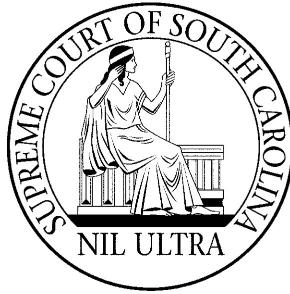

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3
January 13, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sandra Bartley, Claimant, Appellant,

v.

Allendale County School District, Employer, and S.C. School Boards Insurance Trust, Carrier, Respondents.

Appeal From Allendale County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 4476
Heard October 22, 2008 – Filed January 8, 2009

AFFIRMED

Jonathan R. Hendrix, of Lexington, for Appellant.

Kirsten L. Barr, of Mount Pleasant, for Respondents.

KONDUROS, J.: In this worker's compensation action, Sandra Bartley[1] appeals the Appellate Panel's failure to find her totally and permanently disabled, arguing it failed to consider the combined effects of a workplace injury and a pre-existing problem. We affirm.

FACTS

On September 26, 2002, Bartley was employed as a teacher at Fairfax Elementary School for the Allendale County School District (the District). During recess, a fifth-grade student with cerebral palsy ran towards Bartley to give her a hug. The student inadvertently knocked Bartley down onto some tree roots and fell on top of her. Bartley did not go to an emergency room for treatment but had cervical fusion surgery on May 14, 2003. On July 18, 2003, Bartley filed a Form 50, alleging injuries from the incident (the Allendale incident) to the right shoulder, neck, right arm and hand, left knee, and migraine headaches.

On July 24, 2003, her treating physician, Dr. Scott Strohmeyer, noted that Bartley was doing great, her neck was great, and she was in no pain. Because Bartley's husband had lost his job in Allendale, they moved to Columbia to live with his parents. Bartley was feeling better and in August 2003 she began teaching special education in Richland County at Richland One. She completed a medical questionnaire indicating she did not have a problem with arthritis, back pain, joint pain, or any other chronic illness. While working at Richland One, she began having new symptoms after lifting heavy books and working long hours. In October 2003, at Richland One, a student lifted a desk and threatened to throw it at her. The incident (the Richland incident) made Bartley feel fearful again and brought back the memories of being physically hurt. On July 8, 2004, Dr. Strohmeyer noted "she did very well from [the cervical fusion] and then she went back to teaching school and had another incident with a student and, since that time,

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[1] Bartley's son accompanied her to oral arguments. Judge Williams believed he recognized the young man, who identified himself as a member of the South Carolina Judicial Department's information technology unit. Neither counsel for the case sub judice objected to this panel hearing the matter.

she has had a lot of neck pain, right-sided arm pain, lower back pain and pain down her leg." In September 2004, Bartley had fusion surgery in her lower back as a result of a large facet cyst. On December 10, 2004, Bartley filed another Form 50, alleging injuries to the buttocks, right leg, dizziness, ringing in the ears, and psychological overlay.

On August 8, 2005, the single commissioner conducted a hearing. At the hearing, Bartley testified that about a week after the accident, she noticed she could not raise her right arm to write on the blackboard. As time progressed, she could not get out of bed without assistance. She further testified she had children at school carry her books for her, had trouble walking, and stopped exercising.

However, Bartley testified that following the cervical fusion, she started doing better; her headaches and ringing in her ear were better and she regained the range of motion in her right arm. She also testified she "had initially done well [after the surgery] but after doing a lot of the lifting and everything the pain had began . . . ." Further, Bartley indicated she did not feel fearful after her cervical fusion but the Richland incident "made [her] feel fearful again." Additionally, she discussed her lower back fusion but explained "I don't think my low back problem is related to [the Allendale incident]."

At the time of the hearing, Bartley asserted she was having problems with her neck hurting, back pain, lack of strength in her right arm, loss of balance, and dizziness. She also testified she was having problems with her memory; she would pay bills more than once, get lost while driving, or forget to take her medicine.

The District presented evidence, including Bartley's own testimony, she had problems with depression dating back to 1987. In March of 2001, she visited a doctor because she had nausea and dizziness and blacked out. At the visit, she said she had three other episodes when she was nauseated and almost blacked out. Additionally, in January of 2002, she informed her doctor her migraines had gotten worse. In February 2002, it was noted on her patient chart she "suffers from fibromyalgia and also depression and migraine

headaches. She comes in with multiple complaints. . . . She has an increase in her migraines. She states that she used to get a couple a year and over the last four to five weeks she has had several." She also complained of ringing in her ears at that doctor's visit, which the doctor believed was likely Eustachian tube dysfunction. The chart also contained a notation that Bartley appeared to be more depressed. Dr. Mark Lencke believed a congenital Chiari-1 malformation at the base of her skull might be causing her neck pain and depression as well as chronic headaches. Bartley also testified at the hearing she previously was in abusive marriage and had been abused as a child. Additionally, she testified she had been taking Adderall beginning in 1999 after telling her doctor she had "always been disorganized and unfocused."

The District also presented a letter from Dr. Strohmeyer, dated January 27, 2005, in which he responded to the question: "[I]is the condition of lumbar stenosis related to the accident that happened in October 2003 at the patient's employment[?]" He answered, "That is difficult to assess. She had a facet disk that has caused severe stenosis. These can be trauma related or just from degenerative changes. It is very difficult to rule out trauma as being a contributing problem to that condition."

Bartley presented opinions of doctors and a physical therapist that she suffers from post-traumatic stress. Additionally, at his deposition, Dr. Strohmeyer explained Bartley was still having problems related to the Allendale incident or the cervical fusion. Dr. Strohmeyer stated he did not think she could handle the physical demands of being a special needs school teacher. He also agreed Bartley was probably disabled from working full time and thought that was due to the Allendale incident.

The single commissioner found Bartley suffered an injury to her neck arising in and out of the course of employment on September 26, 2002. Accordingly, the commissioner determined Bartley had suffered a thirty percent permanent loss of use of her back. The commissioner gave the physical therapist's opinion that Bartley suffered from post-traumatic stress disorder no weight because she was not a medical doctor or psychiatrist. The commissioner further noted Dr. Drummond discussed post-traumatic stress

disorder but did not link it to the Allendale incident. The commissioner further found Bartley was not disabled as a result of the injury because she began work with Richland One in August 2003, and thus, was not entitled to temporary total disability. Additionally, the commissioner determined she "failed to carry the burden of proof by competent medical evidence that she suffered an injury to any body part other than her neck or that her psychological condition has worsened as a result of this injury." The commissioner also found Bartley did not file claims for benefits for the buttocks, low back, right leg, dizziness, ringing in the ears, or psychological disorder within two years of the date of injury, and thus, those claims were barred by the statute of limitations.

Bartley appealed to the Appellate Panel arguing the commissioner erred in ruling a substantial portion of her claims were barred by the statute of limitations. Bartley also asserted the commissioner erred in failing to find her permanently and totally disabled or that she had sustained a much greater degree of disability in failing to award temporary-total benefits. She further contended the commissioner erred in failing to award her additional medical benefits including past and future medical expenses. Following a hearing, the Appellate Panel affirmed the single commissioner finding Bartley had suffered a thirty percent permanent loss of her back from the incident but determined the claims for the buttocks, low back, right leg, dizziness, ringing in the ears, and psychological disorders were not barred by the statute of limitations. However, the Appellate Panel determined those problems were not caused by the Allendale incident.

Bartley appealed to the circuit court, which affirmed the Appellate Panel's decision. The circuit court found the Appellate Panel properly considered Bartley's pre-existing conditions and determined they were not caused or aggravated by the Allendale incident. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). This

court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law. Stone v. Traylor Bros., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).

The substantial evidence rule governs the standard of review in workers' compensation decisions. Frame v. Resort Servs. Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005). An appellate court can reverse or modify the Appellate Panel's decision only if the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005).

> "Substantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.

Lark, 276 S.C. at 135, 276 S.E.2d at 306.

"[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). In workers' compensation cases, the Appellate Panel is the ultimate finder of fact. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. Hargrove v. Titan Textile Co., 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and weight of the evidence is reserved for the Appellate Panel.

Bass v. Kenco Group, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).

LAW/ANALYSIS

Bartley argues the single commissioner, Appellate Panel, and circuit court all erred in failing to consider the combined effects of a workplace injury and preexisting physical and/or emotional and mental problems. Specifically, Bartley maintains the Appellate Panel erred in relying on this court's decision in Ellison v. Frigidaire Home Products, 360 S.C. 236, 600 S.E.2d 120 (Ct. App. 2004) (Ellison I), which the supreme court reversed, 371 S.C. 159, 638 S.E.2d 664 (2006) (Ellison II). Further, Bartley contends because substantial, reliable, competent, and probative evidence in the record as a whole supports that she is totally disabled and her psychological and physical problems affect more than just her back and hinder her employment, she must be awarded additional benefits. We disagree.

For an injury to be compensable, it must arise out of and in the course of employment. S.C. Code Ann. § 42-1-160(A) (Supp. 2007). An injury arises out of employment if a causal relationship between the conditions under which the work is to be performed and the resulting injury is apparent to the rational mind, upon consideration of all the circumstances. Rodney v. Michelin Tire Corp., 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996). "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." Clade v. Champion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998).

Under section 42-9-10 of the South Carolina Code (Supp. 2007), a claimant has three ways to obtain total disability. First, a claimant can be presumptively disabled.

> The list of injuries included in the presumptive total disability category include: "[t]he loss of both hands,

> arms, feet, legs, or vision in both eyes, or any two thereof, constitutes total and permanent disability to be compensated according to the provisions of this section" or that claimant "is a paraplegic, a quadriplegic, or who has suffered physical brain damage. . . ."

Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 105 n.4, 580 S.E.2d 100, 102 n.4 (2003) (quoting § 42-9-10) (alteration and omission by court). For these injuries, a claimant need not show a loss of earning capacity because the loss is conclusively presumed. Id. at 105, 580 S.E.2d at 102. Second, a claimant can show an injury that is not a scheduled injury under section 42-9-30 of the South Carolina Code (Supp. 2007) "caused sufficient loss of earning capacity to render him totally disabled." Wigfall, 354 S.C. at 105, 580 S.E.2d at 102. "Third, a claimant may establish total disability through multiple physical injuries." Id. at 106, 580 S.E.2d at 103.

When a mental injury is induced by physical injury, unlike a purely mental injury, it is not necessary that it result from unusual or extraordinary conditions of employment. Bass v. Kenco Group, 366 S.C. 450, 464-65, 622 S.E.2d 577, 584 (Ct. App. 2005). Additionally, "[a]ggravation of pre-existing psychiatric problems is compensable if that aggravation is caused by a work-related physical injury." Anderson v. Baptist Med. Ctr., 343 S.C. 487, 493, 541 S.E.2d 526, 528 (2001). Pre-existing depression does not preclude workers' compensation benefits for a mental injury. See Doe v. S.C. Dep't of Disabilities & Special Needs, 377 S.C. 346, 351, 660 S.E.2d 260, 263 (2008). However, the right of a claimant to compensation for aggravation of a pre-existing condition arises only when the claimant has a dormant condition that has produced no disability but becomes disabling because of the aggravating injury. Anderson, 343 S.C. at 493, 541 S.E.2d at 528.

> The language of [section] 42-9-400(a) and (d) indicates the legislature clearly envisioned that a claimant may recover for greater disability than that incurred from a single injury to a particular body part

> if the combination with any pre-existing condition hinders reemployment. There is no requirement that the pre-existing condition aggravated the injury, or that the injury aggravated the pre-existing condition, so long as there is a greater disability simply from the "combined effects" of the injury and the pre-existing condition.[FN4]
>
> FN4. In fact, the statute provides for the aggravation of a pre-existing condition as an alternative to the combined effects provision.

Ellison II, 371 S.C. at 164, 638 S.E.2d at 666. "[A]n injured claimant is entitled to compensation and medical benefits for disability arising from a permanent physical impairment in combination with a pre-existing impairment if the combined effect results in a substantially greater disability." Curiel v. Envtl. Mgmt. Servs. (MS), 376 S.C. 23, 31, 655 S.E.2d 482, 486 (2007) (citing Ellison v. Frigidaire Home Prods., 371 S.C. 159, 638 S.E.2d 664 (2006)).

South Carolina has adopted the "last injurious exposure rule," which

> places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability. Consistent with the rule that an employer takes its employee as it finds her, the last injurious exposure rule makes the insurer at risk at the time of the second injury liable even if the second injury would have been much less severe in the absence of the prior condition and even if the prior injury significantly contributed to the final condition. However, if the second injury is merely a recurrence of the first injury, then the insurer on the risk at the time of the original injury remains liable for the second.

Geathers v. 3V, Inc., 371 S.C. 570, 577-78, 641 S.E.2d 29, 33 (2007) (quotations and citations omitted).

In Gordon v. E. I. Du Pont De Nemours and Co., 228 S.C. 67, 76, 88 S.E.2d 844, 848 (1955) (citations omitted), the South Carolina Supreme Court held when

> a latent or quiescent weakened, but not disabling, condition resulting from disease is by accidental injury in the course and scope of employment aggravated or accelerated or activated, with resulting disability, such disability is compensable. The same principle is equally applicable whe[n] the latent, but not disabling, condition has resulted from a prior accidental injury. If the disability is proximately caused by the subsequent accidental injury, compensability is referable to that, and not the earlier one.

In Geathers, 371 S.C. at 580, 641 S.E.2d at 34, the supreme court applied Gordon because "(1) Claimant suffered a non-disabling back injury during a workplace accident; (2) Claimant's disability was caused by the second accident; and (3) the second injury 'aggravated or accelerated or activated' the pre-existing condition." The court further held the Gordon rule "reflects the essence of the last injurious exposure rule[,] which is to hold the insurer on the risk at the time of the second injury solely liable when the second injury aggravates the first injury." Id.

Expert medical testimony is designed to aid the Appellate Panel in coming to the correct conclusion; therefore, the Appellate Panel determines the weight and credit to be given to the expert testimony. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999). "Once admitted, expert testimony is to be considered just like any other testimony." Id. Accordingly, in deciding whether substantial evidence supports a finding of causation, we consider both the lay and expert evidence. Id. at 341, 513 S.E.2d at 847. While medical testimony is entitled to great respect, it should not be held conclusive irrespective of other evidence and

the fact finder may disregard it if the record includes other competent evidence. Id. at 340, 513 S.E.2d at 846.

The record contains substantial evidence supporting the Appellate Panel's finding Bartley's injuries for the buttocks, low back, right leg, dizziness, ringing in the ears, and psychological disorder were not caused by the Allendale incident. Bartley was doing well and returned to work after the surgery for her injury from the Allendale accident. Dr. Strohmeyer indicated the symptoms for which she is seeking to recover were likely related to the Richland incident or her unrelated lower back problem. Even Bartley testified she was no longer experiencing problems until she lifted some books at Richland One. Additionally, Bartley underwent lumbar fusion surgery, ankle surgery, and a hysterectomy that were all unrelated to the Allendale incident. Further, Bartley has a long history of suffering from depression and migraine headaches.

Although Bartley presented some evidence the Allendale incident aggravated Bartley's pre-existing conditions, the record also contains substantial evidence the Allendale incident did not cause or aggravate her conditions. Substantial evidence may support finding either the Richland incident aggravated her pre-existing conditions or that her pre-existing conditions were not aggravated at all because she was experiencing the same problems before the accident. Accordingly, Ellison II does not apply. The Appellate Panel is the ultimate fact finder and when the facts conflict, as they do here, its findings are conclusive. The record contains substantial evidence supporting the Appellate Panel's decision. Therefore, the circuit court's order is

AFFIRMED.

ANDERSON and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: Mamie L. Jackson,	Appellant,
In Re: City of Columbia,	Respondent,

v.

Mamie L. Jackson,	Defendant.

Appeal From Richland County
James R. Barber, Circuit Court Judge

Opinion No. 4477
Submitted November 1, 2008 – Filed January 8, 2009

REVERSED

Appellate Defender Elizabeth A. Franklin, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Peter M. Balthazor, Office of the City Attorney, of Columbia, for Respondent.

WILLIAMS, J.: Mamie Jackson (Jackson) appeals the trial court's decision to hold her in contempt and her imprisonment sentence of ninety days. We reverse.

FACTS

The City of Columbia (the City) commenced an action against Jackson seeking injunctive relief. Among the grounds for relief, the City sought to enjoin Jackson from accumulating rubbish and debris on her property as prohibited by the City's Code. The trial court granted the City's request and enjoined Jackson from accumulating junk, clutter, and debris on her property. Additionally, the trial court granted the City's request to abate the conditions that constituted a violation of the City's Property Maintenance Code. Subsequently, the City removed and disposed of the junk, clutter, and debris on Jackson's property.

Approximately two months after this hearing, the City brought a petition for rule to show cause as to why Jackson should not be held in contempt for violating the trial court's order prohibiting her from accumulating junk, clutter, and debris on her property. The City argued that less than a week after it removed the items on Jackson's property, Jackson brought additional clutter, debris, and junk back onto her property.

The trial court held a hearing to determine if Jackson was in contempt. Jackson appeared pro se and argued she did not violate the trial court's order because she did not bring additional items onto the property but rather moved the items from inside the house to outside the house for storage purposes. The trial court rejected this argument and found Jackson in contempt and sentenced her to ninety days imprisonment. This appeal follows.[1]

LAW/ANALYSIS

Courts have inherent power to punish for contemptuous conduct. Miller v. Miller, 375 S.C. 443, 453-54, 652 S.E.2d 754, 759-60 (Ct. App.

[1] Jackson was released from custody pending the appeal and appointed counsel.

2007) (internal citations omitted). Courts are vested by their very creation with the power to preserve order in judicial proceedings and to enforce judgments and orders. Id. Contempt results from the willful disobedience of a court's order. Id. A willful act is defined as one which is done voluntarily and intentionally with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done. Id.

Initially, we must determine whether the contempt involved in this case was civil or criminal. The determination of whether contempt is civil or criminal hinges on the underlying purpose of the contempt ruling. Id. at 456-57, 652 S.E.2d at 761. If the primary purpose of contempt is to coerce a party to do the thing required by the court for the benefit of the complainant, then the contempt is considered civil. Id. However, if the principal function of the contempt is to preserve the court's authority and to punish a party for disobedience of the court's order, then it is criminal. Id. Punishment for civil contempt is remedial in that sanctions are conditioned on compliance with the court's order, whereas an unconditional penalty is considered criminal contempt because it is solely and exclusively punitive in nature. Id.

In the present case, the contempt imposed was criminal because the function of the sanctions imposed was to punish Jackson for disobedience of the trial court's order. Namely, the trial court sought to punish Jackson because she violated the order prohibiting her from accumulating junk, clutter, and debris on her property. Furthermore, the punishment imposed, the ninety days imprisonment, was unconditional in that Jackson did not have an opportunity to purge herself of the sanctions if she complied with the court order. Thus, the trial court viewed the sanctions as criminal rather than civil. See id. (holding a sentence of imprisonment is considered punitive, and therefore criminal contempt, if it is limited to a definite period).

The distinction between civil and criminal contempt is crucial because criminal contempt triggers additional constitutional safeguards. Id. The Sixth and Fourteenth Amendments to the United States Constitution ensure that an individual be afforded the right to assistance of counsel before he or she can be validly convicted and punished by imprisonment. State v. Thompson, 355 S.C. 255, 261-62, 584 S.E.2d 131, 134-35 (Ct. App. 2003).

The right to counsel is by far the most pervasive, for it affects a person's ability to assert any other rights he or she may have. Id. The erroneous deprivation of this right constitutes per se reversible error. Id.

It is, however, possible to waive the Sixth Amendment right to counsel. Id. To effectuate a valid waiver of the right to counsel, the accused must (1) be advised of the right to counsel and (2) be adequately warned of the dangers of self-representation. State v. McLauren, 349 S.C. 488, 493-94, 563 S.E.2d 346, 348-49 (Ct. App. 2002) ("Faretta[2] requires that a defendant be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.") (internal citations and quotations omitted). It is the trial court's responsibility to determine whether there was a knowing and intelligent wavier by the accused. Thompson, 355 S.C. at 261-62, 584 S.E.2d at 134-35. A specific inquiry by the trial court expressly addressing the disadvantages of appearing pro se is preferred. Id. at 262-63, 584 S.E.2d at 134-35.

If the trial court fails to address the disadvantages of appearing pro se, this Court will examine the record to determine whether the accused had sufficient background or was apprised of his rights by some other source. McLauren, 349 S.C. at 494, 563 S.E.2d at 349. Consequently, when determining whether the accused knowingly and voluntarily waived his or her right to counsel the "ultimate test is not the trial judge's advice but rather the defendant's understanding." Thompson, 355 S.C. at 262-63, 584 S.E.2d at 135.

The following factors are to be considered in determining if the accused had a sufficient background to understand the disadvantages of self-representation:

(1) the accused's age, educational background, and physical and mental health;

[2] Faretta v. California, 422 U.S. 806 (1975).

(2) whether the accused was previously involved in criminal trials;
(3) whether he knew of the nature of the charge and of the possible penalties;
(4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case;
(5) whether he was attempting to delay or manipulate the proceedings;
(6) whether the court appointed stand-by counsel;
(7) whether the accused knew he would be required to comply with the rules of procedure at trial;
(8) whether he knew of legal challenges he could raise in defense to the charges against him;
(9) whether the exchange between the accused and the court consisted merely of *pro forma* answers to *pro forma* questions; and
(10) whether the accused's waiver resulted from either coercion or mistreatment.

McLauren, 349 S.C. at 494, 563 S.E.2d at 349.

In the present case, the trial court conducted a hearing to determine if Jackson was in contempt. Jackson appeared pro se at this hearing. At the conclusion of the hearing, the trial court sentenced Jackson to ninety days imprisonment. The record is completely devoid of any statements by the trial court informing Jackson of her right to counsel. Additionally, the record does not reveal the trial court warned Jackson in any way as to the dangers of self-representation. Moreover, the trial court did not determine, as required, that Jackson knowingly and intelligently waived the right to counsel.

Our examination of the record does not reveal Jackson had a sufficient background or was apprised of her constitutional right to counsel by another source. Consequently, the trial court's decision to sentence Jackson to ninety days imprisonment was reversible error. Thompson, 355 S.C. at 262-63, 584

S.E.2d at 134-35. (holding the erroneous deprivation of the right to counsel constitutes per se reversible error).[3]

We note that this opinion is limited to the issue of constructive contempt. Constructive contempt is contemptuous conduct occurring outside the presence of the court, whereas direct contempt is defined as contemptuous conduct that occurs in the presence of the court. Miller, 375 S.C. at 455, 652 S.E.2d at 760. In the present case, the contemptuous conduct was Jackson's failure to comply with the court order prohibiting her from accumulating junk, clutter, and debris on her property. This conduct occurred outside the presence of the court and is therefore constructive contempt.[4]

CONCLUSION

Accordingly, the trial court's decision is

REVERSED.[5]

PIEPER, and GEATHERS, JJ., concur.

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[3] The City argues the issue of whether Jackson was entitled to counsel is not preserved for review because the trial court did not address it. We disagree. "A notable exception to this general rule requiring a contemporaneous objection is found when the record does not reveal a knowing and intelligent wavier of the right to counsel. The pro se defendant cannot be expected to raise this issue without the aid of counsel." State v. Rocheville, 310 S.C. 20, 25, 425 S.E.2d 32, 35 (1993). Thus, Jackson was not required to preserve this issue for our review.

[4] Jackson raises other issues on appeal. Due to the disposition of the right to counsel issue, we need not address these issues. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) ("An appellate court need not address remaining issues when disposition of prior issue is dispositive.").

[5] We decide this case without oral arguments pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John and Charlene Turner, Appellants,

v.

Douglas A. Milliman,
Consumer Benefits of America,
NIA Corporation, Mid America
Life Insurance Co., World
Service Life Insurance Co.,
Provident American Life and
Health Insurance Co.,
Provident Indemnity Life
Insurance Co., and Central
Reserve Life Insurance Co., Respondents.

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

Opinion No. 4478
Heard December 3, 2008 – Filed January 12, 2009

AFFIRMED AS MODIFIED

John W. Carrigg, Jr., of Columbia, for Appellants.

Jonathan Matthew Harvey, of Columbia, Lawrence B. Orr, of Florence, Stephanie G. Flynn and Phillip E. Reeves, of Greenville, for Respondents.

GEATHERS, J.: In this fraud and negligent misrepresentation action, Appellants John and Charlene Turner (collectively "the Turners") appeal from the trial court's grant of summary judgment in favor of Respondents Douglas Milliman ("Milliman"), Consumer Benefits of America ("CBA"), National Insurance Alliance Corporation, MidAmerica Life Insurance Company ("MidAmerica"), World Service Life Insurance Company, Provident American Life and Health Insurance Company ("Provident American"), Provident Indemnity Life Insurance Company ("Provident Indemnity"), and Central Reserve Life Insurance Company (collectively "Respondents"). On appeal, the Turners argue the trial court erred in finding that their claims were barred by the three-year statute of limitations; in finding that Milliman's representations to the Turners were insufficient to support a claim for fraud or negligent misrepresentation; in holding that Milliman's statements to John Turner ("Turner") were not attributable to MidAmerica or CBA because Milliman was an insurance broker and not an insurance agent; and, in holding that Turner's wife did not have standing to sue Respondents. We affirm as modified.

FACTS

In November 1996, Turner was in need of health insurance coverage. One of Turner's customers recommended Milliman, a local insurance agent,[1] whom Turner subsequently contacted. Turner's health insurance had recently expired after he left his prior employment at an accounting firm. At the time

[1] Respondents argue Milliman is a general insurance broker rather than an insurance agent. For purposes of this appeal, we generally refer to Milliman as an "insurance agent" but express no opinion as to whether Milliman is an agent or broker, as reaching a conclusion in this regard is not necessary for the disposition of this case.

that Turner sought Milliman's services, Turner was employed at the family's radiator service business.

The Turners and Milliman discussed Turner's health insurance options, specifically the option to purchase group health insurance. Milliman represented to Turner that a group policy with CBA would be a good option because the future premiums would not increase dramatically or as dramatically as the premiums with individual insurance plans. Turner also alleged that Milliman stated group health insurance would be beneficial because of the following: (1) Turner was at an age when he could start developing medical problems and this policy would allow him to keep his coverage; (2) companies writing individual insurance policies were going out of business and the prices of those policies were skyrocketing; and (3) the only way people could afford insurance was to purchase group insurance. Turner further stated that Milliman told him CBA acted as a watchdog over the insurance industry for the benefit of its members and would notify its members when better group coverage was available.

Based on these alleged representations, Turner completed an application for group health insurance through CBA. This group insurance coverage was issued by MidAmerica, which was concurrently assumed and reinsured by Provident Indemnity.[2] Turner's first premium payment in November 1996 was $122.70, which represented his monthly health insurance premium as well as CBA membership dues.[3] From the following month until May 1997, $101.70 was drafted from Turner's account for his monthly health insurance premium. In June 1997, Turner's premium increased to $109.70 and did not increase for eleven months. In June 1998, his premium increased to $143.38, and in December 1998, his premium again increased to $194.50. During the following two years, his premiums increased every six months (June 1999, $230.90; December 1999, $271.95; June 2000, $331.81; and December 2000, $456.21). Turner stated he always

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[2] CBA notified Turner in April 1997 that Turner's policy with MidAmerica would be terminated and assumed in May 1997 by Provident American.

[3] To obtain group health insurance through CBA, Turner had to join CBA as a member.

anticipated the premiums would increase, but by the end of 1999 into 2000, he thought the increases were becoming unreasonable and "just getting completely out of hand."

On April 30, 2001, CBA informed Turner that his monthly premium would increase to $646.19 on June 1, 2001 due to increased research and development healthcare costs. Then, on May 31, 2001, CBA again notified Turner that his premium would increase to $799.61 on July 1, 2001, because of "rising healthcare costs as well as the substantial and continued losses sustained by Provident American. . . ."

In June 2001, as a result of the continued increases in Turner's premiums, Turner submitted a complaint to the South Carolina Department of Insurance. The Department of Insurance wrote Provident American inquiring about its premium rate increases. In response to the Department of Insurance's letter, Provident American told the Department that Turner's insurance contract permitted the company to increase rates with thirty-one days advance written notice and that "it had no alternative but to increase premium rates." Provident American also represented to the Department of Insurance that "[its] members were accustomed to receiving biannual premium rate adjustments," and the May 31, 2001 increase "affect[ed] all current . . . certificate holders." Thereafter, the Department of Insurance notified Turner that he was insured under a "group association policy," and as such, those rates were not subject to approval by the Department.

On June 22, 2001, Provident American notified Turner that it would unilaterally terminate the CBA group association policy, but Turner could reinsure under another group policy for the same initial premium with substantially fewer benefits. Turner testified that he attempted to find alternate health care coverage, but due to the onset of diabetes, no insurance company would insure him. Turner paid his premiums until Provident American terminated his policy in September 2001, and he has been without health insurance since this time.

On December 19, 2003, the Turners initiated suit against Respondents for fraud, negligent misrepresentation, and violation of the South Carolina

Unfair Trade Practices Act ("SCUTPA").[4] In essence, the Turners alleged that Milliman, as an agent of Respondents, made several false representations that induced Turner to sign the insurance application and purchase the group policy from CBA. The Turners stated that because of the excessive premium increases, they were unable to maintain the policy, which ultimately caused them to suffer damages. In turn, each Respondent filed a motion for summary judgment based on the statute of limitations, a lack of material evidence to support the Turners' causes of action, and Charlene Turner's (Mrs. Turner) lack of standing as a real party in interest.

The trial court granted Respondents' motions, finding the Turners "should have been on notice of their alleged injury beginning with the premium increases in 1998." Because the Turners did not file suit until December 19, 2003, and because they "should have been on notice of their alleged claims before December 20, 2000," the trial court found their claims were barred by the three-year statute of limitations. The trial court additionally held Milliman's representations to the Turners were matters of opinion or representations as to future events, which were not actionable in fraud or negligent misrepresentation cases. The trial court further held that the Turners' claim for a violation of SCUTPA was unsupported as SCUTPA contains an explicit exemption for insurance-related practices.[5] Finally, the trial court found Mrs. Turner was not a real party in interest because she was not a co-insured under the group coverage policy.

The Turners filed a Rule 59(e), SCRCP, motion, which the trial court denied. Respondents also filed a Rule 59(e), SCRCP, motion to alter or amend the judgment, asserting additional sustaining grounds for the trial court's grant of summary judgment. The trial court granted Respondents' motion and amended its order to find that Milliman's representations were not attributable to MidAmerica or CBA because he was not an employee or agent of the respective insurers. Further, because MidAmerica had ceded all of its rights and responsibilities to Provident Indemnity, any alleged

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[4] S.C. Code Ann. §§ 39-5-10 to -170.

[5] The Turners do not appeal the trial court's ruling on this issue.

misrepresentations by Milliman were not attributable to MidAmerica. This appeal follows.

STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the trial court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The trial court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 134, 659 S.E.2d 496, 498 (2008).

ISSUES ON APPEAL

The Turners raise four issues on appeal:

(1) The trial court erred in finding their claims were barred by the statute of limitations because conflicting evidence was presented as to when the Turners knew or should have known they had colorable claims against Respondents.

(2) The trial court erred in finding Milliman's representations to the Turners did not support an action for fraud or negligent misrepresentation because the statements were made as part of a general scheme to induce the Turners to purchase group health insurance.

(3) The trial court erred in holding Milliman's statements were not attributable to MidAmerica or CBA because Milliman held himself out as an insurance agent of MidAmerica and CBA.

(4) The trial court erred in holding Mrs. Turner lacked standing because the contracting parties intended for her to be a third-party beneficiary of the insurance contract.

LAW/ANALYSIS

I. The Statute of Limitations as a Bar to Recovery

The Turners argue the trial court erred in granting Respondents' motions for summary judgment based on the statute of limitations. We agree.

The statute of limitations for a tort action is three years. S.C. Code Ann. § 15-3-530(5) (Supp. 2007) (stating the statute of limitations for "an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law" is three years). The limitations period begins to run when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. Burgess v. Am. Cancer Soc'y, South Carolina Div., Inc., 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989); see also S.C. Code Ann. § 15-3-535 (Supp. 2007) ("[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."); Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005) (noting that under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct). The standard as to when the limitations period begins to run is objective rather than subjective. Burgess, 300 S.C. at 186, 386 S.E.2d at 800. Moreover, "[t]he statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some

promptness.'" Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998) (internal citations omitted).

The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide. Brown v. Finger, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962). However, when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he or she had a claim becomes a matter of law to be decided by the trial court. See Arant v. Kressler, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (finding the trial court properly denied amendment of pleadings against defendant doctor in medical malpractice case and properly directed a verdict for the defendants when no conflicting testimony was presented regarding time of discovery of additional cause of action such that the notice issue was one for the trial court to decide); Johnston v. Bowen, 313 S.C. 61, 65, 437 S.E.2d 45, 47 (1993) (finding grant of summary judgment in medical malpractice case was proper based on statute of limitations because even taking the facts in the light most favorable to the plaintiff, only one reasonable inference existed as to when the plaintiff knew or should have known she had a claim).

The trial court found that the initial premium level in November 1996 was $101.80 per month, which had almost doubled to $194.50 by October 1998 and had increased over 250% to $266.95 by October 1999. The trial court held that these increases "standing alone were sufficient to put [the Turners] on notice that Mr. Milliman's statements about premium increases were wrong and that [the Turners] were being injured financially." Because the premiums only continued to increase, the trial court reasoned the Turners should have been on notice beginning with the premium increases in 1998 but no later than the cutoff date of December 19, 2000.

Viewing the evidence in the light most favorable to the Turners, there is more than one reasonable inference as to when the Turners knew or should have known they had a claim against Respondents. Although the dates and amounts of the premium increases are undisputed, we believe a genuine issue

of material fact exists as to when the Turners were on notice that Milliman's prior representations were inconsistent with the premium increases. The premiums increased significantly between 1998 and 2000, but the Turners argue that it was not until May 30, 2001, when they received notification that the premium would increase to $799.61, that they were on notice of a potential claim. While Turner conceded he expected the premiums to increase, he stated that by the end of June 2001, he was aware the premium increases were unreasonable. Upon receiving the last premium increase notification, the Turners promptly investigated the premium increases by corresponding with the South Carolina Department of Insurance in an attempt to ascertain why the premiums were increasing so drastically. Further, Mrs. Turner stated in a 2003 letter to the Delaware Department of Insurance that "soaring premiums" were not a concern until 2001.

While Respondents allege only one reasonable inference can be drawn from the evidence, based on the varying amounts of the premium increases and the timing of those premium increases, we believe reasonable minds could differ on this issue. See Byerly v. Connor, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992) (stating summary judgment is appropriate when "plain, palpable, and indisputable facts exist on which reasonable minds cannot differ"). The determination of when the Turners knew or should have known of any potential claims was consequently a jury issue. See Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 274, 384 S.E.2d 693, 696 (1989); overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. Of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995) (finding that when all of the evidence goes to the reasonableness of a party's actions, the statute of limitations issue becomes one for the jury to decide). As such, the trial court improperly granted Respondents' motions for summary judgment based on the expiration of the statute of limitations.

II. Milliman's Statements as a Basis for Fraud or Negligent Misrepresentation Claims

The Turners next contend that the trial court erred in finding Milliman's representations to the Turners did not support an action for fraud

or negligent misrepresentation because the statements were made as part of a general scheme to induce the Turners to purchase group health insurance. We disagree.

A plaintiff asserting a claim for fraud in the inducement to enter into a contract must establish by clear and convincing evidence the following:

> (1) a representation, (2) its falsity, (3) its materiality, (4) knowledge of its falsity or reckless disregard of its truth or falsity, (5) intent that the representation be acted upon, (6) the plaintiff's ignorance of its falsity, (7) the plaintiff's reliance on its truth, (8) the plaintiff's right to rely thereon, and (9) the plaintiff's consequent and proximate injury.

M.B. Kahn Constr. Co. v. South Carolina Nat'l Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980). Clear and convincing evidence is the "degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 265 n.4, 478 S.E.2d 282, 284 n.4 (1996). In such a case as this, fraud "must be established by evidence which is clear, definite, unequivocal, and satisfactory, or such, as has been said, as to lead to but one conclusion, or as to leave no reasonable doubt" as to the conclusion to be drawn. All v. Prillaman, 200 S.C. 279, 304, 20 S.E.2d 741, 750 (1942) (specifying the standard of proof to establish a constructive trust as a result of party's fraudulent actions).

A plaintiff in a negligent misrepresentation action must establish by a preponderance of the evidence the following:

> (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5)

> the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

McLaughlin v. Williams, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct. App. 2008). A key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement. See Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 20, 419 S.E.2d 795, 799 (Ct. App. 1992).

Under either cause of action, the failure to prove any one of the required elements is fatal to the claim. Brown v. Stewart, 348 S.C. 33, 41, 557 S.E.2d 676, 680 (Ct. App. 2001). Generally, for a representation to be actionable, it must relate to a present or pre-existing fact rather than a statement of future events or an unfulfilled promise. Id. at 41-42, 557 S.E.2d at 680. Further, sales talk or "puffing" ordinarily is not sufficient to establish a claim for negligent misrepresentation or fraud. Jones v. Cooper, 234 S.C. 477, 487, 109 S.E.2d 5, 10 (1959); Satcher v. Berry, 299 S.C. 381, 383, 385 S.E.2d 41, 42 (Ct. App. 1989). An exception to the general rule is recognized for unfulfilled promises which were made by a party who never intended to fulfill the promise and only made the promise to induce the performance of another party. Brown, 348 S.C. at 42, 557 S.E.2d at 680.

Viewing the facts in the light most favorable to the Turners, even if Milliman made the alleged statements to the Turners, these representations are not actionable as a matter of law as they cannot be construed as more than Milliman's opinion as to future events. Turner acknowledged that Milliman's statements about the policy being the "best group insurance product he had ever seen or offered for sale" was only Milliman's opinion. Further, when questioned as to whether Turner thought Milliman was lying to him when Milliman told Turner the premiums would not drastically increase, Turner responded "no" and agreed that he thought Milliman was giving Turner his honest and informed belief at that time. With respect to the remaining representations by Milliman, Turner acknowledged that these statements related to future events. Because mere unfulfilled promises or

statements as to future events are not actionable, and because no evidence was presented to show Milliman made those statements only to induce the Turners into procuring the policy, the trial court properly granted Respondents' summary judgment motions on this ground.[6] See Woods v. State, 314 S.C. 501, 506, 431 S.E.2d 260, 263 (Ct. App. 1993) (stating the failure to observe a promise may support an inference of fraud or a lack of intent to perform only when the failure is coupled with other evidence).

CONCLUSION

Even though we disagree with the trial court's finding that the statute of limitations expired as a matter of law, we nevertheless affirm its decision to grant summary judgment based on the nature of Milliman's statements to the Turners. Because the Turners' action for fraud and negligent misrepresentation against Respondents hinges on Milliman's representations, which are not actionable as a matter of law, the trial court properly granted summary judgment in favor of Respondents.

Accordingly, the trial court's order is

AFFIRMED AS MODIFIED.

WILLIAMS and PIEPER, JJ., concur.

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[6] Due to the disposition of this issue, we need not address the remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal); Barr v. City of Rock Hill, 330 S.C. 640, 646 n.3, 500 S.E.2d 157, 160 n.3 (Ct. App. 1998) (affirming grant of summary judgment on the expiration of the statute of limitations and declining to address the appellants' remaining arguments on the trial court's alternate grounds for granting summary judgment).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,	**Respondent,**
v.	
Yahya Muquit,	**Appellant.**

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 4479
Submitted November 1, 2008 – Filed January 12, 2009

AFFIRMED

Eleanor Duffy Cleary of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

ANDERSON, J.: Yahya Muquit (Muquit) was tried and found guilty of (1) two counts of armed robbery, (2) two counts of possession of a firearm during a violent crime, and (3) two counts of pointing and presenting a

firearm. He was sentenced to thirty-five years' imprisonment. Muquit appeals his convictions and sentences, arguing the circuit court erred in admitting into evidence clothing seized from his personal effects following his arrest. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On October 6, 2005, two men robbed Dale's Quick Stop, a Spartanburg convenience store, at gunpoint. A woman assisted the men by acting as a lookout. The participants absconded with approximately $1300.00. Shortly after the robbery, two men and a woman accosted a satellite dish installer and, pointing a gun at him, demanded the keys to his company vehicle. The keys were in the ignition, and the trio took the van. Both victims called the police. A short time later, the trio abandoned the van and ran away on foot. After a brief chase, police officers apprehended Tunisha Jeter (Jeter), Hardy Lassiter (Lassiter), and Muquit. Jeter later testified on behalf of the State and pled guilty to accessory after the fact of armed robbery.

Following Muquit's arrest, officers obtained a search warrant. The warrant indicated in its description Muquit was the person to be searched and the clothes he was wearing during the commission of the robbery were to be seized if found. However, at the time the warrant was issued and executed, Muquit was in a detention center wearing jail-issued clothing. The clothing sought in the warrant had been removed and stored in a separate location at the jail. The officers seized the stored clothing from the detention center to use as evidence.

At trial, Muquit and Lassiter sought to suppress the clothing seized from their personal effects while they were in jail. The circuit court denied their motion and allowed the clothing into evidence over objections from both defendants. The trial judge instructed:

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

> In any event, I don't have any question that these search warrants are invalid . . . . It described the person to be searched and that person was not searched. Items that have been seized were seized from some other location that was not described in this warrant.
>
> So any search or any seizure of property can't be predicated upon the validity of these warrants because these warrants don't authorize anybody to search the location where the property was taken. But it's my view that in this particular case under the facts of it the search warrant was unnecessary, that the seizure was appropriate; and so I am going to deny each of the defendants' motions to suppress based upon the invalidity of the search warrant, and they are. But they weren't necessary, I don't believe, in order for the seizure to take place.

Both Muquit and his co-defendant were convicted on all charges.

ISSUE

Did the trial judge err by refusing to suppress evidence seized during a warrantless search of property in the custody of the detention center where the owner of the property was being incarcerated?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). We are bound by the trial court's factual findings unless they are clearly erroneous. Id., 577 S.E.2d at 500-501. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Id. Our review in Fourth Amendment search and seizure cases is limited to determining whether any evidence supports the trial court's finding. State v. Bowman, 366 S.C. 485, 501, 623 S.E.2d 378,

386 (2005); see also State v. Baccus, 367 S.C. 41, 48-49, 625 S.E.2d 216, 220 (2006) ("The trial judge's factual findings on whether evidence should be suppressed due to a Fourth Amendment violation are reviewed for clear error.").

LAW/ANALYSIS

Muquit contends the circuit court erred in admitting into evidence clothing seized from his personal effects following his arrest. We disagree.

Although there is no South Carolina case law directly on point, the federal courts view the issue of seizing property already in custody as well-settled. Authority to search an arrestee derives not only from the need to disarm him, but also from "the need to preserve evidence on his person for later use at trial." U.S. v. Robinson, 414 U.S. 218, 234 (1973) (citing Agnello v. U.S., 269 U.S. 20 (1925); Abel v. U.S., 362 U.S. 217 (1960)). When an arrestee's property is already in the custody of law enforcement as an incident of the arrest, the police may seize it at a later time as evidence relating to his offense. U.S. v. Edwards, 415 U.S. 800, 806-807 (1974) (citing Cooper v. California, 386 U.S. 58, 61-62 (1967)) (holding seizure of arrestee's car impounded incidental to arrest was proper even though it occurred a week after arrest). In Edwards, the United States Supreme Court enunciated:

> [O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. **This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the 'property room' of the jail, and at a later time searched and taken for use at the**

> **subsequent criminal trial.** The result is the same where the property is not physically taken from the defendant until sometime after his incarceration.

Id. at 807-808 (emphasis added) (footnotes omitted).

Muquit argues the seizure of his clothing was not incident to his arrest, relying on Chimel v. California, 395 U.S. 752, 764 (1969). However, Chimel did not contemplate a search or seizure of property already in the custody of law enforcement. Instead, Chimel restricts arresting officers from conducting a warrantless search of an arrestee's home, rather than the immediate area around him where he may have hidden a weapon or evidence against him, for evidence of a crime. Id. at 768. Muquit further argues he had a "reasonable expectation of privacy in the contents of [his] personal effects secured by the jail." However, a person's expectation of privacy is either greatly diminished or nonexistent when he is arrested and transfers custody of his property to the State. See Edwards, 415 U.S. at 806-807. Indeed, once the police acquired custody of Muquit's personal effects, they had authority to search or seize that property for use as evidence in prosecuting the crime for which he was arrested. Consequently, the seizure of Muquit's clothing was proper, and the circuit court did not err in admitting the clothing into evidence.

CONCLUSION

On this novel issue, we hold that the seizure of an incarcerated defendant's personal effects in his possession or the possession of the detention center or jail where he is being held is not a violation of the Fourth Amendment of the United States Constitution. Accordingly, we

AFFIRM.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Christal Orange Moore and Rodney B. Stroud, individually and as Personal Representatives of the Estate of Brandon L. Stroud, Appellants,

v.

The Barony House Restaurant, LLC, VanBuren W. High, Terry L. Kunkle, Charles Cannington d/b/a Town & Country Golf Carts, Carolina Auction Co., Inc., Textron Inc. d/b/a E-Z-Go Golf Cars, Joseph Wayne Thornley, and Garrett's Discount Golf Cars, LLC, Defendants,

Of Whom Textron, Inc. d/b/a E-Z-Go Golf Cars is Respondent.

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

Opinion No. 4480
Heard November 6, 2008 – Filed January 12, 2009

AFFIRMED

Carl E. Pierce, II, and Joseph C. Wilson, IV, of Charleston, for Appellants.

Ian S. Ford, of Charleston, and Richard B. North, Jr., of Atlanta, Georgia, for Respondent.

KONDUROS, J: Christal Moore and Rodney Stroud (Appellants), as representatives of the estate of Brandon Stroud (Stroud), appeal the circuit court's grant of summary judgment in favor of Textron, Inc. (Textron) on claims of strict liability and negligence related to the manufacturing and selling of certain golf cars. We affirm.

FACTS

Dr. Terry Kunkle hosted a Christmas party in December 2004 in Berkeley County, South Carolina. Guests at the party were to have drinks and hors d'oeuvres at the residence on one part of the property, and then adjourn to dinner in a barn located across a public road, Highway 311, on another part of the property. Stroud was working for VanBuren High, who co-hosted and catered the event. Part of Stroud's responsibilities included ferrying guests from the residence to the barn via golf car. Toward that end, Kunkle and High had procured two golf cars. One was equipped with lights, and the other was not.

Daniel Causey, another staffperson for the event, testified Stroud attempted to cross the road at about 8:30 p.m. in a golf car that was not equipped with lights. According to the accident report, Stroud attempted to cut a "dogleg" from the driveway on one side of the road to the drive on the opposite side of the road approximately 180 feet down the highway. An SUV driven by Joseph Thornley was approaching from the right. Thornley testified he did not see Stroud until it was too late to brake, turn, or otherwise react before impact. Tragically, Stroud died at the hospital later that night as a result of his injuries.

Appellants brought suit against the various parties responsible for the party, as well as the manufacturer and the distributor of the golf car Stroud was driving. With respect to Textron, Appellants alleged causes of action for strict liability based on Textron's used Fleet golf cars being unreasonably dangerous in light of their forseeable use and based on inadequate warnings. Appellants also alleged negligence based on a failure to warn.

The golf car in this case was manufactured by Textron in 1999 and sold to a golf course in California. In 2004, Textron re-sold the car to Garrett's Discount Golf Cars, Inc., who in turn sold the car to Carolina Auction, Inc. Carolina Auction provided the golf car to Kunkle and High.

Kevin Hollerman, vice-president of sales for Textron, testified Fleet golf cars were generally designed for golf course use. Approximately seventy percent of Textron's customers leased the new Fleet golf cars as opposed to purchasing them. He further testified that when the leased golf cars were returned to Textron upon expiration of the lease, the golf cars were generally purchased by distributors for sale to the public, primarily for uses other than on golf courses.

Hollerman testified he did not know if owner's manuals were provided to distributors upon resale of the golf cars as the cars were often picked up directly from the course by the purchasing distributor. Gerald Powell, a Textron employee, testified prior to the 1990s Fleet golf cars were affixed with a dashboard label stating: "CAR IS RESTRICTED TO TWO OCCUPANTS AND OPERATION ONLY ON A GOLF COURSE BY AUTHORIZED PERSONS." In the early 1990s Textron changed the dashboard label to read: "FOR GOLF COURSE AND NON-HIGHWAY USE ONLY, AND TO BE OPERATED ONLY BY AUTHORIZED DRIVERS IN DESIGNATED AREAS."

The evidence at trial showed golf cars generally are not required under the law or any recognized safety standards to be equipped with lights or reflectors, and the operation of a golf car on a public road at night is prohibited by South Carolina law. S.C. Code Ann. § 56-3-115 (2006).

Additionally, testimony was presented that Textron offered after-market lighting kits that can be added to its golf cars.

The trial court granted summary judgment in Textron's favor with respect to strict liability and negligence. This appeal followed.

STANDARD OF REVIEW

The appellate court "reviews the grant of a summary judgment motion under the same standard as the trial court pursuant to 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." Sloan v. Dep't of Transp., 379 S.C. 160, 167, 666 S.E.2d 236, 239 (2008). All evidence, and inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Zurcher v. Bilton, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Rife v. Hitachi Constr. Mach. Ltd., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005).

LAW/ANALYSIS

I. Strict Liability[1]

Appellants argue the circuit court erred in granting summary judgment in favor of Textron because they presented evidence the used golf car was defective and unreasonably dangerous as sold because Textron could foresee purchasers may misuse the golf car. We disagree.

In order to establish a products liability claim, a plaintiff must show (1) injury by the product; (2) the injury occurred because the product was in a defective condition, unreasonably dangerous to the user; and (3) the product

[1] Issues I, II, IV, and V are all related to the circuit court's conclusion Textron was entitled to judgment as a matter of law with regard to Appellants' strict liability claims.

was in essentially the same condition as when it left the hands of the defendant. Rife v. Hitachi Constr. Mach. Ltd., 363 S.C. 209, 215, 609 S.E.2d 565, 568 (Ct. App. 2005). See S.C. Code Ann. § 15-73-10 (2005) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer, or to his property . . . .").

In this instance, Appellants do not argue the golf car was defective in that it was not functioning as intended. Rather Appellants contend the golf car was defective and unreasonably dangerous to the user because Textron marketed the used Fleet golf cars for operation on public roads without affixing lights and reflective devices or without providing adequate warnings. We disagree.

While the mandatory addition of lights and reflectors to golf cars would no doubt add an increased element of safety, products are not defective simply because they do not have all the optional safety features that could be included. Our supreme court has said: "Most any product can be made more safe. . . . [A] bicycle is more safe if equipped with lights and a bell, but the fact that one is not so equipped does not create the inference that the bicycle is defective and unreasonably dangerous." Marchant v. Mitchell Distrib. Co., 270 S.C. 29, 35-36, 240 S.E.2d 511, 513 (1977). Likewise, the failure to equip the golf cars with lights and reflective equipment does not create the inference the golf car was defective and unreasonably dangerous.

Appellants also contend the golf car was defective and unreasonably dangerous because Textron failed to provide adequate warnings regarding operation at night and on public roads. We disagree.

"A product may be deemed defective, although faultlessly made, if it is unreasonably dangerous to place the product in the hands of the user without a suitable warning." Anderson v. Green Bull, Inc., 322 S.C. 268, 273, 471 S.E.2d 708, 712 (Ct. App. 1996) (Cureton, J., concurring) (citing Marchant v. Lorain Div. of Koehring, 272 S.C. 243, 247, 251 S.E.2d 189, 192 (1979)). However, a product is not defective for failure to warn of an open and obvious danger. Id. (Cureton, J., concurring) (citing Dema v. Shore Enters., 312 S.C. 528, 530, 435 S.E.2d 875, 876 (Ct. App. 1993)). "[A] seller is not

required to warn of dangers or potential dangers that are generally known and recognized. It follows, then, that a product cannot be deemed either defective or unreasonably dangerous if a danger associated with the product is one that the product's users generally recognize." Id. at 271-72, 471 S.E.2d at 710 (citations omitted).

We agree with the circuit court's conclusion the operation of an unlighted golf car on a public highway at night presents an open and obvious risk. The risks associated with this activity seem apparent, particularly in light of other risks that have been found to be open and obvious as a matter of law by our judiciary. See id. at 271, 471 S.E.2d at 711 (holding conductivity of aluminum ladder is a condition commonly known and recognized); Dema, 312 S.C. at 530-31, 435 S.E.2d at 876 (finding danger of operating recreational water vehicle in proximity to swimmers was a matter of common sense precluding necessity of warning). Furthermore, Appellants' expert conceded the danger posed should have been obvious. Consequently, the golf car was not rendered unreasonably dangerous by Textron's failure to warn against nighttime operation on public roads.

II. Negligence[2]

In this case, Appellants claim Textron was negligent in failing to adequately warn of the dangers of nighttime operation of the golf car on public roads. We disagree.

To prove a negligence claim, a plaintiff must demonstrate (1) a duty of care owed by the defendant; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. Platt v. CSX Transp., Inc., 379 S.C. 249, 258, 665 S.E.2d 631, 635 (Ct. App. 2008). "The court must determine, as a matter of law, whether the law recognizes a particular duty." Id.

As previously discussed, there is no duty to warn of dangers that are open and obvious. Anderson, 322 S.C. at 271-72, 471 S.E.2d at 710. Although questions of negligence are often for the jury, when the risk

[2] This section addresses Appellants' Issue III.

complained of is open and obvious to consumers, there is no duty to warn of that risk as a matter of law. See Miller v. City of Camden, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994) (stating negligence is mixed question of law and fact with existence and scope of duty being questions of law and breach of duty being a question for the jury).

Furthermore, we believe Stroud's negligence in driving the golf car would prohibit a recovery under a negligence theory as a matter of law. See Haley ex rel. Haley v. Brown, 370 S.C. 240, 244 n.6, 634 S.E.2d 62, 64 n.6 (Ct. App. 2006) ("Although we agree comparative negligence normally presents a jury question, where, after consideration of all the relevant factors, the only reasonable inference is that the plaintiff's negligence exceeded fifty percent, it becomes a matter of law for the trial court."). Therefore, we cannot conclude any genuine issue of material fact exists warranting the denial of summary judgment in Textron's favor.

CONCLUSION

Because we believe the risk of operating an unlighted golf car at night on a public highway was open and obvious, as a matter of law, the car was not defective or unreasonably dangerous. Furthermore, because the risk was open and obvious, Textron had no duty to warn against the hazards of the conduct that lead to Stroud's accident. Therefore, the ruling of the circuit court is

AFFIRMED.

HEARN, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Time Warner Cable,	Respondent,
v.	
Condo Services, Inc., d/b/a Renaissance Enterprises, Inc.,	Appellant.

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

Opinion No. 4481
Heard December 3, 2008 – Filed January 12, 2009

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

James B. Richardson, Jr., of Columbia, for Appellant.

Frank R. Ellerbe, III, of Columbia, for Respondent.

CURETON, A.J.: A jury awarded Time Warner Cable (Time Warner) damages for a breach of contract after Condo Services, Inc., d/b/a Renaissance Enterprises, Inc. (REI), failed to pay Time Warner monies owed under the parties' contract. The circuit court subsequently ordered REI to

allow Time Warner to continue providing services to REI's customers for the remaining term of the contract and required Time Warner to credit twenty percent of its revenues for video services during this time toward the balance owed by REI on the jury's damages award. We affirm in part, reverse in part, and remand.

FACTS

In a contract effective July 2, 2003, Time Warner agreed to provide video and other services through REI's existing cable system to 784 condominium units in the Myrtle Beach area. The contract provided for an initial term of seven years and an unlimited number of five-year extension terms. The contract required Time Warner to upgrade and maintain REI's cable system at REI's expense and gave Time Warner the exclusive right to provide "bulk multi-channel video services" and additional services[1] through that system. REI agreed to market Time Warner's basic cable services to its customers and to bill its customers for basic cable service. Upon commencement of services, REI was obligated to pay Time Warner $11.50 per month for each condo unit, regardless of whether the unit was occupied. This amount did not include charges for equipment rental or any taxes and fees, all of which REI agreed to pay as well. Time Warner reserved the right to raise the $11.50-per-unit fee by no more than six percent annually upon written notice.[2] Time Warner was to bill REI for its services in advance, and payment was due within thirty days of the date of each invoice.

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[1] "'Additional Services' means any services other than the Bulk Multi-Channel Video Services that can be provided to the [residential condominium complexes] over the System (including . . . video services billed individually to any Residents after the Initial Term and any Extension Terms)." Presumably, services such as digital telephone and high-speed internet would also qualify as "Additional Services." Customers who purchased additional services received a separate bill from Time Warner for those services. REI did not market, bill for, or receive any income from the additional services.

[2] At the time of trial, this amount had increased to $12.69 per unit per month.

The contract defined instances of default and provided remedies. Events constituting default included: (1) either party's failure to perform any material obligation and subsequent failure to cure the problem within thirty days following notice thereof; (2) REI's failure to pay any of Time Warner's invoices timely more than two times during any twelve-month period; and (3) either party's insolvency or participation in a bankruptcy proceeding as a debtor. Under section 7.2 of the contract, each party reserved the right to terminate the contract upon thirty days' notice if breached by the other party, as well as the right:

> [T]o seek all remedies available at law or in equity with respect to a breach or default under this Agreement by the other (including injunctive relief and specific performance, in cases where such breach or default is causing or would cause irreparable damage or where no adequate remedy at law is available), and such rights and remedies shall be cumulative.

Furthermore, if REI defaulted by failing to pay invoices, section 7.2 permitted Time Warner to "elect to provide its package of multi-channel video services on an individually-billed basis directly to Residents during the remaining Term."

In 2004, Time Warner filed suit against REI for failure to pay invoices, alleging breach of contract and seeking an injunction permitting it to serve REI's customers directly. On January 11, 2006, Time Warner notified REI it was terminating the contract effective March 15, 2006. Following a hearing on March 14, 2006, the circuit court entered an order enjoining Time Warner from terminating cable service. In that order, the circuit court specifically found "allowing Time Warner to terminate the contract and discontinue cable service during the pendency of this action would result in irreparable harm to REI and to the owners at the condominium complexes." Time Warner continued providing cable service pursuant to the circuit court's preliminary injunction entered March 14, 2006.

In April 2006, a jury found in favor of Time Warner and awarded it $140,542.21 in money damages on the breach of contract claim. Following the verdict, Time Warner sought injunctive relief enforcing section 7.2 of the contract and permitting it to use REI's cable system to continue delivering cable services to customers in the condominiums. On October 6, 2006, the circuit court granted this relief, subject to certain limitations. The circuit court reasoned that permitting Time Warner to continue providing these services would minimize any interruption to the customers' cable service. The circuit court imposed limitations on Time Warner's continued use of REI's cable system, including: (1) Time Warner must credit twenty percent of the revenues it received from video services to reduce the amount of judgment against REI and make semi-annual reports to the circuit court and REI concerning these reductions; (2) Time Warner must initially fund any additional upgrades to the system, with REI annually becoming responsible for a greater percentage of upgrade costs; and (3) Time Warner must post and maintain for the duration of the order a bond equal to twice the amount of the judgment to ensure its compliance with the order. The order was to expire upon REI's satisfaction of the judgment or on July 2, 2010, the end of the contract's initial seven-year term.

On December 12, 2006, the circuit court denied REI's motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

"When legal and equitable causes of action are maintained in one suit, the court is presented with a divided scope of review." Blackmon v. Weaver, 366 S.C. 245, 248, 621 S.E.2d 42, 43-44 (Ct. App. 2005). An action seeking damages for breach of contract is an action at law. Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). "An action to construe a contract is an action at law reviewable under an 'any evidence' standard." Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). However, the power of the court to grant an injunction lies in equity. Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "A decision whether to grant or deny an injunction

is ordinarily left to the sound discretion of the trial court." Siau v. Kassel, 369 S.C. 631, 638, 632 S.E.2d 888, 892 (Ct. App. 2006). A decision to grant specific performance likewise rests in the sound discretion of the trial court. Campbell v. Carr, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004).

LAW/ANALYSIS

I. Time Warner's Use of REI's Cable System

REI asserts the circuit court abused its discretion in ordering the takeover of REI's cable system as a means of paying off Time Warner's money judgment. We agree.

"The discretion to grant or refuse specific performance is a judicial discretion to be exercised in accordance with special rules of equity and with regard to the facts and circumstances of each case." Guignard v. Atkins, 282 S.C. 61, 66, 317 S.E.2d 137, 140 (Ct. App. 1984). A court may order specific performance if: (1) a valid contract exists between the parties; (2) no adequate remedy at law exists for the breach; (3) specific performance is equitable between the parties; and (4) no fraud, accident, or mistake infects the contract. King v. Oxford, 282 S.C. 307, 314, 318 S.E.2d 125, 129 (Ct. App. 1984). However, specific performance is not an absolute right, and a court granting it must follow established principles and carefully consider all the circumstances of the particular case. Bishop v. Tolbert, 249 S.C. 289, 298, 153 S.E.2d 912, 917 (1967). Generally, a court will not order specific performance that would require "continuous direction and supervision of the court," but an exception to this rule exists for cases in which the public has an interest. 81A C.J.S. Specific Performance § 65 (2004).

Initially, we note this appeal arrives in an unusual procedural posture. Time Warner included both legal and equitable causes of action in its complaint. When REI demanded a jury trial, the breach of contract cause of action became a matter for the jury to decide, but the cause of action for injunctive relief remained within the province of the judge. See Rules 38 & 39, SCRCP. Ordinarily, the circuit court would have followed the jury trial of the legal action with a bench trial of the equitable action. See Airfare, Inc.

v. Greenville Airport Comm'n, 249 S.C. 265, 269, 153 S.E.2d 846, 848 (1967) (holding when legal and equitable issues exist in the same case and jury trial is appropriate, "[t]he legal and equitable issues should be separated and each tried by the appropriate branch of the court"). However, in this matter, no bench trial followed the jury trial. Rather, Time Warner presented its request for injunctive relief in the form of a motion to enforce the remedies section of the contract. The parties filed memoranda supporting or opposing this motion, and on June 6, 2006, the circuit court heard arguments. REI did not oppose Time Warner's presentation of its request for relief in the context of a motion hearing rather than a trial. However, it may have prevented the parties from fully developing evidence that would have assisted the circuit court in fashioning an order that gave effect to the parties' intent as expressed in their contract and subsequent actions.

A. Specific Performance Generally

The circuit court did not err in granting specific performance[3] because it is an appropriate remedy under the circumstances present in this case. See King, 282 S.C. at 314, 318 S.E.2d at 129. REI argues on appeal that no valid contract existed because Time Warner terminated the contract by notice given in January of 2006. However, REI effectively blocked this attempt at termination by procuring a temporary injunction requiring "the parties [to] continue to operate under the July 2, 2003, contract" during the pendency of the lawsuit. The circuit court specifically found "that allowing Time Warner to terminate the contract . . . would result in irreparable harm to REI and to the owners at the condominium complexes." By the time the jury found REI

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[3] While the circuit court makes no reference to this remedy as "specific performance," the parties have characterized it as that. Specific performance "requires precise fulfillment of a legal or contractual obligation." Black's Law Dictionary 1407 (7th ed. 1999). In this matter, Time Warner asked the circuit court to enforce an ambitious contractual provision that supplied few specific terms. The circuit court fashioned an order that ultimately exceeded the intent of the provision. In this section, we concern ourselves only with the propriety of specific performance as a remedy. We address the limiting terms added by the circuit court below.

defaulted, giving Time Warner cause to terminate the contract, Time Warner had reconsidered its decision to terminate. It made no further effort to terminate the contract. Instead, it continued providing services and pursued enforcement of the contract. Therefore, a valid contract existed at the time the circuit court granted the injunctive relief.

REI further argues the circuit court's order is inequitable because it redirects income that would have been REI's to Time Warner and leaves REI with nothing. However, REI's argument focuses on inequities born of the limitations imposed by the order rather than on any inequity that would result from specific performance under the terms of the contract. Aside from these arguments, REI does not challenge the other criteria for specific performance, and we find specific performance to be an appropriate remedy.

B. Use of Specific Performance to Enforce Money Judgment

The circuit court erred in ordering REI's compensation from its court-ordered performance under section 7.2 of the contract to be applied wholly to the satisfaction of Time Warner's money judgment because Time Warner had an adequate remedy at law for its losses under the portions of the contract it had already performed. A party is not entitled to specific performance of a contractual provision if an adequate remedy exists at law. Id. Time Warner sought and received an award of damages for the financial losses it suffered due to REI's inadequate payments prior to trial. These damages were retrospective, making Time Warner whole in light of the losses it suffered in the past. In addition, Time Warner sought injunctive relief to ensure it would not continue to lose revenue by allowing REI to act as a "middle man" in collecting revenues from customers. This relief was prospective. The two types of relief are distinct from one another: the damages authorized by law assuage Time Warner's past losses, and the injunction or specific performance demanded by equity protects Time Warner's anticipated future income under the contract. Because Time Warner has adequate remedies at law for enforcing and collecting its money judgment, the circuit court's use of the injunction or specific performance to satisfy this judgment was improper. Consequently, requiring REI's compensation for its specific performance to be diverted to Time Warner in payment of the judgment was

error, and we reverse the circuit court's decision diverting REI's compensation to Time Warner.[4]

II. Fair Compensation

REI asserts the circuit court abused its discretion in finding twenty percent of Time Warner's video revenues derived from the takeover of REI's cable system would be fair compensation to REI. We agree.

> "Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail." . . .
>
> . . . Our cases have long held that ambiguities must be construed against the party who prepared the contract. . . . [W]e hold "a party to a written contract, where there is no ambiguity or indefiniteness in the essentials, cannot say their minds did not meet." . . . "There exists in every contract an implied covenant of good faith and fair dealing."

Parker v. Byrd, 309 S.C. 189, 193-94, 420 S.E.2d 850, 853 (1992) (internal citations omitted). Furthermore:

> [N]either law nor equity requires every term or condition to be set forth in a contract. Where an

[4] This requirement was also error because it created an inequitable situation between the parties, in contravention of the test enunciated in King. Diverting one hundred percent of REI's income to satisfy Time Warner's money judgment created a draconian judgment-enforcement mechanism that left REI bereft even of a subsistence income from its cable system.

> implied term is necessary to effectuate the intention of the parties, the law will supply it. The unexpressed provision may be inferred from the language of the contract itself, or by looking to the external facts and circumstances surrounding the bargain, or by proving a general custom and usage of including certain terms as part of similar contracts.

Maccaro v. Andrick Dev. Corp., 280 S.C. 96, 100, 311 S.E.2d 91, 94 (Ct. App. 1984) (internal citations omitted).

The circuit court erred in ordering a compensation rate entirely unrelated to the contract between Time Warner and REI. At REI's request, the circuit court prohibited Time Warner from terminating the contract during the litigation. With the contract intact, Time Warner sought specific performance of section 7.2. In granting Time Warner's motion for enforcement of section 7.2 and outlining the obligations of the parties, the circuit court undertook to construe the terms of section 7.2. However, the circuit court effectively rewrote a material provision of the contract, the rate of REI's compensation, using as its model limited evidence of an unrelated and unfinalized agreement between Time Warner and another cable system owner.[5] The twenty-percent rate has no basis in the terms of the agreement between these parties and, standing alone, provides insufficient guidance to determine a fair rate based on other agreements in the cable industry. Consequently, imposing this rate was error.

The circuit court received evidence of each party's income from revenues collected, as well as evidence of each party's obligations under the contract. Determination of a fair monthly compensation rate should reflect

[5] Time Warner identified "one commercial arrangement" in which it utilized the other party's cable system in exchange for a twenty-percent share of video revenues. Time Warner stated the terms of that arrangement were under renegotiation at the time of suit. Without further inquiry, the circuit court found this agreement sufficiently comparable to use as a model for its decision in this matter.

the intent of the parties as memorialized by the terms of the contract. See Id. A fair monthly compensation rate should derive from the income to which the contract entitled each party prior to enforcement of section 7.2, reduced or increased by the actual costs shifted from one party to another by the order of enforcement. The parties must identify for the circuit court the particular burdens and benefits reallocated between them by the order for specific performance and must submit evidence of the actual monthly costs incurred by this shift.[6] Therefore, we reverse and remand to the circuit court for the taking of evidence concerning the costs shifted between the parties by requiring specific performance under the terms of section 7.2 and for entry of an order establishing a fair rate of compensation for REI consistent with the terms of the contract.

CONCLUSION

As to Time Warner's use of REI's cable system, we find while specific performance is an appropriate remedy for prospective relief under the facts of this case, diverting REI's compensation for this performance to Time Warner to satisfy its judgment was error. Accordingly, we reverse the circuit court's order diverting REI's compensation to Time Warner.

As to the amount of fair compensation for Time Warner's use of REI's cable system, we find twenty percent of Time Warner's income from video services is an arbitrary amount unrelated to the compensation rate set by the parties in the original contract. Consequently, we reverse the circuit court's order setting REI's compensation at twenty percent of Time Warner's income from video services and remand for further proceedings consistent with this opinion.

Accordingly, the order of the circuit court is

[6] For instance, both the provision of installation services and converter boxes directly to customers and the cost of billing or maintaining the cable system during the remaining term of the contract have shifted from REI to Time Warner.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ronald B. Serowski, Appellant,

v.

Barbara L. Serowski,
a/k/a Barbara L. Weis, Respondent.

Appeal From Beaufort County
Nancy Chapman McLin, Family Court Judge

Opinion No. 4482
Heard November 6, 2008 – Filed January 12, 2009

AFFIRMED

Thomas M. Neal, III, of Columbia, for Appellant.

James H. Moss, of Beaufort, for Respondent.

PIEPER, J.: This is an appeal from an order granting modification of alimony and reducing appellant's permanent periodic alimony obligation from $1,750.00 to $1,500.00 per month. On appeal, Ronald Serowski (Husband) alleges the family court erred in: (1) failing to eliminate, or alternatively, failing to further reduce his alimony obligation based upon the

parties' alleged change in circumstances; (2) modifying the court's decision as set forth in the initial memorandum instructions to counsel and considering improper ex parte communications from counsel for respondent; (4) relying on the findings of the original divorce decree; and (5) failing to award attorney's fees. We affirm.

FACTS/PROCEDURAL HISTORY

Husband and Barbara Weis (Wife), having been married for thirty-four years, were divorced by final decree dated November 7, 1997. Pursuant to the divorce decree, the marital estate was divided equally and Husband was ordered to pay Wife permanent periodic alimony in the amount of $1,750.00 per month, approximately one-half of Husband's gross monthly income.

On July 10, 2003, Husband filed the instant action seeking modification of the prior alimony award as well as attorney's fees and costs. Wife filed an answer and counterclaim seeking an increase in alimony in addition to attorney's fees and costs.

At the time of the final hearing, Husband was sixty-six years old and Wife was sixty-two. Husband testified his current expenses totaled $5,184.04 per month, marking an increase in expenses by $2,695.48 since the divorce. Wife's testimony revealed her expenses totaled $1,888.85, indicating a decrease by $636.15. Since the time of the divorce, Husband's income had increased by $2,657.42 and Wife's income had increased by $929.50, as a result of her social security and annuity benefits. Additionally, Husband testified his assets totaled $62,993.93; however, the court did not find this evidence credible.[1]

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[1] The court did not find Husband's testimony credible as to his earning potential, expenses, and assets. Specifically, the court found Husband was transferring his assets to his current wife so as to improve his position for either termination or reduction of his alimony obligation.

As to the parties' health, Husband presented evidence and testimony regarding various health problems including congestive heart failure and coronary artery disease which led to open heart surgery in September 2004. Wife testified her health was "'so-so'" and that she continues to suffer from a medical condition which existed at the time of the divorce.

Following the hearing, the court instructed Husband's counsel to prepare a proposed order reducing Husband's alimony obligation from $1,750.00 to $1,000.00. Upon receipt of the proposed order, Wife's counsel wrote the trial judge voicing some disagreement regarding the findings in the proposed order and allegedly further arguing Wife's position in the matter. Husband's counsel objected to the court's consideration of the letter and shortly thereafter Wife's counsel wrote another letter to the court allegedly further arguing the case. Copies of the letters were sent to Husband's counsel on both occasions. After receiving the letters, the court issued a written response to both parties indicating the letters were inappropriate and would not be considered. Thereafter, the court permitted Wife's counsel to submit a proposed order within fifteen days.

On September 20, 2006, the court issued its final order finding Husband failed to prove a material or substantial change in circumstances warranting a termination of alimony, but that evidence was presented to support a request for a reduction in alimony. The order reduced Husband's alimony obligation to $1,500.00 and denied both parties' requests for attorney's fees and costs. Husband timely filed a motion to alter or amend, which the court denied. This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, this court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005). However, despite this broad scope of review, we are not required to disregard the findings of the family court judge, who saw and heard the witnesses, and was in a better position to evaluate their credibility and assign comparative weight to their testimony. Id. Questions concerning the modification of alimony rest within the sound discretion of the family court and will not be overturned

absent an abuse of that discretion. Riggs v. Riggs, 353 S.C. 230, 236, 578 S.E.2d 3, 6 (2003). An abuse of discretion occurs if the court's ruling is controlled by an error of law or if the ruling is based upon findings of fact that are without evidentiary support. Sharps v. Sharps, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

LAW/ANALYSIS

Husband argues the court erred in failing to eliminate Husband's alimony obligation on the ground Wife's increase in income and assets constitutes a substantial or material change in circumstances sufficient to warrant a termination of alimony. We disagree.

"The purpose of alimony is to provide the ex-spouse a substitute for the support which was incident to the former marital relationship." Love v. Love, 367 S.C. 493, 497, 626 S.E.2d 56, 58 (Ct. App. 2006) (internal citation omitted). Pursuant to Section 20-3-170 of the South Carolina Code, changed conditions may warrant a modification or termination of alimony. S.C. Code Ann. § 20-3-170 (1985). This section specifically provides:

> Whenever any husband or wife . . . has been required to make his or her spouse any periodic payments of alimony and the circumstances of the parties or the financial ability of the spouse making the periodic payments shall have changed since the rendition of such judgment, either party may apply to the court which rendered the judgment for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments . . .

Id.

To justify modification or termination of an alimony award, the change in circumstances must be substantial or material. Thornton v. Thornton, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997); Pendergast v. Pendergast, 354 S.C. 32, 38, 579 S.E.2d 530, 533 (Ct. App. 2003). Changes in circumstances

within the contemplation of the parties at the time the divorce was entered generally do not provide a basis for modifying alimony. Calvert v. Calvert, 287 S.C. 130, 139, 336 S.E.2d 884, 889 (Ct. App. 1985). "As a general rule, a court hearing an application for a change in alimony should look not only to see if the substantial change was contemplated by the parties, but most importantly whether the amount of alimony in the original decree reflects the expectation of that future occurrence." Sharps, 342 S.C. at 78, 535 S.E.2d at 917. As such, the party seeking modification has the burden to show by a preponderance of the evidence that the unforeseen change has occurred. Kelley v. Kelley, 324 S.C. 481, 486, 477 S.E.2d 727, 729 (Ct. App. 1996).

Here, Husband asserts that Wife's increase in monthly income as a result of her receipt of social security and annuity benefits constitutes a substantial change in circumstances warranting termination of his alimony obligation. In support of this assertion, Husband cites Eubank v. Eubank, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001), wherein this court found the family court erred in failing to consider the wife's post-decree increase in assets in determining whether to grant a reduction or termination of alimony. While Eubank addresses a situation in which the wife's increase in assets may have warranted a modification or termination of alimony, the Eubank court's reversal of the denial of modification or termination was based on the family court's failure to consider the wife's changes in circumstances in addition to those of the husband. Id. at 375, 555 S.E.2d at 417. In contrast to Eubank, the instant case neither involves a substantial increase in assets on the part of Wife nor a decrease in income on the part of Husband. In fact, Husband actually increased his income. While Husband asserts his expenses have also increased, the family court did not find Husband's testimony regarding his expenses credible. Moreover, in accordance with Eubank, the court properly considered both parties' economic circumstances in reaching its finding. See Eubank, 347 S.C. at 375, 555 S.E.2d at 417. Eubank merely suggests an abuse of discretion where the court fails to consider the appropriate factors and circumstances.

We find the court in the instant matter properly considered both parties' alleged changes in circumstances in concluding that Husband had not proven a material or substantial change in circumstances warranting a termination of alimony. Additionally, the court found Husband's testimony as to his earning

potential, expenses, or assets was not credible. In light of the relatively small percentage increase in Wife's monthly income, review of the evidence supports the court's finding that termination of alimony is not appropriate. Accordingly, the court's denial of the request to terminate alimony was not an abuse of discretion.

In the alternative, Husband asserts the court erred in concluding he failed to prove a change in circumstances warranting a greater reduction of his alimony obligation. We disagree.

As stated, the change in circumstances must be substantial or material to justify a modification of an alimony award. Pendergast, 354 S.C. at 38, 579 S.E.2d at 533. In determining whether the change in circumstances warrants a modification, several considerations relevant to the initial determination of an alimony award may be applied in the modification context as well, including the parties' standard of living during the marriage, each party's earning capacity, and the supporting spouse's ability to continue to support the payee spouse. Penny v. Green, 357 S.C. 583, 589, 594 S.E.2d 171, 174 (Ct. App. 2004).

In the instant case, after carefully reviewing and contrasting the parties' income, expenses, and assets at the time of the divorce and at the time of the hearing, the court found Wife's increase in income due to her receipt of social security and annuity benefits had improved her ability to meet her needs. In addition, the court noted that Wife's net worth had also increased since the parties' divorce. As to Husband's asserted change in circumstances, the court recognized that Husband had suffered serious medical problems. However, with regard to Husband's assertion that his medical problems have limited his earning capacity, the court found Husband's testimony as to his earning capacity was not credible. The evidence in the record supports the court's findings. Therefore, the court's reduction in alimony from $1,750.00 to $1,500.00 was appropriate. Accordingly, the court did not abuse its discretion in failing to award a greater reduction of alimony.

Next, Husband contends the court erred in modifying its decision in the final order. Husband further contends the court's modification was the result of improper ex parte communications from Wife's counsel. We disagree.

Until written and entered, a court has discretion to modify or amend a ruling. Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("The written order is the trial judge's final order and as such constitutes the final judgment of the court.") (citing Rule 58, SCRCP). Moreover, "[i]t is well settled that a judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling." Corbin v. Kohler Co., 351 S.C. 613, 621, 571 S.E.2d 92, 97 (Ct. App. 2002) (quoting Badeaux v. Davis, 337 S.C. 195, 204, 522 S.E.2d 835, 839 (Ct. App. 1999)). Here, the court's initial memorandum to counsel was not the final written order of the court. As such, the court had broad discretion to change or amend its decision in the final written order.

As to Husband's assertion that the court's modification was influenced by the improper ex parte communications of Wife's counsel, this issue is without merit. Here, the trial judge, in denying Husband's motion to alter or amend, specifically stated she did not consider the letters submitted by Wife's counsel. The trial judge further indicated that once it was discovered that the letters served to further argue the case, she set them aside and notified counsel that the communications were improper and would not be given consideration.[2] Additionally, in an attempt to prepare the final written order, the trial judge decided to further review the evidence after concluding the findings contained in the proposed orders from counsel were insufficient. Consequently, the trial judge evaluated the evidence in greater detail and determined that a decrease in alimony of $250.00, as opposed to $750.00, was more appropriate. Although the original award in the memorandum was modified from $750.00 to $250.00, the court's final determination was influenced by nothing more than the facts in the record. Accordingly, we find the court did not engage in improper ex parte communications and the modification of the alimony award from the instruction in the initial memorandum was well within the discretion of the court.

[2] We remind the Bar of Rule 9(b), South Carolina Rules of Family Court, which states "[c]ounsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced."

Turning to the next issue on appeal, Husband asserts the court erred in focusing on the findings of the original divorce decree regarding Husband's earning capacity and marital fault. We disagree.

The factors relevant to the initial determination of an alimony award as set out in Section 20-3-130(c) of the South Carolina Code include, among numerous other factors, employment history and earning potential as well as marital misconduct. S.C. Code Ann. § 20-3-130(c) (2007). Among the factors relevant to a determination of alimony, earning capacity has also been considered in the modification context. Kelley, 324 S.C. at 486, 477 S.E.2d at 729-30 (citing Boney v. Boney, 289 S.C. 596, 599, 347 S.E.2d 890, 892 (Ct. App. 1986)).

While earning capacity can be considered as a factor in an action for modification of an alimony award, there is no evidence the court relied on this factor in arriving at its determination to reduce Husband's alimony obligation. Additionally, there is no indication the court relied on the initial court's findings regarding Husband's marital fault. Review of the order reveals the court balanced the relevant considerations in making its own findings relative to the parties' changes in circumstances. Accordingly, the court did not abuse its discretion in focusing its findings on the parties' changes in circumstances.

Lastly, Husband asserts the court abused its discretion in failing to award attorney's fees and costs. We disagree.

The determination whether to award attorney's fees is within the sound discretion of the family court and will not be overturned absent an abuse of discretion. Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988). In determining whether to award attorney's fees, the court should consider the parties' ability to pay their own fees, the beneficial results obtained by the attorney, the parties' respective financial conditions, and the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

Here, the court properly considered the appropriate factors and concluded each party should be responsible for their own attorney's fees and

costs. Although Husband successfully received a reduction in alimony, Husband was primarily seeking to terminate his alimony obligation based on Wife's alleged change in need. Husband was not successful on the termination claim. Moreover, Husband's income is sufficient to enable him to satisfy his attorney's fees and costs. Accordingly, we find no error in the family court's denial of attorney's fees to Husband.

CONCLUSION

Based upon the foregoing, the order of the family court is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Karen Dallis Carpenter, Appellant,

v.

James Edward Burr, Frank C. Gavay, Cynthia A. Gesualdi and Susan S. Fisher, Respondents.

Appeal From Horry County
Jocelyn B. Cate, Family Court Judge

Opinion No. 4483
Heard December 11, 2008 – Filed January 12, 2009

AFFIRMED

James L. Hills, of Myrtle Beach, for Appellant.

Randall K. Mullins, of N. Myrtle Beach, for Respondents.

THOMAS, J.: This is an appeal of a divorce decree. Karen Dallis Carpenter, the wife, argues the family court erred in (1) failing to grant her a

divorce on the ground of physical cruelty, (2) finding that certain dental and medical expenses she incurred after filing this action were not incurred for marital purposes, (3) declining to order James Edward Burr, the husband, to reimburse her for certain dental bills, (4) finding the home where the parties lived before they separated had not been transmuted and declining to award her a special equity in the asset, (5) denying her alimony, and (6) ordering her to pay a substantial portion of Burr's attorney's fees. We affirm.

FACTS AND PROCEDURAL HISTORY

The parties married on December 13, 2002, in Horry County and last resided together as husband and wife on March 27, 2004. At the time of the merits hearing, Carpenter was sixty-one and Burr was sixty-five.

Before the marriage, Carpenter had worked as an associate professor of nursing and education at Coastal Carolina University from 1978 until 1999, when she retired for medical reasons. Burr had also retired when the parties married, but considered himself an investor.

The parties resided in a home in Tidewater Plantation, North Myrtle Beach. Burr had acquired the home in 2000, before the marriage. The property was titled in Burr's name, along with the names of his nieces and nephew, who are the remaining respondents in this case. With Burr's approval, Carpenter was included in the wind, hail, and home insurance policies on the home and contributed toward payment of the premiums. Carpenter was not listed on the mortgage; however, she paid one-half of each mortgage payment on the home.

After an altercation on March 27, 2004, about sixteen months after they married, the parties separated. According to Carpenter, a disagreement arose between the parties regarding the watering of their plants, whereupon a struggle ensued for the garden hose. Carpenter alleged Burr threw her on the ground, dropped on her with his knees and stuck a garden hose in her mouth, requiring her to seek emergency room treatment. According to Carpenter, the incident also resulted in the need for extensive dental work and caused

intense pain in her spine, which was determined at the emergency room to be spondylolisthesis. Although Burr denied he was the aggressor, he admitted on direct examination that he later pled "no contest" to an assault and battery charge arising from the incident.

Carpenter filed this action on June 11, 2004, requesting (1) a divorce on the ground of physical cruelty or in the alternative an order of separate maintenance and support, (2) alimony and separate maintenance and support, (3) exclusive possession of the Tidewater Plantation home and its contents, (4) exclusive rights to the vehicle she was currently driving, (5) payment by Burr of insurance and medical expenses for both parties, (6) a favorable division of the marital assets, (7) litigation expenses and attorney's fees, and (8) various restraining orders. Simultaneously, she filed a motion for temporary relief. A temporary hearing took place on June 29, and July 8, 2004. On July 8, 2004, Carpenter amended her complaint to add Respondents Frank C. Gavay, Cynthia A. Gesauldi, and Susan S. Fisher, relatives of Burr whose names appeared on the title to the Tidewater Plantation home, as defendants only in regard to the issue of equitable division. She also amended her motion for temporary relief. Respondents Burr, Gavay, Gesauldi, and Fisher answered and counterclaimed on August 4 and 5, 2004. Carpenter replied to Respondents' responsive pleadings on August 23, 2004.

On August 23, 2004, the family court issued an order from the temporary hearing, granting Carpenter, among other relief, exclusive use and occupancy of the Tidewater Plantation home pending further order of the court. Carpenter and Burr were each ordered to pay one half of the monthly mortgage payments.

On June 17, 2005, Burr amended his answer and counterclaim to seek a divorce on the ground of a one-year separation. Although Carpenter, in her reply, admitted the parties had been separated for one year, she denied Burr was entitled to a divorce on this ground.

Another temporary hearing took place on June 27, 2005. On June 30, 2005, the family court issued an order from this hearing denying Burr's motion to repossess the Tidewater Plantation home, denying Carpenter's request to take the deposition of a marriage counselor but allowing her to subpoena the witness for the final hearing, and granting mutual restraining orders.

The final hearing in the matter took place on September 12 and 13, 2005, and on December 5, 6, and 8, 2005. On January 4, 2006, the family court issued an interim temporary order that, inter alia, ordered Carpenter to vacate the Tidewater Plantation home and granted Burr temporary possession of the home.

In the final order and decree of divorce, signed February 14, 2006, and filed February 21, 2006, the family court, inter alia, (1) denied Carpenter's request for a divorce on the ground of physical cruelty; (2) granted Burr a divorce based on a one-year separation, (3) reserved Carpenter's claim for alimony for further disposition based on a material change in circumstances; (4) denied Carpenter's claim for transmutation of the Tidewater Plantation home and awarded Respondents full possession and ownership of the asset; (5) divided the personal property; (6) required the parties' to be responsible for their own attorney's fees and costs; (7) issued mutual restraining orders to Carpenter and Burr; and (8) directed the parties to be responsible for debts in their names without contribution from each other.

Both sides moved to alter or amend, and on May 11, 2006, the family court issued an order (1) denying Carpenter's motions for a new trial and for attorney's fees, (2) awarding Burr $15,000.00 in attorney's fees, and (3) denying Burr's motion to delete the reservation of alimony. Carpenter timely filed a notice of appeal on June 9, 2006.

ISSUES

I. Did the family court err in failing to find physical cruelty against Burr?

II. Did the family court err in failing to find Carpenter's spondylolisthesis and other injuries were caused by Burr during the incident on March 27, 2004?

III. Did the family court err in failing to order Burr to pay certain medical and dental expenses that Carpenter incurred?

IV. Should the family court have found the Tidewater Plantation home had been transmuted into marital property or, in the alternative, awarded Carpenter a special equity interest in the asset?

V. Did the family court err in declining to award Carpenter alimony?

VI. Did the family court err in ordering Carpenter to pay a substantial portion of Burr's attorney fees?

STANDARD OF REVIEW

"In appeals from the family court, an appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence." Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005) (citing Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992) and Owens v. Owens, 320 S.C. 543, 466 S.E.2d 373 (Ct. App. 1996)). "This broad scope of review does not, however, require the appellate court to disregard the findings of the family court." Id. (citing Stevenson v. Stevenson, 276 S.C. 475, 279 S.E.2d 616 (1981)). "Neither is the appellate court required to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." Id. (citing Cherry Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981)). Moreover, "when an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and the reason for its decision." Dearybury v. Dearybury, 351 S.C. 278, 283, 569 S.E.2d 367, 369 (2002) (interpreting Rule 220(b)(1), SCACR).

DISCUSSION

I. Physical Cruelty

Carpenter alleges several errors in the family court's finding that she failed to prove her claim for physical cruelty against Burr. First, Carpenter argues the court mistakenly refused to consider Burr's admission during direct examination that he pled "no contest" to an assault and battery charge arising from the incident that led to the parties' separation as a conclusive finding that he had committed physical cruelty. Second, she maintains information regarding Burr's visits with a counselor proffered through the counselor's testimony or cross-examination of Burr should have been admitted. Finally, she takes issue with the finding that the altercation leading to the parties' estrangement was the only incident of alleged physical cruelty and criticizes the court's consideration of an incident in which she allegedly was the aggressor.

A. Burr's nolo contendere plea

Acknowledging a nolo contendere plea is generally not admissible during a civil proceeding, Carpenter suggests Burr's voluntary acknowledgment of his nolo contendere plea was tantamount to an admission that he had committed physical cruelty against her. In support of this argument, she cites section 17-23-40 of the South Carolina Code, under which such a plea, once entered, authorizes the court to deal with the defendant "in like manner as if he had entered a plea of guilty thereto." S.C. Code Ann. § 17-23-40 (2003). She further references Rule 609 of the South Carolina Rules of Evidence, which allows the admission of a nolo contendere plea "for the purpose of attacking the credibility of a witness." Rule 609, SCRE. These authorities, however, address the legal significance of a nolo plea for purposes of the criminal proceeding during which it is made and the admissibility of such a plea for impeachment purposes. We further hold that, although Burr's voluntary discussion about the plea during his direct testimony rendered it admissible, the family court properly declined to consider it as dispositive evidence that he had committed physical cruelty

against Carpenter on March 27, 2004. Our supreme court has recently noted the nature of a nolo contendere plea, in contrast to that of a guilty plea or an Alford plea, prevents its use "as substantive evidence of guilt in a subsequent proceeding." Zurcher v. Bilton, 379 S.C. 132, 136-37 n.2, 666 S.E.2d 224, 227 n.2 (2008). Furthermore, proof of physical violence does not necessarily establish physical cruelty as a ground for divorce. See Brown v. Brown, 215 S.C. 502, 508, 56 S.E.2d 330, 333 (1949) (stating physical cruelty, for purposes of divorce litigation, "as generally been defined by our courts as actual personal violence, or such a course of physical treatment as endangers life, limb or health, and renders cohabitation unsafe"). Here, as noted by the family court, there was evidence in the record suggesting (1) the injuries Carpenter sustained during the altercation were less serious than she alleged; and (2) after the parties separated, Carpenter voluntarily initiated contact with Burr, thus making questionable her claim that she was "deathly afraid" of him. Burr's voluntary admission of his nolo contendere plea, then, was not a concession on his part that Carpenter was entitled to a divorce on the ground of physical cruelty.

B. Evidence concerning Burr's statements and conduct during counseling sessions

Carpenter also contends the family court erred in refusing to admit the proffered testimony of a licensed professional counselor that, in Burr's presence, she had told the counselor that Burr "threw her down and jumped on her" and "shoved a garden hose in her mouth" and Burr never attempted to refute her statements. She also alleges error in the court's refusal to allow her attorney to cross-examine Burr about his communications with the counselor. The family court held the prohibition in section 19-11-95(D)(1) against the use of "confidences revealed" during the course of treatment from a mental health provider as "evidence of grounds for divorce" applied to the evidence at issue. See S.C. Code Ann. § 19-11-95(D)(1) (Supp. 2007). Carpenter, however, argues any communications between Burr and the counselor during sessions when the counselor met with both parties were not "confidences" because her presence prevented them from being "private." We disagree.

Section 40-75-190 of the South Carolina Code provides that "[a]ll communications between clients and their licensed professional counselor or marriage and family therapist are considered privileged as provided in Section 19-11-95 . . . ." Id. § 40-75-190 (2001). Under section 19-11-95, "confidence" is defined as "a private communication between a patient and a provider or information given to a provider in the patient-provider relationship." Id. § 19-11-95 (A)(3) (Supp. 2007).

To date, we have found no decisions from the courts of this State addressing the question of whether the "private" nature of communications from a patient to his or her mental health treatment provider is compromised by the presence of a co-participant in the treatment when the communications at issue are made. Our research of case law from other jurisdictions, however, indicates that, at least where marriage counseling is concerned, it would defeat the purpose of the treatment to hold the confidential relationship between a patient and a counselor and the privileged nature of a confidences communicated during the course of such a relationship are compromised by the presence of the patient's spouse during the particular counseling session when the confidence is revealed. See Mrozinski v. Pogue, 423 S.E.2d 405, 408 (Ga. Ct. App. 1992) (noting that "[t]he object of the privilege is to encourage the full trust of the patient so as to persuade him to reveal his innermost feelings and private acts" and suggesting the privilege is "essential" because "nowhere is the patient more reluctant to reveal his true feelings and thoughts than in family therapy"); Touma v. Touma, 357 A.2d 25, 30 (N.J. Super. Ct. 1976) ("Since marriage counseling often brings the two spouses together for therapy, the fact that client and counselor are in the presence of a third—here the marital partner—does not waive the privilege."). Moreover, our decision to apply the patient-provider privilege to all communications made by a marriage counseling participant during treatment, regardless of whether the other spouse was in attendance, is consistent with this State's policy of supporting the marriage relationship and encouraging reconciliation of married couples. Cf. S.C. Code Ann. § 20-3-90 (1976) (mandating that a divorce decree state that an attempt was made to reconcile the parties to such an action and that the efforts were unavailing);

Grant v. Grant, 233 S.C. 433, 437, 105 S.E.2d 523, 525 (1958) ("In a controversy relating to marriage the Court is concerned not only with the rights of the individuals involved but also with the public interest."); Hickum v. Hickum, 320 S.C. 97, 107, 463 S.E.2d 321, 326 (Ct. App. 1995) (Goolsby, J., concurring) (noting decisions of the court should "further this state's public policy of preserving marriages and encouraging reconciliations").

C. Evidence about other incidents of alleged physical cruelty

Finally, Carpenter contends the family court erred in apparently disregarding evidence concerning other incidents, one occurring before the parties' marriage and the other after their separation. Carpenter maintains these other incidents discredit the family court's finding that the altercation giving rise to the parties' estrangement was the only incident of alleged physical cruelty. She also complains about a reference in the appealed order to an incident in which she allegedly was the aggressor. In her brief, however, Carpenter cites no case law or other authority to support her position that a family court must consider allegations of abuse occurring before a marriage or after a separation in determining whether a spouse has established physical cruelty as a ground for divorce. Furthermore, she does not explain why the family court erred in finding she was the aggressor in another physical altercation during the marriage. We therefore hold these arguments are conclusory and decline to address them further. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (holding an issue will be deemed abandoned when the appellant fails to provide arguments or supporting authority).

II. Finding Regarding Carpenter's Spondylolisthesis and Other Problems

Carpenter alleges error in the family court's refusal to find that her spondylolisthesis and injuries to her teeth were caused by Burr during the altercation that led to the parties' separation. There is evidence in the record, however, supporting the family court's findings that Burr was not responsible for the afflictions that Carpenter claimed she suffered at his hand, including (1) Carpenter's admission, only after being confronted with the findings of

the administrative law judge in her social security case, that she had become disabled from spondylolisthesis in 1999; (2) records from the radiologist who examined Carpenter during the March 2004 incident indicating the spondylolisthesis with which she was diagnosed at the time was consistent with degenerative disc change; and (3) Carpenter's acknowledgment that, before the incident leading to the parties' separation, she fell numerous times and had engaged in physical activities that could have aggravated her condition. In our view, the family court's findings on this issue were contingent on the credibility of the witnesses, a determination we believe was appropriately made in this case by the presiding family court judge. See Gambrell v. Gambrell, 295 S.C. 457, 460, 369 S.E.2d 662, 663 (Ct. App. 1988) ("Although we have jurisdiction in domestic matters to find facts based on our own view of the preponderance of the evidence, we are not required to disregard the findings of the trial judge, who saw and heard the witnesses and was in a better position to evaluate their testimony.").

III. Payment of Medical and Dental Expenses

Carpenter next contends the family court incorrectly determined it did not have jurisdiction to award her certain medical and dental expenses, contending they were valid marital debts. We agree with Carpenter that, notwithstanding the limited jurisdiction of the family court, it can make an equitable distribution award or a special equity award that serves a comparable purpose to money damages if the parties frame the issue appropriately. See Peake v. Peake, 284 S.C. 591, 593, 327 S.E.2d 375, 376 (Ct. App. 1985) (noting the parties were bound by their stipulations that the issue was reimbursement rather than equitable division). Nevertheless, because the family court's finding that Carpenter did not establish her entitlement to a divorce on the ground of physical cruelty was supported by the evidence, we likewise uphold the court's refusal to order Burr to pay her medical and dental bills, regardless of whether the court erred in stating it lacked jurisdiction to award damages.

IV. Marital Nature of the Tidewater Plantation Residence

Carpenter argues the Tidewater Plantation residence was transmuted into marital property and should have been included in the marital estate. In the alternative, she contends the family court should have awarded her a special equity in the asset. We disagree.

Burr acquired the house more than one year before the parties married and had it titled in his own name and the names of several members of his extended family. Although Carpenter was listed on numerous insurance policies on the house and paid a share of the premiums, we concur in the family court's finding that this participation was not sufficient to infer that Burr intended to treat the home as marital property; rather, it reflected Burr's concern that Carpenter be protected because her personal effects were in the home. Furthermore, contrary to Carpenter's contention that she was unaware that she was not on the deed until after the parties' separation, the record contains an exhibit indicating otherwise. We further believe that the short duration of the marriage, the lack of evidence that the parties took out any joint loans to improve the property, and fact that Carpenter's contributions to the equity in the property were not significant support a finding that the home had not been transmuted.

In the alternative, Carpenter alleges error in the finding by the family court that she failed to provide evidence that she acquired a special equity in the property. In support of this argument, Carpenter notes she gave Burr a large sum of money to "invest," which she claims was used in the construction of the home. She further points out that she paid one half of the monthly mortgage payments. The family court, however, found that (1) prior to the marital litigation the investment account was "liquidated and [her] funds restored to her in full"; and (2) Carpenter's contributions to the mortgage payments during the parties' brief marriage did not result in a material reduction in the mortgage balance principal. Carpenter does not specifically challenge these findings on appeal, and we hold they constitute adequate evidence supporting the determination by the family court that

Carpenter is not entitled to a special equity in the Tidewater Plantation residence.

V. Alimony

Carpenter argues the refusal by the family court to award her alimony was error because she will have ongoing medical expenses based on the injuries she allegedly sustained from Burr's actions. We disagree. The family court gave adequate consideration to the statutory criteria for alimony, in particular, the parties' incomes and nonmarital assets. We also note that the appealed order did not foreclose Carpenter's right to seek alimony in the future based on a substantial change of circumstances.

VI. Attorney's Fees

Finally, Carpenter contests the award of attorney's fees to Burr; however, the only argument she makes regarding this issue is that the fees were improper given the family court's findings on the other issues she has appealed. Because we have affirmed these other issues, we likewise uphold the attorney's fees award.

CONCLUSION

For the foregoing reasons, we affirm the family court order in its entirety.

AFFIRMED.

ANDERSON and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Chastity Chastain, Appellant,

v.

Tyson Chastain, Respondent.

Appeal From Florence County
Arthur E. Morehead, III, Family Court Judge

Opinion No. 4484
Heard December 11, 2008 – Filed January 12, 2009

AFFIRMED AS MODIFIED

Irby E. Walker, Jr., and G. Miles Gordon, both of Conway, for Appellant.

Marian D. Nettles, of Lake City and Kevin M. Barth, of Florence, for Respondent.

Philip Bryan Atkinson, of Florence as Guardian Ad Litem.

HEARN, C.J.: Chastity Chastain (Wife) appeals from an order of the family court awarding custody of her three children to Tyson Chastain (Husband) and requiring her to pay $2,500 in private investigator fees. Wife

alleges, inter alia, that the family court judge erred in holding she engaged in flagrant promiscuity. We disagree with the family court's holding as to flagrant promiscuity but affirm the underlying action.

FACTS

Husband and Wife married on March 9, 1996. They lived in Columbia until the birth of their first child, Cassidy, on July 15, 1997. After Cassidy was born, they moved to Johnsonville where they lived with Husband's parents for several months before they began renting their own home. Later that same year, Husband and Wife separated, and Husband moved back in with his parents while Wife, along with Cassidy, moved into a double-wide trailer in Lake City. After four or five months of separation, Husband and Wife resolved their marital differences, and Husband moved into the trailer in Lake City with his wife and daughter. However, when Cassidy became old enough to attend school, Husband and Cassidy stayed at Husband's parents' home in Johnsonville during the week so Cassidy could attend school in the Johnsonville School District. During the remainder of their marriage, Husband and Wife had two children: Dawson, born December 3, 2001, and Elizabeth Grace, born December 8, 2003.

During the time they lived in Columbia, Husband played professional golf and worked as an assistant golf professional. After moving to Johnsonville in 1997, Husband continued working as an assistant golf pro in Florence. However, Husband was fired for stealing $5,000 from the golf club.[1] After losing his job, Husband began working as the office manager for a construction company, ASI. When Husband began working for ASI, the company was owned by Wife's uncle. While ASI was owned by Wife's uncle, Husband was required to work long hours and commute to the company's office in Florence. In 2003, Husband's father purchased ASI and moved the company's office to a spare room located in his home in Johnsonville. Currently, Husband works for ASI out of his parents' home and enjoys a very flexible work schedule. Meanwhile, Wife has maintained employment as an administrative assistant at Nan Ya Plastics since she moved to the Johnsonville area.

[1] Husband's parents re-paid this money to his employer.

Early in 2005, Husband suspected Wife was having an extramarital affair, and he hired a private investigator, Alan Capps, to confirm his suspicions.[2] Capps reported Wife was having an affair with a co-worker, Steve Vargas. Thereafter, Husband commenced a divorce action on the grounds of adultery. However, the family court dismissed the action based on condonation, finding Husband and Wife engaged in sexual relations before the hearing. According to Husband, Wife offered him little help with the children during this time and spent her nights talking on the telephone and away from the house. On July 13, 2005, Husband left the marital home and took the children to his parents' house. The parties have been separated since that time, and, on August 1, Husband commenced this action for divorce, custody, child support, and separate support and maintenance. In October 2005, Wife began an extramarital affair with another co-worker, Lee Dotson.[3]

While the parties were separated, Wife brought Dotson to Cassidy's dance recital. After the dance recital, Wife, along with Dotson, approached Husband and asked where the children were. Husband, who had already sent the children home with his brother, responded by telling Dotson to step outside and that he was going "to beat his tail." Wife and Lee's parents followed the men outside. While outside, Husband's mother attempted to take a picture of Wife and Dotson together. Wife pushed Husband's mother away from her to prevent her from taking the picture. In turn, Husband grabbed Wife by the arm. A physical altercation ensued between Husband and Dotson, ending with the arrest of Husband, his mother, Wife, and Dotson. All eventually pled guilty to disorderly conduct and paid fines.

This would not be the last incident between Husband, Wife, and Dotson. After Husband and Wife had been separated for eight months, Husband began having sexual relations with Dotson's wife, Beth.[4] One night, Dotson and Wife followed Husband and Beth from Ruby Tuesday's to Beth's house. When they arrived at Beth's house, Dotson peered in the

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[2] Husband paid Capps and Allied Services, another private investigator, a total of $2,700.
[3] Wife and Lee's relationship was ongoing at the time of this action.
[4] Lee and his wife were separated, but not yet divorced, at this time.

window and observed Husband and Beth kissing. After a few moments of deliberation with Wife, Dotson threw a brick through the bedroom window. Then, Dotson and Wife kicked the door of the residence open. While inside, Dotson and Wife took pictures of Husband as he put his clothes on and of Beth with the bed-covers pulled over her.

In spite of Wife's on-going relationship with Dotson, she claims he has had no interaction with her children. She admits he stayed at her house one night while the children were in her care. However, Wife maintains the children were asleep and did not see Dotson.

The Guardian ad Litem, Phillip Atkinson, visited both parents and prepared a report prior to the court hearing. At Wife's home, the guardian found an exposed light socket. Furthermore, he noted Wife placed her four-year-old, Dawson, in the front seat without a booster seat. Generally, the Guardian acknowledged Wife experienced difficulty controlling the children during his visit. By contrast, the Guardian observed "completely different children" when he visited Husband's house. In Husband's home, the Guardian found the children to be "quiet, respectful, and loving." In addition, the Guardian found Husband took every safety precaution imaginable in his home.

The family court found Husband was not entitled to a divorce based on the fault grounds of adultery because he engaged in a sexual relationship with Dotson's wife before the grant of a divorce. The court, however, granted the parties a divorce on the grounds of living separate and apart for one year. The court awarded Husband custody of all three children, finding Wife engaged in "flagrant promiscuity." However, the family court found Wife's extra-marital affairs did not negatively affect the welfare of her children. Finally, the court directed Wife to pay $2,500 of Husband's $2,700 private investigator bill, stating her adulterous conduct forced Husband to incur these expenses. Wife did not make any post-trial motions and timely served her notice of appeal.

STANDARD OF REVIEW

On appeal from the family court, this court has jurisdiction to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. Mr. T v. Ms. T, 378 S.C. 127, 131-32, 662 S.E.2d 413, 415 (Ct. App. 2008). Although this court may find facts in accordance with our own view of the preponderance of the evidence, we are not required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Marquez v. Caudill, 376 S.C. 229, 239, 656 S.E.2d 737, 742 (2008). In particular, an appellate court "should be reluctant to substitute its own evaluation of the evidence on child custody for that of the [family] court." Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

LAW/ANALYSIS

Wife argues the family court erred in finding she engaged in flagrant promiscuity and in considering her adulterous conduct in determining the best interests of the children. Initially, Wife notes the family court found her adulterous affairs did not affect her children. In light of this finding, the only way her adulterous affairs could have been relevant in the best interest analysis was if the court found she engaged in flagrant promiscuity. Wife alleges her conduct was not analogous to the conduct of the mother in Boykin v. Boykin, and therefore, the trial court committed an error of law in finding her conduct rose to the level of flagrant promiscuity. 296 S.C. 100, 370 S.E.2d 884 (Ct. App. 1988). Unlike the mother in Boykin, who engaged in five extra-marital affairs, Wife was only involved in two extra-marital affairs, while her Husband was involved in one. Id. at 102, 370 S.E.2d at 886. Furthermore, the mother in Boykin regularly partied with friends until the early morning hours. Id. Wife asserts her conduct did not rise to this level; therefore, the family court erred when it found she engaged in flagrant promiscuity.

A parent's morality, while a proper consideration in custody disputes, is limited in its force and effect to the relevance it has, either directly or indirectly, on the welfare of the child. Clear v. Clear, 331 S.C. 186, 190, 500

S.E.2d 790, 792 (Ct. App. 1998) (citing Davenport v. Davenport, 265 S.C. 524, 527, 220 S.E.2d 228, 230 (1975)). Thus, conduct that is immoral must also be shown to be detrimental to the welfare of a child before it is of legal significance in a custody dispute. Stroman v. Williams, 291 S.C. 376, 379, 353 S.E.2d 704, 705 (Ct. App. 1987). However, flagrant promiscuity inevitably affects the welfare of the child and establishes "a watershed in the court's quest to protect the best interests of a minor child." Boykin, 296 S.C. at 102, 370 S.E.2d at 886.

We believe the family court erred in finding Wife's conduct rose to the level of flagrant promiscuity. Flagrant promiscuity serves only as an exception to the general rule, which requires immoral conduct to have a detrimental affect on the welfare of the child in order to have legal significance. Id. Because it only exists as an exception, we believe it is meant to be invoked sparingly—to embrace that rare situation of glaringly bad and outrageous conduct not present in these facts. Here, Wife engaged in two extra-marital affairs, while Husband engaged in one extra-marital affair. In addition, Wife essentially lives with her current boyfriend, Dotson, when her children are not in her care. Also, Wife brought Dotson to her daughter's dance recital, and a physical altercation between Dotson and Husband ensued. In our view, these facts do not fall within the ambit of flagrant promiscuity.

Accordingly, the family court erred in finding Wife's conduct rose to the level of flagrant promiscuity. Because the family court found Wife's immoral conduct did not detrimentally affect the welfare of her children and because her conduct does not fall within the flagrant promiscuity exception, the family court also erred in considering her adulterous conduct in the best interests of the child calculus. We now turn to whether the family court's award of custody to Husband was in the best interests of the children.

Wife contends the family court erred in awarding custody to Husband. Wife claims the best interests of the children would have been served by granting custody to her. Specifically, Wife asserts she, unlike Husband, regularly takes the children to church. Moreover, she served as the primary care-taker of the children during their marriage while Husband spent his time playing golf.

"The paramount and controlling factor in every custody dispute is the best interests of the child." Brown v. Brown, 362 S.C. 85, 90, 606 S.E.2d 785, 788 (Ct. App. 2004). The family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact on the child. Epperly v. Epperly, 312 S.C. 411, 415, 440 S.E.2d 884, 886 (1994). Psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life should also be considered. Wheeler v. Gill, 307 S.C. 94, 99, 413 S.E.2d 860, 863 (Ct. App. 1992). "In other words, the totality of circumstances unique to each particular case constitutes the only scale upon which the ultimate decision can be weighed." Paparella v. Paparella, 340 S.C. 186, 189, 531 S.E.2d 297, 299 (Ct. App. 2000).

The best interests of the children are served by awarding custody to Husband, without considering Wife's immoral conduct. First, the family court found Wife exposed her children to safety risks while they were in her care. Specifically, Wife transported her four-year-old, Dawson, in the front seat without a booster seat and had an exposed electrical socket in her home. Second, both Husband and Wife agree Johnsonville School District, where Husband lives, offers a better education for their children than Lake City School District, where Wife lives. In fact, while the parties were married and living in Lake City, Husband and Cassidy, the only child old enough to attend school, stayed at Husband's parents' home during the week so she could attend school in Johnsonville. By awarding custody to Husband, the children can attend school in this more desirable school district. See Glanton v. Glanton, 314 S.C. 58, 60, 443 S.E.2d 810, 812 (Ct. App. 1994) ("The education of a child is something that affects his best interest.").

The Guardian found Wife experienced difficulty controlling the children while in her care. During the Guardian's visit to her home, only two children—Elizabeth Grace and Dawson—were present. Elizabeth Grace repeatedly screamed and cried when denied her way and refused to listen to Wife's request to apologize to her brother. In spite of her refusal to listen to her mother, Wife allowed Elizabeth Grace to continue playing without consequence. By contrast, Wife spanked Dawson and sent him to timeout for pushing Elizabeth Grace's bike. The inability of Wife to control her children,

and the inconsistent manner in which she disciplined her children greatly concerned the Guardian. However, the Guardian observed completely different children in the care of Husband. While in his care, the children were "quiet, respectful, and loving." The fact Husband exhibits more control over the children and instills discipline in their lives impacts the best interests of the child analysis. See Paparella, 340 S.C. at 189, 531 S.E.2d at 299 (noting the totality of the circumstances is the only way to determine the best interests of the children).

In addition, Husband works from home and maintains a flexible work schedule, which allows him to spend more time with the children and adjust his schedule to accommodate their needs. Also, Husband lives with his mother, who is retired and willing to do whatever necessary to help in raising the children. By contrast, Wife's work schedule is very inflexible, and she has no one living with her in the house to help in raising the children. Lastly, while Wife served as the primary caretaker of the children for a large part of their marriage, Husband has changed very much since this early stage of their marriage and now freely fills these roles. As Wife stated, "He wants to be daddy of the year." "He doesn't play golf anymore. He doesn't do anything." In addition, Wife acknowledged, since the separation, Husband cooks, cleans, and bathes the children. In considering all of the factors in this case, the best interests of the children are served by awarding custody to Husband.

For the final issue on appeal, we must consider whether the family court abused its discretion in ordering Wife to pay $2,500 in private investigator fees to Husband. Wife argues Husband sought a divorce on the grounds of adultery. However, the family court refused to grant a divorce on this basis because he also engaged in an extra-marital affair. Specifically, the family court found the affirmative defense of recrimination barred the grant of a divorce based on adultery in this case. Ultimately, the court ordered Wife to pay the private investigator fees because her flagrant adulterous conduct caused Husband to incur these expenses.

Section 20-3-120 of the South Carolina Code (1976 & Supp. 2007) authorizes the family court to order payment of litigation expenses, including attorney's fees, to either party in a divorce action. An award of attorney's

fees rests within the sound discretion of the trial court and should not be disturbed on appeal absent an abuse of discretion. Doe v. Doe, 319 S.C. 151, 157, 459 S.E.2d 892, 896 (Ct. App. 1995). The family court is given broad discretion in this area. Id. "The same considerations that apply to awarding attorney's fees also apply to awarding litigation expenses." Patel v. Patel, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004) (citing Nienow v. Nienow, 268 S.C. 161, 173, 232 S.E.2d 504, 510 (1977)). Reimbursable expenses include reasonable and necessary expenses incurred in obtaining evidence of a spouse's infidelity. Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988).

This issue is not preserved for appellate review. See I'On v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (noting an appellate court can affirm for any reason appearing in the record). Wife never objected to the family court's award of private investigator fees to Husband at trial or in a post-trial motion. See Washington v. Washington, 308 S.C. 549, 551, 419 S.E.2d 779, 781 (1992) (stating issues not raised to the family court during trial or through post-trial motions are not preserved for appellate review). As a consequence, this issue is not preserved for appeal.

Accordingly, the decision of the circuit court is

AFFIRMED AS MODIFIED.

SHORT, J., and KONDUROS, J., concur.