joe Roberson, Appellant.

Appeal From Sumter County
R. Wright Turbeville, Family Court Judge

Opinion No. 3802
Submitted April 6, 2004 – Filed May 24, 2004

AFFIRMED

Charles Thomas Brooks, of Sumter, for Appellant.

Harry C. Wilson, of Sumter, for Respondent.

HEARN, C.J.: The family court granted Sharon B. Roberson a divorce from Willie J. Roberson on the grounds of one year's continuous separation. On appeal, Husband challenges the equitable division of a mobile home park and the marital home, the award of alimony, the securing of the alimony, and the award of attorney's fees to Wife. We affirm.

FACTS

Husband and Wife were married in 1987. Each party owned real property prior to the marriage. Wife's home was used as the marital residence, and the parties made various improvements to it during the marriage. Husband owned a mobile home park prior to the marriage, and improvements were made to the park during the course of the marriage. The family court issued a divorce decree finding both properties were transmuted into marital property and apportioned the home sixty-five percent to Wife and thirty-five percent to Husband. The family court apportioned the original mobile home park sixty-five percent to Husband and thirty-five percent to Wife. The balance of the marital estate, including additional mobile homes purchased for the park during the marriage, was divided sixty-three percent to Husband and thirty-seven percent to Wife. The Wife was granted possession of the marital home, and Husband was ordered to assume the second mortgage and pay $41,460 to Wife. The remaining real and personal property, with the exception of a few personal items, was granted to Husband. The family court awarded Wife permanent periodic alimony in the amount of $600 per month and required Husband to maintain life insurance in the amount of $25,000 as security for the payment of alimony. Finally, the family court awarded Wife $8,000 in attorney's fees.

STANDARD OF REVIEW

"On appeal from an order of the family court, this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." Hopkins v. Hopkins, 343 S.C. 301, 304, 540 S.E.2d 454, 456 (2000) (citation omitted). However, this broad scope of review does not require us to ignore the findings of the family court. Haselden v. Haselden, 347 S.C. 48, 58, 552 S.E.2d 329, 334 (Ct. App. 2001). "Neither are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." Id. (citation omitted).

LAW/ANALYSIS

1. Division of the Mobile Home Park and Marital Home

Husband argues the family court erred by assigning Wife a thirty-five percent interest in the original mobile home park contending that Wife's contribution to the park was minimal. Further, Husband asserts that his contribution to the improvement and appreciation of the marital home should afford him a greater share of the home. We disagree.

Section 20-7-472 of the South Carolina Code (Supp. 2003) sets forth the various equitable apportionment factors and vests the family court with discretion to decide what weight to assign the factors. Jenkins v. Jenkins, 345 S.C. 88, 100, 545 S.E.2d 531, 537 (Ct. App. 2001). When reviewing the family court's equitable apportionment, "this Court looks to the fairness of the overall apportionment. If the end result is equitable, it is irrelevant that this Court might have weighed specific factors differently than the trial judge." Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988) (citations omitted). The family court's apportionment of marital property will not be disturbed on appeal absent an abuse of discretion. Bragg v. Bragg, 347 S.C. 16, 23, 553 S.E.2d 251, 255 (Ct. App. 2001). "This court will affirm the family court judge if it can be determined that the judge addressed the factors under section 20-7-472 sufficiently for us to conclude he was cognizant of the statutory factors." Jenkins, 345 S.C. at 100, 545 S.E.2d at 537.

The family court in this case considered all fifteen of the statutory factors regarding equitable apportionment found in section 20-7-472, and made extensive written findings regarding these factors. Initially, the court noted that Husband made the major direct contributions to the marital property but that Wife made significant indirect contributions. The court found that both the home and the mobile home park had significant special equity prior to the marriage.

With respect to the home, the court found that Husband made mortgage payments on the home for five and a half years while Wife did not

work. Husband correctly asserts that significant improvements had been made to the home during the marriage from marital funds, with most of the direct contributions coming from Husband's income. These improvements included installing a new roof, adding new carpeting, remodeling a bathroom and kitchen, building a patio, and installing a pool. However, at least some of the repairs appear to have been financed with marital funds in the form of insurance proceeds received by the parties after Hurricane Hugo.

The family court also found that Wife had assisted with the mobile home park and that some of the original mobile homes had been replaced. There is ample testimony in the record to support this finding. Husband testified that at least three mobile homes from the original park had been replaced and four additional mobile homes acquired during the marriage. Wife also assisted with the running and maintenance of the mobile home park during the marriage. Wife testified that she helped Husband with the park's bookkeeping, raking, cleaning, shopping, and bank deposits. Wife's daughter testified that Wife worked in the mobile home park during the marriage by running errands. Wife's friend also testified that Wife worked in the park by raking leaves and shopping for curtains.

Based on the record and the family court's extensive consideration of the apportionment factors in section 20-7-472, we find no abuse of discretion in the court's equitable division of the marital home and the mobile home park.

2. Alimony and Alimony Security

Husband argues that the family court's award of $600 per month in permanent periodic alimony was excessive. We disagree.

The decision of the family court with respect to alimony will not be disturbed on appeal unless there is an abuse of discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002). "An abuse of discretion occurs when the judge is controlled by some error of law or where the order, based upon findings of fact, is without evidentiary support." Id. (citation omitted). In making an award of alimony, the family court must

consider the thirteen factors set forth in section 20-3-130(C) of the South Carolina Code (Supp. 2003). "No one factor is dispositive." Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 425 (Ct. App. 2001) (citation omitted). Alimony is awarded as a substitute for support normally incident to a marital relationship and should place the supported spouse, as nearly as possible, in the same position he or she enjoyed during the marriage. Id. at 184, 554 S.E.2d at 424.

In this case, the family court carefully considered and made written findings on all thirteen factors enumerated in section 20-3-130(C). However, Husband argues that the amount of alimony awarded to Wife will place Wife above the standard that she enjoyed during the marriage, and that it may operate as a disincentive for the Wife to provide her own support. The family court considered, and the evidence in the record supports a finding that the standard of living the parties enjoyed during the marriage was such that Husband provided for Wife's needs. However, Husband asserts that because Wife re-entered the work force subsequent to the parties' separation, her income, in addition to an award of alimony, would exceed the standard of living enjoyed during the marriage. Husband's argument is without merit. The family court considered Wife's post-separation income. The court evaluated Wife's expenses and income and determined that Wife would need approximately $1,000 per month to meet her anticipated expenses. Based on those financial findings, the family court awarded Wife $600 per month in alimony. We find this award is supported by the evidence in the record, and therefore the family court did not abuse its discretion in awarding alimony.

Husband also argues that the family court erred by requiring him to provide security for the alimony through a life insurance policy in the amount of $25,000 because the court did not make specific findings as required by section 20-3-130(D) of the South Carolina Code (Supp. 2003). Section 20-3-130(D) states: "In making an award of alimony or separate maintenance and support, the court may make provision for security for the payment . . . with due consideration of the cost of premiums, insurance plans carried by the parties during marriage, insurability of the payor spouse, the probable economic condition of the supported spouse upon the death of the payor spouse, and any other factors the court may deem relevant . . . ."

(emphasis added). There is no requirement that specific findings be made. See Wooton v. Wooton, 356 S.C. 473, 478, 589 S.E.2d 769, 771 (Ct. App. 2003) (stating that while it is preferable for the family court judge to address the statutory factors enumerated in section 20-3-130(D), the failure of the judge to make such a finding does not require the appellate court to vacate the judgment below).

Additionally, this statute is similar to the equitable apportionment statute, section 20-7-472 of the South Carolina Code (Supp. 2003), which requires the family court to "give weight" to certain enumerated factors. That statute has been interpreted as not requiring specific findings by the family court as long as the factors were addressed with sufficiency for the appellate court to conclude the family court was cognizant of the factors in the particular case. See Jenkins, 345 S.C. at 100, 545 S.E.2d at 537. Here, the court commented that Husband already had a $50,000 life insurance policy in place and "that circumstances justify requiring the Defendant to secure his alimony payments[.]" Previously in its order, the court also thoroughly discussed the various financial positions of the parties. Thus, we believe that the family court properly considered all requisite factors to secure alimony.

3. Attorney's fees

Husband maintains the family court erred in ordering him to contribute $8,000 towards Wife's attorney's fees and costs. We disagree.

An award of attorney's fees lies within the sound discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. See Bowen v. Bowen, 327 S.C. 561, 563, 490 S.E.2d 271, 272 (Ct. App. 1997). The family court, in determining whether to award attorney's fees, should consider each party's ability to pay his or her own fees, the beneficial results obtained, the parties' respective financial conditions, and the effect of the fee on the parties' standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). In determining the reasonable amount of attorney's fees to award, the court should consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, counsel's professional standing, the

contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

The family court found that Wife needed assistance to pay her attorney's fees and that Husband was in a position to assist because he received all of the income-producing property by way of equitable distribution. The family court also found that Wife obtained beneficial results in terms of equitable distribution and alimony. The family court considered the parties' respective financial conditions, including the impact of attorney's fees. Finally, the family court concluded that the amount of $8,000 was reasonable in light of the Glasscock factors. The court expressly considered each of the Glasscock factors in the final order, and we find no abuse of discretion in his award. See Henggeler v. Hansen, 333 S.C. 598, 605, 510 S.E.2d 722, 726 (Ct. App. 1998) (finding no abuse of discretion in awarding attorney's fees when the family court considered the Glasscock factors).

Accordingly, the family court order is

AFFIRMED.

ANDERSON and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jill H. McCall, **Appellant,**

v.

State Farm Mutual Automobile Insurance Company, Kimberly J. Sullivan and Marcia Hardy, **Respondents.**

Appeal From Oconee County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 3803
Submitted May 12, 2004 – Filed May 24, 2004

AFFIRMED AS MODIFIED

Richard L. Whitt, of Columbia, for Appellant.

Michael T. Cole and Charles R. Norris, of Charleston, for Respondents.

ANDERSON, J.: This suit arises as a result of an insurance dispute. Appellant contends her late husband's automobile insurance policy either contained an automobile death indemnity provision or would have if not for Respondents' negligence. The circuit court granted Respondents' motion for summary judgment as to the South Carolina parties and applied the South Carolina door closing statute to dismiss the case. We affirm as modified.[1]

FACTUAL/PROCEDURAL BACKGROUND

Brian and Jill McCall lived in North Carolina and had a State Farm automobile insurance policy, which contained an automobile death indemnity provision. This North Carolina automobile insurance policy was obtained through Tom Sawyer Agency. In February 2000, Brian and Jill McCall separated and Brian McCall moved to South Carolina. In South Carolina, Brian McCall contacted Sullivan Insurance Agency and acquired State Farm automobile insurance for his vehicle. Brian McCall purchased a State Farm policy containing comprehensive and collision coverage, but not an automobile death indemnity provision. Brian McCall signed a policy application that explicitly omitted the automobile death indemnity provision.

Jill McCall informed Tom Sawyer Agency that she and Brian McCall had separated. As a result, Tom Sawyer Agency removed the automobile death indemnity coverage from the policy. Tragically, in March 2000, Brian McCall died in an automobile accident. Appellant, Jill McCall, seeks an automobile death indemnity from State Farm; however, the insurer denies one existed at the time of the accident. Appellant brought causes of action for bad faith refusal to pay, negligent supervision, breach of contract, respondeat superior, unfair trade practices, and negligence against State Farm and the South Carolina agents that sold Brian McCall his policy.

It is undisputed that the North Carolina policy originally contained an automobile death indemnity provision. Appellant asserts the South Carolina

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

agents erred by omitting the death indemnity provision contained in the North Carolina policy when they wrote the South Carolina policy.

In February 2002, the circuit court heard Respondents' motion for summary judgment and dismissed the two South Carolina insurance agents, Marcia Hardy and Kimberly Sullivan, as well as any claims arising from the South Carolina policy. However, the court did grant Appellant thirty days to amend her complaint to allege a cause of action arising under the North Carolina policy. No appeal was taken from this Order. Appellant filed an amended complaint restating her claims as arising under the North Carolina policy.

In the amended complaint, Appellant maintained the South Carolina agents caused the North Carolina automobile death indemnity provision to be cancelled and they failed to notify Brian McCall of the cancellation or provide him a refund of the unearned premium. Respondents deny the South Carolina agents had any involvement with the cancellation of the North Carolina automobile death indemnity provision.

In October 2002, the circuit court heard Respondents' motion for summary judgment as to the claims in the amended complaint. Again, the South Carolina insurance agents were dismissed from the case. In addition, the court applied the door closing statute, section 15-5-150 of the South Carolina Code, to dismiss the suit because neither Jill McCall nor State Farm is a resident of South Carolina. Appellant argues the circuit court erred in granting summary judgment and in applying section 15-5-150 to the North Carolina claims.

STANDARD OF REVIEW

"Summary judgment is appropriate only when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 130, 558 S.E.2d

271, 273 (Ct. App. 2001) (quoting Rule 56(c), SCRCP); see also Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.").

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." McNair v. Rainsford, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998) (citing Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991); Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990)). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." Lanham v. Blue Cross & Blue Shield of South Carolina, Inc., 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002) (citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Id. at 362, 563 S.E.2d at 333 (citing Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000)).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." Hall v. Fedor, 349 S.C. 169, 173, 561 S.E.2d 654, 656 (Ct. App. 2002) (citing Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999)). "Even 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." Id. at 173-74, 561 S.E.2d at 656. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Murray v. Holnam, Inc., 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct. App. 2001) (citing Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 523 S.E.2d 795 (1999)).

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP."

Murray, 344 S.C. at 138, 542 S.E.2d at 747 (citing Brockbank, 341 S.C. 372, 534 S.E.2d 688; Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998)).

LAW/ANALYSIS

1. MOTION FOR SUMMARY JUDGMENT

Appellant contends the circuit court erred in granting Respondents' motion for summary judgment. Appellant argues there existed both genuine issues of material fact and a disputed matter of law. Specifically, Appellant points to alleged inconsistencies in the various affidavits presented to the court by Respondents and to an admission that Appellant's husband was provided a quote for a South Carolina policy containing an automobile death indemnity provision.

However, these allegations of factual inconsistencies and admission disregard the procedural and factual predicate of the suit. Appellant neglects the fact that the unappealed February 2002 Order is the law of the case. While affidavits were submitted stating the South Carolina agents, Marcia Hardy and Kimberly Sullivan, did not have any involvement in the cancellation of the automobile death indemnity from the North Carolina policy, there is a complete dearth of any evidence that they were involved in the cancellation.

A. The Law of the Case

An unappealed order becomes the law of the case. Toler's Cove Homeowners Ass'n v. Trident Const. Co., Inc., 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003); Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 174-75, 525 S.E.2d 869, 871 (2000); Priester v. Brabham, 230 S.C. 201, 203, 95 S.E.2d 167, 168 (1956); Wooten v. Wooten, 354 S.C. 242, 250, 580 S.E.2d 765, 769 (Ct. App. 2003); Larimore v. Carolina Power & Light, 340 S.C. 438, 445, 531 S.E.2d 535, 538-39 (Ct. App. 2000). "A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case."

Austin v. Specialty Transp. Servs., ___ S.C. ___, ___, 594 S.E.2d 867, ___ (Ct. App. 2004).

On April 8, 2002, the circuit court signed an order dismissing Marcia Hardy and Kimberly Sullivan from the case, stating "there is no genuine issue of material fact as to the plaintiff's claim under or related to the South Carolina policy and, therefore, the plaintiff's claims related to that policy and to the State Farm insurance agents involved in the issuance of that policy are dismissed with prejudice." Appellant did not appeal, but filed an amended complaint as allowed by the Order. Therefore, the ruling by the circuit court is the law of the case.

The April 8, 2002 Order dismissed the South Carolina agents. Appellant tried to avoid this Order by amending the complaint to allege the South Carolina agents caused the North Carolina automobile death indemnity provision to be cancelled and failed to notify Brian McCall of the cancellation or provide him a refund of the unearned premium. In the initial complaint, the Appellant asserted the South Carolina agents erred by omitting the death indemnity provision contained in the North Carolina policy.

Appellant relies on this difference in verbiage to suggest she is advancing different actions in the first and amended complaint. However, the result under each is the same—no automobile death indemnity provision exists. This similarity is reinforced by Jill McCall's affidavit submitted during the second summary judgment motion hearing: "The change in coverage on the North Carolina State Farm Insurance policy, caused by the issuance of the new South Carolina State Farm Insurance policy, had the same result as canceling the death indemnity coverage under the North Carolina State Farm Insurance Policy." During the second summary judgment hearing, Appellant's counsel summarized that "something happened between the North Carolina agents and the South Carolina agents that caused coverage to lap[se] under that North Carolina policy."

Veritably, any difference in argument advanced against the South Carolina agents in the initial and amended complaint is nothing more than semantic. In both complaints, Appellant essentially argues the South

Carolina agents' omission of the death indemnity provision had the effect of canceling the provision. The April 8, 2002 Order dismissed this claim. Because that Order was not appealed, a challenge on this point is not properly before this court.

B. Summary Judgment Proceeding

During the summary judgment motion, there were four affidavits before the circuit court that stated the South Carolina agents had no involvement in the cancellation of the North Carolina death indemnity policy. These included affidavits from agents Marcia Hardy and Kimberly Sullivan, which denied any involvement in canceling the death indemnity provision. Another affidavit came from Audrey Martens, a State Farm employee in the underwriting department, who reported the death indemnity provision was removed as a result of a change sent to State Farm underwriting from Tom Sawyer Agency. Finally, there is an affidavit from Judith Sawyer, of Tom Sawyer Agency, stating that after the agency learned of the McCalls' separation, the agency removed the death indemnity provision from the North Carolina policy as a result of the separation. The assertion that the provision was removed at the instruction of Tom Sawyer Agency after they learned of the McCall's separation is supported by the fact that Appellant admits to advising Judith Sawyer that the couple had separated.

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot rest on mere allegations or denials contained in the pleadings. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial." Hansen v. United Serv. Auto. Ass'n, 350 S.C. 62, 67, 565 S.E.2d 114, 116 (Ct. App. 2002); see also Humana Hosp.-Bayside v. Lightle, 305 S.C. 214, 216-17, 407 S.E.2d 637, 638 (1991). Because four affidavits state the South Carolina agents were not involved, Appellant cannot simply rest on her pleadings. Appellant submitted one affidavit for the circuit court's consideration, but this affidavit does not address with any specificity the alleged actions the South Carolina agents took to cancel the death indemnity provision. Appellant submitted no evidence to support her conclusion that the South Carolina actors had any

involvement with the cancellation of the automobile death indemnity provision; apodictically, a consideration of the grant of summary judgment on its merits would yield the same result reached by simply applying the law of the case.

2. DOOR CLOSING STATUTE

After the circuit court determined the claims against the South Carolina agents should be dismissed with prejudice, the remaining parties were: (1) Appellant, a North Carolina resident, (2) and State Farm Mutual Automobile Insurance Company, an out-of-state corporation. The subject of the suit was a North Carolina insurance policy. Accordingly, the court determined that the door closing statute, section 15-5-150 of the South Carolina Code, prohibited the court from having subject matter jurisdiction over the suit.

Section 15-5-150 states:

> An action against a corporation created by or under the laws of any other state . . . may be brought in the circuit court: (1) By any resident of this state for any cause of action; or (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

S.C. Code. Ann. § 15-5-150 (1977); accord Moosally v. W.W. Norton & Co., Inc., ___ S.C. ___, ___, 594 S.E.2d 878, ___ (Ct. App. 2004). Cause of action is the "legal wrong threatened or committed against the complaining party," while "subject of the action" is "the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen, concerning which the wrong has been done; and this is, ordinarily the property, or the contract and its subject matter, or the thing involved in the dispute." Murphy v. Owens-Corning Fiberglas Corp., 356 S.C. 592, 596, 590 S.E.2d 479, 481 (2003) (quoting Ophuls & Hill v. Carolina Ice & Fuel Co., 160 S.C. 441, 450, 158 S.E. 824, 827 (1931)). State Farm Company is an out-of-state corporation. Jill McCall is a resident of North Carolina. Because the Appellant is not a resident of this State, the cause of action must have

arisen or the subject of the action must have been situated within this State in order for the court to have jurisdiction. See Moosally v. W.W. Norton & Co., Inc., ___ S.C. ___, ___, 594 S.E.2d 878, ___ (Ct. App. 2004) (noting that "[b]ecause none of the Appellants are residents of South Carolina, our determination of their capacity to sue [Respondent] turns on whether their cause of action arose within this State"). The subject matter of this suit is a North Carolina insurance policy. The only allegations that involved this State were those with the South Carolina State Farm agents. Because of the dismissal of the South Carolina agents, the nexus between this State and the suit is broken. See Rosenthal v. Unarco Indus., Inc., 278 S.C. 420, 424, 297 S.E.2d 638, 641 (1982) (stating the door closing statute "provides a forum for wrongs connected with the state while avoiding the resolution of wrongs in which the state has little interest."); accord Cox v. Lunsford, 272 S.C. 527, 531-32, 252 S.E.2d 918, 920-21 (1979) (overruled on other grounds by Farmer v. Monsanto, 353 S.C. 553, 579 S.E.2d 325 (2003)); Nix v. Mercury Motor Express, Inc., 270 S.C. 477, 482-84, 242 S.E.2d 683, 684-85 (1978) (overruled on other grounds by Farmer v. Monsanto, 353 S.C. 553, 579 S.E.2d 325 (2003)). Therefore, the circuit court's dismissal of the case was not in error.

Appellant attempts to avoid the efficacy of the door closing statute by arguing "the decedent, a resident of this state at the time of his death, should be allowed, through his beneficiary, to maintain the cause of action for neglect and wrongful cancellation against the Defendant agents and insurance company." The application of the door closing statute was clearly addressed to the court by Respondent, but Appellant advanced no arguments on this issue to the circuit court. "In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." Holy Loch Distrib., Inc. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)); accord Ellie, Inc. v. Miccichi, ___ S.C. ___, ___, 594 S.E.2d 485, ___(Ct. App. 2004). "Error preservation requirements are intended to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Therefore, this issue is not preserved for appellate review.

Even if we were to consider Appellant's argument that the door closing statute does not apply because the cause of action is not the Appellant's personal claim but the decedent's as insured, we would affirm. Appellant relies upon South Carolina case law allowing an action for wrongful cancellation to be brought during the lifetime of the insured by either the insured or beneficiary if the beneficiary's interest is an absolute and indefeasible vested interest. Further, an action after the death of the beneficiary is viable. Babb v. Paul Revere Life Ins. Co., 224 S.C. 1, 9, 77 S.E.2d 267, 271 (1953). Babb only addresses the beneficiary's capacity to bring a suit for wrongful cancellation, not the implications of a suit brought by a beneficiary and its relationship to the survival statute.

Because of the holding in Babb, we find it necessary to consider South Carolina's interest in adjudicating this suit. The door closing statute serves three basic objectives.

> First, it favors resident plaintiffs over non-resident plaintiffs. Second, it provides a forum for wrongs connected with the state while avoiding the resolution of wrongs in which the state has little interest. Third, it encourages activity and investment within the state by foreign corporations without subjecting them to actions unrelated to their activity within the state.

Murphy v. Owens-Corning Fiberglas Corp., 346 S.C. 37, 45-46, 550 S.E.2d 589, 593 (Ct. App. 2001) (citations omitted) (overruled on other grounds by Farmer v. Monsanto, 353 S.C. 553, 579 S.E.2d 325 (2003)); see also Rosenthal v. Unarco Industries, Inc., 278 S.C. 420, 424, 297 S.E.2d 638, 641 (1982); Cox v. Lunsford, 272 S.C. 527, 531-32, 252 S.E.2d 918, 920-21 (1979). The supreme court in Murphy explicated the door closing statute's policies:

> The first policy, favoring resident plaintiffs, is reflected in subsection (1) of § 15-5-150 of the Door Closing Statute, which allows "any resident of this State" to maintain "any cause of action." This subsection, essentially "opening the Door" for resident plaintiffs, is irrelevant to determining whether . . . a

> nonresident . . . has the capacity to maintain this suit. The second policy expressed in the statute restricts actions brought in state courts to those where the alleged wrong is connected to the State. . . . The third policy consideration when a nonresident seeks to sue a foreign corporation in state court is whether the suit is predicated on the corporation's in-state activities.

Murphy, 356 S.C. at 597, 590 S.E.2d at 481-82. The third statutory provision "prohibits a non-resident from maintaining an action against a foreign corporation in a South Carolina court unless the cause of action arose in South Carolina or the subject of the action is located there." Murphy, 346 S.C. at 45, 550 S.E.2d at 589. Appellant is a not a South Carolina resident. This cause of action relates to a North Carolina insurance policy provision that all evidence suggests was removed by individuals in North Carolina. Finally, all evidence demonstrates that State Farm's actions in South Carolina are unrelated to any potential liability created by its actions in North Carolina. All three objectives of the door closing statute evince that South Carolina has no interest in providing a forum for this suit and require application of section 15-5-150.

Appellant's contention that she is bringing the suit on behalf of the deceased is answered by the fact that the named plaintiff in this case is Jill McCall rather than the Estate of Brian McCall. Appellant is not asserting the decedent's personal claim, but her claim as beneficiary. Additionally, Appellant's complaint contains statements that Jill McCall would have benefited from the death indemnity provision. If the action were brought solely to assert the decedent's claims, discussion of the indemnity's benefit to her would be unnecessary.

Recently, our supreme court addressed the door closing statute in Farmer v. Monsanto, 353 S.C. 553, 579 S.E.2d 325 (2003). In the case sub judice, the circuit court found it lacked subject matter jurisdiction over the case because of the door closing statute, but this is at variance with the conclusion reached in Farmer. Farmer overruled prior case law and determined the door closing statute does not involve subject matter jurisdiction, but instead the capacity of a party to sue. Id. 353 S.C. at 556-57,

579 S.E.2d at 327-28. The decision in Farmer does not impact the conclusion reached by the circuit court. Farmer edifies: "§ 15-5-150 does not involve subject matter jurisdiction but rather determines the capacity of a party to sue." Id. at 557, 579 S.E.2d at 327; accord Moosally v. W.W. Norton & Co., Inc., ___ S.C. ___, ___, 594 S.E.2d 878, ___ (Ct. App. 2004).

CONCLUSION

Based on the foregoing, the circuit court's grant of summary judgment is

AFFIRMED AS MODIFIED.

HUFF and BEATTY, JJ., concur.