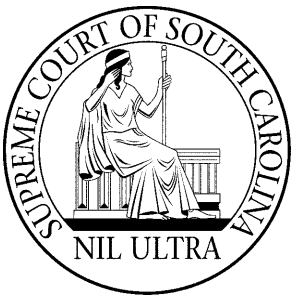

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 27
June 16, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Christopher Sam Commander, Appellant.

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

Opinion No. 4560
Heard March 18, 2009 – Filed June 11, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek and Assistant Appellate Defender LaNelle C. DuRant, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh,

Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Melody J. Brown, Office of the Attorney General, of Columbia; and Solicitor Warren B. Giese of Columbia, for Respondent.

GEATHERS, J.: Appellant Christopher Commander seeks review of his murder conviction. He challenges the trial court's admission of certain expert testimony and the trial court's failure to charge the jury on the defense of accident. We affirm.

FACTS/PROCEDURAL HISTORY

Commander's pregnant girlfriend, Gervonya Goodwin, was last seen alive by members of her family on November 29, 2004. On January 7, 2005, her family discovered her body covered with a blanket and lying on a couch inside her home. The body was mummified and partially decomposed.[1] Additionally, Goodwin's purse, cell phone, and car were missing. Police investigators and family members later discovered that Commander had (1) stolen Goodwin's car, credit cards, and cell phone; (2) withdrawn money from her bank accounts; and (3) sent text messages from her cell phone to members of her family indicating that she was at the beach and was still alive. Commander admitted to killing Goodwin when he was arrested in New Orleans, Louisiana.

The State indicted Commander for murder in violation of S.C. Code Ann. § 16-3-10 (2003). At trial, the State's expert in forensic pathology, Dr. Clay Nichols, testified that the cause of Goodwin's death was asphyxiation. Prior to sharing his final conclusion as to the cause of death, counsel for the

[1] "Mummified" means that the body is dried out from a low level of humidity so that the skin surfaces are relatively maintained and the internal organs maintain their shape in the normal anatomic relationships. The State's expert in forensic pathology, Dr. Clay Nichols, stated that Goodwin's body could have dried out from being left in her heated home for several weeks.

State questioned him about his preliminary conclusion upon examining Goodwin's body at her home:

> Q Did you come – after your examination and prior to getting the toxicology reports back, did you come to a preliminary conclusion as [sic] the cause of death in this case?
>
> A Yes, I did.
>
> Q And what was that, sir?
>
> A Given the fact that this woman died under suspicious circumstances, that the history I was given was that her – she was already in her house, no one had talked to her for a period of time, her car was missing, her purse was missing, there was some indication that somebody was sending text messages to family members indicating that the dead woman, Gervonya Goodwin, was still alive, this indicated an extremely suspicious circumstance, and I felt that we were dealing with a homicide.

Defense counsel immediately objected. Outside the jury's presence, defense counsel argued that Dr. Nichols' opinion was based on matters outside the scope of his expertise and therefore was not allowed under Rule 702, SCRE.[2] The trial court questioned Dr. Nichols on his definition of "homicide," and Dr. Nichols responded as follows:

> THE WITNESS: Yes sir. Homicide is someone [sic] who died as a result of the actions of another individual.

[2] Rule 702, SCRE, states the following: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

THE COURT: As opposed to?

THE WITNESS: An accidental cause where somebody **unintentionally** caused death to another individual.

(emphasis added). Defense counsel objected to Dr. Nichols' use of the concept of intent in his definition of "homicide" and requested that the trial court give a curative instruction to the jury.

The trial court did not indicate whether it would give a curative instruction, but it directed counsel for the State to question Dr. Nichols on his definition of "homicide" in the jury's presence.[3] Dr. Nichols provided the jury with the following definition:

Q Doctor, what is your definition of homicide?

A A person that [sic] has died as a result of another person's actions.

Q And in your opinion in this case, was this or could this have been a natural death?

A No, I don't believe so.

[3] The trial court relied on the opinion of Maine's Supreme Judicial Court in State v. Young, 662 A.2d 904 (Me. 1995), in which the court held that a medical examiner's testimony that the victim's death was a homicide neither exceeded the examiner's area of expertise nor invaded the province of the factfinder. The opinion explained that the trial court could prevent any potential prejudice by explaining that the term "homicide" merely distinguishes death caused by another human being from accidental and natural deaths and suicide.

Q Or an accidental death?

A No, I do not believe so.

Q Or a suicide?

A No, I don't believe so.

Defense counsel cross-examined Dr. Nichols on his earlier statement that Goodwin died under "suspicious circumstances," and Dr. Nichols explained that the autopsy process included interpreting the history of the case. During his explanation, Dr. Nichols stated "somebody went through an awful lot of effort to cover up this death . . . ." After ruling out other causes of death, Dr. Nichols concluded that the cause of Goodwin's death was homicide due to asphyxiation. The conclusion was based in part on the absence of any other cause. Dr. Nichols later stated, "I'm not claiming intent. I'm claiming that she died as a result of somebody else's actions."

The State also presented the testimony of John Pressley, who met Commander while they were both serving prison time at the Alvin S. Glenn Detention Center. Pressley testified that Commander approached him to obtain assistance with a petition for a writ of habeas corpus and that they had several conversations about Commander's pending murder charge. Pressley recounted Commander asking him the following question:

> What do you think if I told my attorney to tell them that she, the victim, hit me in the head with a stick, we had an argument and she hit me in the head with a stick and I fell unconscious and fell on top of her, and when I regained consciousness she had died from being suffocated?

Pressley stated that he told Commander that no one was going to believe that account of events. Pressley also indicated that Commander later told him that he had an argument with Goodwin, that she hit him with a stick and made

him angry, and that he fell on her and suffocated her. Pressley further stated, "I asked him were you unconscious, and he said, no, he wasn't unconscious, he suffocated her." On cross-examination, Pressley repeated Commander's question regarding what he should tell his attorney:

> And he asked me a question, what did I think, he wanted my opinion. If he had this lawyer . . . what did I think if he told his lawyer to tell the State that his girlfriend, the victim, hit him in the head with a stick and he fell unconscious and fell on her and when he was – when he regained consciousness that she had died from suffocation because he was on her, he fell on top of her. And I told him, no one is going to believe this.

At the conclusion of trial, defense counsel requested the trial court to charge the jury on the defenses of self-defense and accident, but the trial court declined to do so. As to Dr. Nichols' testimony, the trial court charged the jury that they were not to place any expert opinions "above the idea of your own opinions on the subject, but you are to consider these opinions along with all the other evidence in the case in forming your own conclusions." The jury found Commander guilty of murder, and the trial court sentenced Commander to life imprisonment without the possibility of parole. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in allowing Dr. Nichols to give his opinion that the "suspicious circumstances" surrounding Goodwin's death indicated a homicide when that opinion was not based on scientific, technical, or other specialized knowledge that would assist the jury in understanding the evidence or in determining a disputed fact as required by Rule 702, SCRE?

2. Did the trial court err in declining to charge the jury on the defense of accident?

STANDARD OF REVIEW

The conduct of a criminal trial is left largely to the discretion of the trial court, and this Court will not interfere unless the rights of the appellant were prejudiced. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). As such, this Court reviews errors of law only and is bound by the trial court's factual determinations unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

LAW/ANALYSIS

I. Admission of Expert Testimony

Commander asserts that the trial court erred in admitting Dr. Nichols' opinion that the "suspicious circumstances" surrounding Goodwin's death indicated a homicide because that opinion was not based on scientific, technical, or other specialized knowledge that would assist the jury in understanding the evidence or in determining a disputed fact. We conclude that Commander was not prejudiced by the admission of this opinion into evidence.

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Rule 103, SCRE. In other words, to warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005); Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

To establish prejudice, the appellant must convince this Court that there is a reasonable probability that the jury's verdict was influenced by the challenged evidence. Fields, 363 S.C. at 26, 609 S.E.2d at 509. Here, Commander argues that he was prejudiced by Dr. Nichols' opinion detailing

the "suspicious circumstances" of Goodwin's death because it misled the jurors into substituting his opinion for their own judgment on matters not requiring specialized knowledge.

Assuming, arguendo, that the admission of this opinion violated Rule 702, SCRE, Commander was not prejudiced. Dr. Nichols later explained to the jury that in concluding that Goodwin's death was a homicide, he was not purporting to give an opinion on "intent," but was rather attempting to establish the manner of death—that Goodwin died as a result of somebody else's actions. Further, during the course of giving standard jury instructions, the trial court advised the jury that they were not to place any expert opinions above the idea of their own opinions on the subject at hand, but that they were to consider expert opinions along with all the other evidence in the case in forming their own conclusions. Such an instruction is consistent with established South Carolina law. "The same tests which are commonly applied in the evaluation of ordinary evidence are to be used in judging the weight and sufficiency of expert testimony." State v. Douglas, 380 S.C. 499, 503, 671 S.E.2d 606, 609 (2009); [4] see also State v. White, Op. No. 26642 (S.C. Sup. Ct. filed April 27, 2009) (Shearouse Adv. Sh. No. 18 at 36, 41) (holding that the trial court properly instructed the jury that they were to give expert dog handler's testimony such weight and credibility as they deemed

[4] In Douglas, the defendant, who had been convicted of committing a lewd act on a minor, argued that the trial court erred in qualifying a witness who had interviewed the victim as an expert in forensic interviewing and in admitting her testimony that, based on the interview, she concluded that a medical evaluation was necessary. Id. at 500-01, 671 S.E.2d at 607. The defendant argued that the witness' testimony was prejudicial because the jury likely gave her testimony undue weight simply because of her qualification as an expert. Id. at 503, 671 S.E.2d at 609. The Court held that the disputed testimony was not required to be presented by an expert witness, but that the defendant was not prejudiced by her qualification as an expert because such qualification did not require the jury to accord her testimony any greater weight than that given to any other witness. Id. at 502-03, 671 S.E.2d at 608-09.

appropriate as with any and all witnesses testifying at trial). "As with any witness, the jury is free to accept or reject the testimony of an expert witness." Douglas, 380 S.C. at 503, 671 S.E.2d at 609.

In any event, the admission of the disputed testimony was harmless in light of the overwhelming evidence of Commander's guilt. See State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (holding that whether error is harmless depends on the facts of each case, including the importance of challenged testimony in prosecution's case, whether the testimony was cumulative, presence or absence of evidence corroborating or contradicting testimony on material points, extent of cross-examination otherwise permitted, and overall strength of prosecution's case). Therefore, the admission of Dr. Nichols' testimony does not warrant reversal. See Rule 103, SCRE (stating that error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected); State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding that error is harmless when it could not reasonably have affected the result of the trial).

II. Jury Charge on Accident

Commander argues that the trial court erred in failing to instruct the jury on the defense of accident. We disagree.

If a killing is unintentional and occurs "while the perpetrator [is] engaged in a lawful enterprise, and [is] not the result of negligence, the homicide will be excused on the score of accident." State v. Brown, 205 S.C. 514, 521, 32 S.E.2d 825, 828 (1945).

"The law to be charged must be determined from the evidence presented at trial." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). In determining whether the evidence requires a charge of accident, the Court views the facts in a light most favorable to the defendant. Cf. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996) (charging

voluntary manslaughter). However, an instruction should not be given unless justified by the evidence. State v. Moultrie, 273 S.C. 532, 533, 257 S.E.2d 730, 731 (1979). "If a jury instruction is provided to the jury that does not fit the facts of the case, it may confuse the jury." State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). This Court will not reverse the trial court's ruling regarding jury instructions unless the trial court abused its discretion. State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005).

Commander points to John Pressley's testimony as evidence of an accident. Commander cites State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001), for the proposition that inconsistencies in the evidence must not deprive a defendant of the benefit of evidence supporting a jury charge on a lesser-included offense. In Knoten, our Supreme Court held that a jury charge on voluntary manslaughter was required when the evidence included a confession that showed sufficient legal provocation despite other evidence showing that the defendant later recanted the confession. Id. at 308-09, 555 S.E.2d at 397-98.

Even if we disregard Commander's admission to Pressley that he was not unconscious when he fell on Goodwin, Commander's earlier strategy session with Pressley indicated that Commander merely sought advice on what to tell his attorney. In our view, this does not constitute evidence of an accident. Therefore, the trial court acted well within its discretion in declining to charge the jury on the defense of accident.

CONCLUSION

Accordingly, Commander's conviction is

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Melenia Trotter, Respondent,

v.

Trane Coil Facility, Employer, and Phoenix Insurance Company, Carrier, Appellants.

Appeal From Richland County
James E. Lockemy, Circuit Court Judge

Opinion No. 4561
Heard April 22, 2009 – Filed June 12, 2009

REVERSED IN PART, VACATED IN PART, and REMANDED

Rebecca Anne Roberts and Byron P. Roberts, of Chapin, for Appellants.

Ann M. Mickle, of Rock Hill, Stephen B. Samuels, of Columbia, for Respondent.

WILLIAMS, J.: Trane Coil Facility and Phoenix Insurance Company (collectively referred to as Employer) appeal from the circuit court's order affirming the Appellate Panel of the Workers' Compensation Commission's (the Appellate Panel) finding that Melenia Trotter (Claimant) was entitled to workers' compensation benefits for an injury to her lower back. We reverse in part, vacate in part, and remand.

FACTS/PROCEDURAL HISTORY

Claimant began working for Spherion Temporary Services (Spherion) in August 2004. Spherion provides temporary workers to companies including Employer. Claimant began working for Employer around December 2004.[1] Employer manufactures and supplies heating, ventilation and air conditioning systems, and Claimant worked in the "turb and trim" position, turbulating and trimming coils.

According to Claimant's testimony, in December 2004 she began to experience "low back pain" and stiffness from turbulating and trimming coils. Claimant allegedly reported her back pain to her team leader, Darryl Cloud, on several occasions. She also claims to have reported the pain to Dwayne Duboo, Employer's safety director, on one occasion as well.

On January 31, 2005, Claimant felt a "pop" in her lower back area while she was turbulating. Although she continued to work all week, the pain steadily increased. Claimant stated she kept Cloud informed of her situation. On February 4, 2005, Claimant saw her supervisor, Pat Charleston, and allegedly informed him she hurt her back turbulating and was going to have to go to the doctor. Claimant stated Charleston advised her he would send Duboo to speak with her. Claimant then left to go home without hearing from Duboo.

[1] Claimant's start date with Employer is in dispute. Claimant argues she began working for Employer November 15, 2004, while Employer claims she did not begin until December 6, 2004.

On February 5, 2005, Claimant went to the emergency room due to her lower back pain. Claimant received a shot in the hip and some pain medication, and she made an appointment with Dr. W. Scott James, III, an orthopedist, for the following week.

On February 7, 2005, Dr. James examined Claimant and scheduled an MRI. Claimant testified she called Carlos Mays in Employer's personnel department to inform him Dr. James had advised her to not work. Claimant stated Mays told her to bring in the doctor's slip, and Charleston made of copy of the document.

Following the MRI, Dr. James recommended Claimant undergo surgery, which she did on February 21, 2005. Claimant applied for and began receiving short-term disability benefits from Employer, which ended in April 2005.

On February 28, 2005, Claimant participated in a conference call with Charleston, Duboo, Mays, and Adrian Barnhill, Employer's human resource manager. During this call, Claimant revealed she had undergone surgery, and she subsequently provided a written statement documenting her claim.

On May 11, 2005, Claimant filed a Form 50 alleging "an accidental injury to her back on 2-4-05" caused by repetitive "lifting, pulling and pushing." Claimant also stated she gave verbal notice to her "supervisor" on February 4, 2005. In response, Employer denied the claim pending further investigation because (1) Claimant failed to provide notice prior to proceeding with the surgery, and (2) Employer found no evidence Claimant's back complaints and her job duties were causally connected. A hearing was scheduled for September 20, 2005.

Prior to the hearing, Employer made two motions. The first motion was to add Spherion as a defendant in the suit. Employer made this request because "Claimant's medical report state[d] that 'this [medical condition] has really been going on for the past several months'[, and] . . . Claimant ha[s] only been employed by [Employer] for approximately two and a half months." The single commissioner denied the motion.

In the second motion, Employer requested a continuance due to the difficulty it faced in scheduling a deposition with Dr. James. Employer originally scheduled Dr. James's deposition for September 7, 2005. Due in part to Employer's plan to also depose Claimant on that date, Employer rescheduled Dr. James's deposition for September 14, 2005. Dr. James later canceled the deposition and rescheduled for October 3, 2005. The single commissioner denied the motion.

At the hearing, Employer requested the record remain open for Dr. James's deposition. Employer additionally requested the record remain open for the deposition of Charleston. He was unable to attend the hearing due to his hospitalization for stomach cancer complications. The single commissioner denied the request as to Dr. James's deposition, finding Employer had the opportunity to depose him but chose not to for strategic reasons. The single commissioner, however, granted the request as to Charleston and agreed to leave the record open for fourteen days. As of October 4, 2005, Charleston's doctors stated he was still incapacitated, so Employer requested an "additional period of time to allow the parties to proceed with the deposition of Mr. Charleston." This request was granted, and the single commissioner allowed the record to remain open until October 20, 2005. Notice of this extension was mailed to Employer October 20, 2005, and was therefore received after the record had already been closed.

The single commissioner issued an order on May 5, 2006. In this order, the single commissioner found:

> That on or about December 31, 2004[, Claimant] felt a pop in her back while working. She continued to work until February 4, 2005, causing further injury to her low back. . . . [Claimant] properly and timely reported the problems with her back to both her team leader[, Cloud,] and to her supervisor, Pat Charleston. . . . [O]n [Claimant's] first visit to a medical doctor [(Dr. James)] after the injury, she reported a work related injury to her lower back. . . . Dr. James causally related her low back complaints and resulting injury to the job that [Claimant] performed

> with [Employer]. . . . [T]he workers' compensation carrier for [Employer] shall reimburse [Claimant's] private insurance carrier for all causally related medical treatment incurred since the accident date of December 31, 2004. . . . [Employer] is the employer responsible for this claim and that all benefits referenced in this Order shall be provided through them.

The Appellate Panel sustained the single commissioner's order in its entirety, as did the circuit court. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act (the APA) governs this Court's standard of review in appeals from the Appellate Panel. Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 164 (Ct. App. 2007). "In an appeal from the [Appellate Panel], neither this Court nor the circuit court may substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact." Id. However, an appellate court may reverse or modify a decision of the Appellate Panel "if the findings and conclusions of the administrative agency are affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Gray v. Club Group, Ltd., 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000).

LAW/ANALYSIS

Employer argues the Appellate Panel abused its discretion by affirming the single commissioner's refusal to grant Employer's pretrial motion for a continuance in order to allow for the depositions of two key witnesses to be taken. We agree.

"Administrative agencies are required to meet minimum standards of due process," and "[i]n cases where important decisions turn on questions of fact, due process at least requires an opportunity to present favorable

witnesses." Smith v. S.C. Dep't of Mental Health, 329 S.C. 485, 500, 494 S.E.2d 630, 638 (Ct. App. 1997). "An administrative or quasi judicial body is allowed a wide latitude of procedure and [is] not restricted to the strict rule of evidence adhered to in a judicial court." Hallums v. Michelin Tire Corp., 308 S.C. 498, 504, 419 S.E.2d 235, 239 (Ct. App. 1992). Great liberality is to be exercised in allowing the introduction of evidence in workers' compensation proceedings. Hamilton v. Bob Bennett Ford, 339 S.C. 68, 70, 528 S.E.2d 667, 668 (2000); see Brown v. La France Indus., 286 S.C. 319, 324-25, 333 S.E.2d 348, 351 (Ct. App. 1985) (stating a single commissioner has similar discretion as that of a trial judge in deciding whether to reopen a case for the introduction of additional evidence).

A motion for continuance due to the absence of a material witness is addressed to the judge's discretion, and therefore, the ruling will not be disturbed unless it is shown to be an abuse of discretion. Logan v. Gatti, 289 S.C. 546, 548, 347 S.E.2d 506, 507 (Ct. App. 1986). This abuse of discretion must result in prejudice to the moving party. Hudson v. Blanton, 282 S.C. 70, 74, 316 S.E.2d 432, 434 (Ct. App. 1984). Additionally, "[t]o justify a continuance, the moving party must show not only the absence of some material evidence but also due diligence on his part to obtain it." Id.

As to the deposition of Charleston, we find the Appellate Panel abused its discretion by affirming the single commissioner's decision to not grant Employer's motion for a continuance and to close the record without Charleston's deposition being taken. As Claimant's supervisor, Charleston was the person whom Claimant was to inform regarding any work related injury. From the beginning, Employer contested Claimant's claim arguing Claimant failed to give notice of her injury prior to seeking medical help from Dr. James. Charleston's testimony would undoubtedly be material evidence to the issue of notice, and without his testimony, Employer had no way of contesting the issue. Charleston's testimony was so crucial and important to Employer's defense that its exclusion constitutes prejudicial error. See Guffey v. Columbia/Colleton Reg'l Hosp., Inc., 364 S.C. 158, 170-71, 612 S.E.2d 695, 701 (2005) (stating an appellate court considers whether "the wrongly excluded evidence or testimony was so crucial and important in proving the aggrieved party's claim or defense that its exclusion constitutes prejudicial error").

Additionally, the record contains ample evidence Employer exercised due diligence in obtaining Charleston's deposition, but through no fault of its own was unable to provide that evidence prior to the closing of the record. Employer planned to have Charleston testify in person at the hearing, but when that was not possible because of Charleston's hospitalization, Employer then sought to depose Charleston at the first opportunity his doctors would allow. The record, however, was closed before Employer was able to do so. While the exact date on which Charleston would become available for a deposition was unknown, Employer did not make any unreasonable requests, such as keeping the record open indefinitely. In fact, the record was only left open for one month, while the single commissioner's order was not issued until nearly seven months following the hearing.

Because we find the evidence Employer contemplated offering through Charleston's testimony was crucial, and because Employer exercised due diligence in obtaining that testimony, we find the Appellate Panel abused its discretion by not granting Employer's motion for continuance or keeping the record open for Charleston's deposition. See Logan, 289 S.C. at 548-49, 347 S.E.2d at 507-08 (holding it was "an error of law and consequently an abuse of discretion" to deny a motion for continuance when "only a two and one-half month continuance" was sought, the motion was based upon the witness's absence after being unexpectedly ordered to sea, and the deposition was purely a discovery deposition); see also Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) (finding respondent should have been permitted to complete discovery when the record did not "support a finding that [respondent] was dilatory in pursuing discovery" because depositions were scheduled for the week following the hearing but were postponed and this delay was not solely attributable to respondent).

Concerning the testimony of Dr. James, we likewise find the Appellate Panel abused its discretion by affirming the single commissioner's order not allowing for either a continuance or for the record to remain open for his deposition to be taken. Dr. James was Claimant's treating physician and, as such, had unique and crucial testimony which could not be offered by any other witness or through his medical records alone. By not allowing Employer to take Dr. James's deposition, Employer was left with no way of

challenging Claimant's medical claims. The Appellate Panel's ruling was, therefore, not harmless to Employer, and Employer was prejudiced. See Means v. Gates, 348 S.C. 161, 171, 558 S.E.2d 921, 926 (Ct. App. 2001) ("[W]e find exclusion of the [expert testimony of a neuropsychologist] was not harmless error as there was no equivalent testimony presented to this effect.").

Furthermore, Employer sought to depose Dr. James prior to the hearing, but due to scheduling difficulties, the deposition was scheduled for a date after the hearing. Although Employer rescheduled the deposition once, Employer exercised due diligence to try and take the deposition prior to the hearing. Dr. James, rather than Employer, was the party unavailable before the hearing. The record contained no evidence of misconduct, intentional or otherwise, by Employer that would warrant the exclusion of this crucial witness. See Orlando v. Boyd, 320 S.C. 509, 512, 466 S.E.2d 353, 355 (1996) ("[T]here is no evidence of intentional misconduct in the record which would warrant the exclusion of a crucial witness.").

We find Employer exercised due diligence in trying to depose both Dr. James and Charleston in a timely manner, and Employer was prejudiced by the exclusion of their testimony because it was necessary evidence for the Appellate Panel to make an informed decision. Thus, the Appellate Panel abused its discretion in excluding this testimony. We, therefore, reverse the order of the circuit court affirming the Appellate Panel and remand the case to the Appellate Panel to allow for additional testimony from Dr. James and Charleston.[2] At the conclusion of this testimony, the Appellate Panel shall issue new findings of facts and conclusions of law based on the overall record.

In light of our decision to reverse and remand this case for further testimony, and because we believe the additional testimony could affect

[2] From a practical standpoint, the single commissioner's two rulings on keeping the record open for depositions appear inconsistent. Because the single commissioner was already allowing the record to remain open for Charleston's deposition, allowing the record to also remain open for the deposition of Dr. James would cause no further delay.

Employer's remaining arguments, we vacate the remainder of the circuit court's order and remand all issues to the Appellate Panel for reconsideration following the taking of the additional testimony.[3] See Smith, 329 S.C. at 501-02, 494 S.E.2d at 638 (stating while an appellate court recognizes the Appellate Panel is the sole fact-finder in workers' compensation cases, the improper exclusion of testimony by the single commissioner amounted to an error of law that deprived the claimant of his right to present his case and deprived the Appellate Panel of the evidence it needed to make its findings of fact); see, e.g., Ellerbe v. Ellerbe, 323 S.C. 283, 297, 473 S.E.2d 881, 889 (Ct. App. 1996) (holding the issue of alimony should be remanded for reconsideration because the issue of equitable division was being remanded and would affect the issue of alimony).

CONCLUSION

Based on the foregoing, the circuit court's order is

REVERSED IN PART, VACATED IN PART, and REMANDED.

HUFF and KONDUROS, JJ., concur.

[3] Employer's remaining arguments, which should all be reconsidered on remand, are: (1) the Appellate Panel abused its discretion by refusing to grant Employer's pretrial motion to add Spherion as an additional defendant; (2) the Appellate Panel erred in finding Claimant suffered a compensable injury arising out of and in the course of her employment; (3) the Appellate Panel erred in determining Claimant suffered a compensable injury by accident arising out of and in the course and scope of her employment; and (4) the Appellate Panel erred in failing to address the issue of credit for disability payments made outside the scope of a work related injury.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Matthew S. Walrath, Appellant,

v.

Stephanie A. Pope, Respondent.

Appeal From Richland County
Kellum W. Allen, Family Court Judge

Opinion No. 4562
Submitted April 1, 2009 – Filed June 12, 2009

AFFIRMED

Stephen D. Schusterman, of Rock Hill, for Appellant.

Paul V. Degenhart, of Columbia, for Respondent.

WILLIAMS, J.: Matthew Walrath (Father) appeals the family court's order finding Stephanie Pope (Mother) should retain custody of the couple's two minor children even if Mother moves out of state. We affirm.

FACTS/PROCEDURAL HISTORY

Father and Mother married in March 1998 in Texas. They had two children while married, a daughter born in 1999 and a son born in 2000. The couple later divorced in Texas in June 2002. Pursuant to the Texas Divorce Decree (the Decree), Father and Mother were granted joint custody of the children, with primary custody being awarded to Mother. Additionally, the Decree gave Mother the right to establish the primary residence of the two children. Mother was required to give Father sixty days notice if she intended to move with the children.

Mother moved with the children from Texas to Maryland for a job opportunity in June 2003. Father followed the family to Maryland in order to remain close to the children. Father eventually found employment as a facility supervisor. While in Maryland, Mother married her current husband (Stepfather) and had a child with him.

In May 2004, Mother gave Father notice she would be moving with the children to Blythewood, South Carolina. Stepfather had an opportunity to practice law with a South Carolina firm, which would allow Mother to stay at home with the children. Father again followed Mother and the children, relocating to Fort Mill where he was able to get a job with his same company. While living in Fort Mill, Father began dating and eventually married his current wife (Stepmother).

After Stepfather began to experience some job difficulties, Mother began to search for a job. Mother searched in the Columbia and Charlotte areas but with no success. Eventually she expanded her search to other states and was able to secure a job working out of her home in South Carolina for a company in the Kansas City area. After her company told her she must relocate to Kansas City, Missouri in order to keep her job, Mother gave Father notice of her intended move. Father then brought this action, asking for a change of custody or, in the alternative, an order prohibiting Mother from moving the children to Kansas City. A hearing was held. The family

court found no change of custody was in order, and Mother was allowed to move the children. This appeal followed.

STANDARD OF REVIEW

When reviewing a family court order, this Court may find facts based on its view of the preponderance of the evidence. Patel v. Patel, 359 S.C. 515, 522-23, 599 S.E.2d 114, 118 (2004). This broad scope of review, however, does not relieve the appealing party of the burden of showing the family court committed error. Latimer v. Farmer, 360 S.C. 375, 380, 602 S.E.2d 32, 34 (2004). Additionally, this Court is not required to disregard the family court's findings, as it was in the position to see and hear the witnesses and was therefore in a better position to evaluate their credibility. Patel, 359 S.C. at 523, 599 S.E.2d at 118. "This degree of deference is especially true in cases involving the welfare and best interests of the [children]." Latimer, 360 S.C. at 380, 602 S.E.2d at 34.

LAW/ANALYSIS

Father argues the family court erred in determining custody of the children should remain with Mother even if she moves to Kansas City. We disagree.

South Carolina courts have recognized the difficulty of the issue we have before us: balancing the custodial parent's right to relocate with the minor children against the non-custodial parent's "right to continue his or her relationship with the [children] as established before the custodial parent's relocation." Id. This issue is made even more difficult when both parents share a devoted and loving relationship with the children, as Mother and Father do in the current situation. In resolving this issue, however, our Supreme Court has stated we are no longer to be guided by the presumption against relocation, and should instead focus on the children's best interests. Id. at 381, 602 S.E.2d at 34-35.

"In all child custody cases, including relocation cases, the controlling considerations are the [children's] welfare and best interests." Id. at 381, 602

S.E.2d at 35. When a change in custody is sought, the non-custodial parent must show a change in circumstances occurring subsequent to the entry of the divorce decree. Id. This change of circumstances must be such that it would substantially affect the interests and welfare of the children, not merely the parties, their wishes, or their convenience. Sharpe v. Sharpe, 256 S.C. 517, 521, 183 S.E.2d 325, 327 (1971). Additionally, "it is incumbent upon the moving party to show that the welfare of the [children] requires the court to ignore and set aside the agreement of the parties incorporated in the decree." Id.

Because the overriding concern in all child custody matters is the best interests of the children, when a change in custody is sought by the non-custodial parent, that parent must establish (1) there has been a substantial change in circumstances affecting the welfare of the children and (2) a change in custody is in the overall best interests of the children. Latimer, 360 S.C. at 381, 602 S.E.2d at 35.

A change in the custodial parent's residence is not in itself a substantial change in circumstances affecting the welfare of the children that justifies a change in custody. Id. at 382, 602 S.E.2d at 35.

> Relocation is one factor in considering a change in circumstances, but is not alone a sufficient change in circumstances. One location may not necessarily affect the best interests of the [children] as would another. The effect of relocation on the [children's] best interest[s] is highly fact specific. It should not be assumed that merely relocating and potentially burdening the non-custodial parent's visitation rights always negatively affects the [children's] best interests.

Id.

While South Carolina has not delineated criteria for evaluating whether the best interests of the children are served in relocation cases, our Supreme

Court has acknowledged, without endorsing or specifically approving, factors other states consider when making this determination. Id. For example, our Supreme Court stated the New York Court of Appeals looks at (1) each parent's reason for seeking or opposing the relocation; (2) the relationship between the children and each parent; (3) the impact of the relocation on the quality of the children's future contact with the non-custodial parent; (4) the economic, emotional, and educational enhancements of the move; and (5) the feasibility of preserving the children's relationship with the non-custodial parent through visitation arrangements. Id. at 382-83, 602 S.E.2d at 35-36 (citing Tropea v. Tropea, 665 N.E.2d 145, 148 (N.Y. 1996)). Additionally, our Supreme Court noted Pennsylvania courts require the following considerations in relocation cases: (1) the economic and other potential advantages of the move; (2) the likelihood the move would substantially improve the quality of life for the custodial parent and the children and is not the result of a whim of the custodial parent; (3) the motives behind the parent's reasons for seeking or opposing the move; and (4) the availability of a realistic substitute visitation arrangement that will adequately foster an ongoing relationship between the non-custodial parent and the children. Id. at 383, 602 S.E.2d at 36 (citing Gancas v. Schultz, 683 A.2d 1207, 1210 (Pa. Super. Ct. 1996)).

Applying some of these factors to the present case, while keeping in mind the overriding consideration of the children's best interests is paramount, we affirm the family court's order allowing custody of the children to remain with Mother even if she relocates with the children to Kansas City.

We first note the integrity of the motives behind each parent's reason for seeking or opposing the move does not weigh against either parent, as neither Mother nor Father demonstrated any spiteful or vindictive motives. Mother testified as to the financial reasons behind the move to Kansas City and the difficulty she has had trying to find employment closer to South Carolina. Mother also testified she believed the move was in the children's best interests. Likewise, Father testified his only reason for opposing the move was because he believed it was in the children's best interests to be

allowed to "settle down" in South Carolina where they have become a part of the community.

Additionally, both Mother and Father share a healthy, loving relationship with the children. The guardian ad litem (GAL) testified this was a case involving not only two good parents, but also two stepparents that love the children. After spending time with the children in both households and recognizing the strong relationship each parent shares with the children, the GAL recommended the family court allow Mother to move to Kansas City. The family court also found that even though "[b]oth parents should be commended for putting their children first[,] . . . the children are doing well under the current situation while being in [Mother's] care." The family court noted the children are "flourishing while being in the primary care of [Mother]."

Further, the move to Kansas City will provide potential advantages to the children, which were discussed at the hearing. With the move, Mother will be able to provide the children with economic security she cannot provide if she were to remain in South Carolina. This economic security includes not only a comfortable income but also affordable health insurance. Additionally, Mother testified the company she works for believes in a balance between work and home life, which will allow for more time with the children. Furthermore, Mother testified she has lots of family and friends in the area, which would provide a support system for the entire family. This testimony, as well as other testimony that Mother has already looked into schools and housing in the Kansas City area, additionally demonstrates Mother has put a great deal of thought into the potential move to Kansas City and the move is not the result of a whim on her part.

Finally, when looking into the availability of a realistic substitute visitation arrangement between Father and the children, the family court acknowledged Father stated he will move to Kansas City if Mother is allowed to move there with the children. If Father follows through with this move, Father's visitation with the children will likely increase. Mother stated she would allow Father to pick the neighborhood she would move to, in hopes that both parents would live in the same area, which would cut down on the

children's travel time between the two households and allow Father to attend more of the children's activities. The family court, however, also provided for continued visitation while Father remains in South Carolina. The family court was able to provide a new schedule that allowed Father to continue to have visitation with the children every other weekend and alternating holidays as the Decree allowed. This new schedule included the added benefit of Mother reimbursing Father for one airline ticket per month if he chooses to fly to Kansas City to visit the children. Although we acknowledge the relationship between Father and the children will be significantly affected if Father remains in South Carolina, the family court's order acknowledged the new hardships and did its best to provide the children with continuous and meaningful contact with Father.

After considering all of the evidence presented and giving deference to the family court, we find Father has failed to establish a substantial change in circumstances affecting the welfare of the children. We, therefore, do not believe a change in custody is in the children's best interests.[1]

CONCLUSION

Based on the foregoing, the family court's order is

AFFIRMED.[2]

HUFF and KONDUROS, JJ., concur.

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[1] Although Father states that if a change in custody is not granted, an alternate ground to his argument is that this Court should prohibit Mother from moving, Father never makes a separate argument for this alternate position. His brief only addresses the change of conditions that should allow for a change of custody, and therefore, we decline to address this argument. See Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (stating an issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority).

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Diane M. Tracy, Respondent,

v.

Preston Tracy, Appellant.

Appeal From Horry County
H. T. Abbott, III, Family Court Judge

Opinion No. 4563
Submitted May 1, 2009 – Filed June 12, 2009

AFFIRMED

Elizabeth J. Saraniti, and Virginia L. Moore, of Surfside Beach, for Appellant.

James P. Stevens, Jr., of Loris, for Respondent.

SHORT, J.: Preston Tracy appeals the family court's denial of his Rule to Show Cause. Mr. Tracy argues the family court erred in failing to find Diane Tracy in contempt, allowing Ms. Tracy to enter into an Offer In Compromise (OIC) with the Internal Revenue Service (IRS), and failing to award attorneys' fees and costs. We affirm.

FACTS

On January 17, 2007, after seven-and-a-half years of marriage, the Tracys divorced. The statutory ground for divorce was Ms. Tracy's adultery. The Final Order and Decree of Divorce contained the following language:

> As to the tax liability for 2004 and 2005 tax years, the parties agree to file joint tax returns . . . with accountant David Gatti preparing such returns. As to each tax year (2004, 2005 and 2006) Wife shall have 30 days within which to provide all necessary paperwork relative to her income and deductible expenses and shall review and execute such returns within five (5) days of notification from the accountant that such returns are complete . . . . Wife shall bear sole responsibility for the costs for preparing these returns and shall be solely responsible for any tax liability associated with these tax years.
>
> . . .
>
> Husband shall loan Wife $15,000 . . . and such loan shall be secured along with her obligation to pay a portion of Husband's attorney's fees/costs, her obligation to reimburse Husband for her share of the tax liability for 2006 and her responsibility for 100% of the tax liability associated with 2004 and 2005 with a first mortgage against [her property] . . . . The note and mortgage shall reflect an initial amount of

> $35,000 ($15,000 loan and $20,000 for attorney's fees/costs) and shall have a future advance clause securing her obligation as to her tax liability as specified above.

Additionally, the Order provided any violation "shall be considered Contempt of Court."

On May 16, 2007, Mr. Tracy filed a Rule to Show Cause, requesting the court require Ms. Tracy to show cause why she should not be held in contempt of court for noncompliance with the terms and conditions of the Final Order and Decree of Divorce. The family court found Ms. Tracy failed to comply with certain time limits set forth in the Final Order, specifically noting the requirement of filing the tax returns and forwarding the payment. Nevertheless, the family court determined Ms. Tracy's noncompliance was not willful, and thus, did not hold her in contempt. Specifically, the court noted Ms. Tracy delayed her execution and forwarding of the tax returns because her two minor children's social security numbers were incorrect, depriving her of the deductions, and the correction took approximately four months to resolve. Thus, the court did not find her in willful contempt because the court believed she had a valid reason for requesting the corrections.

Addressing Ms. Tracy's noncompliance with the Order by not paying the 2004 and 2005 taxes, the family court noted she entered into negotiations with the IRS for an OIC. The court again found her conduct was not willful: "She signed the returns, obtained a mortgage for the funds necessary to pay off the obligations, contacted the taxing authorities, completed and filed the Offers in Compromise with the required partial payments and held the balance of the funds with an escrow agent." Moreover, the family court stated:

> At the time the agreement was approved, [Ms. Tracy] was without funds to meet the financial obligations imposed; for she had to borrow money from [Mr. Tracy] to purchase the home. Subsequently, she

> obtained a mortgage and paid off [Mr. Tracy] with the balance of the funds placed in escrow. Her delay in obtaining the mortgage funds for the payment of the obligations was, in my opinion, not entirely her fault; for she had difficulty in obtaining the payoff amount from [Mr. Tracy] as to his existing mortgage. Her borrowing capacity is limited by her income and although she initially obtained funds, which she believe[d] to be sufficient to pay the obligations, this turned out not to be the case. For the actual tax amounts exceeded the figure contained on the spread sheet attached to the parties' agreement.

Additionally, the family court found Ms. Tracy's testimony credible, especially regarding her belief that the amount of tax liability she was assuming was contained on the spreadsheet attached to the parties' agreement, which was approximately $30,000, and the actual amount exceeded $40,000.

With regard to Mr. Tracy's lien status on Ms. Tracy's property, the family court stated it was difficult to understand because "once he was paid the funds owed, his lien status became a non-issue." Finally, the family court dismissed the Rule to Show Cause, found Ms. Tracy was not in contempt, and authorized Carroll Padgett (Ms. Tracy's escrow agent) to disburse the funds for the OIC. Mr. Tracy moved for reconsideration and the family court denied his motion. This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005). However, despite our broad scope of review, we remain mindful of the family court's findings because it is the family court who observed the witnesses, and who was in a better position to evaluate the witnesses' credibility and assign comparative weight to their testimony. Id.

LAW/ANALYSIS

I. Contempt

Mr. Tracy argues the family court erred in failing to find Ms. Tracy in contempt for: (1) willful failure to provide payment to the IRS and respective state agencies when she forwarded the parties' joint 2004 and 2005 income taxes as required by the Final Order and Decree of Divorce; and (2) willful failure to provide him with a first mortgage on her property to protect his interest as required by the Final Order and Decree of Divorce. We disagree.

"A trial court's determination regarding contempt is subject to reversal where it is based on findings that are without evidentiary support or where there has been an abuse of discretion." Henderson v. Puckett, 316 S.C. 171, 173, 447 S.E.2d 871, 872 (Ct. App. 1994). "An abuse of discretion occurs either when the court is controlled by some error of law or where the order, based upon findings of fact, lacks evidentiary support." Townsend v. Townsend, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003).

> A party may be found in contempt of court for the willful violation of a lawful court order. Before a party may be found in contempt, the record must clearly and specifically show the contemptuous conduct. In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order. At the same time, we remain cognizant that "contempt is an extreme measure and the power to adjudge a person in contempt is not to be lightly asserted."

Hawkins v. Mullins, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004) (internal citations omitted).

Section 63-3-620 of the South Carolina Code provides the penalties for an adult's violation of a court's order: "An adult who wilfully violates,

neglects, or refuses to obey or perform a lawful order of the court, or who violates any provision of this title, may be proceeded against for contempt of court." S.C. Code Ann. § 63-3-620 (2008).[1]

Here, Ms. Tracy testified at length regarding her efforts to comply with the Final Order and Decree of Divorce. She stated she began attempting to obtain a mortgage the day after the Final Order and Decree of Divorce was entered. Ms. Tracy indicated she obtained a letter from the first company she sought a mortgage from stating it would not give her a mortgage because Mr. Tracy would not release a note with the payoff amount. Additionally, Ms. Tracy contended Mr. Tracy continually contacted the taxing authorities to complicate her attempts to resolve the situation.[2] His interference required her to constantly check with the agencies to ensure she was getting all the necessary information. As a result of his conduct, Ms. Tracy contended she had to hire an escrow agent, Carroll Padgett, to finally obtain the payoff amount and secure a mortgage. In response to Mr. Tracy's allegation Ms. Tracy paid personal debts before the tax liabilities, Ms. Tracy explained she had to pay the approximate $6,000 in personal debt before being qualified for the mortgage.

Additionally, Ms. Tracy explained she did not mail the payment with the tax returns to the IRS because she had not closed on the mortgage and did not have the money. Moreover, she stated she would have forwarded the

[1] Section 63-3-620 was formerly codified as section 20-7-1350 of the South Carolina Code of Laws (Supp. 2007).

[2] An example of his interference was evidenced during his cross-examination. Ms. Tracy identified six letters from taxing authorities where Mr. Tracy changed the primary address from her home address to his home address. Specifically, Mr. Tracy testified: "I didn't change the address so that [Ms. Tracy] would not get any communications. I did talk to the IRS and I did inform them that mine was the primary social security number on [the return]." Additionally, Mr. Tracy contacted the IRS to inform them of the escrow account, seemingly in an effort to thwart the OIC acceptance. Ms. Tracy also testified Mr. Tracy called the tax agencies to inform them that she had enough money to pay the taxes in full.

funds with the returns if she had enough funds, but the estimate on the parties' agreement was incorrect. Ms. Tracy eventually obtained a $90,000 mortgage on her house to pay her obligations under the Final Order and Decree of Divorce.

After Padgett received the escrow funds,[3] he began paying the tax agencies. Ms. Tracy indicated she paid the 2006 taxes, but entered into an OIC with the IRS for the 2004 and 2005 taxes, and filed the OIC as quickly as she could.

With regard to the delay in filing the returns, David Gatti, Mr. Tracy's personal accountant, testified the taxes contained incorrect social security numbers for Ms. Tracy's children and it took him almost two months to correct the return.

Hence, the family court did not err in refusing to find Ms. Tracy in contempt for noncompliance with the Final Order and Decree of Divorce. While the record does contain evidence that Ms. Tracy did not comply with all of the time limits set forth in the Order, we find Ms. Tracy did not willfully violate, neglect, or refuse to perform the duties proscribed in the Order. Additionally, ample evidence in the record supports the family court's findings.

In addressing Mr. Tracy's contention that Ms. Tracy should have maintained Mr. Tracy's first lien status on her property until the tax liabilities are completely satisfied, we agree with the family court that his argument is difficult to comprehend. Once Mr. Tracy was paid the funds he was owed, his lien status essentially became a non-issue because she no longer owed him money. Ms. Tracy has accepted responsibility and has taken appropriate measures to satisfy the tax liabilities through obtaining a mortgage of her own and entering into an OIC with the IRS. Accordingly, the family court

[3] Ms. Tracy first paid Mr. Tracy $35,000 for the $15,000 loan to purchase the house and $20,000 in attorneys' fees and costs, pursuant to the Final Order and Decree of Divorce. The remainder of the mortgage was placed in an escrow account to satisfy the tax liabilities.

properly found Ms. Tracy was not in contempt for noncompliance with the Final Order and Decree of Divorce.

II. Offer In Compromise

Mr. Tracy argues the family court erred in allowing Ms. Tracy to enter into an Offer In Compromise with the IRS. Specifically, Mr. Tracy asserts the OIC does not protect him from liability for the assessed tax amount. We disagree.

"Before any action can be maintained, a justiciable controversy must be present." Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983); see also Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (holding a justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights, and a positive legal duty which is denied by the adverse party). "The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." Sloan, 356 S.C. at 547, 590 S.E.2d at 346. "In determining a ripeness issue under the 'case or controversy' requirement of Article III of the United States Constitution, federal courts use a two-factor test: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 227-28, 467 S.E.2d 913, 918 (1996).

The language in the Final Order and Decree of Divorce gives Ms. Tracy the sole responsibility for any tax liability associated with 2004 and 2005. Nowhere in the document is Ms. Tracy restricted from entering into an OIC with the IRS to reduce the tax liability. Additionally, the IRS accepted Ms. Tracy's OIC, and no evidence exists to indicate she has defaulted on her responsibilities. Moreover, this issue is not ripe for review because Mr. Tracy has not been exposed to any liability at this time as a result of Ms. Tracy entering into the OIC. Furthermore, any claim Mr. Tracy may have is

contingent upon Ms. Tracy's nonpayment. Lastly, during the Rule to Show Cause Hearing, the family court specifically provided Mr. Tracy with the remedy of coming back before the court if Ms. Tracy defaulted on her tax obligations. Accordingly, the issue is not ripe for judicial decision and the parties suffer no hardship from withholding a decision.

III. Attorneys' Fees and Costs

Mr. Tracy alleges the family court erred in failing to award him attorneys' fees and costs stemming from Ms. Tracy's contempt. We disagree.

"In a family court matter, '[t]he award of attorney's fees is left to the discretion of the trial judge and will only be disturbed upon a showing of abuse of discretion.'" Abate v. Abate, 377 S.C. 548, 555, 660 S.E.2d 515, 519 (Ct. App. 2008) (quoting Upchurch v. Upchurch, 367 S.C. 16, 28, 624 S.E.2d 643, 648 (2006)). "Under South Carolina law, the family court has jurisdiction to determine whether to award attorney's fees in a matter properly before it." Id.

Here, Mr. Tracy does not contend the family court abused its discretion in declining to award him attorneys' fees. Moreover, Mr. Tracy's issues were brought prematurely because he suffered no injury from Ms. Tracy's actions. Thus, the family court did not err in declining to award Mr. Tracy attorneys' fees and costs.

CONCLUSION

Accordingly, the family court's order is

AFFIRMED.

WILLIAMS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No.: 2007-CP-23-01036

Phyllis Marie Robinson, Appellant,

v.

Merle F. Code, Respondent.

Case No.: 2007-CP-23-01037

Odell Haggins, Jr., as Personal Representative of the Estate of Odell Haggins, Sr., Appellant,

v.

Merle F. Code, Respondent.

Case No.: 2007-CP-23-01038

Phyllis Marie Robinson, as Personal Representative of the Estate of Rodell Dante Haggins, Appellant,

v.

Merle F. Code, Respondent.

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

Opinion No. 4564
Heard April 21, 2009 – Filed June 12, 2009

AFFIRMED

David K. Haller, of Columbia, and Carl L. Solomon, of Charleston, for Appellants.

Douglas F. Patrick and T.S. Stern, Jr., of Greenville, for Respondent.

SHORT, J.: Odell Haggins, Jr., as personal representative of the Estate of Odell Haggins, Sr., and Phyllis Robinson, individually and as personal representative of the Estate of Rodell Haggins, (collectively, Appellants), appeal from the circuit court's order, arguing the court erred in finding the failure to install smoke detectors in a rental home was not actionable under the South Carolina Residential Landlord and Tenant Act (Landlord-Tenant Act), and notice was an element of a landlord's liability for failing to maintain rental premises. We affirm.

FACTS

Odell Haggins, Sr. rented a house located in Seneca, South Carolina. The house was owned by Merle Code. In the morning hours of February 25, 2004, while Odell Haggins, Sr., Rodell Haggins, and Phyllis Robinson were

sleeping in the house, an upholstered chair in the living room caught fire. The home did not have smoke detectors. When firefighters responded to the fire, they found the bodies of Odell and Rodell, who both died from carbon monoxide poisoning and smoke inhalation. Robinson was found alive, but overcome by smoke.

Robinson filed two complaints against Code, one on behalf of herself and one as the personal representative of the estate of Rodell Haggins. Haggins, Jr. also filed a complaint against Code as the personal representative of the estate of Odell Haggins, Sr. The complaints alleged Code was negligent for failing to supply and install smoke detectors in the rental house. Code filed a motion to strike the allegations concerning the smoke detectors, and after a hearing, the circuit court issued its order granting Code's motion to strike all allegations concerning the smoke detectors. This appeal followed.

STANDARD OF REVIEW

A motion to strike, challenging a theory of recovery in the complaint, is comparable to a motion to dismiss under Rule 12(b)(6), SCRCP. McCormick v. England, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct. App. 1997). "Where a pleading is attacked for an alleged failure to state a cause of action, the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case." Burns v. Wannamaker, 286 S.C. 336, 339, 333 S.E.2d 358, 360 (Ct. App. 1985). A court should not strike a cause of action merely because the court doubts the plaintiff will prevail in the action. McCormick, at 633, 494 S.E.2d at 434. However, the matter of striking from a pleading is largely within the discretion of the trial judge. Brown v. Coastal States Life Ins. Co., 264 S.C. 190, 194, 213 S.E.2d 726, 728 (1975). Thus, the grant of a motion to strike will not be reversed except for an abuse of discretion or error of law. Id. at 194-95, 213 S.E.2d at 728.

LAW/ANALYSIS

Appellants argue the circuit court erred in finding Code's failure to install smoke detectors in Haggins's rental home was not actionable under the Landlord-Tenant Act, and notice was an element of a landlord's liability for failing to maintain rental premises. We disagree.

"Traditionally, under the law of South Carolina, a landlord owes no duty to maintain leased premises in a safe condition." Young v. Morrisey, 285 S.C. 236, 239, 329 S.E.2d 426, 428 (1985). However, the Landlord-Tenant Act,[1] enacted in 1986, requires a landlord to comply with applicable housing codes materially affecting health and safety, and "make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." S.C. Code Ann. § 27-40-440(a)(1) and (2) (2007). The Landlord-Tenant Act provides for recovery of actual damages as a result of any material noncompliance by the landlord. S.C. Code Ann. § 27-40-610(a) and (b) (2007). The Landlord-Tenant Act mentions the delivery of "a written notice to the landlord specifying the acts and omissions constituting the breach." S.C. Code Ann. § 27-40-610(a) (2007). Also, the Landlord-Tenant Act provides a tenant's rights "do not arise until he has given notice to the landlord and the landlord fails to act within a reasonable time." S.C. Code Ann. § 27-40-630(d) (2007). As a result, this court has held the Landlord-Tenant Act creates a cause of action for a tenant of residential property against the landlord, "for failure, after notice, to make necessary repairs and to do what is reasonably necessary to keep the premises in a habitable condition." Watson v. Sellers, 299 S.C. 426, 433, 385 S.E.2d 369, 373 (Ct. App. 1989). The Landlord-Tenant Act does not specifically mandate landlords must provide smoke detectors in their rental properties.

Article 11 of Building Codes and Fire Prevention,[2] enacted in 1994, however, requires all one-family dwellings to be equipped with smoke detectors. S.C. Code Ann. § 5-25-1310(A) (2004). Article 11 mandates the

[1] S.C. Code Ann. § 27-40-10 to 940 (2007).
[2] S.C. Code Ann. § 5-25-1310 to 1380 (2004).

owner of a rental dwelling is responsible for supplying and installing smoke detectors in the home, and must provide the tenant with instructions for testing and replacing the batteries in the smoke detectors. S.C. Code Ann. § 5-25-1330(A) (2004). The Article further states a tenant must notify the owner in writing of any deficiencies in the smoke detectors. S.C. Code Ann. § 5-25-1330(B) (2004). However, Article 11 provides, "[f]ailure to comply with the provisions of this article does not create a cause of action for a per se statutory violation of liability, or for negligence-based liability, for death, injury, or damages." S.C. Code Ann. § 5-25-1380 (2004).

Appellants' complaints alleged, in pertinent part, that Code was negligent for:

> (a) Failing to install smoke detectors in the dwelling;
>
> (b) Failing to supply smoke detectors in the dwelling;
>
> (c) Failing to provide instructions on the use of smoke detectors at the same time the tenant took possession of the building; and
>
> (d) Failing to comply with the requirements of applicable building codes in effect materially effecting [sic] the property.

The complaints did not state which South Carolina code sections the Appellants claimed Code violated.[3] Code filed a motion to strike pursuant to Rule 12(f), SCRCP. "In ruling on such a motion, a Court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990).

[3] Although Appellants did not state which South Carolina code sections their complaints were based on, it appears from the allegations that Appellants were alleging Code violated South Carolina Code sections 5-25-1310(A) and 5-25-1330(A). S.C. Code Ann. §§ 5-25-1310(A) and 1330(A) (2004).

Code moved to strike all allegations pertaining to smoke detectors on the basis that Article 11 does not create a cause of action for failure to install smoke detectors. Article 11 specifically provides that failure of a landlord to supply or install smoke detectors does not create a cause of action for a per se statutory violation of liability, or for negligence-based liability, for death, injury, or damages. S.C. Code Ann. § 5-25-1380 (2004). Also, Appellants did not allege they notified Code of the lack of smoke detectors in the home, as required by the Article. S.C. Code Ann. § 5-25-1330(B) (2004).

In response to Code's motion to strike, Appellants asserted they did not allege a cause of action under Article 11, but rather under the Landlord-Tenant Act. But, the Landlord-Tenant Act, which preceded Article 11 by eight years, does not specifically state landlords must provide smoke detectors in their rental properties. This court has found the Landlord-Tenant Act requires written notice to the landlord specifying the acts and omissions constituting the breach and failure of the landlord to make the necessary repairs after notice. Watson, 299 S.C. at 433, 385 S.E.2d at 373. Appellants' complaints do not allege that Haggins, Sr., notified Code of the lack of smoke detectors in the residence or that Code failed to correct the problem after notice. Therefore, the trial court was correct in granting Code's motion because the complaints did not allege violations of the Landlord-Tenant Act, and Article 11 does not provide for a negligence cause of action.

CONCLUSION

Accordingly, the trial court's order is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.