The Supreme Court of South Carolina

In the Matter of F. Bryant Brown, Respondent.

ORDER

This Court issued a definite suspension of two years and disbarred respondent. In the Matter of Brown, Op. No. 25895 (S.C. Sup. Ct. filed November 8, 2004) (Shearouse Adv. Sh. No. 44 at 59). The Office of Disciplinary Counsel (ODC) has now filed a petition seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. ODC's petition is granted.

IT IS ORDERED that Paul W. Dillingham, 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. Dillingham shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Dillingham 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 W. Dillingham, Esquire, has been duly appointed by this Court.

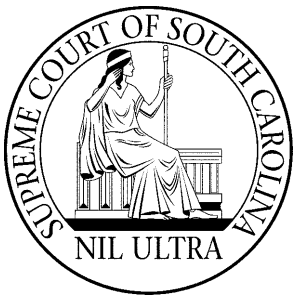
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Paul W. Dillingham, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Dillingham's 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
December 31, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3

January 18, 2005

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mabel Dixon, Appellant,

v.

Stevan Fay Dixon, Respondent.

Appeal from Anderson County
Ellis B. Drew, Jr., Master-in-Equity

Opinion No. 25925
Heard June 23, 2004– Filed January 18, 2005

AFFIRMED

Steven C. Kirven, of McNair Law Firm, P.A., of Anderson, for Appellant.

Louisa Rice Lund, of Rice and Lund, of Anderson, for Respondent.

CHIEF JUSTICE TOAL: This Court certified this case pursuant to Rule 204(b), SCACR, to review the master-in-equity's decision declaring Stevan Fay Dixon (Son) the titleholder of his mother's home in fee simple absolute. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Appellant Mabel Dixon (Mother) is eighty-four-years old and has lived alone in her home in Anderson, South Carolina for the past forty-seven years. She has two children: Stevan (Son), who resides in Anderson, and Nicki, who, at the time of trial, resided in Ohio. Other than a hearing problem,[1] Mother has no health problems.

In October 1998, Mother conveyed her property to Son for a stated consideration of "Five ($5.00) Dollars and other love and consideration." At the same time the deed was executed, Mother and Son also signed an agreement (Lifetime Agreement), prepared by Son, whereby he agreed to care for Mother and maintain her residence.[2] The Lifetime Agreement also provided that if the property were ever sold, the proceeds from the sale would be divided equally between Son and his half-sister, Nicki.

Mother testified that she has not always had a good relationship with Son. Nevertheless, Mother testified that because she felt he "had a change of personality," she decided to give him a limited power of attorney prior to the execution of the deed, in case she had to be hospitalized. Mother and Son also opened a joint checking account with a balance in excess of $14,000 to be used in the event Mother was incapable of paying her bills. Son testified that he never withdrew funds from the account.

At some point, however, Mother decided that "the situation was not working out" and revoked Son's limited power of attorney.[3] Apparently

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[1] Mother had a "mastoid operation." She testified that she could only hear out of one ear.

[2] The Lifetime Agreement was never recorded.

[3] Mother gave the limited power of attorney to Peggy Dove, whom Son did not trust. Jessica Dixon, Son's daughter-in-law, also testified that Son was

Mother believed Son was not helping her as he promised. Mother testified that (1) Son only paid 1/3 of the property taxes on the property and that she had to pay the remaining 2/3 of the amount owed; (2) she had to hire someone to take care of the yard; (3) she paid for the insurance on the property, not Son; and (4) she had to pay someone to cut down two dead trees in the yard after Son refused to cut them down. Son disputes this testimony.

Son testified that in addition to paying the insurance and taxes on the house, he performed various tasks in the home, such as finding someone to fix the toilet. He also testified that he drove Mother to the grocery store and to the doctor's office. Mother claimed that she had to rely on Son for transportation because Son never returned her car after he took it to have the brakes checked. On the contrary, Son testified that Mother thought there was a problem with the brakes, so he drove it to his house in order to test them but did not find anything wrong with them. Son also testified that he does not believe that Mother is capable of driving safely.

Despite their rocky relationship, Mother decided to convey her home to Son. She later claimed that the only reason why she did so is because he convinced her that if she did not take the property out of her name, Medicaid would seize it if she failed to pay her medical expenses. Son claims that his half-sister gave Mother this idea and that he had nothing to do with the decision to take the property out of Mother's name. Son testified that he gave Mother the option to convey the property to him or to his half-sister, but he did not care who received title. Ultimately, Mother chose to give the property to Son.

After preparing the deed,[4] Son drove Mother to a pawnshop, where Mother signed the deed and the Lifetime Agreement. Mother remembered executing the deed and the Lifetime Agreement and testified that she knew what she was doing when she signed the deed.

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afraid Dove would "gain grandma's house, take it away from her, put her in a nursing home, sell it and get the money."

[4] According to Son, he prepared the deed and the Lifetime Agreement as Mother instructed.

Approximately a year-and-a-half later, Son executed and delivered a document to Mother purporting to leave the home to her when he died. Son drafted this document after Mother expressed concerns about Son's wife, rather than Mother's daughter, inheriting an interest in the property.

After a confrontation in 2001, Mother asked Son to leave her home. Later, Mother changed the locks to the house, preventing Son from entering the home. Mother also requested that Son re-convey the title to the property to her. Son refused and Mother filed this action.

The master-in-equity declared Son the owner of the property in fee simple absolute. The master found there was "no evidence that the deed was the result of duress or coercion, or that [Son] exerted undue influence over [Mother] in the execution or procurement of the deed." Further, the master found that Mother "fully appreciated the nature of the conveyance and its legal effect," and she "recalled the location and circumstances of its execution, as well as the names of the witnesses." Therefore, the master determined that Mother failed to establish that the deed should be set aside. Mother appealed the master's decision, and pursuant to Rule 204(b), SCACR, this Court certified the case from the court of appeals.

Mother raises the following issues for review:

I. Did the master err in refusing to set aside the deed for undue influence or failure of consideration?

II. Did the master err in refusing to construe the transactions involved as to creating a life estate in Mother or imposing a trust for the benefit of Mother?

Son raised the following issue for review:

III. Did the master err in not barring Mother's claims under the statute of limitations?

LAW/ANALYSIS

Standard of Review

"An action to rescind a contract lies in equity." *Gibbs v. G.K.H., Inc*., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993). When reviewing an equitable action, this Court may determine the facts in accordance with its own view of the preponderance of the evidence. *Thornton v. Thornton*, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997); *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

I. Setting Aside the Deed

A. Failure of Consideration

Mother argues that the deed conveying the house to Son should be set aside because Son failed to take care of her according to the Lifetime Agreement, which was incorporated into the deed to provide additional consideration. We hold that even if the Lifetime Agreement was properly incorporated into the deed, the deed should not be set aside for failure of consideration.

We first determine whether the Lifetime Agreement was properly incorporated into the deed. As a general rule, when a deed is unambiguous on its face, we look only to the four corners of the document. *See Klutts Resort Realty Inc. v. Down'round Dev. Corp.*, 268 S.C. 80, 89, 23 S.E.2d 20, 25 (1977) (holding that a court will not examine extrinsic evidence to interpret a contract absent an ambiguity). If the vital terms of a contract are ambiguous, then, in an effort to determine the intent of the parties, the court may consider probative, extrinsic evidence. *South Carolina Dept. of Nat. Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001).

In the present case, the stated consideration is "five dollars and *other love and consideration*," which we find to be ambiguous. In addition, the

Lifetime Agreement is probative of the parties' intent because the Lifetime Agreement and the deed were executed at the same time. This Court has held that when multiple documents are executed contemporaneously in the course of and as a part of the same transaction, the Court may consider and construe the instruments together in order to ascertain the intention of the parties and the terms of the agreement. *Café Associates, Ltd. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991); *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25. Because the Lifetime Agreement and the deed were executed contemporaneously, and the Lifetime Agreement helps to explain the ambiguous phrase in the deed which recites consideration as: "five dollars and other love and consideration," we find that the Lifetime Agreement was incorporated into the deed as consideration for conveyance.

Having determined that the Lifetime Agreement provides additional "other consideration" under the deed, we next decide whether the consideration of the agreement failed warranting this Court setting the deed aside. When deciding whether there has been a failure of consideration, this Court has held that "the slightest consideration is sufficient to support the most onerous obligation…." *First National Bank of South Carolina v. Wade*, 245 S.C. 426, 431, 141 S.E.2d 102, 104 (1965) (internal quotations and citations omitted). Moreover, absent fraud and deception, the Court will not "deprive [the contract] of validity." *Id. See also All v. Prillaman*, 200 S.C. 279, 292, 20 S.E.2d 741, 747 (1942) (holding that setting aside a deed is not the proper remedy for failure of consideration absent fraud or deceit).[5]

We find that the consideration did not fail, and that even if it had, the proper remedy would not be to set the deed aside. The agreement provided that Son would "maintain and care for" Mother's property, as well as, "at a time determined by [Mother] … care for [Mother's] needs as necessary." We find that Son cared for Mother and her property. Although Mother was not satisfied with the amount of care Son provided, we do not find that he failed to act in accordance with the terms of the Lifetime Agreement. Mother does not deny that Son was her main source of transportation. In addition, some

[5] Mother does not argue any fraud or deception as part of her failure of consideration cause of action.

time after the parties signed the Lifetime Agreement, Mother changed the locks to her home, preventing Son from caring for her in her home. We have held that a party who prevents a condition of a contract cannot seek relief by relying on the other party's resulting nonperformance. *Champion v. Whaley*, 280 S.C. 116, 311 S.E.2d 404 (1984).

Therefore, we hold that Mother's cause of action for failure of consideration is without merit and we affirm the master's decision on that issue.

B. Undue Influence

In the alternative, Mother argues that because she and Son were in a confidential relationship, Son had the burden of proving that he did not unduly influence her, and that he failed to meet that burden. We agree that Mother and Son shared a confidential relationship, but we do not find that Son failed to meet his burden.

1. Confidential Relationship

To show a "confidential relationship" existed between the grantor and grantee, the grantor must present adequate evidence that she has placed her "trust and confidence in the grantee, and the grantee has exerted dominion over the grantor." *Brooks v. Kay*, 339 S.C. 479, 489, 530 S.E.2d 120, 125 (2000); *Middleton v. Middleton*, 300 S.C. 402, 404, 388 S.E.2d 639, 641 (1990); *Hudson v. Leopold*, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986). Once a contestant has proven a confidential relationship existed at the time of conveyance, the burden shifts to the grantee to prove that the contestant's conveyance was not the product of undue influence. *Brooks*, 339 S.C. at 489, 530 S.E.2d at 125.

To begin, we find that Mother and Son were in a confidential relationship at the time of conveyance. First, the parties are related. Although this Court has declined to hold that a familial relationship, alone, is

sufficient evidence of a confidential relationship,[6] a familial relationship certainly *supports* an argument that a confidential relationship exists. Second, Mother gave Son a limited power of attorney, suggesting that she placed some trust and confidence in him to make decisions for her in case she had to be hospitalized. Third, after the deed was recorded, Mother and Son opened a joint bank account consisting entirely of Mother's money. This account was created by Mother for Son to use for her benefit upon her inability to access that money on her own. Fourth, Son prepared all of the documents in question, including the deed and the Lifetime Agreement. Moreover, Mother signed those documents without first consulting an attorney, trusting that Son had drafted them according to her wishes. Therefore, we hold that Mother and Son were in a confidential relationship.

2. Undue Influence

We now turn to whether Son satisfied his burden to prove that he did not unduly influence Mother to convey him the property. We recently described the nature of undue influence:

> the influence must be the kind of mental coercion which destroys the free agency of the creator and constrains him to do things which are against his free will, and that he would not have done if he had been left to his own judgment and volition.[7]

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[6] *Hudson*, 288 S.C. at 196, 341 S.E.2d at 139.

[7] Most of our jurisprudence on the issue of undue influence involves a contestant seeking to set aside a will, rather than a deed, as does the case quoted above; nonetheless, we find no reason why this discrepancy should change our analysis. *See First Nat'l Bank of Appleton v. Nennig*, 285 N.W.2d 614, 623 (Wis. 1979) (holding that "undue influence in the execution an of *inter vivos* conveyance is proved in the same way that undue influence is proved in the execution of a will"); *Lyons v. Elston*, 98 N.E. 93 (Mass. 1912) (holding that the analysis is the same regardless of whether the underlying document sought to be set aside on the grounds that the plaintiff was unduly influenced is a will or a deed).

Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). The influence must be of such a degree that it prevents the grantor's exercise of judgment and free choice. *Id.* Moreover, a showing of general influence is not tantamount to undue influence. *Calhoun v. Calhoun*, 277 S.C. 527, 531, 290 S.E.2d 415, 418 (1982). For this Court to void a conveyance of land, a contestant must show that the undue influence was brought directly to bear upon the conveyance. *Russell*, 353 S.C. at 219, 578 S.E.2d at 335.

We find that Mother's free will was never overcome. At trial, the master found that Mother was "very clear about what she was doing," "fully appreciated the nature of the conveyance and its legal effect," and "recalled the location and circumstances of its execution, as well as the names of the witnesses." In addition, the record indicates that Mother is a strong-willed woman who, by her own motivation, decided to convey the property to Son in an attempt to prevent a potential creditor from seizing her property.

Although it is questionable whether Mother made a good decision when she conveyed her property to Son, we find the decision was one of her own free will. Accordingly, we hold that Son proved that he did not unduly influence Mother.

II. Life Estate/Trust

Mother argues that if this Court does not set aside the deed, it should hold that Mother is the beneficiary of a trust or that she holds a life estate in the property in question, with a remainder to her two children. We disagree.

Mother raised this issue for the first time in a Rule 59, SCRCP, motion. We hold that this issue is not preserved for review. *See, e.g., Eaddy v. Oliver*, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001) (holding that an issue first raised in a post-trial motion is not preserved for appellate review).

III. Statute of Limitations

Son argues Mother's claims of undue influence and failure of consideration are barred by the statute of limitations set forth in South Carolina Code Ann. 15-3-530(1) and (7) (Supp. 2003). We hold that section 15-3-530 does not bar these claims.

We first turn to Mother's undue influence cause of action. Son argues that section 15-3-530(7), which applies to actions for fraud and those actions considered fraud by a court of chancery before 1870, serves to bar Mother's undue influence claim. We disagree.

First, Mother did not plead or prove the existence of fraud in this case; therefore, we hold section 15-3-530(7) does not apply. Second, a claim alleging undue influence is an equitable action. *Bullard v. Crawley*, 294 S.C. 276, 284, 363 S.E.2d 897, 902 (1987). Further, "[a]n action to rescind a contract lies in equity." *Gibbs v. G.K.H., Inc*., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993). This Court has held that the statute of limitations does not apply to actions in equity. *See Anderson v. Purvis*, 211 S.C. 255, 44 S.E.2d 611 (1947); *Anderson v. Purvis*, 220 S.C. 259, 67 S.E.2d 80 (1951) (holding that the Court's power to do equity transcends the limitations of the statute of limitations). Because Mother's undue influence claim is an action in equity, we hold that the statute of limitations is inapplicable.

We next turn to Mother's failure of consideration cause of action.[8] Section 15-3-530(1) places a three-year statute of limitation on contract actions; however, the discovery rule applies to that section. *Santee Portland Cement Co. v. Daniel Int'l Corp*., 299 S.C. 269, 271, 384 S.E.2d 693, 694 (1989), *overruled on other grounds Atlas Food Sys. and Servs. v. Crane Vendors Div. of Unidynamics Corp*., 319 S.C. 556, 462 S.E.2d 858 (1995).

[8] We have held that, absent a showing of fraud or deceit, setting a deed aside is not the correct remedy for failure of consideration. *All*, 200 S.C. at 292, 20 S.E.2d at 747. The proper remedy, therefore, is damages, a remedy in law. Accordingly, Mother's failure of consideration cause of action is subject to the statute of limitations.

The discovery rule provides that the statute of limitations does not begin to run until a person using reasonable diligence knew or should have known the existence of the claim. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996); *Snell v. Columbia Gun Exchange, Inc*., 278 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). A plaintiff should have known the existence of a claim if the facts and circumstances of an injury would put a person of common knowledge and experience on notice of that claim. *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371, 597 S.E. 2d 27, 29 (Ct. App. 2004).

In the present case, the Lifetime Agreement was signed more than three years before Mother brought the underlying claims. Nevertheless, Mother's allegations that Son failed to provide her care were based upon facts not known to her at the time she signed the Lifetime Agreement. We find that Mother brought her claim within three years of the time that she discovered the incidents and facts supporting that claim. Therefore, we hold that the statute of limitations does not bar Mother's failure of consideration claim.

CONCLUSION

For the foregoing reasons, we affirm the master-in-equity's ruling, holding that Son is the titleholder of the property in fee simple absolute.

AFFIRMED.

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ronald E. Clark, Sr., individually and as Personal Representative of the Estate of Amy Danielle Clark, Respondent,

v.

South Carolina Department of Public Safety and Charles Clyde Johnson, Defendants,

Of whom South Carolina Department of Public Safety is Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 25926
Heard October 19, 2004 – Filed January 18, 2005

AFFIRMED

Andrew F. Lindemann and William H. Davidson, II, of Davidson, Morrison and Lindemann, P.A., of Columbia, for Petitioner.

Sammy Diamaduros, of White, Diamaduros & Diamaduros, of Union and Suzanne E. Coe, of Atlanta, for Respondent.

Chief Counsel Buford S. Mabry, Jr., Deputy Chief Counsel Paul S. League, Assistant Chief Counsel James A. Quinn, of Columbia for Amicus Curiae South Carolina Department of Natural Resources,.

John A. O'Leary, of Columbia, for Amicus Curiae South Carolina Troopers' Association.

Mark A. Keel, of Columbia, for Amicus Curiae South Carolina State Law Enforcement Division.

Sandra J. Senn, of Charleston, for Amicus Curiae South Carolina Sheriffs' Association.

Vinton DeVane Lide, of Lexington, for Amicus Curiae South Carolina Law Enforcement Officers' Association.

JUSTICE BURNETT: We granted South Carolina Department of Public Safety's (the Department's) petition to review the Court of Appeals' decision in Clark v. South Carolina Dept. of Pub. Safety, 353 S.C. 291, 578 S.E.2d 16 (Ct. App. 2002). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Respondent Ronald E. Clark, Sr. (Clark) brought this wrongful death action as the personal representative of the estate of his daughter, Amy Danielle Clark (decedent). Clark's action against the Department and Charles Johnson[1] arises from a fatal automobile accident, which occurred on April 5, 1997. The decedent was killed when her vehicle was struck by Johnson's vehicle as he was being pursued by Trooper J.N. Bradley of the South Carolina Highway Patrol. The jury returned a $3.75 million verdict

[1] Johnson is not a party to this appeal.

for Clark against both the Department and Johnson. The jury concluded Johnson was eighty percent at fault and the Department twenty percent at fault. The trial court reduced the Department's liability to $250,000, the allowable amount under the Tort Claims Act at the time of the verdict. The Department raises several issues on appeal.

ISSUES

I. Did the Court of Appeals err in concluding the trial court properly charged the jury on the standard of care owed by law enforcement officers during police pursuits?

II. Did the Court of Appeals err in holding there was sufficient evidence showing Trooper Bradley acted with gross negligence in initiating and failing to terminate the pursuit?

III. Did the Court of Appeals err in finding the duty of the trooper to drive with due regard for the safety of all persons is independent of the duty of the Department to monitor the pursuit?

IV. Did the Court of Appeals err in holding the trial court properly denied the Department's motions for judgment as a matter of law on the ground of discretionary immunity?

V. Did the Court of Appeals err in refusing to grant a new trial absolute based on the amount of the jury's verdict?

I.

The Department contends the Court of Appeals erred in determining the trial court properly instructed the jury on the legal duty owed by law enforcement officers with respect to police pursuits. We disagree.

We find no error in the trial judge's instructions. The parties agreed the applicable standard of care is gross negligence.[2] The trial court defined gross negligence as "the failure to exercise a slight degree of care" and stated gross negligence could also "mean when a person is so indifferent to the consequences of his conduct as not to give slight care as to what he is doing." The definition provided by the trial court is consistent with South Carolina law. See Faile v. South Carolina Dept. of Juvenile Justice, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544 (2002); Hicks v. McCandlish, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952).

II.

The Department contends the Court of Appeals erred in concluding the trial court did not err in refusing to direct a verdict and grant the Department's motion for judgment notwithstanding the verdict (JNOV) on Clark's claims that Trooper Bradley was grossly negligent in his decision-making. The Department argues there was no evidence to support a verdict that Trooper Bradley was grossly negligent. We disagree.

In ruling on a motion for directed verdict and JNOV, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999). The trial court should deny the motion where either the evidence yields more than one inference or its inference is in doubt. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). This Court will reverse the trial court's ruling on a directed verdict motion only where there is no evidence to support the ruling or where the ruling is controlled by error of law. Hinkle v. National Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

[2] The Court of Appeals noted that no issue was raised on appeal regarding the standard for culpability and therefore becomes the law of the case. Citing ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal).

The trial court properly submitted the case to the jury to consider whether Trooper Bradley was grossly negligent in initiating and failing to terminate the pursuit. Gross negligence is the "intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Jinks, 355 S.C. at 345, 585 S.E.2d at 283. Gross negligence is also the "failure to exercise slight care" and is "a relative term and means the absence of care that is necessary under the circumstances." Id.

The evidence in this case could yield a finding of gross negligence on the part of Trooper Bradley. On April 5, 1997, at approximately 1:30 a.m., Trooper Bradley observed Johnson driving a van erratically and at a speed of 57 m.p.h. in a 45 m.p.h. zone. In addition to driving erratically, Johnson failed to use his turn signals. Bradley testified he activated his blue lights and siren and attempted to stop the van, but Johnson did not stop. Bradley called in the van's license plate number and reported to dispatchers he was pursuing the van.

During the pursuit, Johnson stopped the van in a gravel parking lot. Bradley exited his vehicle and approached the van. As Bradley neared the van, Johnson suddenly put the van in reverse and attempted to run over Bradley. Johnson sped off and the pursuit resumed. Bradley observed Johnson run off the left side of the road and spin around. Bradley testified he radioed in his belief Johnson was going to wreck.

Trooper Thomas Justice joined the pursuit and attempted to slow the van by pulling in front of it. Johnson drove around Justice and Justice fell into position behind Bradley. Justice, as the secondary officer in the pursuit, took over most of the radio communications so Bradley could focus on the pursuit.

Bradley continued the pursuit and dispatchers notified the troopers the van had been reported stolen. Bradley testified he observed light traffic as they drove through a straight portion of the road. Bradley attempted to pass Johnson on the left in an attempt to get in front of the van in order to slow its speed, but was unsuccessful when Johnson tried to run Bradley off

the road. Johnson ran a red light at an intersection, narrowly avoiding colliding with another car. The troopers slowed and proceeded through the intersection.

Johnson encountered a pickup truck in his lane of traffic approximately five or six miles before reaching the North Carolina border. Johnson tried to pass the truck on the right using the emergency lane, but the truck also pulled to the right. Johnson immediately jerked the van to the left, crossed the centerline, and collided head-on with Amy Clark's vehicle. The van became airborne before crashing into the woods and catching fire.

Sergeant John Vaughn testified he was the district supervisor on call that night. Vaughn inquired whether a supervisor was needed when he heard Bradley advise dispatchers he was initiating a pursuit. Vaughn could not recall whether he had actually monitored any portion of the pursuit. The second-shift supervisor, Lonnie Plyler, did not monitor the pursuit because he was handling the administration of a breathalyzer examination. Plyler did not know who supervised the third shift. Plyler went to the scene of the accident after Justice radioed for a supervisor.

Samuel Killman, Clark's expert on high-speed pursuits, testified the standard of care for an officer pursuing a suspect requires the officer continuously evaluate the danger of the chase and weigh the danger of apprehending the suspect against the danger the chase is creating. Clark's counsel asked Killman if there was any point during the chase where he felt Bradley deviated from the standard of care. Killman testified he believed Bradley should have terminated the pursuit because the longer the chase went on, the clearer it became that Johnson was not going to stop. Killman further testified that supervisors are required to continually monitor pursuits.

Gregory Smith, the Department's expert in police training and pursuits testified, "there is no national standard for standard of care." Smith testified the chase initiated by Bradley was warranted and should not have been terminated by either Bradley or his supervisors. Smith based his testimony on the factors outlined in the Department's Vehicle and Foot Pursuit Policy.

The Court of Appeals, construing the evidence in a light most favorable to Clark, concluded the pursuit should have been called off after it was (1) obvious Johnson was willing to do whatever it took to get away; and (2) after Johnson attempted to run Bradley off the road and then narrowly missed colliding with another vehicle at the intersection. The Court of Appeals also noted Johnson was within five or six miles of the North Carolina border at which point South Carolina authorities would have been required to terminate the pursuit. Finally, the Court of Appeals concluded the "heightened dangerousness of the pursuit" was evidenced by evidence Bradley notified the dispatcher he believed a crash was imminent. Clark, 353 S.C. at 302, 578 S.E.2d at 22.

From this testimony, the Court of Appeals concluded there was some evidence from which a jury could conclude Bradley was grossly negligent in failing to end the pursuit. Id. We agree. Killman, an experienced law enforcement officer, testified the officer should have discontinued the pursuit. In addition, Bradley testified he did not feel the van was going to stop and he realized the van was probably going to make it to North Carolina where Bradley would be required to terminate the pursuit. Accordingly, the issue was properly submitted to the jury.

III.

The Department argues the Court of Appeals, in affirming the trial court's denial of the Department's motion for JNOV, erred in finding the duty to monitor or supervise the pursuit to be an independent duty. The Department contends Clark's negligent supervision claim is entirely derivative of the claim Trooper Bradley was grossly negligent in commencing the pursuit and failing to terminate the pursuit before the accident occurred. The Department contends because the jury did not indicate Bradley breached his duty of care, the Department should not be held liable for the derivative claim of failure to supervise.

Under the facts of this case and given the evidence presented at trial, we conclude the Department was not entitled to judgment as a matter of

law on the failure to supervise claim. Jinks, 355 S.C. at 345, 585 S.E.2d at 283 (trial court should deny the motion where either the evidence yields more than one inference or its inference is in doubt). The jury could have found the Department breached a separate duty to monitor the pursuit and to provide its independent assessment of its continued viability. Based on the evidence presented, the jury could have found the Department failed to exercise slight care or show any care in monitoring the pursuit and the Department's gross negligence was a proximate cause of the accident.

IV.

The Department contends the Court of Appeals erred in holding Trooper Bradley's conduct was not protected by discretionary immunity. We disagree.

South Carolina Code Ann. § 15-78-60(5) (Supp. 2003) provides governmental entities are not liable for losses resulting from "the exercise of discretion or judgment by the governmental entity or employee for the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." The burden of establishing an exception to the waiver of immunity is on the governmental entity asserting the defense. Niver v. South Carolina Dept. of Hwy. & Pub. Transp., 302 S.C. 461, 395 S.E.2d 728 (Ct. App. 1990). To establish discretionary immunity, the governmental entity must prove its employees, faced with alternatives, actually weighed competing considerations and made a conscious choice. Pike v. Dept. of Transp., 343 S.C. 224, 540 S.E.2d 87 (2000). The governmental entity must show that in weighing the competing considerations and alternatives, it utilized accepted professional standards appropriate to resolve the issue before them. Id. Mere room for discretion on the part of the entity is not sufficient to invoke the discretionary immunity provision. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997).

Police officers have a duty to apprehend those who violate the law and the decision to commence or continue pursuit of a fleeing suspect is, by necessity, made rapidly. However, a police officer's paramount duty is to protect the public. We acknowledge circumstances exist when it is

reasonable for a police officer to adopt a course of conduct which causes a high risk of harm to the public. Nevertheless, such conduct is not justified if the public is subjected to unreasonable risks of injury as the police carry out their duties. We conclude that a law enforcement officer is not immune from liability under Section 15-78-60(5) for the decision on whether to begin or continue the immediate pursuit of a suspect.[3]

V.

The Department contends the Court of Appeals erred in finding a new trial absolute was not warranted based on the $3.75 million verdict in favor of Clark.

The Department argues the verdict is grossly excessive and shockingly disproportionate to the injuries therefore indicating the jury acted out of passion, caprice, prejudice, or other considerations not founded in the evidence. Specifically, the Department argues the decedent had reached the age of majority and no longer resided with her parents for whom she did not provide financial support. The Department argues the only damages recoverable would be for the loss of companionship, grief, wounded feelings, and funeral expenses.

In Knoke v. South Carolina Parks, Recreation, and Tourism, 324 S.C. 136, 478 S.E.2d 256 (1996), we concluded a wrongful death verdict of $3 million for the death of a twelve-year-old child was not excessive and was necessary to compensate the child's parents for intangible damages which, cannot be determined by any fixed measure. See also Lucht v. Youngblood, 266 S.C. 127, 221 S.E.2d 854 (1976) (losses to parents for the untimely death of a child are intangibles, the values of which cannot be determined by any fixed yardstick). Furthermore, pecuniary loss is only one of six elements to be considered in awarding damages in a wrongful death action. See Self v.

[3] The Department contends the Court of Appeals created a distinction between planning and operational activities in determining Bradley's conduct was not subject to discretionary immunity. We decline at this time and under the facts of this case to recognize such a distinction.

Goodrich, 300 S.C. 349, 387 S.E.2d 713, 714 (Ct. App. 1989). Accordingly, we affirm the Court of Appeals' decision upholding the jury's award of damages.

For the foregoing reasons, we affirm the Court of Appeals' opinion.

AFFIRMED.

TOAL, C.J., MOORE and WALLER, JJ., concur. PLEICONES, J., concurring in a separate opinion.

JUSTICE PLEICONES: I concur in the result reached by the majority, but would adopt the decision of the Court of Appeals in its entirety. See, supra, n. 3; see also Clark v. S.C. Dep't of Pub. Safety, 353 S.C. 291, 305-06, 578 S.E.2d 16, 23 & nn. 26-28 (Ct. App. 2002). I believe the Court of Appeals properly recognized the dichotomy between planning and operational acts in determining the application of discretionary immunity.

The Supreme Court of South Carolina

In the Matter of Henry H. Cabaniss, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Dennis E. O'Neill, 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. O'Neill shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. O'Neill 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 Dennis E. O'Neill, 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 Dennis E. O'Neill, 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. O'Neill'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
January 12, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mulherin-Howell, a South Carolina Partnership, **Plaintiff,**

v.

Elvis Cobb, Jean Cobb, William Rickborn, Patricia Rickborn, The Council Of Timesharing Interest Owners Of Apartments Of Sea Cabin On The Ocean III, Charles A. Gray, and Francis M. Gray, **Defendants,**

And,

The Council Of Timesharing Interest Owners Of Apartments Of Sea Cabin On The Ocean III, **Third-Party Plaintiff,**

v.

Allen P. Howell, Howell & Associates, Inc., and the Estate of Charles M. Mulherin, by Katherine S. Mulherin, Personal Representative, **Third-Party Defendants.**

Of Whom Mulherin-Howell, A South Carolina Partnership, Elvis Cobb, Jean Cobb, William Rickborn, Patricia Rickborn, Charles A. Gray and Francis M. Gray are the, Respondents,

And The Council of Timesharing Interest Owners of Apartments of Sea Cabin on The Ocean III is the Appellant.

Appeal From Charleston County
Donald W. Beatty, Circuit Court Judge

Opinion No. 3919
Heard December 8, 2004 – Filed January 10, 2004

AFFIRMED

Robert R. Black and W. Andrew Gowder, of Charleston, for Appellant.

William C. Cleveland, of Charleston, for Respondent Mulherin-Howell.

ANDERSON, J.: This appeal arises from Mulherin-Howell's (Mulherin) suit to quiet title to property previously owned by Mulherin. After competing motions for summary judgment were filed, the trial court found Mulherin had standing to bring the suit and Mulherin's action was not

barred by any applicable statute of limitations. Additionally, the court granted summary judgment in favor of Mulherin, Elvis and Jean Cobb, William and Patricia Rickborn, Charles and Francis Gray, and Mulherin's individual partners (collectively, Mulherin) on the counterclaims and third-party complaint filed by the Council of Timesharing Interest Owners of Apartments of Sea Cabin on The Ocean III (the Council). The Council appeals. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In the mid-1980's, Mulherin developed timeshare units on the Isle of Palms in the horizontal property regime known as Sea Cabin on the Ocean III. Homeowners purchased a specific week in a specific unit. In 1987, Mulherin sold week 22 of unit 123 to the Cobbs. A deed was recorded in Charleston County. The Cobbs subsequently exchanged their first week for week 23 of unit 104. No deed was given by the Cobbs back to Mulherin for the first week. A deed was prepared establishing the Cobbs as owners of week 23 of unit 104, but it was never recorded.

The Rickborns purchased week 22 of unit 123 from Mulherin in 1989. The deed from Mulherin to the Rickborns was duly recorded. The Rickborns have continuously occupied and paid dues to the Council on their week. The Cobbs have continuously occupied and paid dues on week 23 of Unit 104. The Cobbs have never exercised ownership over week 22 of unit 123. The Council has continuously received dues from each party without questioning their right to the property.

In 1994, the Council sued Mulherin, asserting it was not properly paying dues on the timeshares it continued to own. The parties settled the suit in 1997. As part of the settlement, Mulherin agreed to deed its unsold units to the Council. Mulherin gave the Council a quitclaim deed to interests it held in any other units. Each party signed a release, which stated: "IT IS UNDERSTOOD AND AGREED that this is a full and final Release of all claims of every nature and kind whatsoever, and releases claims that are known and unknown, suspected and unsuspected." In addition to the

settlement, the Council, through its attorney, agreed to "accommodate dues paying contract purchasers" in regard to settling their title once the quitclaim deed was issued. A letter written by the Council's attorney to Mulherin's attorney dated November 26, 1997, read:

> As to your inquiry concerning the quitclaim deed, it was my understanding of the settlement that this would cover unidentified weeks which might have title problems or any retained or reversionary interests which [Mulherin] might have. Basically my client would prefer no lingering presence of [Mulherin] in the timeshare apartments. . . . **[I]t would be my expectation that the quitclaim deed may in fact transfer nothing, but rather insure that [Mulherin has] no further interest.** (Emphasis added)

Thereafter, according to William Rickborn, the Council advised him "that the Homeowners Association considered itself to be the owner of Unit 104, Week 23 [by operation of the quitclaim deed from Mulherin] and that it would not cooperate in having title to the units heretofore occupied by [Rickborn] and Mr. Cobb clarified."

In 1998, Mulherin, as owner in trust of week 23 of unit 104 for the Cobbs, brought suit against the Council to quiet title to the various units and weeks in which deeds were not properly filed and recorded. Mulherin alleged fraud based on the representations of the Council's attorney and contended the Council improperly interfered with its contract with the Cobbs for them to exchange weeks and then to deed back to Mulherin the unit, which was subsequently sold to the Rickborns. The Cobbs and Rickborns were made defendants because of their interest in the outcome of the lawsuit.[1] Mulherin did not seek any relief from them.

The Council filed an answer denying Mulherin's claims. The Council pled affirmative defenses averring Mulherin: (1) lacked standing to bring the suit; (2) released the Council "from the claims asserted in the Amended

[1] By consent order, Charles A. Gray and Francis M. Gray were made party defendants in this action.

Complaint"; and (3) could not bring the suit because it was barred by the statute of limitations. The Council set forth counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, fraud, and slander of title. Finally, the Council filed a third-party action against Mulherin's individual partners for conspiracy. Because Charles M. Mulherin had died, his estate was named as a party.

Each party filed motions to dismiss and for summary judgment. The trial court considered all motions as motions for summary judgment. The court found Mulherin had standing to bring the suit. The court concluded there was no breach of the settlement agreement by Mulherin as it properly presented a quitclaim deed to the Council and the nature of a quitclaim deed is that there is no warranty made as to the quality of the title being transferred.

As to the Council's other claims, the court ruled: (1) the counterclaim failed to properly allege all nine elements of fraud; and (2) there is no evidence the Council did not or could not know of the existence of title problems with respect to the Cobbs and Rickborns. On the claim for slander of title, the court determined it was premature to bring the action as a counterclaim in the same action which serves as the basis of the claim because it can only be based upon a lawsuit in which a party prevails. The court found no special damages or malice were pled by the Council. As to the Council's third-party complaint alleging the individual partners of Mulherin engaged in a conspiracy with respect to how the timeshare units were originally sold, the court held the events involved took place prior to the 1997 release signed by the parties and, therefore, were barred. The court granted summary judgment in favor of Mulherin as to the Council's counterclaims and third-party complaint.

The court denied the Council's motion for summary judgment as to Mulherin's claims. The court declared Mulherin had standing to bring the action, the claims were not barred by the release as the purported actions took place after the signing of the release, and the claims were not barred by "any applicable statute of limitations."

The Council filed a motion pursuant to Rules 52(b) and 59(e), SCRCP, averring: (1) the court erred in determining Mulherin had standing; (2) there was an issue of material fact related to the Release and what claims it barred; (3) the complaint alleged special damages as to the conspiracy claim; and (4) the claim for slander of title should not have been dismissed. The court denied the motion.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. White v. J.M. Brown Amusement Co., 360 S.C. 366, 601 S.E.2d 342 (2004); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is appropriate where 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 judgment as a matter of law. Belton v. Cincinnati Ins. Co., 360 S.C. 575, 602 S.E.2d 389 (2004); McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004); Rule 56(c), SCRCP; see also Higgins v. Medical Univ. of South Carolina, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (noting that when ruling on motion for summary judgment, trial judge must consider all of documents and evidence within record, including pleadings, depositions, answers to

interrogatories, admissions on file, and affidavits). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002); see also Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (noting that all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall, 359 S.C. at 376, 597 S.E.2d at 183. 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 simply rest on mere allegations or denials contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Ellis, 358 S.C. at 518-19, 595 S.E.2d at 822; Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999); Rule 56(c), SCRCP.

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354

S.C. 58, 580 S.E.2d 433 (2003); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins, 358 S.C. at 289, 594 S.E.2d at 561-62; Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001).

ISSUES

I. Did the circuit court err in finding Mulherin had standing to bring the underlying action?

II. Did the circuit court err in concluding Mulherin's action was not barred by any applicable statute of limitations?

III. Did the circuit court err in granting summary judgment in favor of Mulherin where there are genuine issues of material fact?

LAW/ANALYSIS

I. STANDING

The Council argues the court erred in finding Mulherin had standing to bring the underlying action. We disagree.

A plaintiff must have standing to institute an action. Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 528 S.E.2d 647 (1999); Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003). To have standing, one must have a personal stake in the subject matter of the lawsuit. Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. South Carolina Dep't of Natural Res., 345 S.C. 594, 550 S.E.2d 287 (2001); Evins v. Richland County

Historic Pres. Comm'n, 341 S.C. 15, 532 S.E.2d 876 (2000); Newman v. Richland County Historic Pres. Comm'n, 325 S.C. 79, 480 S.E.2d 72 (1997). One must be a real party in interest. Charleston County Sch. Dist. v. Charleston County Election Comm'n, 336 S.C. 174, 519 S.E.2d 567 (1999); see also Henry v. Horry County, 334 S.C. 461, 463 n.1, 514 S.E.2d 122, 123 n.1 (1999) ("To have standing, one must be a real party in interest."). A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action. Charleston County Sch. Dist., 336 S.C. at 181, 519 S.E.2d at 571; see also Anchor Point, Inc. v. Shoals Sewer Co., 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992) (holding a party has standing to sue if the party has "a real, material, or substantial interest in the subject matter of the action, as opposed to . . . only a nominal or technical interest in the action"); Huff v. Jennings, 319 S.C. 142, 148, 459 S.E.2d 886, 890 (Ct. App. 1995) ("A real party in interest is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.") (internal quotations omitted).

The Council maintains McLeod v. Baptiste, 315 S.C. 246, 433 S.E.2d 834 (1993), and Shaw v. Hardy, 270 S.C. 298, 241 S.E.2d 906 (1978), are determinative in this case. In McLeod, the court concluded a "grantor lacks standing to enforce a covenant against a remote grantee when the grantor no longer owns real property which would benefit from the enforcement of that restrictive covenant." McLeod, 315 S.C. at 247, 433 S.E.2d at 835. Thus, McLeod is distinguishable.

In Shaw, a claim of title to property was brought by Shaw against Hardy.[2] The Shaw court noted: "Hardy does not claim, nor is there any indication that he could claim, any interest in the property. Indeed, Hardy expressly gave up any interest he may have had in the property in question by conveying that interest to the Martin's Lake Club prior to the institution of

[2] Shaw was the collective name used to identify two individuals and their d/b/a company name.

this suit." Id. at 300, 241 S.E.2d at 907. The court concluded Hardy was not a proper party to the lawsuit. The court explicated:

> It is true that Hardy may have an "interest" in the placement of the boundary line in the sense that he may be concerned with its ultimate placement and his potential liability, if any, to his grantee but this does not give him any adverse claim to the property claimed by Shaw so as to bring him within the purview of the statutes above quoted. Having parted with any interest in, or claim to, this property and there being no showing of his having reacquired any interest in it, Hardy was neither a necessary nor proper party defendant and his motion for summary judgment should have been granted.[3]

Id. at 300-01, 241 S.E.2d at 907. Shaw is inapposite because Mulherin is claiming an interest in week 23 for unit 104, unlike Hardy who had disclaimed all interests adverse to Shaw.

In the instant case, Mulherin claims to be in possession of one of the weeks, specifically week 23 of unit 104. In the amended complaint, Mulherin maintained it holds the unit in constructive trust for the Cobbs pursuant to prior agreement, which allowed the Cobbs to exchange weeks. Additionally, Mulherin has an interest in enforcing its contracts with both the Cobbs and Rickborns in which it alleges the Council is interfering. The circuit court found:

> [Mulherin] clearly has an interest in the dispute because of the potential exposure it may have to the third parties if the [Council] succeed[s] in dispossessing those to whom [Mulherin] sold the units. [Mulherin] has an interest in the effect of the

[3] The statutes involved in Shaw were: (1) S.C. Code Ann. § 15-5-30 (1976), which has been repealed and replaced with Rule 17, SCRCP; and (2) S.C. Code Ann. § 15-67-10 (1976), which allows a person in possession of property to bring an action to settle all claims against any parties who may have adverse claims.

> quitclaim deed which it provided to the [Council]. Therefore, [Mulherin] is a real party in interest and does have standing to enforce the rights that arise out of its contract of settlement with and/or quitclaim deed to the [Council].

Mulherin is "a real party in interest." Apodictically, the trial court correctly determined Mulherin had standing to bring the instant action.

II. STATUTE OF LIMITATIONS

The Council contends the trial court erred in failing to find Mulherin's claims were barred by any applicable statute of limitations because the events underlying the action occurred not in 1998, when the suit was filed, but in 1987-1989 when the titles to week 23 of unit 104 and week 22 of unit 123 were originally conveyed with problems. We disagree.

Initially, we note the Council failed to cite any supporting authority for this position. Further, all arguments made are merely conclusory statements. Concomitantly, the Council abandoned the issue on appeal and it need not be addressed by this court. See First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) (stating Appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority); R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000) (declaring an issue is deemed abandoned if argument in appellate brief is only conclusory).

Even if properly presented, the issue fails on the merits. The events giving rise to the underlying action occurred after Mulherin gave a quitclaim deed to the Council for any interest it may own. The bulk of Mulherin's claims were to correct title after the Council alleged ownership of week 23 of unit 104. William Rickborn filed an affidavit indicating the Council refused to recognize his ownership over week 22 of unit 103 and had frustrated the process of the Cobbs signing over that week and taking week 23 of unit 104 as agreed upon with Mulherin. These claims could not have been brought until after the 1997 agreement and the quitclaim deed were filed.

Other claims are based upon representations made by the attorney for the Council regarding the settlement agreement. Indubitably, these claims could not have been brought in 1989, as the Council claims, because the representations were not made until 1997. The trial court properly concluded Mulherin's claims against the Council were based on events that occurred no earlier than 1997. Therefore, the action brought in 1998 is not barred by any applicable statute of limitations.

III. SUMMARY JUDGMENT

The Council avers the trial court erred in granting Mulherin's motion for summary judgment as to its counterclaims for breach of contract, breach of covenant of good faith and fair dealing, fraud, and slander of title. Additionally, the Council complains the trial court erred in granting summary judgment on its claim for conspiracy. We disagree.

First, the Council failed to cite any supporting authority for its position. All arguments made are merely conclusory statements. Consequently, the Council abandoned the issue on appeal and we need not consider it. See Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004) (noting that failure to provide arguments or supporting authority for an issue renders it abandoned); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999) (declaring that conclusory arguments may be treated as abandoned). Second, even if this issue was properly raised, it would fail on the merits.

A. Breach of Contract

On the breach of contract claim, the Council argues the jury "may well have regarded the settlement agreement as a bar to [Mulherin's] initiation of this lawsuit." However, this in no way refutes the trial court's conclusion that the agreement required a quitclaim deed and did not require a warranty as to the title being transferred between the parties. A quitclaim deed does not guarantee the quality of title, but only conveys that which the grantor may lawfully convey. See Martin v. Ragsdale, 71 S.C. 67, 50 S.E. 671 (1905).

If the Council is maintaining Mulherin breached the contract and settlement by bringing the lawsuit after "releasing all claims," we find this argument meritless. The release did not explicitly bar claims brought subsequent to the date of the release. It does not operate as a bar to the claims brought by Mulherin because those claims arose after the settlement agreement and subsequent deeds were filed.

B. Fraud

The only claim regarding fraud made by the Council in its brief is "[t]he trial court is in error when it states that the complaint does not set forth the nine elements of fraud. It does. . . . The other statements regarding this cause of action are matters of fact which present questions of fact for the jury." These statements fail to edify this court as to any evidence in the record to dispute the findings made by the circuit court.

The judge specifically found the Council failed to offer evidence of a representation made by Mulherin upon which the Council either relied or had a right to rely. The Council alleged in its counterclaim: "The representation that [Mulherin] would convey without disclosure of secret deeds and encumbrances was material and false and known by [Mulherin] to be false or recklessly made since some of the property to be transferred had already been secretly transferred or encumbered by [Mulherin]." Yet, as the trial court determined, the Council knew or should have known of the confusion regarding title to week 22 of unit 123 and week 23 of unit 104. Both owners had been paying dues for years on the respective weeks. The Council, through its attorney, agreed to "accommodate dues paying contract purchasers" in regard to settling their title once the quitclaim deed was issued. Therefore, the trial court properly concluded no representation was made upon which the Council had a right to rely, as it knew there were problems with the title and agreed to accommodate some owners whose titles had problems.

C. Slander of Title

The only claim the Council makes in its brief regarding slander of title is "[t]his also presents facts for the jury for no discovery has been taken prior to hearing in this matter." Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). However, the Council never moved for a continuance to conduct discovery, nor was this issue ever raised to the trial court. Thus, the issue is not preserved for review on appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

On the merits, the slander of title claim is based upon the filing of the pleadings in the underlying matter. The Council has not established a proper basis for the claim. See Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002) (finding judicial proceedings are privileged and cannot form the basis of a claim for slander of title).

D. Conspiracy

The allegations in the third-party claim of conspiracy all relate to the sale of shares in Sea Cabins by Mulherin and its partners. The Council asserted the individual partners of Mulherin engaged in a conspiracy with respect to how the timeshare units were originally sold. As a result of the settlement agreement, Mulherin transferred all of its properties to the Council. The allegations do not state it continued to sell any properties after the transfer. Without question, these sales all took place prior to the settlement agreement between Mulherin and the Council. Concomitantly, the release barred all claims which either party had at the time of the settlement. The trial court properly found the conspiracy claim was barred by the release.

CONCLUSION

We rule the trial court properly found Mulherin was a real party in interest and had standing to bring the action. We hold the action brought by Mulherin was not barred by any applicable statute of limitations. Finally, we conclude the trial court properly granted summary judgment to Mulherin on the Council's counterclaims and third-party complaint. Accordingly, the decision of the trial court is

AFFIRMED.

STILWELL and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amy P. Lacke, **Appellant,**

v.

Michael R. Lacke, **Respondent.**

Appeal From Aiken County
Peter R. Nuessle, Family Court Judge

Opinion No. 3920
Heard December 7, 2004 – Filed January 10, 2005

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Frank S. Potts, of Columbia, for Appellant.

Gary Hudson Smith, III, of Aiken, for Respondent.

ANDERSON, J.: Amy P. Lacke (Amy) initiated this action against Michael R. Lacke (Michael) to enforce a Joint Parenting Agreement

(the agreement) entered into by the parties and made part of an Illinois court's order of divorce. Amy appeals a South Carolina court's construction and enforcement of the agreement. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

Amy and Michael were divorced by decree of an Illinois court filed in February 1990. The Illinois court incorporated the Joint Parenting Agreement into its order. The following provision encompassed the parties' duties regarding college funding for their children:

> The parties shall utilize their best efforts for the payment of the children's college education, which obligation is predicated upon the scholastic aptitude of the child and the parties current respective financial abilities. The decision affecting the education of the child, including the choice of college or other institution, shall be made jointly by the parties and shall consider the expressed preference of the child, but neither party shall unreasonably withhold his or her consent to the expressed preference of the child. Said college tuition shall be subject to the children's application for grants and scholarships and both parties shall timely cooperate in completing any financial aid forms to secure any said funds for higher education.

Amy brought this action to enforce Michael's obligation to contribute to their daughter Laura's college education. At the time of trial, Laura had completed approximately two years of college. During the hearing, it was determined Michael had only contributed approximately $1,550 toward Laura's education. Amy testified she contributed roughly $8,300 toward Laura's education expenses, although some of these payments were for automobile expenses incurred by Laura.

According to their financial declarations, Michael and Amy had gross incomes of $88,392 and $46,440 per year, respectively. Michael previously

made as much as $140,000 per year. Additionally, he makes child support payments for two other children from his second and third marriages.

The trial court found the provision requiring the parties to pay for college was ambiguous, and therefore, considered the parties' intent in making the agreement to determine the parties' responsibilities and obligations thereunder. The court concluded: (1) transportation expenditures were not part of the expenses contemplated by the agreement; (2) Laura was obligated to apply for loans; (3) the parties were only required to pay toward Laura's expenses after she applied for loans and after her income had been considered; (4) Michael and Amy were to bear equally any amount owed for Laura's education; and (5) Michael was to reimburse Amy his share of the expenses within thirty days.

STANDARD OF REVIEW

In appeals from the family court, this Court may find facts in accordance with its own view of the preponderance of the evidence. Emery v. Smith, ___S.C.___, 603 S.E.2d 598 (Ct. App. 2004) (citing Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992)). However, this broad scope of review does not require us to disregard the family court's findings. Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002); Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). Nor must we 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. Cherry v. Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981); Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999); see also Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App. 1996) (ruling that because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to the family court's findings where matters of credibility are involved).

ISSUES ON APPEAL

I. Did the trial court err in construing the Joint Parenting Agreement?

   A. Did the trial court err in finding the agreement is ambiguous?

   B. Did the trial court err in finding transportation costs are not college expenses under the agreement?

   C. Did the trial court err in finding the agreement requires Laura to incur loans and allocate her income toward her college expenses?

   D. Did the trial court err in finding the agreement requires Amy and Michael to share Laura's education expenses equally?

II. Did the trial court err in allowing Michael thirty days in which to reimburse Amy for any amount owed?

III. Did the trial court err in failing to award Amy attorney's fees?

LAW/ANALYSIS

I. Construction of the Agreement

A parent may contractually obligate himself to pay educational expenses beyond the age of majority. Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994). Construction of such an agreement is a matter of contract law. Id. Generally, where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give

effect to it. Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001); Bogan v. Bogan, 298 S.C. 139, 378 S.E.2d 606 (Ct. App. 1989). When an agreement is unambiguous, effect should be given according to the ordinary and popular sense of the words employed therein. See, e.g., Warner v. Weader, 280 S.C. 81, 311 S.E.2d 78 (1983) (providing that an unambiguous contract must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary, and popular sense); see also Heins, 344 S.C. at 158, 543 S.E.2d at 230 ("The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully.").

However, where an agreement is ambiguous, the court should seek to determine the parties' intent. Ebert v. Ebert, 320 S.C. 331, 465 S.E.2d 121 (Ct. App. 1995); Mattox v. Cassady, 289 S.C. 57, 344 S.E.2d 620 (Ct. App. 1986); see also Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997) (explaining unambiguous marital agreements will be enforced in accordance with their terms, while ambiguous agreements will be examined in same manner as other agreements in order to determine intention of parties). "A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear." Smith-Cooper v. Cooper, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001). Construction of an ambiguous contract is a question of fact. Skull Creek Club Ltd. P'ship v. Cook & Book, Inc., 313 S.C. 283, 437 S.E.2d 163 (Ct. App. 1993).

A. Ambiguity

In McDuffie v. McDuffie, 313 S.C. 397, 438 S.E.2d 239 (1993), the South Carolina Supreme Court found "the words 'all college expenses,' without more, [are] patently ambiguous." McDuffie, 313 S.C. at 400, 438 S.E.2d at 241. In the instant case, the first clause of the original agreement is patently ambiguous. It states: "The parties shall utilize their best efforts for the payment of the children's college education, which obligation is predicated upon the scholastic aptitude of the child and the parties current respective financial abilities." It fails to define college education, or delineate which expenses should be paid for by the parties. Accordingly, we agree with the trial court that the agreement is ambiguous as to the expenses

encompassed by the phrase "college education." The court properly sought to determine the intent of the parties. See Mattox v. Cassady, 289 S.C. 57, 344 S.E.2d 620 (Ct. App. 1986).

B. Expenses Covered

Amy contends the trial court erred in finding transportation costs were not included as college education expenses. We disagree.

The agreement is vague as to which expenses qualify as "college education" costs. McDuffie, 313 S.C. 397, 438 S.E.2d 239, illustrates when transportation costs may be covered by an otherwise ambiguous agreement to pay for a child's college education. In McDuffie, the court determined that transportation was not an expense intended to be covered by the father's agreement "to pay all expenses associated with [the] college education of any of said children . . . ." Id. at 398, 438 S.E.2d at 240. The court noted that "in her testimony, Mother defined college expenses as 'tuition, room, and board . . . books or supplies,' and advised that she was willing to pay for transportation." Id. at 400, 438 S.E.2d at 241. Thus, the court gave credence to the parties' testimony of their intent in making the agreement.

Here, there is no evidence establishing the parties' intent regarding the inclusion of transportation as a college expense. During cross-examination, Amy professed:

> Q. But you agree with Mr. Lacke—he says nothing about covering transportation expenses?
>
> A. I disagree.
>
> Q. So, where it says payment for the children's college education your understanding of that is to mean transportation and everything else?
>
> A. There are many other things that I've read about the law in Illinois and it always includes transportation as part of that.

Q. But that's not in this agreement, is it?

A. It is in that agreement. I think it is implicit in that agreement.

Critically, this discussion does not edify as to the parties' intent in signing the agreement—it only demonstrates Amy's desire that transportation now be covered and her misunderstanding of Illinois law.

In her brief, Amy points to 750 Ill. Comp. Stat. 5/513 as grounds for inclusion of transportation costs in education expenses. The statute provides, in relevant part:

> The educational expenses **may include**, but shall not be limited to, room, board, dues, tuition, **transportation**, books, fees, registration and application costs, medical expenses including medical insurance, dental expenses, and living expenses during the school year and periods of recess, which sums may be ordered payable to the child, to either parent, or to the educational institution, directly or through a special account or trust created for that purpose, as the court sees fit.

Id. (emphasis added). This statute, however, lends no great benefit to Amy.

Nothing in the agreement indicates it is to include transportation costs. The statute uses the word "may," which merely indicates transportation expenditures are not prohibited from inclusion as an education-related expense. The agreement does not reference the statute, and neither party expressed intent that a vehicle be a covered cost of Laura's education; therefore, the trial judge was within his discretion in ruling that transportation expenses are not covered in the agreement. See McPherson v. J. E. Sirrine & Co., 206 S.C. 183, 33 S.E.2d 501 (1945) (providing that words cannot be read into a contract which import intent wholly unexpressed when the contract was executed).

Presented with a dearth of evidence from which to glean the intent of parties, the trial judge ruled the following to be covered expenses: "1. tuition; 2. room; 3. board; 4. books; and 5. supplies." We find no error in the determination that the parties did not intend to include transportation costs as an expense covered under the agreement.

C. Loan and Work Requirements

The trial court concluded that Laura was required to incur debt in the form of student loans and to work to support herself prior to the parties being responsible for any payment of her college expenses. Amy contends this was error, and we agree.

While the agreement is ambiguous as to precisely which expenses are to be included under "college education," the agreement is unequivocal as to who is to pay the expenses. Consequently, the court's only function was to enforce the agreement according to its terms. See Heins, 344 S.C. at 158, 543 S.E.2d at 230 ("Unambiguous marital agreements will be enforced according to their terms.").

The agreement makes clear that Laura should incur no cost for her education. Although the agreement requires her to apply for scholarships and grants, neither type of financial aid requires reimbursement, and certainly neither requires her to assume debt and make payments of principal and interest. The South Carolina Supreme Court has considered a similar clause in an agreement to pay for college expenses: "The agreement states that Father will pay all reasonable expenses 'to the extent that such expenses are not provided by any scholarship, grant or other assistance available to the children.'" Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). The court announced:

> When words of particular and specific meaning are followed by general words, the general words are construed to embrace only persons or things of the same general kind or class as those enumerated. See Swanigan v. American Nat'l Red Cross, 313 S.C. 416, 438 S.E.2d 251 (1993). The forms of "assistance"

> enumerated in the agreement are all within the same general class of programs that do not require repayment. We find "other assistance" does not include loans that require repayment.

Id.

The provision in question here does not include loans or even "other assistance" as a category. It simply and unquestionably limits Laura's contributions to scholarships and grants, and it was error to oblige her to incur debt where no such requirement exists in the agreement.

Similarly, the agreement does not require that Laura work to support herself through college before the parties are required to contribute. The agreement provides: "The **parties** shall utilize their best efforts for the payment of the children's college education, which obligation is predicated upon the **scholastic aptitude of the child and the parties current respective financial abilities**." (Emphasis added). The agreement places only the requirement of scholastic aptitude upon the child. The parties' financial ability and best efforts are to be considered, but no reference is made to Laura's ability to pay or her financial condition. In Ellis, the supreme court "reverse[d] the Court of Appeals' holding that . . . [the child's] ability to contribute reduced Father's obligation to pay." 316 S.C. at 248, 449 S.E.2d at 488. Lucidly, when a party enters into an agreement to pay for his child's education, the terms of that agreement control the rights and obligations of the party.

The trial court's comments during a colloquy with the attorneys indicates an error in its determination. The court explained:

> Well, over time I have found that that is the big dilemma in all of these cases. This one may be a little different because you've got an Illinois agreement, but that's the big dilemma in all of these cases. **It is getting more and more difficult to show need. I have had two or three of these lately, and I've noticed overall it is getting more and more difficult, I suppose, as there are more grants, scholarships, and loans available.**

(Emphasis added).

The agreement included no provision for the establishment of need, and neither party indicated intent that Laura demonstrate need prior to the parties being required to pay for her education. For the court to include need as a requirement is a significant modification of the Illinois order and is not allowed under section 20-7-1152 of the South Carolina Code (Supp. 2003), because Illinois has exclusive jurisdiction under the Uniform Interstate Family Support Act (UIFSA), S.C. Code Ann. § 20-7-960 and –1010 (Supp. 2003). See Badeaux v. Davis, 337 S.C. 195, 207-08, 522 S.E.2d 835, 841 (Ct. App. 1999) (providing a detailed and extensive summation of UIFSA statutes and requirements).

Furthermore, this case is governed by the parties' agreement. Consequently, Risinger v. Risinger, 273 S.C. 36, 253 S.E.2d 652 (1979), is inapplicable. Pursuant to Risinger, the family court may order a parent to pay for a child's college education where no agreement to pay exists. The Risinger court held:

> [A] family court judge may require a parent to contribute that amount of money necessary to enable a child over 18 to attend high school and four years of college, where, as here, there is evidence that: (1) the characteristics of the child indicate that he or she will benefit from college; (2) the child demonstrates the ability to do well, or at least make satisfactory grades; (3) the child cannot otherwise go to school; and (4) the parent has the financial ability to help pay for such an education.

Id. at 39, 253 S.E.2d at 653-54.

Subsequently, in Hughes v. Hughes, 280 S.C. 388, 313 S.E.2d 32 (Ct. App. 1984), this Court elaborated upon the third prong of the Risinger test. We adjudged that

> [a]mong the factors to be considered in determining whether and to what extent financial assistance for college is necessary are the availability of grants and loans and the ability of a child to earn income during the school year or on vacation. [Citation omitted]. We find these factors relevant because an emancipated child has a duty to help minimize college expenses when a parent's financial support for these expenses is sought through the family courts.

Id. at 391, 313 S.E.2d at 33-34. See generally Nicholson v. Lewis, 295 S.C. 434, 369 S.E.2d 649 (Ct. App. 1988) (finding trial court properly required father to pay a portion of daughter's remaining educational expenses where daughter worked full time during summer breaks, helped with the upkeep of her automobile, was searching for part time work during the school year, and had obtained grants and student loans); Kelly v. Kelly, 310 S.C. 299, 301, 423 S.E.2d 153, 154 (Ct. App. 1992) (holding the family court erred by requiring mother to contribute to son's college expenses where son "made no attempt whatever to apply for educational loans.").

However, Risinger and Hughes have no application to situations where a parent voluntarily binds himself in an agreement to assume a child's college expenses. When such an agreement exists, the child is under no obligation to minimize expenses, incur student loans, or apply her own income to pay for college unless the agreement so provides. See McDuffie v. McDuffie, 313 S.C. 397, 438 S.E.2d 239 (1993). Here, the agreement unambiguously places the burden to pay for Laura's education exclusively on Michael and Amy. It was error to hold otherwise.

D. Parties' Shares of Expenses

The trial court found each party should be equally responsible for the remaining costs of Laura's education after applicable sources have been exhausted. Amy argues the court erred by placing an equal burden on the parties. We agree.

The agreement, without ambiguity, mandates that the parties bear the burden of Laura's education costs—not equally, but according to their respective abilities. The agreement provides: "The parties shall utilize their best efforts for the payment of the children's college education, which obligation is predicated upon . . . the parties current **respective financial abilities**." (Emphasis added). The trial court did not set forth any findings regarding the parties' current financial abilities. Nor did the court explain the evidence upon which it was relying in finding an equal division appropriate.

After our full review of the evidence, we conclude an equal division of Laura's education costs is unfair, inappropriate, and fails to give effect to parties' agreement. The agreement predicates each party's obligation to bear the cost of Laura's education upon that party's respective ability to pay. Concomitantly, enforcement of the agreement requires analysis of Amy and Michael's economic conditions. An equal sharing of the expenses could only be supported by finding an equal ability to pay.

The financial declarations reveal that Michael's annual gross income at the time of trial was approximately $88,392. Amy's total income, including sums received for child and spousal support, amounted to $46,440 per year. However, Michael confessed that when Laura began college, his annual income was "probably 130 to 140,000 a year."

The Illinois Appellate Court has found all aspects of a party's financial condition should be considered in reaching a conclusion regarding their ability to pay college expenses. In re Marriage of Drysch, 732 N.E.2d 125 (Ill. App. Ct. 2000). The order is from an Illinois court, and Illinois continues to retain continuing exclusive jurisdiction over the order. See Badeaux v. Davis, 337 S.C. 195, 207-08, 522 S.E.2d 835, 841 (Ct. App. 1999) (explaining where a foreign jurisdiction has entered an order and this state does not have grounds for accepting exclusive jurisdiction, the continuing exclusive jurisdiction will remain in the issuing state); S.C. Code Ann. § 20-7-1000 and –1010 (Supp. 2003). Therefore, the trial court should have looked to Illinois law for determination of the parties' rights and responsibilities under the order. See S.C. Code Ann. § 20-7-1138(A) (Supp.

2003) (establishing law of the issuing state governs the nature, extent, amount, and duration of current payments and other obligations of support).

In Drysch, the Illinois court concluded the income of a party's new spouse should be included as part of his or her ability to pay if that money is pooled and used to support each spouse. 732 N.E.2d at 129. At trial, Michael declared that his new wife earned "[a]pproximately $58,000 a year." Additionally, in Greiman v. Friedman, 414 N.E.2d 77 (Ill. App. Ct. 1980), the Illinois Appellate Court found father's expenses in raising a second family should be considered. Id. at 82-84.

These numbers reveal substantial disparity between the financial abilities of Michael and Amy. Based on the parties' respective gross incomes of $88,392 and $46,440, we require Michael to pay 66% of Laura's education expenses, with Amy bearing the burden of 34%. We remand to the trial court for a determination of the amount of expenses incurred by Laura, including expenses related to her having to assume debt to pay for school, which remained after her receipt of scholarships and grants. The parties shall be responsible for this amount pursuant to the division set forth in this opinion, and the trial court shall enter an order setting forth the amount owed by each party.

II. When Payment Required

The agreement does not provide a time frame for paying education costs. It simply requires payment of the expenses. At the time of the hearing, Laura had completed two years of schooling and incurred two years worth of debt and expenses, which should have been paid by Amy and Michael. It was error for the court not to require immediate payment of any amount owed by Michael for the years already completed by Laura.

According to Amy's brief, Laura graduated from college in the spring of 2004. Therefore, we rule that the parties shall make payment of the known expenses immediately. Upon remand, the family court is to determine with certitude the amount owed by each party in accordance with this opinion, and that amount shall be due immediately.

III. Attorney's Fees

Amy contends the trial court erred in failing to award her attorney's fees. We find the trial court failed to properly consider the relevant factors and explain its reasoning in denying attorney's fees.

The award of attorney's fees is at the sound discretion of the family court. See Stevenson v. Stevenson, 295 S.C. 412, 368 S.E.2d 901 (1988). In deciding whether to award attorney's fees, the family court should consider: (1) the parties' ability to pay their own fee; (2) the beneficial results obtained by counsel; (3) the respective financial conditions of the parties; and (4) the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 415 S.E.2d 812 (1992); Shirley v. Shirley, 342 S.C. 324, 536 S.E.2d 427 (Ct. App. 2000). Our supreme court has identified the following factors for determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991).

The court's order simply stated: "I further find that both parties shall be responsible for their own attorney fees and costs associated with this action." This succinct and brief statement fails to provide any evidence the trial court considered the appropriate factors in reaching its decision.

Further, we conclude that South Carolina law controls concerning the consideration of an award of attorney's fees, because this action was instituted and initiated for the purpose of enforcing an Illinois court order in the State of South Carolina. All activities and proceeding in this regard have occurred within the jurisdiction of South Carolina. Regardless, the factors to be considered in awarding attorney's fees under Illinois law are substantially the same as, if not identical to, the factors announced in E.D.M. and Glasscock. See In re Marriage of Landfield, 567 N.E.2d 1061 (Ill. App. Ct. 1991) (listing the factors considered in making determination of attorney's fees award as skill and standing of attorneys employed; nature of

controversy; novelty and difficulty of questions at issue; amount and importance of subject matter, especially from family law standpoint; degree of responsibility involved in management of case; time and labor required; usual and customary charge in community; and benefits resulting to client); 750 Ill. Comp. Stat. 5/508.

Accordingly, the issue of attorney's fees is remanded to the trial court for adequate and proper consideration of the appropriate factors consistent with the results reached in this opinion.

CONCLUSION

We find the trial court correctly determined costs associated with Laura's ownership of a vehicle are not included in the amount covered by the parties. However, the court erred in its determination that Laura must apply for loans to pay for her schooling prior to the rise of any obligation to pay by Amy or Michael. Further, we conclude the trial court erred in deducting Laura's income, either during school or during break, from the amount owed by the parties. We hold the parties shall divide the expenses of Laura's education 66% to Michael and 34% to Amy.

We remand to the trial court for an order setting forth the amount of college expenses, including any expenses related to Laura incurring debt to pay for school, which are to be covered by the parties. The family court shall require immediate payment by the parties. Finally, the court shall reconsider the award of attorney's fees in accordance with this opinion. This case is affirmed in part, reversed in part, and remanded to the trial court for entry of an order consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

STILWELL and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

BPS, Inc., **Appellant,**

v.

William M. Worthy, II and Carolina Benefit Administrators of SC, Inc., **Defendants,**

Of Whom William M. Worthy, II, is the **Respondent.**

and

William M. Worthy, II, and Carolina Benefit Administrators of SC, Inc., **Third-Party Plaintiffs,**

v.

Robert J. Dickey, **Third-Party Defendant.**

Appeal From Spartanburg County
Gary E. Clary, Circuit Court Judge
Larry R. Patterson, Circuit Court Judge

Opinion No. 3921
Heard December 7, 2004 – Filed January 10, 2005

REVERSED and REMANDED

John D. Hawkins, of Spartanburg, A. Camden Lewis, Mark W. Hardee and Thomas A. Pendarvis, all of Columbia, for Appellant.

Ginger D. Goforth, Matthew E. Cox and Walter M. White, all of Spartanburg, for Respondent.

ANDERSON, J.: BPS, Inc. appeals from a circuit court order granting summary judgment to William M. Worthy, II and from an order denying its motion to alter or amend. We reverse and remand.

FACTUAL/PROCEDURAL BACKGROUND

BPS, Inc. (BPS) is a company which processes insurance claims as a third party administrator for corporations. Carolina Benefit Administrators of SC, Inc. (Carolina Benefit) administers insurance claims as a third party administrator for self-funded ERISA plans. In the summer of 2000, Robert J. Dickey, president of BPS, and William M. Worthy, II, president of Carolina Benefit, entered into negotiations for the sale of BPS's assets to Carolina Benefit. Around September 22, 2000, Carolina Benefit and BPS executed a letter of intent. Attorneys for both companies then began drafting an Asset Purchase Agreement.

Although no written agreement existed between the parties, Carolina Benefit provided an earnest money deposit of $100,000 to BPS in November of 2000. Thereafter, a transition team of BPS employees began working out of Carolina Benefit's offices, though they remained BPS employees. Dickey declared that Carolina Benefit received "access to computer and paper files

containing information relating to the operations of BPS, Inc., including pricing, renewals and other information concerning customers of BPS, Inc."

In November of 2000, Carolina Benefit learned that various accounts in BPS's portfolio were leaving BPS. On November 22, 2000, Dickey signed a version of the Asset Purchase Agreement, making handwritten changes before signing it. Worthy was on vacation at that time. Upon his return, Worthy was informed that BPS's largest account would not be renewed for the coming year. Worthy refused to sign the agreement. Dickey averred that at that time Carolina Benefit had already "taken possession of the BPS assets, employed its employees and begun servicing its clients."

In December of 2000, BPS filed a lawsuit against Carolina Benefit and Worthy seeking injunctive relief and damages. The amended complaint alleged causes of action for breach of contract, breach of contract accompanied by fraudulent act, promissory estoppel, quantum meruit, violation of the Unfair Trade Practices Act, intentional interference with a contract, fraud, negligent misrepresentation, and fraud in the inducement. Carolina Benefit and Worthy answered and filed a counterclaim against BPS and a cross-claim against Dickey.

BPS sought an injunction to prevent Carolina Benefit

> from using the assets and name of BPS, Inc., from employing persons now or formerly employed by BPS, Inc., from contacting or otherwise doing business with any current or former client or customer of BPS, Inc., from utilizing any proprietary information, trade secret or other information obtained from BPS, Inc. in the course of its negotiations and purchase of assets from BPS, Inc., from entering into any contracts of any kind with clients, customers, employees or others now or formerly associated with Plaintiff . . . .

BPS filed various affidavits in support of the request for the temporary restraining order along with the complaint. A temporary restraining order was issued. Thereafter, a temporary injunction was ordered. The parties subsequently entered into a consent agreement in which Carolina Benefit

agreed not to use BPS's assets and name or to use proprietary information or trade secrets obtained from BPS or its employees in the course of its negotiations for the purchase of BPS's assets. By order of the circuit judge, the "Plaintiff shall maintain the disputed $100,000 earnest money deposit in an interest-bearing escrow account until further order of this Court."

Worthy moved to dismiss the action against him individually. He filed an affidavit in support of his motion, as well as excerpts from the depositions of Worthy and Dickey. The motion was heard before Judge Gary E. Clary on August 14, 2002. The trial court instructed counsel for Worthy to prepare a proposed order granting the motion to have Worthy dismissed as a defendant. The proposed order, mailed on August 27, 2002, noted: "Where matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. See Rule 12(b), SCRCP."

On August 30, before Judge Clary signed the order, BPS's attorney wrote to the court objecting to the conversion. Counsel for BPS argued that if the motion was to be treated as a motion for summary judgment, the entire depositions should be placed into the record. A complete copy of Dickey's deposition was attached to the letter.

Judge Clary did not reply to this letter, but directed that the letter from BPS's attorney and Dickey's deposition be "filed in the Court file." Counsel for Carolina Benefit and Worthy did not object. Nonetheless, Judge Clary signed the order as proposed on September 6, 2002. The order referenced the depositions of both Worthy and Dickey in setting forth the facts, but stated: "[BPS] failed to submit any affidavits so the facts before the Court are those as set forth by the Affidavits and Deposition excerpts provided by Defendant/Third-Party Plaintiff Worthy." The order granted Worthy's motion for summary judgment as to individual liability.

BPS filed a motion to alter or amend. In the interim, Judge Clary left the bench. The motion to alter or amend was heard before Judge Larry Patterson. Judge Patterson denied the motion.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. White v. J.M. Brown Amusement Co., 360 S.C. 366, 601 S.E.2d 342 (2004); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004); Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Medical Univ. of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is appropriate where 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 judgment as a matter of law. Belton v. Cincinnati Ins. Co., 360 S.C. 575, 602 S.E.2d 389 (2004); McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004); Rule 56(c), SCRCP; see also Higgins v. Medical Univ. of South Carolina, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (noting that when ruling on motion for summary judgment, trial judge must consider all of the documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); see also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) ("On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.").

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000); Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004); Hawkins, 358 S.C. at 289, 594 S.E.2d at 561-62; Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001).

LAW/ANALYSIS

BPS argues that: (1) Judge Clary erred in granting summary judgment to Worthy; (2) summary judgment should not have been granted until discovery was complete; and (3) Judge Patterson erred "in his determination that he had no authority to alter and amend the summary judgment order of Judge Clary."

I. SUMMARY JUDGMENT

A. Basis and Reasons for the Summary Judgment Order in Case Sub Judice

The dispositive issue is whether the circuit court erred in granting summary judgment to Worthy. BPS contends Judge Clary's order erroneously found that BPS had failed to submit any affidavits in opposition to Worthy's motion to dismiss, and thus based its findings solely on Worthy's affidavits. We agree.

Here, the affidavits in support of the temporary injunction were filed with the complaint. It is undisputed that the affidavits were in the record at the time the motion was heard. Furthermore, Judge Clary inserted Dickey's full deposition into the record before he signed the order. Worthy did not object to this action. Judge Clary had the excerpts from the deposition testimony in the submissions from Worthy. Thus, the circuit court erred in refusing to consider all of the evidence in the record, and in failing to view the evidence in the light most favorable to the non-moving party.

Clearly, many issues in the case remained in dispute. BPS brought nine causes of action in addition to the request for an injunction. Worthy should not have been dismissed from the action unless it was clear that BPS could not establish prima facie liability on any of them.

Worthy claims that as an officer of Carolina Benefit, he is immune from liability. He cites Hunt v. Rabon, 275 S.C. 475, 272 S.E.2d 643 (1980), for this proposition. In Hunt, the Supreme Court articulated:

> Generally the reason for the creation of a corporation is to limit liability. While there are instances in which directors and/or trustees and officers may be personally liable, an officer or a director of a corporation is not, merely as a result of his standing as such, personally liable for torts of corporate employees. To incur liability he must ordinarily be shown to have in some way participated in or directed the tortious act. . . . .

We find the following relevant rule in 19 Am. Jur. 2d Corporations, 4, Liability for Torts:

> § 1382. Generally.
>
> A director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character; he is not liable for torts committed by or for the corporation unless he has participated in the wrong. Accordingly, directors not parties to a wrongful act on the part of other directors are not liable therefor. If, however, a director or officer commits or participates in the commission of a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby, and it does not matter what liability attaches to the corporation for the tort . . . .
>
> § 1383. Liability for acts of subordinate officers, agents, or employees.
>
> Ordinarily, a director is not liable for the tortious acts of officers, agents, or employees of the corporation, unless he participated therein or authorized the wrongful act. It is held that directors cannot be held liable for the acts of subordinate officers which they neither participated in nor sanctioned, and where they could not, in the exercise of ordinary and reasonable supervision, have detected the wrongdoing of such subordinate officers . . . .

In 19 C.J.S. Corporations § 845-Torts, the rule is stated in this way:

> "A director, officer, or agent is not liable for torts of the corporation or of other officers or agents merely because of his office. He is liable for torts in

> which he has participated or which he has authorized or directed."

Id. at 477-78, 272 S.E.2d at 644.

Nothing in the law shields Worthy from direct liability in tort for his own actions. See Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) ("An officer, director, or controlling person in a corporation is not, merely as a result of his or her status as such, personally liable for the torts of the corporation. To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act."). Worthy is personally liable for any tortious acts he participated in or directed.

Additionally, Worthy is liable for unfair trade practices that he personally committed. "[I]n private actions under the UTPA, directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the UTPA." Plowman v. Bagnal, 316 S.C. 283, 286, 450 S.E.2d 36, 38 (1994) (emphasis added); see also Donsco, Inc. v. Casper Corp., 587 F.2d 602 (3rd. Cir. 1978) (finding that corporate officer is individually liable for unfair competition in which he participates); Moy v. Schreiber Deed Sec. Co., 535 A.2d 1168 (Pa. Super. Ct. 1988) (stating that corporate president could be held individually liable under the participation theory for acts of unfair competition which he personally committed); Great Am. Homebuilders, Inc. v. Gerhart, 708 S.W.2d 8 (Tex. App. 1986) (determining that corporate officer who knowingly participates in deceptive trade practice may be held individually liable).

Similarly, the corporate veil does not protect Worthy from liability for his own actions. Section 33-6-220(b) (1999) of the South Carolina Code states: "Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct." (Emphasis added).

Worthy asserts that even if the claims apply to him, BPS failed to establish liability based on the evidence presented. Viewing the evidence in the light most favorable to BPS, we conclude there is sufficient evidence in the record to survive summary judgment. First, two of the affidavits of BPS employees alleged that "Mr. Worthy got what he wanted without having to pay." Second, there was evidence that Worthy and Carolina Benefit took possession of BPS assets, employed its employees, and began servicing its clients while intending not to execute the agreement. Third, some files and a computer were taken after Dickey had been assured the parties had reached an agreement. The verbiage and language of the order of the circuit judge reveals indubitably that the court did not consider any of this evidence or give efficacy to the complete depositions of Worthy and Dickey. Therefore, the circuit court erred in granting summary judgment to Worthy.

B. Discovery

BPS maintains the granting of summary judgment was improper because discovery was incomplete. Summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001); Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991); see also Schmidt v. Courtney, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003) ("Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a 'full and fair opportunity to complete discovery.'").

There may exist a possible query as to whether this issue was raised to the circuit court either during the hearing or during the Rule 59(e), SCRCP motion. That conundrum is answered directly and completely in the actions and positions taken and argued before the circuit court issued the order granting summary judgment. Specifically, BPS was faced with a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, dated July 26, 2002. On August 30, 2002, BPS objected to the conversion of the 12(b)(6) motion to a motion for summary judgment. Despite the objection posed by BPS, the circuit judge treated the original 12(b)(6) motion as a motion for summary judgment under Rule 56, SCRCP. Without utilizing completion of discovery as a ground for opposition to the conversion activity of the circuit judge, BPS

voiced a position in contra to the ruling of the circuit judge that encapsulates the need for further discovery activities. BPS submitted Dickey's complete deposition as an active response to the conversion of the original 12(b)(6) motion.

The Rule 59(e) motion filed by BPS professed:

> 1. On Page 3 of Judge Clary's Order he states that "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. See Rule 12(b), SCRCP." However, no notice that the motion would be converted from a Motion to Dismiss to a Motion for Summary Judgment was given.
>
> 2. ". . . Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."
>
> . . . .
>
> 6. Mr. John Hawkins, co-counsel for the Plaintiff and Third-Party Defendant, wrote to Judge Clary on August 30, 2002, asking that if indeed the Court intended to convert this matter to a Motion for Summary Judgment, the Plaintiff and Third-Party Defendant should be allowed a "**reasonable opportunity to present all material made pertinent to such a motion by Rule 56.**" Rule 12(b), SCRCP. As stated in the accompanying affidavit of Mr. Hawkins, a review of the Court file shows that Judge Clary granted his request that the deposition of Mr. Dickey be placed in the record. (Emphasis added).

Luculently, this issue is encompassed within the virginal, continuing, and briefed factual and legal occurrences depicted in the record on appeal in its entirety.

The circuit judge committed reversible error in proceeding to consider and convert the initial Rule 12(b)(6) motion to a motion for summary

judgment without giving BPS adequate and reasonable opportunity and time to present all materials pertinent to a Rule 56 motion.

II. MOTION TO ALTER OR AMEND

BPS avers that Judge Patterson erred in refusing to reach the merits in denying BPS's motion to alter or amend. Because we find that summary judgment was improper, we do not reach this issue. Regardless of how the circuit court ruled on the motion to alter or amend, the fact that the issues were raised and a ruling obtained was sufficient to preserve them for appeal.

CONCLUSION

Accordingly, we **REVERSE** the circuit court's order granting summary judgment to Worthy and **REMAND** this case for trial.

REVERSED and REMANDED.

STILWELL and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Phillip J. Donahue, Appellant,

v.

Multimedia, Inc., Multimedia Entertainment, Inc., Gannett Co., Inc., and Universal Television Enterprises, Inc., Respondents.

Appeal From Greenville County
John W. Kittredge, Circuit Court Judge

Opinion No. 3922
Heard November 16, 2004 – Filed January 10, 2005

AFFIRMED

Steven E. Farrar, Jack H. Tedards, Jr., William B. Swent and William J. Watkins, Jr., all of Greenville, for Appellant.

Donald A. Harper, N. Ward Lambert, Cynthia Buck Brown, James B. Pressley, Jr., Brent O. Clinkscale, all of Greenville and Robert C. Bernius, of Washington, for Respondents.

WILLIAMS, J.: Phillip J. Donahue appeals a grant of summary judgment in favor of Multimedia, Inc., Multimedia Entertainment, Inc., Gannett Co., Inc., and Universal Television Enterprises, Inc. ("Respondents"), arguing the trial court erred in interpreting a longstanding contract between the parties under the applicable law of New York. We affirm.

FACTS

The facts as set forth by the trial court are as follows:

> Th[is] action arises from a 1982 contract between . . . Phillip J. Donahue and [Respondents] . . . providing for Mr. Donahue's performance as Master of Ceremonies on a television talk show.
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> On April 15, 1982, [Donahue] entered into a Contract for Services with Multimedia Program Production, Inc. (the former name of the Defendant MEI). This contract cancelled and superseded a 1978 contract between the parties.
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> Under the terms of the 1982 contract, [Donahue] agreed to serve as "Master of Ceremonies on the television program presently entitled 'Donahue' (the 'Program')." The parties further agreed in Section 10(q) of the contract that the laws of the State of New York govern its terms. The contract was subsequently amended four times. The amendments primarily adjusted the amount of remuneration due to [Donahue] and extended the contract's "term." Each iteration of the contract was for a definite term. The last amendment was entered into on October 12, 1994. Pursuant to that final amendment, the contract's term expired on August 31, 1996:

> Extended Term: The term of the Contract shall be extended so that, as extended, it shall expire at midnight on August 31, 1996. (1994 amendment to Contract, Section 2)

The final amendment also provided that discussions between the parties regarding the continuation of any programming beyond the expiration date were to be commenced on or before May 31, 1995.

. . . .

Sometime before May 31, 1995, [Donahue] decided not to renew his contract with MEI beyond its August 31, 1996 expiration date.

In July 1995 . . . Gannet Co., Inc. ("Gannett") submitted, and the Board of Directors of Multimedia approved, a proposal for Gannett's purchase of the stock of Multimedia. Multimedia shareholders approved the proposal at a special meeting on November 15, 1995. Pursuant to that transaction, [Donahue] received a substantial payment for his Multimedia shares.

Following Gannett's acquisition of Multimedia stock, MEI continued to produce the "Donahue" program, and [Donahue] continued to perform his duties as its master of ceremonies. The last program was taped on April 29, 1996. The "extended term" of the contract expired on August 31, 1996 pursuant to its explicit terms.

Almost three months later, on November 21, 1996 . . . Universal Television Enterprises, Inc. ("Universal") purchased the assets of MEI. Those assets included a group of videotapes of the "Donahue" program, characterized as the "Donahue Library."

(Trial Court Order dated August 15, 2002).

Section 6 of the contract, entitled "Sale and Assignment," contains the following language:

> Donahue agrees that Multimedia shall have the right to sell and assign this contract at any time during the term hereof . . . .
>
> Notwithstanding the foregoing, Multimedia agrees that it will not so enter into a binding commitment during the term hereof . . . for any assignment of rights and interests of Multimedia in the Program and in the distribution in syndication thereof which includes an assignment of this Contract without first consulting with Donahue and specifying and giving Donahue the option to meet the price and other related terms and conditions contained in the offer . . . .

In 2001, Donahue brought a breach of contract action against Respondents, arguing the Gannett and Universal transactions each constitute a violation of the contract's assignment clause and Donahue's right of first refusal. Donahue petitioned the court to have the transactions voided and sought exclusive ownership rights in the Donahue library. After reviewing voluminous materials submitted in support of both parties' positions, the trial court granted summary judgment in favor of Respondents. Following a Rule 59(e) motion by Donahue to alter or amend the trial court's initial order, the decision to grant summary judgment was reiterated in a lengthy second order. This appeal followed.

STANDARD OF REVIEW AND APPLICABLE LAW

The contract provides that its terms shall be subject to and construed in accordance with New York law. Because New York contract law does not violate South Carolina public policy, we find its application appropriate. See Standard Register Co. v. Kerrigan, 238 S.C. 54, 70, 119 S.E.2d 533, 541-542 (1961) (finding the laws of other jurisdictions, when deemed applicable by

agreement, are generally enforceable in South Carolina unless repugnant to the public policy of this state).

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003); George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Laurens Emergency Med. Specialists, PA v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 108, 584 S.E.2d 375, 377 (2003). In determining whether any triable issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. Sauner v. Public Serv. Auth. of South Carolina, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003); Hendricks v. Clemson Univ., 353 S.C. 449, 455-56, 578 S.E.2d 711, 714 (2003).

New York law is consistent with South Carolina law with respect to summary judgment evidentiary standards. See Dougherty v. Kinard, 626 N.Y.S.2d 554, 555 (N.Y. App. Div. 1995) ("Where there are no material and triable issues of fact, [a] motion for summary judgment should be granted.").

LAW / ANALYSIS

I. The Gannett Transaction

Donahue argues that Gannett's 1.7 billion dollar purchase of Multimedia's stock violated his contract with MEI because the transaction constitutes an unauthorized "assignment" of the contract. We disagree.

In regard to this issue, we adopt the following sound analysis of the trial court:

> There is no question that the 1995 stock purchase transaction was between Gannett and Multimedia, the parent corporation of MEI. MEI was not a party to the transaction.

> After Gannett purchased Multimedia's stock, MEI continued as a wholly owned subsidiary of Multimedia, and MEI's contract with [Donahue] continued as it had before the transaction. [Donahue] acknowledges that there were no changes in the daily operation of his program, in the persons to whom he reported, in the production of the program, or in his contract with MEI.
>
> An assignment consists of three elements: (1) an assignor, (2) an assignee, and (3) transfer of control of the thing assigned from the assignor to the assignee. Leon v. Martinez, 84 N.Y.2d 83, 88 (N.Y. 1994); see also Restatement (Second) of Contracts § 317 (1981) ("An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.").
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> The transfer of the stock of a corporation, however, does not constitute an assignment of a contract of that corporation. See Dennis' Natural Mini-meals, Inc. v. 91 Fifth Ave. Corp., 568 N.Y.S.2d 740, 743 (N.Y. App. Div. 1991); Rubenstein Bros. v. Ole of 34th [St., Inc.], 421 N.Y.S.2d 534, 538 (N.Y. Civ. Ct. 1979); In re Pearl-Wick Corp., 15 B.R. 143, 147 (Bankr. S.D.N.Y. 1981), aff'd without opinion, 697 F.2d 295 (2d Cir. 1982). Here, Gannett did not purchase the stock of MEI, the party to the contract. Rather, Gannett bought the stock of Multimedia, the corporate parent of the contracting entity. Since the transfer of the stock of a corporation does not constitute an assignment of the corporation's contract, the transfer of the stock of the parent of a contracting corporation can hardly constitute an assignment of its subsidiary's contract.
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> (Trial Court Order dated August 15, 2002).

We find nothing in the language of Donahue's contract or the particularities of this transaction that would warrant, as Donahue argues on appeal, an interpretation of "assignment" which, in contravention to New

York common law, would bar the sale of Mutimedia's stock to Gannett. As such, Gannett's purchase of Multimedia's stock did not breach any terms or conditions of the 1982 contract between MEI and Donahue.

II. The Universal Transaction

A. The Assignment Clause

Pursuant to Section 2 of Donahue's contract, as amended in 1994, the agreement's general term expired on August 31, 1996. In November 1996, MEI sold its assets, including the Donahue library, to Universal. Donahue argues this transaction violated the contract because his right of first refusal under Section 6 survived the contract's termination date and was not honored. We disagree, and again adopt the trial court's analysis:

> Section 6 of the contract governs the sale or assignment "during the term hereof" of the "rights and interests of Multimedia [the designation of MEI in this contract] in the Program and in the distribution in syndication thereof which includes an assignment of this Contract." As discussed [in the fact section of this opinion], this section afforded [Donahue] the "option to meet the price and other related terms and conditions contained in the offer of purchase of the Program and this Contract." Notwithstanding that Section 6 specifically applies only "during the term" of the contract, [Donahue] argues that since certain other provisions of the contract provided for "perpetual" rights, Section 6 should also be construed to bind MEI in perpetuity. An examination of the contract as a whole shows that such an interpretation is not tenable.
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> . . . .
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> While Sections 2(c) and 2(d) provide for royalty payments for any reruns of the "Donahue" program, those limited provisions do not extend other terms of the contract. [Donahue] had no continuing obligation to perform as master of ceremonies

for MEI, and MEI had no continuing obligation to produce and distribute the "Donahue" program without him.

The language of the Contract is unambiguous: it provided that the "term" of the Contract ended on a date certain, and that Plaintiff's "right of first refusal" lasted only during the term of the Contract:

> The term of the Contract shall be extended so that, as extended, it shall expire at midnight, August 31, 1996. (Contract, October 1994 amendment, ¶ 2).
>
> Notwithstanding the foregoing, [MEI] agrees that it will not so enter into a binding commitment **during the term hereof** . . . without first consulting with Donahue . . . (Contract § 6, emphasis added).

Section 6 of the contract and the Plaintiff's rights thereunder expired when the contract's "extended term" expired on August 31, 1996. After that date, MEI was free to sell and assign its rights in the Donahue Library as it saw fit.

(Trial Court Order dated August 15, 2002).

It is this court's duty to enforce the plain language of Donahue's contract. Wallace v. 600 Partners Co., 634 N.Y.S.2d 669, 671 (N.Y. 1995) ("It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed . . . clear, complete writings should generally be enforced according to their terms."). Donahue's right of refusal, as outlined in Section 6, is expressly limited to "the term" of the contract, which expired in August 1996. The fact that the parties expressly agreed certain provisions of the contract would last "in perpetuity" creates no ambiguity in terms expressly limited to the contract's general term. We therefore agree with the trial court that, as a matter of law, the transfer of MEI assets to Universal was in no way

precluded by Donahue's right of first refusal as agreed upon in Section 6 of the contract.

B. Contract for Personal Services

Donahue also argues the trial court erred in determining the contract, at the time of the Universal transaction, lacked the indicia of a personal services contract. It is his contention that because MEI's right of assignment was, like Donahue's right of first refusal, limited to the contract term, New York common law applies by default to all transactions occurring after the contractual termination date. He asserts that because the contract should be interpreted as one for personal services, New York law bars its assignment; thus, the Universal transaction is void. We disagree.

New York law, like that of many jurisdictions, employs an exception to the general rule of assignability of contracts when the contract is for "personal services." Jennings v. Foremost Dairies, Inc., 235 N.Y.S.2d 566, 573 (N.Y. Sup. Ct. 1962); In re Compass Van & Storage Corp., 65 B.R. 1007, 1010 (Bankr. E.D.N.Y. 1986) ("The nonassignability imprint of personal service contracts is firmly established New York law."). Even a personal services contract, however, may be assigned if the contract provides for assignment. Preferred Oncology Networks of America, Inc. v. Bottino, 1997 WL 305253, at *2 (S.D.N.Y. 1997) ("Defendants represent to this Court that New York law does not recognize assignment of an obligation to provide personal services, yet neglect to inform the court that this prohibition is inapplicable when the parties expressly provide for assignability.").

Here, it is clear the parties contemplated possible assignment when entering into the agreement. During its entire fourteen-year term, Donahue's contract expressly granted MEI the right to assign, subject only to Donahue's option to meet any offered purchase price. These minimal restrictions on assignment lend little weight to the notion that the parties intended MEI's obligations to be of a "personal" unassignable nature once the contract expired. See In re Compass Van & Storage Corp., 65 B.R. at 1011 ("Personal service contracts synthesize into those consensual agreements of

ineluctable genre and distinctive characteristics that commit to a special knowledge, unique skill or talent, singular judgment and taste.")

Donahue presents to this court the proposition that exclusive distribution contracts are *per se* personal service contracts under the law of New York. In support of this position, he cites American Can Co. v. AB Dick Co., 1983 WL 2198 (S.D.N.Y. 1983), a case dealing with an exclusive distribution contract that expressly barred assignment and never mentions the term "personal service contract." Without addressing this personal service contract "*per se*" argument, we conclude, as did the trial court, that Donahue's contract, following the expiration of its term, lacked the qualities of an exclusive distribution contract.

Section 10(f) of Donahue's contract grants MEI a perpetual, vested, and exclusive right in all "material" arising from the contract's performance. As such, MEI owned all right, title and interest in the Donahue library prior to the Universal transaction, provided they pay Donahue his percentage of any proceeds from its sale. According to Section 3 of the contract, MEI alone had the sole and exclusive right to distribute reruns of the program. As stated by the trial court:

> The Contract is not one . . . whereby MEI or Universal serve as distribution agents for [Donahue]. Unlike agency distribution arrangements, where party B acts as a distributor of goods belonging to party A, in this case one party – MEI – distributes its own goods, and has full discretion to distribute the tapes or not, as it alone sees fit. MEI's only duty, and [Donahue's] only corresponding right, is to the transfer of a percentage of any proceeds realized from MEI's marketing efforts. That is all [Donahue] bargained for, and it is all the Contract gives to him. For this conceptual reason, in addition to the clear terms of the Contract, the agency cases relied upon by [Donahue] are simply irrelevant.
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> (Trial Court Order dated September 30, 2002).

Donahue downplays this proprietary distinction and calls our attention to two New York cases he asserts reflect that ownership of the product does not control the existence of an agency distribution contract. On the contrary, we find these cases take careful steps to establish the distributor did not have a true property interest in the subject matter of the contracts. See Andrian v. Unterman, 118 N.Y.S.2d 121, 127-28 (N.Y. App. div. 1952), aff'd, 306 N.Y. 771 (N.Y. 1954) (holding a trademark, the subject of the distribution contract at issue, is "not the subject of property except in connection with an existing business" and "no property existed" in the use of one's name for the marketing of a product); Bentley v. Textile Banking Co., Inc., 271 N.Y.S.2d 417, 419 (N.Y. App. Div. 1966) ("[D]espite the words used describing the transactions as sales, no transfer of title [to the subject of the contract] was intended or took place."). Because Donahue's contract granted MEI ownership of the tape library and all material arising from the contract, the contract ceased to operate as an exclusive distributorship upon the expiration of the contract's general term. We therefore find his arguments regarding its status as a contract for personal services to be without merit.

CONCLUSION

Because we conclude the Gannett and Universal transactions did not violate New York law or breach any terms or conditions of the 1982 contract between MEI and Donahue, the trial court's decision is

AFFIRMED.

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