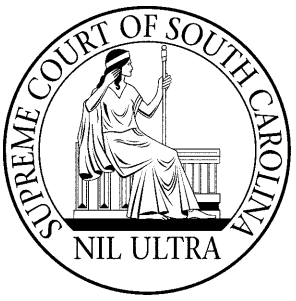

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 32

August 16, 2004

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brackenbrook North Charleston, LP, North Bluff North Charleston, LP, Riverwoods, LLC, Ashley Arbor, LLC, et al., Respondents/Appellants,

v.

The County of Charleston, Andrew Smith in his official capacity as Charleston County Treasurer, Peggy A. Moseley in her official capacity as Charleston County Auditor, and D. Michael Huggins in his official capacity as Charleston County Assessor, Appellants/Respondents.

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

Opinion No. 25855
Heard April 20, 2004 - Filed August 16, 2004

REVERSED AND REMANDED

Joseph Dawson, III, and Bernard Ferrara, Jr., both of Charleston County Attorney's Office, of North Charleston; M. Dawes Cooke,

Jr., and P. Gunnar Nistad, both of Barnwell, Whaley, Patterson & Helms, LLC, of Charleston, for Appellants/Respondents.

G. Trenholm Walker, Andrew K. Epting, and Amanda R. Maybank, all of Pratt-Thomas, Epting & Walker, PA, of Charleston, for Respondent/Appellants.

JUSTICE PLEICONES: Respondents/appellants (Taxpayers) filed this action against appellants/respondents (County)[1] seeking a refund of a portion of their 2001 real property taxes. The parties appeal orders which, among other things, held that Taxpayers were not required to exhaust their administrative remedies prior to bringing this refund action directly in circuit court. We hold this ruling was error, and reverse and remand the matter to circuit court with instructions to dismiss the suit without prejudice to Taxpayers' rights to pursue refunds through administrative channels.

FACTS

A countywide appraisal resulted in large increases in the assessed value of many real properties located in County. In May 2000, the General Assembly passed an act (Enabling Act) authorizing counties to exempt from *ad valorem* property taxes any increase in valuation greater than 15%. See S.C. Code Ann. § 12-37-223A (Supp. 2003). In November 2000, County adopted Ordinance 1163 (Ordinance), purportedly pursuant to the Enabling Act. The Ordinance capped the valuation increase on owner-occupied primary residences at 15%, but provided no relief for other properties.[2]

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[1] Appellants/Respondents in this appeal are the County and three county officials: the treasurer, the auditor, and the assessor. We will refer to them collectively as "County" in this opinion.

[2] Property classified as owner-occupied primary residences is taxed on an assessment equal to four percent of the fair market value of the property. S.C. Code Ann. § 12-43-220(C)(1) (Supp. 2003). All other real property not specifically classified under section 12-43-220 is taxed at six percent.

The "property tax assessment" (PTA) for each parcel of taxable real estate in a county is determined by multiplying the property's fair market value or special use value by the appropriate assessment ratio, that is, 4% for owner-occupied residences and 6% for other properties. S.C. Code Ann. § 12-60-30(19) (2000 and Supp. 2003). This PTA figure is then multiplied by the taxing district's[3] millage rate, resulting in the tax assessment, that is, the dollar amount owed by the taxpayer for that year.[4] The millage is determined by dividing the value of all taxable property located within a taxing district's boundaries by the district's annual budget.[5]

The effect of the Ordinance in tax year 2001 was to reduce the fair market value of many owner-occupied residences. As the result of the Ordinance's reduction of the total value of taxable real property in the County, the millage rate for all taxing districts was higher than it would have been had all property been fully valued. All County taxpayers in 2001 were affected by the higher millage although taxpayers who benefited from the Ordinance's cap ultimately received a tax bill for an amount less than they would have received had the cap not been imposed. The impact of the Ordinance in tax year 2001 was to shift approximately $9.83 million of the tax burden primarily to owners of non-owner-occupied primary residences.

Following the adoption of the Ordinance, but prior to the date 2001 property taxes were due, certain county taxpayers (Riverwoods plaintiffs)

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[3] Different property within the County is subject to different taxing entities depending on the property's location within, for example, a municipality, and/or a special purpose district.

[4] County has adopted a Local Options Sales Tax (LOST). See S.C. Code Ann §§ 4-10-10 through –90 (Supp. 2003). Pursuant to the LOST act, each year a credit factor is determined for each taxing district within the County; each parcel's individual credit is determined by multiplying the property's fair market or special use value by the taxing entity's credit factor. The resulting credit is then subtracted from the tax assessment figure, resulting in the actual tax owed by the property owner.

[5] See also County of Lee v. Stevens, 277 S.C. 421, 289 S.E.2d 155 (1982) (explanation of *ad valorem* real property tax system).

brought an action challenging the legality of the Ordinance. The Riverwoods plaintiffs sought a declaratory judgment striking down the Ordinance and also sought an injunction. The trial judge found the Ordinance invalid, but declined "to issue injunctive relief of any sort that would constitute affirmative judicial interference with the County's taxing processes… Whether the County chooses on its own to take any remedial action in light of this Court's decision is up to it." Riverwoods circuit court order.

County appealed the Riverwoods order to the extent it struck down the Ordinance, and the Riverwoods plaintiffs cross-appealed the denial of injunctive relief. On appeal, the Court held the Ordinance invalid because it violated the terms of the Enabling Act which did not permit the 15% cap to be limited to owner-occupied primary residences. Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002). In affirming the Riverwoods plaintiffs' appeal from the denial of the injunction, we held that they had an adequate legal remedy in that they could pay their 2001 *ad valorem* property taxes "under protest"[6] and cited S.C. Code Ann. § 12-60-2550 (2000).[7]

After the circuit court filed its order in Riverwoods striking down the Ordinance, five taxpayers paid their 2001 real property taxes "under protest" and virtually simultaneously filed a civil action seeking a declaratory judgment that the Ordinance was invalid and seeking a refund. This suit, and ensuing cross-appeals, is resolved by our opinion in the companion case to the present controversy. See Hoefer Family Ltd. Partnership v. County of Charleston, Op. No. 25856 (S.C. Sup. Ct. filed August 16, 2004) (Shearouse Adv. Sh. 32).

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[6] Reference to "paying under protest" is an anachronism; under the current tax scheme in Title 12, Chapter 60, there is no requirement that an *ad valorem* taxpayer pay "under protest" in order to pursue a refund.

[7] We incorrectly suggested that the Riverwoods plaintiffs could seek prepayment relief under § 12-60-2550, a statute concerned only with PTA protests.

The Taxpayers in this case timely paid their 2001 real property taxes; following our decision in Riverwoods declaring the Ordinance invalid, they initiated this circuit court action seeking certification of a taxpayer class and refunds for all class members. The circuit court certified a class and ordered refunds; in so doing, it refused County's request that the action be dismissed in order for Taxpayers to exhaust their administrative remedies. Both Taxpayers and County have appealed numerous issues. We find it necessary to address only the issue whether Taxpayers were required to exhaust their administrative remedies rather than bring this direct refund suit in circuit court.

ISSUE

Was the circuit court obligated to dismiss this suit for a refund because Taxpayers had failed to exhaust their administrative remedies?

ANALYSIS

In 1995 the General Assembly adopted the South Carolina Revenue Procedures Act[8] (the Act) "to provide the people of this State with a straight forward procedure to determine any disputed revenue liability." S.C. Code Ann. § 12-60-20 (2000).[9] Section 12-60-80 (Supp. 2003) of the Act

[8] 1995 Act No. 60.

[9] In 2000, the General Assembly substituted the phrase "dispute with the Department of Revenue" for "any disputed liability" in § 12-60-20. See § 12-60-20 (Supp. 2003). Although this amendment could be read as indicative of an intent to limit the Act to tax issues involving the DOR, when amending § 12-60-20 the legislature did not amend or repeal those parts of the Act which deal solely with county tax disputes. In light of this, we hold that a court must look first to the Act when faced with a question of county tax protest procedures. Glover v. Suitt Constr. Co., 318 S.C. 465, 458 S.E.2d 535 (1995) (statutes which are part of the same general law are construed together).

provides:[10]

> **§ 12-60-80. Wrongful collection of taxes; declaratory judgment; class action prohibited.**
>
> (A) Except as provided in subsection (B), **there is no remedy other than those provided in this chapter in any case involving the illegal or wrongful collection of taxes**, or attempt to collect taxes.
> (emphasis supplied).
>
> (B) Notwithstanding subsection (A), an action for a declaratory judgment where the sole issue is whether a statute is constitutional may be brought in circuit court. This exception does not include a claim that the statute is unconstitutional as applied to a person or a limited class or classes of persons.
>
> (C) Notwithstanding subsections (A) and (B), a claim or action for the refund of taxes may not be brought as a class action in the Administrative Law Judge Division or any court of law in this State, and the department, political subdivisions, or their instrumentalities may not be named or made a defendant in any other class action brought in this State.

If a taxpayer brings a circuit court action when she should have pursued administrative remedies under the Act, the circuit court "shall dismiss the

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[10] This statute was amended effective June 18, 2003, prior to the final order in this matter. Before that date, § 12-60-80 read:

> There is no remedy other than those provided in this chapter in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes.

The amendment does not affect our resolution of the administrative remedies issue.

case without prejudice." § 12-60-3390 (2000 and Supp. 2003). County contends the circuit court erred in refusing to dismiss Taxpayers' direct refund suit without prejudice under this statute since Taxpayers were required to first pursue administrative remedies under the Act. We agree.

The circuit court reviewed our decision in Riverwoods, *supra*, which indicated that the remedy for taxpayers aggrieved by the Ordinance was found in § 12-60-2550. The circuit court held that Taxpayers were not obligated to pursue this administrative remedy since their objection did not challenge their Property Tax Assessment (PTA), which is the only type of property tax protest contemplated by this statute. The circuit court went on to hold that Taxpayers had no remedy under the Act because the court concluded that the Act did not provide a procedure for any type of challenge other than to the PTA. As explained below, we agree that § 12-60-2550 is not applicable to these Taxpayers, but conclude the circuit court erred in concluding they had no administrative remedy under the Act.

The Act contains detailed procedures for a taxpayer who wishes to challenge the county's determination of her property's PTA , that is, the fair market value, the special use value, or the assessment ratio, the components of the PTA. § 12-60-30(19). Under the statutory scheme, most PTA appeals are initiated and resolved well before the taxes are due. The procedures found in article 9 of the Act apply to all PTA appeals. §12-60-1710 (2000). In years where there has been a countywide reassessment, notice of the new valuations must be mailed to property owners by February 1.[11] §12-60-2510 (2000 and Supp. 2003). In other years, the assessor must give notice by July 1 to owners whose property values have been increased by $1,000 or more. Id. The property owner has 30[12] days to give the assessor written notice if she objects to one or more of the PTA components. § 12-60-2510(3). A written request for a meeting with the assessor is the equivalent of notice that the taxpayer objects to the PTA. § 12-60-2520(A). If, after reviewing the written objection, the assessor agrees with the property owner, the assessor must correct the error. § 12-60-2520(B). If she does not agree, then she must

[11] Beginning in 2002, this date has been changed to October 1. 2002 Act No. 271, § 1.
[12] Now 90.

schedule a meeting. If the issue is not resolved at the meeting, then the assessor must give the taxpayer protest information. Id. On this protest form, the taxpayer must identify which part of the PTA she disagrees with, that is the property's value or its classification, and propose her suggested value or class. § 12-60-2520(B)(5). The assessor must respond to the protest within 30 days, and give the taxpayer notice that she must pursue any appeal before the county board of assessment appeals. § 12-60-2520(B)(4).

The county board of assessment appeals(board) "may rule on any timely appeal relating to the correctness of any of the elements of the [PTA]…." § 12-60-2530. After the board's written disposition of an appeal, the aggrieved party (whether taxpayer or assessor) may appeal to the Administrative Law Judge Division. § 12-60-2540. If the PTA appeal will not be concluded by December 31 of the tax year, the assessor must ask the auditor to issue an adjusted property tax bill figured on 80% of the protested assessment. § 12-60-2550.

These statutes contemplate that a PTA protest will be initiated prior to the payment of any tax, and anticipates that most PTA protests will be resolved before the taxes are due. In situations where the PTA appeal will not be concluded by December 31, § 12-60-2550 provides for the issuance of a reduced bill and mandates a refund if the appeal results in a decision that the Taxpayer owes an amount less than the 80% already paid. § 12-60-2550(C).

There may be situations where the PTA protest is initiated so close to the tax due date that it is not possible for the auditor to issue an adjusted bill as provided by § 12-60-2550. In those rare situations the taxpayer will be required to pay the bill in full, and her remedy will be to initiate an administrative refund action pursuant to § 12-60-2560.[13]

[13] See also S.C. Code Ann. § 12-43-220(C)(3) (2000) (permitting refund action under § 12-60-2560 notwithstanding any other provision of law where property was eligible for a 4% classification).

While the Act contains many specific procedures for taxpayers challenging their PTAs, relief under the Act is not limited to these types of protests. Section 12-60-2530(A) specifically provides the board of assessment appeals may rule on any PTA dispute "and also other relevant claims of a legal or factual nature except claims relating to property tax exemptions." Although no prepayment procedure is specified for non-PTA protests, the Act does provide for a taxpayer to seek a refund of taxes paid. § 12-60-2560 (2000). The first part of this refund statute provides that a person seeking a refund because of an alleged PTA error must comply with the specific limitations found in § 12-60-1750, which in turn refers to the time limitations initiating PTA appeals. § 12-60-2560(A). Subsection (A) of the refund statute requires persons seeking administrative refunds for reasons other than PTA errors to commence those actions within the time limits of § 12-54-85(F), which is essentially a two-year statute of limitations. If § 12-60-2560 were limited to PTA refunds, as the circuit court found here, then there would be no reason for it to refer to § 12-54-85(F) since the time limits for commencing all related actions would be the 90 day PTA limit found in § 12-60-2510(3).

As with PTA protests, a taxpayer commences a refund action by filing a claim with the assessor. § 12-60-2560(A). In refund actions, however, the assessor together with the auditor and treasurer make the initial determination. If the refund request is denied, the taxpayer may appeal to the county board of assessment appeals. The refund statute contains a specific reference to the board's authority to rule on a timely PTA appeal, just as the PTA appellate statute specifically refers to the board's ability to rule on timely PTA appeals as well as "other relevant claims of a legal or factual nature…" Compare § 12-60-2560(B) with § 12-60-2530(B). The refund statute then defaults to the procedures followed by the board in a PTA appeal under § 12-60-2530. § 12-20-2560(B-D) (2000).

A taxpayer disputing a PTA must timely initiate his claim. A timely PTA claim will, in almost all instances, be made before any tax is due: if not resolved prior to that due date, then a taxpayer may invoke the 80% payment procedure found in § 12-60-2550. In those unusual circumstances where a PTA protest is not commenced prior to the tax due date, and in all other

circumstances where a taxpayer believes that he has been wrongly or illegally required to pay a property tax, then the taxpayer must first pay the tax and then initiate a request for a refund pursuant to § 12-60-2560.

These Taxpayers do not dispute any component of their PTA. Rather, Taxpayers complain that their PTA was subjected to a higher millage, and thus their tax bills were inflated, as the consequence of the application of the unlawful Ordinance. Looking first to the Act, as we must,[14] we hold that Taxpayers' remedy is not this direct circuit court refund suit, but rather an administrative refund pursuant to § 12-60-2560. In fact, Taxpayers acknowledged at oral argument that they had initiated an administrative refund action, which has been stayed pending disposition of this appeal. Since Taxpayers had this administrative refund remedy available to them, the circuit court erred in refusing to dismiss this action without prejudice. § 12-60-3390. Accordingly, we reverse the circuit court orders and remand this matter with instructions to dismiss the suit without prejudice to Taxpayers' rights to pursue their refund requests.

We are deeply concerned that other taxpayers within the class certified by the circuit court judge[15] in this case may have forgone their administrative remedies in reliance on the orders issued in this case. For this reason, and because County concedes, as it must, that it is required to return the unlawfully collected taxes, we instruct that all taxpayers within the class who have not yet filed administrative refund actions shall have 120 days after the remittitur is sent to file such claims. Notice of this right shall be given to all eligible taxpayers, in writing, by County within thirty days of the filing of this opinion.

Further, we express our disapproval of County's actions in all matters related to this Ordinance. County chose, in the face of a court order striking

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[14] See § 12-60-20 and § 12-60-80.

[15] "All real property taxpayers whom Charleston County billed for 2001 *ad valorem* real property taxes and who owned at least one parcel of real property subject to *ad valorem* taxes that did not qualify for the value exemption under the tax cap Ordinance."

down the Ordinance and a blunt warning by the trial judge that it was proceeding at its own risk, to collect taxes pursuant to that Ordinance. Once the Ordinance's invalidity was confirmed by this Court, County chose not to refund the illegally collected taxes promptly, but chose instead to place obstacles in the way of its wronged taxpayers. County did not promptly pay refunds to taxpayers who initiated a court action, nor, the record shows, did it pay those taxpayers who pursued administrative remedies. Instead of minimizing the fiscal impact of its unwise decision to levy taxes in reliance on the Ordinance, County has expended more taxpayer money fighting the refund-seekers on every front.

Further, in an unprecedented act, County audaciously suggested to the trial judge, and now suggests to us, that the judicial system issue a writ of mandamus to County requiring it to rebill all County taxpayers who benefited in 2001 from the unlawful Ordinance. It is axiomatic that mandamus, "the highest judicial writ known to the law,"[16] lies only to compel the performance of a ministerial act and "is limited…to the protection of a plain, admitted, and unquestioned legal right that has been arbitrarily or without due warrant of law denied." Gardner v. Blackwell, 167 S.C. 313, 320, 166 S.E. 338, 340 (1932). Were the duty so clear that issuance of this prerogative writ was warranted, then County would not need our imprimatur in order to act.[17]

[16] Willimon v. City of Greenville, 243 S.C. 82, 86, 132 S.E.2d 169, 170 (1963).

[17] In 1903, we held that assessments for back taxes could be made only "in pursuance of express and very specific statutory direction." Milster v. City of Spartanburg, 68 S.C. 26, 32, 46 S.E. 539, 541 (1903). We have been unable to locate statutory authority for a rebill of selected taxpayers, nor have we been able to discern a ministerial duty on the part of County to rebill certain taxpayers. Compare S.C. Code Ann. § 12-4-510 (3) (2000); see also S.C. Code Ann. § 12-60-1740 (2000) (if funds are not available for refunds, the county government must provide for repayment).

CONCLUSION

The circuit court orders are reversed and the case remanded with instructions to the circuit court to dismiss the suit without prejudice pursuant to § 12-60-3390. Further, County shall, within thirty days of this opinion, give written notice to all taxpayers within the class certified by the circuit court, other than those who have already initiated administrative refund requests, of their right to seek an administrative refund, and of the date by which the refund request must be initiated. Finally, pursuant to Rule 222(a), SCACR, we award Taxpayers their appellate costs, and a reasonable attorney's fee. Accordingly, the orders on appeal are

REVERSED AND REMANDED.

BURNETT, J., and Acting Justice J. Ernest Kinard, Jr., concur. MOORE, A.C.J., dissenting in a separate opinion in which WALLER, J., concurs.

ACTING CHIEF JUSTICE MOORE: The majority's decision requires Taxpayers to pursue administrative remedies by filing claims for refunds with the county assessor under § 12-60-2560. I respectfully dissent.[18]

As the majority points out, Taxpayers' claims do not involve property tax assessments but instead challenge the proper millage rate to be applied in calculating the amount of tax due. The county assessor has no authority regarding millage rates and relief under § 12-60-2560 is inappropriate. *See* S.C. Code Ann. § 12-37-90 (2000) (responsibilities and duties of assessors); *see also* County of Lee v. Stevens, 277 S.C. 421, 289 S.E.2d 155 (1982) (the authority to set the tax rate belongs to the county governing body).

Further, Chapter 60, Subarticle 9, including § 12-60-2560, applies only to complaints regarding county property tax assessments. Section 12-60-2560 provides in pertinent part:

> (A) Subject to the limitations in Section 12-60-1750, and within the time limitation of Section 12-54-85(F), a property taxpayer may seek a refund of real property taxes assessed by the county assessor and paid . . . by filing a claim for refund with the county assessor. . . .

The majority concludes the reference to the statute of limitation found in § 12-54-85(F) indicates that § 12-60-2560 must allow appeals aside from property tax assessments since property tax assessments are already governed by the time lines set out in § 12-60-2510. I disagree. Refund claims under § 12-60-2560 are governed by the general statute of limitation in § 12-54-85(F) because § 12-60-2560 allows challenges to the assessment ratio for prior years. Other sections of the tax code specify that § 12-60-2560 is the remedy in this assessment context. *See* S.C. Code Ann. § 12-43-220(c)(3) (2000) (allowing application under **§ 12-60-2560** for refund because the property was eligible for the legal residence assessment ratio); *see also* S.C. Code

[18]I agree we incorrectly instructed the Riverwoods plaintiffs to apply for administrative relief under § 12-60-2550.

Ann. § 12-37-252(B) (2000) ("When a person qualifies for a refund pursuant to Sections **12-60-2560** and 12-43-220(c) for prior years' eligibility for the four percent owner-occupied residential assessment ratio, the person also may be certified for a homestead tax exemption. . . ."). This limited reading of § 12-60-2560 is consistent with the remaining sections of Subarticle 9 which all relate to county property tax assessments.

In sum, Chapter 60 does not include contests to a county's tax rate and the limitation in § 12-60-80 to the remedies provided in this chapter does not control. I therefore agree with the circuit court's ruling that the administrative process is limited to challenges to an individual's property tax assessment and does not apply here.

Further, the majority's decision allows those who benefited from the illegal ordinance to retain a windfall. Since County has represented to this Court that it is willing to issue recalculated tax bills to all taxpayers for the 2001 tax year, I would order it to do so. This is a fair resolution to ensure that all taxpayers equitably share the tax burden for services provided in 2001. If County simply pays refunds, the amount refunded must be included as a liability in a future budget. It is unfair that Taxpayers would then be taxed to cover the cost of their own refunds.

I would affirm.

WALLER, concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Hoefer Family Limited Partnership, Herbert W. Hoefer Marital Trust, Lilla F. Hoefer, Carol S. Hoefer, Theodore M. Hoefer, Jr., Elizabeth Hoefer Ward and C. Scott Ward, Appellants/Respondents,

v.

The County of Charleston and Andrew C. Smith, CPA, in his official capacity as Charleston County Treasurer, Respondents/Appellants.

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

Opinion No. 25856
Heard April 20, 2004 - Filed August 16, 2004

REVERSED AND REMANDED

John M.S. Hoefer and K. Chad Burgess, both of Willoughby & Hoefer, PA, of Columbia, for Appellants/Respondents.

Joseph Dawson and Bernard E. Ferrara, Jr., both of Charleston County Attorney's Office, of North Charleston, for Respondents/Appellants.

JUSTICE PLEICONES: Appellants/respondents the (Hoefers)[1] paid their 2001 *ad valorem* real property taxes to respondents/appellants (County)[2] "under protest" and then initiated this refund action in circuit court.[3] The Hoefers appeal from an order calculating their refunds, contending the circuit court erred in its methodology; County appeals several issues, arguing among other things that the circuit court erred in refusing to dismiss this suit and to require the Hoefers to exhaust their administrative remedies. We reverse the circuit court orders and remand the matter to circuit court with instructions to dismiss the suit without prejudice to the Hoefers' right to pursue their administrative refund remedies.

This is a companion case to our decision filed today in Brackenbrook North Charleston, LP v. County of Charleston, Op. No. 25855 (S.C. Sup. Ct. filed August 16, 2004) (Shearouse Adv. Sh. 32). For the reasons given in Brackenbrook, we hold that the Hoefers must pursue their refunds using the procedure found in S.C. Code Ann. § 12-60-2560 (2000).[4] Further, pursuant to Rule 222(a), SCACR, we award the Hoefers their appellate costs and a reasonable attorney's fee.

The circuit court orders on appeal are reversed to the extent they decide any issue other than the lawfulness of Charleston County Ordinance 1163, and the matter remanded.

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[1] The appellants/respondents are five individuals, one marital trust, and a family limited partnership.

[2] Respondents/appellants are Charleston County and its treasurer, referred to collectively as "County."

[3] According to the complaint, several of the Hoefers did not pay the taxes until after the suit was commenced.

[4] The parties confirmed at oral argument that the Hoefers had initiated a refund request under this statute that was being held in abeyance pending the decision in the suit.

REVERSED AND REMANDED.

WALLER, BURNETT, JJ., and Acting Justice J. Ernest Kinard, Jr., concur. MOORE, A.C. J., dissenting in a separate opinion.

ACTING CHIEF JUSTICE MOORE: I respectfully dissent. To the extent the trial court's order is consistent with my dissent in the companion case of Brackenbrook North Charleston, LP v. County of Charleston, Op. No. 25855 (S.C. Sup. Ct. filed August 16, 2004), I would affirm.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charlotte Latimer, Stuart Latimer, and Michelle Farmer, Appellants,

v.

Daniel Farmer, Respondent.

Appeal From Pickens County
Wayne M. Creech, Family Court Judge

Opinion No. 25857
Heard May 27, 2004 - Filed August 16, 2004

AFFIRMED

Raymond W. Godwin, of Greenville, for Appellants.

Robert M. Rosenfield, of Porter & Rosenfield, of Greenville, for Respondent.

Kelvin R. Kearse, of Easley, Guardian ad Litem.

JUSTICE BURNETT: This is a custody dispute arising out of the custodial parent's relocation. Appellant Michelle Latimer Farmer (Mother) appeals the family court order concluding Respondent Daniel W. Farmer (Father) should be allowed to relocate with their adopted child (Child). Appellants Charlotte and Stuart Latimer (Grandparents) appeal the family court's order denying them autonomous visitation rights with Child. We affirm.

FACTS

Mother and Father were married on June 4, 1988 and were divorced on February 11, 2000 because of Mother's adultery with one John Case.

Approximately a year and a half before the divorce, Father and Mother adopted Child, a Romanian orphan born May 14, 1997. Father and Mother brought Child home to Greenville in August 1998. Three weeks later, Father discovered Mother's adulterous relationship with Case. Mother agreed to terminate the relationship and the couple were reconciled.

In May 1999, the parties' adoption of Child was completed. One month later, Mother separated from Father. Father became suspicious of Mother's activities, and, at the suggestion of Mother's parents, hired a private investigator who confirmed Mother was still involved in the adulterous relationship. Following initiation of divorce proceedings by Father, the parties, by agreement, resolved all issues incident to the divorce. The agreement provided Father would have sole custody of Child and Mother was given visitation each week from 6:00 p.m. Thursday through 6:00 p.m. Saturday and additional visitation during holiday and vacation periods.

Father is an automation programmer.[1] While in Greenville Father was employed by Fluor-Daniel Corporation. Father sought and

[1] While in Greenville, Father's job entailed creating programs for automated industries, visiting factories for which the programs were designed

continued . . .

received a job offer in Plymouth, Michigan and now resides there with Child, his new wife, and a child born to them.

When Father informed Mother he was moving to Michigan, Mother and Grandparents sought and obtained an *ex parte* order preventing Father from moving to Michigan with Child. Appellants also sought a permanent restraining order preventing Father from moving out of state with Child or, in the alternative, transfer of custody to Mother. A hearing was held in November 2001. The court concluded it to be in Child's best interests to allow Father to move to Michigan with Child. The court also denied Grandparents' autonomous visitation rights independent of those of Mother. The court ordered extensive visitation for Mother, including computer teleconferencing, e-mail, and telephone contact.[2]

ISSUES

I. Did the family court err in allowing Father to relocate to Michigan and declining to change custody of Child to Mother?

II. Did the Guardian ad Litem (GAL) adhere to the proper standards in conducting his investigation?

III. Did the family court judge abuse his discretion in denying separate visitation rights to Grandparents?

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and implementing the programs. He has no formal education, but has received on the job training.

[2] Telephone contact is unlimited when initiated by Child. Wife has two calls per week not to exceed thirty minutes at specified times. Computer teleconferencing is unlimited when initiated by Child and one per week when initiated by Wife. E-mail access is unlimited.

LAW/ANALYSIS

Where a family court order is appealed, we have jurisdiction 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 credibility. Strout v. Strout, 284 S.C. 429, 327 S.E.2d 74 (1985). This degree of deference is especially true in cases involving the welfare and best interests of the child. Dixon v. Dixon, 336 S.C. 260, 263, 519 S.E.2d 357, 359 (Ct. App. 1999). Our broad scope of review does not relieve the appealing party of the burden of showing the family court committed error. Skinner v. King, 272 S.C. 520, 252 S.E.2d 891 (1979).

I.

We are called upon to resolve one of the most challenging problems our family courts encounter. Cases involving the relocation of a custodial parent with a minor child bring into direct conflict a custodial parent's freedom to move to another state without permission from the court and the noncustodial parent's right to continue his or her relationship with the child as established before the custodial parent's relocation.

Some states recognize a presumption in favor of the custodial parent's right to relocate. See e.g., In re Custody of D.M.G. & T.J.G., 951 P.2d 1377, 1383 (Mont. 1998); In re Marriage of Burgess, 13 Cal.4th 25 (1996). Since our decision in McAlister v. Patterson, 278 S.C. 481, 299 S.E.2d 322 (1982), the courts in this state have been guided by a presumption against relocation in determining whether to allow a custodial parent to relocate with a minor child. We take this opportunity to review this presumption. Insofar as McAlister established a presumption against relocation, we hereby overrule it for the following reasons.

First, we recognize that standards imposing restrictions on relocation have become antiquated in our increasingly transient society. Second, confusion abounds surrounding the status of our relocation law, in

part, because of the often stated, but infrequently applied, presumption against relocation. In all child custody cases, including relocation cases, the controlling considerations are the child's welfare and best interests. The presumption against relocation is a meaningless supposition to the extent a custodial parent's relocation would, in fact, be in the child's best interest.

Under the present facts, Mother seeks a change in custody. As in all matters of child custody, a change in custody analysis inevitably asks whether the transfer in custody is in the child's best interests. In order for a court to grant a change in custody, there must be a showing of changed circumstances occurring subsequent to the entry of the divorce decree. Davenport v. Davenport, 265 S.C. 524, 220 S.E.2d 228 (1975). "A change in circumstances justifying a change in the custody of a child simply means that sufficient facts have been shown to warrant the conclusion that the best interests of the children would be served by the change." Stutz v. Funderburk, 272 S.C. 273, 276, 252 S.E.2d 32, 34 (1979). The change of circumstances relied on for a change of custody must be such as would substantially affect the interest and welfare of the child. Because the best interest of the child is the overriding concern in all child custody matters, when a non-custodial parent seeks a change in custody, the non-custodial parent must establish the following: (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the overall best interests of the child.

In the present case, Mother seeks a change in custody. Therefore, she bears the burden of establishing both of these criteria.[3]

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[3] Mother disagrees that she bears the burden of showing a substantial change in circumstances. Mother argues Father seeks to modify the custody agreement. However, the custody agreement is silent on whether Father could move out of state with Child. Therefore, there was no agreement on relocation to be modified. This case is distinguishable from Pitt v. Olds, 333 S.C. 478, 511 S.E.2d 60 (1999). In Pitt, the custodial, relocating parent sought a modification of the custody order to alter the visitation schedule and consequently bore the burden of showing a substantial change in circumstances. In the present case, the non-custodial parent seeks

continued . . .

Mother has failed to show a substantial change in circumstances warranting a change in custody from Father to Mother for reasons set forth below. Father's remarriage, in and of itself, is not a sufficient change of circumstance affecting the welfare of Child to warrant a transfer of custody to Mother. See Fisher v. Miller, 288 S.C. 576, 344 S.E.2d 149 (1986) (remarriage alone is not sufficient to warrant a change in custody). Likewise, a change in Father's residence is not itself a substantial change in circumstances affecting the welfare of Child, which justifies a change in custody. We decline to hold relocation in itself is a substantial change in circumstance affecting the welfare of a child. Relocation is one factor in considering a change in circumstances, but is not alone a sufficient change in circumstances. One location may not necessarily affect the best interests of the child as would another. The effect of relocation on the child's best interest is highly fact specific. It should not be assumed that merely relocating and potentially burdening the non-custodial parent's visitation rights always negatively affects the child's best interests.

Not only has Mother failed to show a change in circumstances affecting Child's welfare, she has also failed to show a change in custody would be in Child's best interests. We believe the best interests of Child are served by Father's relocation with Child to Michigan. We have not previously delineated criteria for evaluating whether the best interests of the child are served in relocation cases. As noted by the Court of Appeals in Pitt v. Olds, 327 S.C. 512, 519, 489 S.E.2d 666, 670 (Ct. App. 1997), reversed on other grounds, 333 S.C. 478, 511 S.E.2d 60 (1999), other states have provided criteria to guide a court's decision. We do not endorse or specifically approve any of these factors for consideration, but merely provide the following for consideration in determining whether a child's best interests are served. For example, the New York Court of Appeal has set forth the following factors when determining if the child's best interests are served:

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a change in custody and therefore bears the burden of showing sufficient changed circumstances affecting the welfare of the child.

(1) each parent's reasons for seeking or opposing the move,
(2) the quality of the relationships between the child and the custodial and noncustodial parents,
(3) the impact of the move on the quality of the child's future contact with the noncustodial parent,
(4) the degree to which the custodial parent's and child's life may be enhanced economically, emotionally, and educationally by the move, and
(5) the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements.

Tropea v. Tropea, 665 N.E.2d 145, 148 (N.Y. 1996).

Pennsylvania requires courts in potential relocation cases to consider:

(1) the potential advantages of the proposed move, economic or otherwise;
(2) the likelihood the move would improve substantially the quality of life for the custodial parent and the children and is not the result of a whim on the part of the custodial parent;
(3) the integrity of the motives of both the custodial and noncustodial parent in seeking the move or seeking to prevent it;
(4) and the availability of realistic substitute visitation arrangements that will adequately foster an ongoing relationship between the child and the noncustodial parent.

Gancas v. Schultz, 683 A.2d 1207, 1210 (Pa. Super. Ct. 1996).

Montana and Florida have compiled comparable factors.[4]

Applying some of these factors to this case and considering foremost the overriding consideration in all custody matters, *i.e.*, the best interests of the child, we affirm the family court's order allowing Father to relocate to Michigan and denying a change in custody.

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[4] Montana's factors are:

> (1) whether the prospective advantage of the move will improve the general quality of life for parent and child; (2) the integrity of the custodial parent's motives in moving; (3) the integrity of the noncustodial parent's motives for opposing the relocation, and the extent to which it is intended to secure a financial advantage with respect to continuing child support and; (4) the realistic opportunity for visitation which can provide an adequate basis for preserving and fostering the noncustodial parent's relationship with the child if relocation is permitted.

Carter v. Schilb, 877 S.W.2d 665, 667-68 (Mont. Ct. App. 1994).

Florida law provides the court must consider:

> (1) whether the move would be likely to improve the general quality of life for both the residential parent and the child; (2) the extent to which visitation rights have been allowed and exercised; (3) whether the primary residential parent, once out of the jurisdiction, will be likely to comply with any substitute visitation arrangements; (4) whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child and the secondary residential parent; (5) whether the cost of transportation is financially affordable by one or both parties; and (6) whether the move is in the best interests of the child.

Florida Statutes § 61.3(2)(d) (1997).

First, the potential advantages of the proposed move weigh in favor of Father's relocation. Father's current job, unlike his previous employment in Greenville, does not require travel, thereby allowing him to spend more time with Child. Additionally, Father has a stable family environment in Michigan having his siblings in close vicinity. Mother and her family, on the other hand, have a history of familial discord. Not only has Mother's relationship with her parents been unstable, Mother's brother is currently estranged from Grandparents.

Child's moral upbringing is also enhanced by her relocation with Father. The family court concluded even though Mother was a full time homemaker prior to the parties' separation, Father assumed the majority of the care of Child when he came home from work. The court also found Father has taken the responsibility for the moral upbringing of Child by taking her to church and reading her Bible stories.

Second, we conclude it likely the move would improve the quality of life for the custodial parent and the child, and it is not the result of a whim on the part of the custodial parent. For the reasons stated above, the quality of Child's life would be enhanced by the dependable and loving family environment in Michigan.

Third, the integrity of the motives of both the custodial and noncustodial parent in seeking the move or seeking to prevent it neither weigh in favor of nor against Child's best interests. The family court concluded Father's primary reason for the move was job related. Neither Father's reasons for moving nor Mother's reasons for seeking a change in custody seem to originate from spiteful or vindictive motives thereby affecting Child's best interests.

Fourth, we consider the availability of a realistic substitute visitation arrangement that will adequately foster an ongoing relationship between Mother and Child. Clearly, the relationship between Mother and Child will be significantly affected given the prior frequency of contact and the hardship now imposed on the visitation schedule because of the distance to travel. Mother is provided extensive contact with Child given the distance

involved. As previously noted, the family court ordered Mother would have extensive visitation with Child.

Mother raises several evidentiary issues in disputing the family court's order that Child's relocation with Father is in Child's best interests. First, Mother argues the family court erred in allowing testimony about her adulterous conduct predating the adoption hearing, which violated principles of res judicata. We disagree. Res judicata requires three elements: (1) the judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical in the first; (3) the second action must involve matters properly included in the first action. Plum Creek Dev. Co., Inc. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). The third element is not satisfied. The court's finding in the adoption hearing on the fitness of parents for purposes of adoption has no bearing on any future determination of custody.

As to Mother's assertion the family court judge overemphasized Mother's adultery in refusing to transfer custody to her, a review of the order shows this determination was not based on Wife's adulterous conduct. The family court made specific findings regarding the best interests of Child and the effect of her relocation on her welfare. Specifically, the court found Father has taken a proactive role in Child's life, has taken responsibility for Child's moral upbringing, and has a history of fostering familial relationships. It is upon these bases the family court judge made his determination regarding custody. Even with no proof of adultery, the record supports the grant of custody to Father.

Second, Mother argues the court failed to give due consideration to Child's age and background in determining whether a change in custody was appropriate. We disagree. The court did consider Child's age and the fact Child is a Romanian orphan and Mother previously had significant visitation. Recognizing the hardship imposed on the mother/daughter relationship, the Court made a special provision for "live" video teleconferencing. Additionally, Father actively participated in the Romanian adoption and there is no indication Mother has special knowledge regarding Romanian orphans.

Finally, Mother contends the court improperly ignored the testimony of Heather Cirelli, an expert who spoke on the possible negative consequences of Father relocating with Child. We disagree. In the court's Order on Motion to Reconsider, the court expressed great reservation about Cirelli's credentials. The court stated it exercised great latitude in even qualifying Cirelli as an expert. Cirelli was contacted about three weeks prior to trial and saw Child only once. To the extent Mother advanced a contrary opinion at trial, the family court acted within its discretion in assigning more weight to Father's expert. See Bragg v. Bragg, 347 S.C. 16, 21-22, 553 S.E.2d 251, 254 (Ct. App. 2001) (appellate court is not required to ignore the trial judge who saw and heard the witnesses and was in a better position to evaluate their credibility and assign comparative weight to their testimony).

For the foregoing reasons, Mother has failed to show (1) a substantial change in circumstances affecting Child's welfare and (2) a change in custody advances Child's overall best interests. Additionally, the court did not err in its evidentiary rulings.

II.

Mother argues the trial court erred in failing to require the GAL to adhere to the standards we set forth in Patel v. Patel, 347 S.C. 281, 555 S.E.2d 386 (2001). The present case was filed in April 2000 and pre-dates the Patel opinion. Although the GAL was allowed to make a recommendation regarding custody prior to the Patel decision, we conclude the guardian meticulously conducted an independent, balanced, and impartial investigation.

In Patel, we set the baseline standards for the responsibilities and duties of a GAL. In particular, the GAL shall:

> conduct an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child and the family, which should include: reviewing relevant documents; meeting with and observing the child in the home setting and

> considering the child's wishes, if appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case.

Id. at 288, 555 S.E.2d at 390; see also South Carolina Private Guardian Ad Litem Reform Act, S.C. Code Ann. § 20-7-1549 (Supp. 2003) (codifying the Patel guidelines with more specificity, but only directly applicable to guardians ad litem appointed after January 15, 2003).

In Patel, the GAL's investigation overwhelmingly favored the husband. For example, the GAL contacted the husband's attorney nineteen times, but failed to ever contact wife's counsel. The GAL only met with the children when they were with the husband. The GAL even secretly listened in on conversations between husband and wife while visiting with the husband. Id. at 286, 555 S.E.2d at 388-89. The Court concluded the actions and inactions of the GAL so tainted the decision of the family court that wife was not afforded due process. Id. at 286-87, 291, 555 S.E.2d at 389, 391.

In this case the GAL submitted two reports. The GAL interviewed Mother on several occasions and observed Mother and Child together on one occasion. The GAL also met independently with Mother's new husband. When the GAL learned Mother had remarried, the GAL requested Mother send photographs of her new home and Child's bedroom. The GAL noted the Mother's residence was "very adequate." The GAL also stated that if Child were placed with Mother and her husband on a permanent basis, Child would not suffer. The GAL testified Mother did a good job with Child, takes good care of her and her husband seemed "very genteel."

The GAL observed Father with Child on two occasions. One visit was at the former marital home in Easley and the other was in the GAL's office. The GAL did not visit the Father in Michigan, finding it would present an undue financial burden for the litigants. Instead, the GAL requested Father send information pertaining to the town where Father was living, the schools, and pictures of the home. Therefore, there is no merit to Mother's assertion that the GAL was biased because he asked Father to prepare an album for him with information about Father's situation.

Finally, Mother alleges the GAL has not spent substantial time with Child in eighteen months. To the contrary, the GAL consistently inquired of both parents as to Child's situation. The GAL filed a supplemental report in July 2003. The GAL attended depositions of Mother and Father about six weeks prior to the trial date. At that time the GAL asked questions and received updated information. We conclude the GAL showed no bias or prejudice in the investigation.

III.

Grandparents argue the trial court erred in failing to permit them some form of autonomous visitation with Child. We disagree.

South Carolina Code Ann. § 20-7-420(33) (Supp. 2003) provides the family court has exclusive jurisdiction

> to order periods of visitation for the grandparents of a minor child where . . . parents of . . . child . . . are divorced . . . regardless of the existence of a court order or agreement, and upon a written finding that the visitation rights would be in the best interests of the child and would not interfere with the parent/child relationship. In determining whether to order visitation for the grandparents, the court shall consider the nature of the relationship between the child and his grandparents prior to the filing of the petition or complaint.

In Brown v. Earnhardt, 302 S.C. 374, 396 S.E.2d 358 (1990), we stated,

> it would seldom, if ever be in the best interests of the child to grant visitation rights to the grandparents when their child, the parent, has such rights. Visitation by grandparents should be derivative; otherwise the child might have four, or even six people competing for his company: father, mother, paternal grandparents and maternal grandparents.

Id. at 377, 396 S.E.2d at 360 (quoting In the Matter of Adoption of a Child by M., 355 A.2d 211, 213 (N.J. Super. Ct. Ch. Div. 1976)).

In Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565 (2003), we applied the United State Supreme Court's opinion in Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Under Troxel, the court must give "special weight" to a fit parent's decision regarding visitation. Before visitation may be awarded to grandparents over a parent's objection, one of two evidentiary hurdles must be met: the parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child's best interest.

No compelling or exceptional circumstances exist in this case that would warrant autonomous visitation. This is a difficult case because Grandparents enjoyed a close relationship with Child and were her primary caretakers during the marital difficulties between Mother and Father. However, given the tumultuous nature of the relationship between Mother and Grandparents, we believe autonomous visitation with Grandparents could divide the family further should Mother's relationship with her parents again deteriorate. A contentious environment created by an additional visitation schedule would not be in Child's best interests. However, we strongly encourage Mother to foster an ongoing relationship between Child and Grandparents by sharing her visitation time with Grandparents when Child visits her in South Carolina.

CONCLUSION

For the foregoing reasons, we affirm the decision of the family court (1) denying a change in custody to Mother, (2) concluding the GAL followed appropriate standards in his investigation, and (3) denying Grandparents autonomous visitation rights.

MOORE, A.C.J., WALLER, PLEICONES, JJ., and Acting Justice Clifton Newman, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Christopher Holroyd, Gillian Holroyd and American AVK Co., Respondents,

v.

Michael R. Requa, Appellant.

Appeal From Charleston County
John C. Hayes, III, Circuit Court Judge

Opinion No. 3852
Heard March 10, 2004 – Filed August 9, 2004

AFFIRMED

Eugene N. Zeigler, Hamilton Osborne, Jr. and James Y. Becker, all of Columbia, for Appellant.

Justin O'Toole Lucey and Mary L. Arnold, both of Mt. Pleasant, for Respondents.

CURETON, A.J.: Christopher Holroyd, Gillian Holroyd, and American AVK Company (collectively "Respondents") brought this action against their insurance agent, Michael Requa, alleging various causes of action for misrepresentation, fraud, and negligence stemming from Requa's solicitation and sale of a health insurance policy to Respondents. Requa denied these allegations and claimed Respondents' state law causes of action were preempted and barred by the federal Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 to -1461 (Supp. 2003) ("ERISA"). The jury rendered a verdict in favor of Respondents. The trial court subsequently denied Requa's post-trial motions for judgment notwithstanding the verdict and new trial. Requa now appeals. We affirm.

BACKGROUND

Requa was an insurance agent doing business in Moncks Corner, South Carolina. At the center of this case is a health insurance plan administered by Fidelity Group, Inc., that Requa marketed to American AVK Company for its employees. At issue was whether Requa was liable for Fidelity's failure to pay legitimate medical expense claims filed by Holroyd, one of American AVK's employees.

Fidelity's Health Insurance Plan

The program administered by Fidelity was not a typical insurance plan. Rather than being developed and sold by a traditional insurance company, the Fidelity plan was the product of an association of several distinct entities.

Around 1995, a purported employee union called the International Workers Guild (IWG) (also known as the International Workers Association) entered into a collective bargaining agreement with a purported employer's association, the National Association of Business Owners and Professionals (NABOP).[1] Under this agreement,

[1] Testimony from Respondents' witnesses indicated that the entities were not true employer or employee organizations under ERISA.

employees joining IWG would be provided healthcare benefits through a third-party-trust called the International Guild Health and Welfare Trust Fund (IWG Fund). The arrangement provided in part that employers would join the collectively bargained agreement prepared by the organizers of the arrangement with IWG and NABOP. Employees paid membership dues to IWG, and the employers made monthly contributions on behalf of their enrolled employees. The IWG Fund managed the plan, and Fidelity marketed it and administered claims.

Requa was recruited to market the Fidelity plan to his customers by John Branham and Marty Geitler, the exclusive general agents for the Plan. Over the course of two meetings, Branham and Geitler explained the structure and benefits of the Plan and provided Requa with marketing materials prepared by Fidelity. Several months later, Requa executed a marketing agreement to act as agent for the Fidelity Plan.

Requa's Solicitation of American AVK

In late 1996, Requa sent a letter to American AVK Company, a subsidiary of an international company with offices in California and South Carolina, soliciting interest in a group health insurance program from Fidelity Group, Inc.

The letter described the pricing, benefits, and network of care providers that were included in the Fidelity plan. Requa made various claims in the letter about the quality of the Fidelity plan. He wrote that it offered "great benefits with reasonable prices," had "[a] history of low rate increases and an A+ rate," was "#1 in benefits compared to other carriers," and was "[l]ocally strong with reciprocal access nationwide." In addition to these more subjective claims, Requa specifically noted that "[t]he Fidelity Group has an average annual rate increase of only 3.4% over the last 8 years." The letter further claimed Fidelity was reinsured through "Reliance [Reinsurance Company],

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However, the trial court did not make specific findings in this regard, and it is not necessary to our decision in this case.

rated A+ by A.M. Best."[2] The Fidelity plan was the only product promoted in the letter.

Shortly after receiving Requa's letter, American AVK decided to enroll in the Fidelity Plan. American AVK paid monthly premiums for the coverage and the participating employees made monthly contributions.

Failure of the Fidelity Plan

Within months of American AVK's enrollment in the Plan, Fidelity began having problems paying claims in a timely manner. No later than July 1997, Requa was aware Fidelity was experiencing problems—specifically advising one of his clients that "[t]he Fidelity Group has apparently experienced rapid growth—too soon—without the capacity to handle it."

Also in July 1997, Requa received a letter from the South Carolina Department of Insurance notifying him that the Fidelity Group's insurance plan and Requa's involvement in marketing that plan were the subject of an investigation as to whether Fidelity had complied with state law regulating the sale of insurance. The letter instructed Requa to immediately cease the marketing and sale of the Plan until the Department of Insurance was able to make a final determination.

It is undisputed that Requa did not advise American AVK or its employees of the difficulties experienced by the Fidelity Plan or the ongoing investigation when he learned of the problems. In May 1998, Requa claimed he sent a letter to all of his clients enrolled in the Fidelity Plan, including American AVK, advising them that "your health insurer, The Fidelity Group, has some serious problems and that it may be time to move to another, more competent carrier." Respondents, however, deny ever having received this letter.

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[2] A.M. Best Company rates insurance companies based on their financial ability to meet their ongoing obligations.

Holroyd's Unpaid Claims

This action arises from unpaid medical claims submitted to Fidelity by one of American AVK's enrolled employees, Christopher Holroyd. Holroyd suffered severe heart attacks in July and October 1998. He incurred approximately $65,000 in medical costs, which Fidelity did not pay. Because Requa failed to inform them of Fidelity's problems, Holroyd, his wife, Gillian, and American AVK filed the underlying action against Requa. The jury returned a verdict in favor of Respondents on the charges of negligence, negligent misrepresentation, and breach of fiduciary duty. Respondents were awarded $365,000 in actual damages and $180,000 in punitive damages.

Requa moved for judgment notwithstanding the verdict (JNOV), a new trial absolute, and a new trial nisi remittitur, which were denied. Requa appeals.

STANDARD OF REVIEW

"In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). The motions must be denied by the trial court when the evidence yields more than one inference or its inference is in doubt. Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 149 (1999). On appeal from the denial of a motion for a directed verdict or JNOV, this Court will reverse the trial court only where there is no evidence to support the ruling below. Id.; Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997).

"Further, a trial court's decision granting or denying a new trial will not be disturbed unless the decision is wholly unsupported by the evidence or the court's conclusions of law have been controlled by an

error of law." Sabb, 350 S.C. at 427, 567 S.E.2d at 236; Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 722 (Ct. App. 1996). In determining whether the judge erred in denying a motion for a new trial, we must look at the testimony and inferences raised therefrom in favor of the nonmoving party. Welch v. Epstein, 342 S.C. 279, 302-03, 536 S.E.2d 408, 420 (Ct. App. 2000).

LAW/ANALYSIS

I. Timeliness of Appeal

As a threshold matter, Respondents argue this Court lacks subject matter jurisdiction to consider this appeal because Requa's post-trial motions were not timely filed. We disagree.

Rule 59(b), SCRCP, provides that "[t]he motion for new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter." In the present case, the jury rendered its verdict on December 20, 2001. Requa filed his post-trial motions twenty-six days later on January 15, 2002. Respondents assert that Requa's failure to make his post-trial motion within the ten days prescribed by Rule 59(b) divests this Court of jurisdiction to review the case.

The jury's verdict in this case did not constitute an adjudication of all the claims in the case. The parties agreed that Respondents' claim brought under the Unfair Trade Practices Act (UTPA) would be submitted to the trial court. The trial court stated at the conclusion of trial that a written order on the UTPA claim would be issued at a later date. Respondents sent Requa a notice on January 8, 2002, that they intended to withdraw their UTPA claim. The UTPA claim, however, was formally withdrawn by Respondents on January 23, 2002.

Rule 54(b), SCRCP, provides:

> When more than one claim for relief is presented in an action, whether as a claim,

> counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The trial court had not ruled on all of the claims presented at the time the jury rendered its verdict. The trial court also made no "express determination" that there was no reason for delay in entering judgment on the claims that had been submitted to the jury. Accordingly, the time for filing post-trial motions did not begin to run until the time Respondents' UTPA claim had been withdrawn. Requa filed his post-trial motions within seven days of the informal notice of withdrawal and eight days prior to the formal withdrawal. Requa's post-trial motions were therefore timely under the rules.

Further, this Court generally only lacks jurisdiction over an appeal when the notice of appeal is untimely. The notice of appeal must be served in civil cases within thirty days after receipt of written notice of entry of final order. When a party makes a timely post-trial motion for judgment notwithstanding the verdict, to alter or amend the judgment, or for a new trial, "the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion." Rule 203(b)(1), SCACR. The failure to timely serve a notice of appeal "divests this court of subject

matter jurisdiction and results in dismissal of the appeal." Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999).

As previously discussed, Requa timely filed his post-trial motions after the UTPA claim was informally dismissed. The trial court issued his order denying Requa's post-trial motions on January 25, 2002. Requa filed and served his notice of appeal on the same day. Accordingly, Requa served his notice of appeal within the time prescribed by the rules, and this Court has jurisdiction to entertain this appeal.

II. ERISA Preemption

A primary component of Requa's defense in the present case was his argument that the state law claims Respondents asserted were preempted and barred by ERISA. The trial court denied Requa's motions for directed verdict and for JNOV based on ERISA preemption. Requa appeals these rulings.

Initially, Requa argues one of the trial court's rulings mandated a finding that Respondents' claims were preempted by ERISA. One way to come within the purview of ERISA is if a healthcare plan provided to employees is an "employee welfare benefit plan" (EWBP). Whether a plan is an EWBP is a question of fact. Int'l Ass'n of Entrepreneurs of Am. Benefit Trust v. Foster, 883 F.Supp. 1050, 1056 (E.D.Va. 1995). A plan can be established as an EWBP if: (1) it is established by a bona fide employer or employee group, and (2) the purpose is to provide the beneficiaries, through the purchase of insurance or otherwise, medical or other benefits. 29 U.S.C. § 1002 (1); Foster, 883 F. Supp. at 1056.

The trial court in the present case ruled in a pre-trial motion for summary judgment that the healthcare plan "sold by Requa to Plantiffs is and was at all relevant times insurance." At trial, Requa requested that he be permitted to refer to the plan during trial as a "group health insurance plan," and the trial court allowed him to do so. Therefore, Requa argues the trial court determined the plan was a group health insurance plan which qualified as an Employee Welfare Benefit Plan,

and thus, ERISA preempted Respondents' state law claims. Although the trial court permitted Requa to refer to the healthcare plan as a group health insurance plan, this does not amount to a legal finding that the plan fell within the purview of ERISA and it does not alter the prior order finding the plan was "insurance." Accordingly, this argument has no merit.

In any event, Congress imposed comprehensive federal oversight of employee benefit plans with the passage of ERISA. ERISA provides for express preemption of "any and all State laws insofar as they may now or hereafter relate to" employee benefit plans. 29 U.S.C. § 1144(a). "A state law claim 'relates to' an employee benefit plan if it has a connection with or reference to the plan." Heaitley v. Brittingham, Dial & Jeffcoat, 320 S.C. 466, 469, 465 S.E.2d 763, 765 (Ct. App. 1995) (citing Shaw v. Delta Air Lines Inc., 463 U.S. 85, 97 (1983)). Although ERISA's preemption language is broad, state law claims "which affect employee benefit plans in 'too tenuous, remote, or peripheral a manner' do not relate to the plan" and, thus, are not preempted by ERISA. Id.; Dist. of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992).

This Court has previously addressed whether certain state law claims for damages due to misrepresentation and professional negligence were preempted by ERISA. In Heaitley, a widow sought damages from her deceased husband's former partnership for continuing to accept his life insurance premiums during his lifetime despite deleting him from the policy. This Court held her state law claim was only "indirectly" related to ERISA in that she was not seeking to recover benefits under the policy. The widow was seeking damages for misrepresentation of coverage. Heaitley, 320 S.C. at 469-70, 465 S.E.2d at 765.

In Medical Park OB/GYN, P.A. v. Ragin, 321 S.C. 139, 467 S.E.2d 261 (Ct. App. 1996), a physician's office relied upon the faulty representations of Ragin in the creation of an employee benefit plan. Because Ragin failed to inform Medical Park regarding mandatory contributions to the plan, the plan was severely underfunded and

Medical Park was subject to substantial legal liability. Medical Park sued Ragin for negligent misrepresentation, breach of fiduciary duty, and professional negligence. Noting the purpose of ERISA was to protect the interest of participants in employee benefit plans, this court held that the "relationship between Medical Parks' claims and the regulation or administration of an ERISA plan is too tenuous, remote, or peripheral to trigger pre-emption." Medical Park, 321 S.C. at 145, 467 S.E.2d at 264-65. Because adjudication of Medical Park's state law claims would not "affect the rights of any plan participants or beneficiaries and [would] not threaten the uniform regulation or administration of employee benefit plans," this court held the state law claims did not fall within ERISA's preemptive scope. Id. at 146, 467 S.E.2d at 265.

The United States Court of Appeals for the Fourth Circuit has also decided that state law claims for professional malpractice were not preempted by ERISA. In Coyne & Delany Co. v. Selman, 98 F.3d 1457 (4th Cir. 1996), the Fourth Circuit considered whether an employer's professional malpractice claim it brought against an insurance agent was preempted by ERISA. In that case, as in the present case, the employer alleged it had been fraudulently induced by the insurance agent to purchase group health insurance for its employees. Id. at 1463-64. The Fourth Circuit held that fraudulent inducement claims against insurance agents were not preempted, finding that:

> We believe that [plaintiff's] malpractice claim against insurance professionals is a "traditional state-based law[ ] of general applicability [that does not] implicate the relations among the traditional ERISA plan entities," including the principals, the employer, the plan, the plan fiduciaries and the beneficiaries. There is no question that [plaintiff's] malpractice claim is rooted in a field of traditional state regulation. Common law professional malpractice, along with other forms of tort liability, has

> historically been a state concern. Moreover, a common law professional malpractice claim is "a generally applicable [law] that makes no reference to, or functions irrespective of, the existence of an ERISA plan." The state law at issue in this case imposes a duty of care on all professionals, including all insurance professionals. Common law imposes the duty of care regardless of whether the malpractice involves an ERISA plan or a run-of-the-mill automobile insurance policy. Thus, the duty of care does not depend on ERISA in any way. Finally, the state law malpractice claim does not affect relations among the principal ERISA entities. Defendants' malpractice, if any, occurred before the faulty plan went into effect and before defendants began to act as Plan Administrator and Plan Supervisor. Accordingly, the claim is asserted by [plaintiff], in its capacity as employer, against the defendants in their capacities as insurance professionals, not in their capacities as ERISA fiduciaries.

Id. at 1471 (internal citations omitted).

Turning to the instant case, we similarly find the state law claims are not preempted by ERISA. Respondents brought claims of misrepresentation, fraud, and negligence against Requa. Respondents sought damages from Requa for his professional malpractice in failing to adequately investigate the Fidelity plan and in failing to inform them when it became evident that the Fidelity plan had problems. The malpractice claims are rooted in the common law of tort liability. Like the malpractice claims in Heaitley and Medical Park, these common law claims do not impact—even in a tenuous fashion—employee benefit structures or their administration, bind employers or plan

administrators to particular choices, or preclude uniform administrative practice.

Furthermore, Respondents' claims are not aimed at obtaining ERISA benefits. Rather, they brought this action seeking damages proximately caused by Requa's misrepresentations in marketing the Fidelity Plan and his negligent failure to apprise Respondents of the Plan's financial and regulatory difficulties. If Respondents prevail on their claims, Requa will be liable in his individual capacity for his negligence as an insurance professional. Thus, the connection between the state law claims and the employee benefit plan is so tenuous such that ERISA does not preempt them.

For these reasons, we cannot say that the common law tort action at issue in this case "relate[s] to any employee benefit plan" within the meaning of 29 U.S.C. § 1144(a). Accordingly, we find there was evidence to support the trial court's denial of Requa's motions for directed verdict and JNOV.[3]

III. Contested Evidentiary Rulings

Requa next appeals several of the trial court's rulings on evidentiary matters raised at trial. We address each of these issues separately below.

The decision to admit or exclude evidence is within the trial court's sound discretion. Washington v. Whitaker, 317 S.C. 108, 118, 451 S.E.2d 894, 900 (1994); Haselden v. Davis, 341 S.C. 486, 497, 534

[3] We also note that Requa admits in his brief that it was his burden to prove the existence of a recognized ERISA plan before the trial court could determine whether state law claims were preempted. He also admits that the fact of whether the Fidelity plan was an ERISA plan was "a question of fact that has yet to be determined." Requa's admitted failure to provide any evidence at trial that the plan was an ERISA plan is an additional ground supporting the trial court's decision to deny his motions for directed verdict and JNOV.

S.E.2d 295, 301 (Ct. App. 2000). The judge's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law. Carlyle v. Tuomey Hosp., 305 S.C. 187, 192, 407 S.E.2d 630, 633 (1991). To warrant reversal, however, Requa "must show both the error of the ruling and the resulting prejudice." Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994).

A. Admission of Evidence as to Unpaid Medical Bills and Premiums Paid

Requa argues the trial court erred by admitting evidence of the amount of premiums paid and unpaid medical bills for Holroyd and other employees enrolled in the Plan. He essentially argues that the jury should not have considered evidence of the total amount of premiums paid by American AVK on behalf of all of its employees when the only employee joined in the lawsuit was Holroyd. We find no error.

At the start of the trial, Requa moved to exclude evidence of the amount of premiums paid and the amount of the unpaid claims under the Fidelity plan, arguing the evidence of both amounted to a claim for recission and would be confusing to the jury. The trial court denied the motion. However, Requa himself testified during the trial that the Holroyds had $65,000 in unpaid medical bills and that $15,000 in premiums had been paid to Fidelity. Requa later withdrew his objection to the presentation of the medical bills. The Holroyds testified, without objection, regarding the receipt and amount of unpaid medical bills. Although Requa moved for directed verdict at the end of Respondents' case, he argued the evidence of both the premiums and unpaid medical bills was not the proper measure of damages.

Requa also argued in his post-trial motion to alter or amend the judgment that the evidence of both medical bills and the premiums paid was not proper measures of damages, was irrelevant, or, if relevant, was more prejudicial than probative. The trial court ruled that both the medical bills and the premiums paid were appropriate to be submitted

on Respondents' claims. The court further noted that even if the jury inappropriately considered the total amount of premiums paid, it was impossible to determine that fact as the jury returned a general verdict.

There are preservation problems with Requa's issue on appeal. Although Requa opposed the introduction of the evidence of medical bills and premiums paid before the testimony, after the testimony, and in a post-trial motion, he did not object when the evidence was actually introduced during the trial. In fact, the evidence that Requa complains about in this appeal was also elicited from his own testimony without objection. Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal. See Doe v. S.B.M., 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997) (holding that a contemporaneous objection is "required to properly preserve an error for appellate review"); Cogdill v. Watson, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986) ("The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object."). Because Requa failed to object at the time the evidence was introduced, we do not believe this issue is preserved for appellate review.

B. Requa's Request to Cross-examine Respondents Regarding Allegations Made in the Original Complaint

Requa next argues the trial court erred by not allowing him to cross-examine Respondents regarding a statement in their original complaint.

One of the contested issues at trial was whether Requa informed American AVK that there were problems with Fidelity. Respondents' original complaint stated that they had received a letter from Requa in May 1998 informing them that their "health insurer, the Fidelity Group, has some serious problems and that it may be time to move to another more competent carrier." Respondents filed an amended complaint which did not include the assertion that Requa wrote them to inform them of the problems with Fidelity.

At trial, Requa sought to cross-examine Holroyd about the assertion in the original complaint. Respondents objected, claiming the statement was inadvertently copied from a complaint filed in a separate action. The trial court concluded the statement in the original complaint was the result of a scrivener's error and its inadvertent inclusion in the original complaint should not be allowed to prejudice Respondents. We find no error.

Our courts have corrected scriveners' errors when warranted. See Canal Ins. Co. v. Caldwell, 338 S.C. 1, 7, 524 S.E.2d 416, 419 (Ct. App. 1999) (finding that a party was not bound by a scrivener's error regarding commencement time on insurance policy). In this case, Requa understood the statement had been culled from another complaint and acknowledged this at trial. Furthermore, Requa did not object when Respondents amended their complaint to delete the statement. Because there was evidence to support the trial court's ruling on this matter, the judge did not err in denying Requa's motion for a new trial as to this issue.

C. Unpaid Medical Bills of Others

During cross-examination, Requa admitted that his policyholders have "a million dollars in unpaid claims." Requa's counsel objected, a bench conference was held, and Requa's cross-examination continued. During closing arguments, Respondents' counsel argued that "there's a million dollars in unpaid claims on Requa . . . ." Requa's general objection was sustained. However, without objection from Requa, the trial court had Requa's testimony regarding his policyholders' unpaid claims read to the jury prior to deliberations.

Requa failed to place the grounds for his first objection on the record, failed to request a curative instruction when the testimony was referred to during closing arguments, and failed to object when the trial court ordered the testimony read to the jury. Accordingly, this issue is not preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding that an objection must be sufficiently specific to inform the trial court of the point being urged by

the objector); State v. Patterson, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997) (holding that where a party objects to closing arguments and the objection is sustained, but counsel did not move to strike or request a curative instruction, the issue is not preserved for appellate review); see also Murray v. Bank of America, 354 S.C. 337, 347, 580 S.E.2d 194, 200 (Ct. App. 2003) (same); Doe v. S.B.M., 327 S.C. at 356, 488 S.E.2d at 880 (holding that a contemporaneous objection is "required to properly preserve an error for appellate review").

D. Evidence of Damage to Respondents' Credit Rating

Requa next argues the trial court erred by allowing testimony regarding damage to the Holroyds' credit rating. We disagree.

Requa testified at trial that unpaid medical bills could affect the Holroyds' credit rating. Without objection, Gillian Holroyd testified that because Holroyd's medical bills remained unpaid, they feared losing their home, and they were receiving distressing telephone calls from creditors. No evidence was admitted regarding the Holroyds' credit rating or any changes to the rating.

In his motion for a new trial, Requa complained about Gillian Holroyd's testimony, arguing he was denied access to the Holroyds' credit reports prior to trial. In denying the motion for a new trial on this issue, the trial court found Gillian's testimony was cumulative to Requa's own testimony and that Requa had failed to argue anything regarding denial of access to credit reports before the motion for a new trial.

We first note that the evidence submitted on this issue, without objection, only indicated that the Holroyds had outstanding bills and were receiving distressing telephone calls from creditors. There was no evidence with regard to the credit ratings of the Respondents. In his argument in support of this issue, Requa even admits that no evidence was submitted with regard to Gillian Holroyd's or American AVK's credit ratings. Because no evidence of credit ratings was admitted at trial, Requa's argument has no merit.

Further, Gillian Holroyd's testimony was cumulative to Requa's testimony, and the evidence regarding the distressing phone calls was admitted without objection. As such, the issue is not preserved for appellate review. Doe v. S.B.M., 327 S.C. at 356, 488 S.E.2d at 880.

Because there is evidence to support the trial court's ruling, we find no error with the denial of the new trial motion based on the credit rating "evidence."

E. Evidence of Future Damages

Requa next argues that the trial court erred by admitting evidence of future damages in the form of increased premiums for health insurance Holroyd will be forced to pay, allegedly due to the Fidelity Plan's failure to pay Holroyd's legitimate medical expense claims. We find no error.

"Under current South Carolina law, the standard of admissibility for evidence of future damages is 'any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of the defendant's acts . . . if otherwise competent.'" Pearson v. Bridges, 344 S.C. 366, 372, 544 S.E.2d 617, 620 (2001) (quoting Martin v. Mobley, 253 S.C. 103, 109, 169 S.E.2d 278, 281-82 (1969)).

During Requa's testimony, he admitted that Holroyd's premiums would increase substantially due to his heart attack. Without objection, Holroyd's expert, John O'Brien, testified that Holroyd would have a difficult time getting health insurance and he would be plagued with "hefty" premiums because his heart condition would be considered a preexisting condition.

Respondents offered expert testimony that Holroyd's heart condition will be considered a preexisting condition when he signs on with a new insurance carrier. Because of the preexisting condition, he will be required to pay a much higher rate for insurance coverage than he had in the past. Had the Fidelity Plan honored its commitment to

pay the legitimate medical claims of its enrollees, the need for Holroyd to obtain new coverage would not have arisen. Instead, Holroyd was left without coverage and in the market for a new insurer at the time he was recovering from a catastrophic illness. If, as the jury found, Requa was negligent in his failure to investigate the adequacy of the Fidelity Plan and had represented the Plan accurately when marketing it to American AVK, the Holroyds may have never been subject to paying the higher premiums the expert projected. Allowing the jury to consider evidence of future damages is, therefore, wholly appropriate.

F. Use of Mortality Tables in Assessing Future Damages

Requa also argues the trial court erred in charging the jury on the mortality tables to quantify Holroyd's future damages. Here, too, we find no error.

The trial court must charge the current and correct law applicable to issues raised in the pleadings and supported by the evidence. Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). When reviewing a jury instruction for error, this court must consider the charge "'as a whole in light of the evidence and issues presented at trial.'" Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999).

The Legislature has provided life expectancy tables to be considered when it is necessary in civil actions to determine the life expectancy of any person. See S.C. Code Ann. § 19-1-150 (1985) ("When it is necessary, in any civil action or other mode of litigation, to establish the life expectancy of any person from any period in his life, whether he be living at the time or not, the table below shall be received in all courts and by all persons having power to determine litigation as evidence (along with other evidence as to his health, constitution and habits) of the life expectancy of such person.").[4]

[4] This statute was amended in April 2004. The amendment has no effect on the issue in this case.

During the charge conference, the parties debated whether the mortality tables should be charged to the jury. Requa argued that under ERISA, Holroyd would have "credible coverage that would have extended to any future coverage" such that future damages, and the mortality tables, were not an issue. Noting there was evidence in the record regarding future damages in the form of increased premiums, the trial court decided to give the charge concerning the mortality tables. The jury was instructed as follows:

> Now, at this time, Mr. Holroyd is 52 years of age. We have in this state a statute that has been established by way of actuarial study that states what one's life expectancy should be at a certain age. This is allowed into evidence at a trial. At this age, 52, Mr. Holroyd, has a life expectancy of 23.7 years. In determining how long one would live, you may consider life expectancy. You may also consider other evidence in the case which bears on his health, age, physical condition, or any other factors that you deem appropriate in determining whether or not you would – in determining how you would use that life expectancy.
>
> You would not use that life expectancy at all unless you determined that Mr. Holroyd would have some damages in the future. That has nothing to do with what has happened, has only to do with what may happen in the future.

Requa informed the trial court that he had no objections to the instructions. In his post-trial motions, however, Requa argued that charging the mortality tables was error because any increase in premiums was due to the heart attack, not Requa's actions and the future damages were in contravention of federal law. The trial court denied the motion, finding there was evidence to support the charge and Requa failed to object after the instruction was given.

Even assuming Requa properly preserved this argument for appellate review, we find no error with the instruction. There was evidence that Holroyd would suffer future damages due to increased

premiums. The jury could properly consider the mortality tables to determine the amount of future damages. Because there was evidence to support the charge, the trial court correctly instructed the jury with regard to the mortality tables. The trial court did not err in denying Requa's post-trial motion with regard to this issue.

IV. Change of Venue

Requa next argues the trial court erred by failing to grant his motion for change of venue. We disagree. "A motion for a change of venue is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Kelsey, 331 S.C. 50, 67, 502 S.E.2d 63, 71 (1998).

This action was filed in Charleston County in January 1999. Requa did not assert the defense of improper venue in his pleadings, and he did not file his motion for change of venue until April 2000. The matter did not ultimately come before the trial court for hearing until February 2001, at which time the case had already been placed on the trial roster and was subject to being called for trial at any time. Moreover, there is evidence that most of the discovery had been completed prior to the hearing.

Requa points out that the right of a defendant to be tried in the county of his residence is a substantial right and argues he did not waive that right. A defense of improper venue may be waived if not made by motion under Rule 12, SCRCP, or raised as an affirmative defense in a responsive pleading. Henley v. North Trident Reg'l Hosp., 275 S.C. 193, 195, 269 S.E.2d 328, 328 (1980) (holding that the right to be tried in the county of one's residence, "while it is a 'substantial and valuable right,' . . . relates only to the question of venue and can be waived").

In Henley, our supreme court held that the defendant's failure to challenge venue until five months after the complaint had been filed was unreasonable, and he had therefore waived his right to be tried in the county of his residence. We find the same result is warranted in the

present case where the delay continued for many more months and was not pursued with the trial court until the case was nearing trial.

Accordingly, we find the trial court did not abuse its discretion in denying Requa's motion for change of venue.

V. Damages

Requa next argues the trial court erred in failing to grant his motion for a new trial or, in the alternative, a new trial nisi remittitur on the grounds the damages awarded by the jury were grossly disproportionate to the evidence. We disagree.

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice." Allstate Ins. Co. v. Durham, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993). The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. Vinson, 324 S.C. at 404, 477 S.E.2d at 723. In other words, to warrant a new trial absolute, the verdict reached must be so "grossly excessive" as to clearly indicate the influence of an improper motive on the jury. Rush v. Blanchard, 310 S.C. 375, 379-80, 426 S.E.2d 802, 805 (1993). Although the decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court, an abuse of discretion occurs if the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Krepps v. Ausen, 324 S.C. 597, 607, 479 S.E.2d 290, 295 (Ct. App. 1996).

Requa first claims the jury's award of $365,000 in actual damages is unsupported by the evidence because Respondents only presented evidence of $65,000 in unpaid medical bills. The evidence offered by Respondents not only included unpaid medical bills, but also

included embarrassment, humiliation, credit problems, increased future insurance premiums, stress, premiums paid, and decreased coverage due to preexisting conditions in a new policy. We find no reason, therefore, to disturb the jury's verdict.

With respect to punitive damages, Requa argues the jury's award of $180,000 was clearly motivated by passion, caprice, and prejudice. Here, too, we see no reason to disturb the trial court's finding that the punitive damages award was supported by and not disproportionate to the evidence. The trial court separately listed and addressed the eight factors required in a post-trial review of punitive damages awards under our Supreme Court's ruling in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). Requa's culpability, knowledge, and ability to pay are amply supported by the evidence contained in the record.

In light of all the evidence presented, we find the trial court did not abuse its discretion in finding the actual and punitive damages were not disproportionate to the evidence.

CONCLUSION

For the reasons stated above, we find: that the Respondents' claims were not preempted by federal ERISA laws; that the trial court correctly ruled on Requa's evidentiary objections; that Requa's motion for a change of venue was correctly denied; and that the trial court did not abuse its discretion in denying Requa's motions for new trial. The judgment of the trial court is therefore

AFFIRMED.

HUFF and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gary E. McClain, Appellant,

v.

Pactiv Corporation, Howard Sellers, Tim Randall, Jody Rowland, Joseph P. Berley, Linda Milton, Joe Powell, Doug Boynton, Larry Wonoski, Joe Garrison, Ron Clark and Robin Montgomery, Defendants,

of whom Pactiv Corporation and Joseph P. Berley are, Respondents.

Appeal From Aiken County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 3853
Heard June 23, 2004 – Filed August 9, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

J. Dennis Bolt, of Columbia, for Appellant.

Paul H. Derrick and Kristin E. Toussaint, both of Greenville, for Respondents.

STILWELL, J.: Gary E. McClain appeals the dismissal of his causes of action against Pactiv Corporation and Joseph P. Berley. He argues the trial court erred in (1) ruling his intentional infliction of emotional distress claim was barred by the exclusivity provision of the South Carolina Workers' Compensation Act and (2) concluding his remaining claims—civil conspiracy, false arrest, abuse of legal process, and invasion of privacy—were barred by the doctrine of collateral estoppel. We affirm in part, reverse in part, and remand.

BACKGROUND

This case arises from McClain's allegations that his former employer, Pactiv, and fellow employees conspired with each other and with law enforcement to have him arrested and involuntarily committed after he spoke in favor of a union at a plant meeting regarding an ongoing unionization campaign. At the meeting, Pactiv's plant manager, Joseph R. Garrison, Jr., spoke against labor unions and McClain suggested the union be allowed to speak to the workers.

McClain alleges that in the days following the meeting, Pactiv's director of occupational health, Dr. Joseph Berley, called McClain's former psychiatrist; told him McClain had made threatening statements to employees who did not support the union; "passed along lies, rumors, gossip, and innuendo"; and asked about how to get McClain committed. Also, Pactiv employees including Robin Montgomery, Pactiv's head of corporate security, met with officers from the local sheriff's department. McClain asserts the employees also related false and unsubstantiated statements to the officers. According to Garrison, they were alerting the officers of safety concerns raised by several employees involving McClain. After the meeting, sheriff's

officers discovered an outstanding warrant against McClain, stopped him on his way to work, and took him into custody.

After arresting McClain, officers took him to a hospital. McClain was then involuntarily committed to a mental health facility. McClain claims that while he was committed, Berley reported false information to McClain's treating psychiatrist for the purpose of prolonging his commitment.

Following McClain's commitment, a probate court found him mentally ill and ordered him to undergo an outpatient treatment program. McClain asserts Berley also attempted to affect the outcome of the proceeding by sending a fax to McClain's physician at the mental facility.

McClain first brought suit in federal court against Pactiv, Berley, other Pactiv employees, and members of the Aiken County Sheriff's Department. His complaint asserted causes of action under 42 U.S.C. § 1983 and several state law claims including civil conspiracy, false arrest, defamation, abuse of legal process, invasion of privacy, and intentional infliction of emotional distress. Both the Pactiv defendants and the law enforcement defendants were granted summary judgment. The district court found McClain presented no evidence the law enforcement officers acted improperly or violated his constitutional rights. As to the Pactiv employees, the court found there was no evidence linking them to a conspiracy involving the alleged constitutional violations. Specifically, the court held McClain "has not been able to produce any affidavit, deposition, or other form of evidence to support his theory that the Pactiv Individuals were involved in the decision to arrest or commit him."

Having granted summary judgment on the federal actions, the court declined to exercise jurisdiction over McClain's remaining state law claims and dismissed them without prejudice. On appeal, the Fourth Circuit Court of Appeals affirmed the district court's ruling.

Thereafter, McClain filed this action. The trial court dismissed several defendants and causes of action that are not subjects of this appeal. The order on appeal dismissed the remaining claims against Pactiv and Berley and thus

ended the action. The court agreed with Pactiv that the intentional infliction of emotional distress claim was barred by the exclusivity provision of the Workers' Compensation Act. The court also found McClain's claims for civil conspiracy, false arrest, abuse of legal process, and invasion of privacy were barred by collateral estoppel because of the order in the federal action.

DISCUSSION

I. Intentional Infliction of Emotional Distress

McClain argues the trial court erred in ruling his claim for intentional infliction of emotional distress was barred by the exclusivity provision of the Workers' Compensation Act. We disagree.

The rights and remedies of an injured worker under the Workers' Compensation Act constitute the worker's exclusive remedies against the employer. S.C. Code Ann. § 42-1-540 (1985). Our supreme court has held the intentional infliction of emotional distress constitutes a personal injury that falls within the scope of the act. Loges v. Mack Trucks, Inc., 308 S.C. 134, 137, 417 S.E.2d 538, 540 (1992). The court later affirmed and clarified this holding by stating: "It is only when the tortfeasor/co-employee is the 'alter ego' of the employer that the liability falls outside the scope of the Act." Dickert v. Metropolitan Life Ins. Co., 311 S.C. 218, 220, 428 S.E.2d 700, 701 (1993). The alter ego exception applies only to "'dominant corporate owners and officers.'" Id. at 221, 428 S.E.2d at 701 (quoting 2A Larson, Workmen's Compensation, §§ 68.21 and 68.22). McClain argues Montgomery and Berley are alter egos of Pactiv and thus the claim is not governed by the Workers' Compensation Act. Nothing in the record before us suggests either Montgomery or Berley is a dominant corporate owner or officer. We therefore reject McClain's argument that the alter ego exception applies to this case and hold the trial court correctly dismissed this cause of action as barred by the exclusivity provision of the Workers' Compensation Act.

II. Collateral Estoppel

McClain also argues the trial court erred in ruling his remaining claims were barred by collateral estoppel. As to the false arrest, abuse of legal process, and invasion of privacy claims, we agree. As to the civil conspiracy claim, we affirm the dismissal on a different ground.

The doctrine of collateral estoppel, or issue preclusion, serves to prevent a party from relitigating in a subsequent action an issue actually and necessarily litigated and determined in a prior action. Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 251, 481 S.E.2d 706, 707 (1997). In the current action, the trial court found all of McClain's remaining claims barred by the district court's ruling. In reaching this conclusion, the trial court relied on the following portion of the district court's order:

> [McClain] alleges that the Pactiv Individuals not only conspired with the Sheriff to have [McClain] picked up by deputies, but that they also conspired to place [McClain] in a mental health facility against his will in order to squelch his pro-union activity. However, [McClain] has not been able to produce any affidavit, deposition or other form of evidence to support his theory that the Pactiv Individuals were involved in the decision to arrest or commit him. Moreover, Sheriff Sellers and Officer Rowland have submitted sworn affidavits in which they declare that the Pactiv Individuals did nothing more than ask for extra security at a personnel meeting and were not involved with the decision to serve the 1995 arrest warrant or to commit [McClain].

(Emphasis added.)

This passage of the district court's order was part of its decision that there was no link between the Pactiv employees and the alleged violations of McClain's constitutional rights. That is, the court found no evidence the Pactiv employees were acting under color of state law. Because the district court dismissed McClain's federal actions, it specifically declined to exercise jurisdiction over his state law claims. Nothing in the district court's order

can be construed as a conclusive determination of the issues in McClain's false arrest, abuse of legal process, or invasion of privacy claims.

McClain argues his civil conspiracy action is also not barred by the district court's order. He notes that in addition to a conspiracy between law enforcement and Pactiv employees, he also asserted in his complaint that Pactiv and its employees conspired with each other, a matter not decided in any fashion by the district court's order. However, McClain's conspiracy claim cannot survive on this theory, as the law is clear that a corporation cannot conspire with itself. Anderson v. S. Ry. Co., 224 S.C. 65, 69, 77 S.E.2d 350, 351 (1953) (holding conspiracy cause of action could not be sustained after involuntary nonsuit and jury verdict left corporation as the only remaining defendant because a corporation cannot conspire with itself); Goble v. Am. Ry. Express Co, 124 S.C. 19, 27-28, 115 S.E 900, 903 (1923) (ruling although a corporation's agents may render the corporation liable for torts committed in the scope of their employment, an agent or multiple agents may not render the corporation liable for a civil conspiracy involving only corporate agents); 16 Am. Jur. 2d Conspiracy § 56 (1998) (noting because a corporation cannot conspire with itself, a civil conspiracy is not possible where the co-conspirators are employer and employee or principal and agent).

We therefore affirm the circuit court's dismissal of McClain's intentional infliction of emotional distress cause of action and his cause of action for civil conspiracy, but reverse the dismissal of his state law causes of action for false arrest, abuse of legal process, and invasion of privacy, and remand these claims to the circuit court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEARN, C.J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Heyward Leon Rogers, Appellant.

Appeal From Lexington County
Marc H. Westbrook, Circuit Court Judge

Opinion No. 3854
Hear June 9, 2004 – Filed August 9, 2004

AFFIRMED

Senior Assistant Appellate Defender Wanda P. Hagler, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; Solicitor Donald V. Myers and Assistant Solicitor C. Dayton Riddle, both of Lexington, for Respondent.

HEARN, C.J.: Heyward Leon Rogers was convicted of two counts of first degree criminal sexual conduct, assault and battery with intent to kill, kidnapping, and strong arm robbery. On appeal, Rogers argues the court erred by (1) allowing the solicitor to ask leading questions during the deaf victim's direct examination, (2) allowing the victim's son to serve as her interpreter during cross-examination, (3) failing to grant Rogers' motion for a mistrial after learning that six jurors were exposed to a newspaper article about the trial, (4) admitting a purse into evidence before the victim identified it, (5) admitting fingerprint results into evidence, and (6) sentencing him to life without parole when his last conviction for a most serious crime was nineteen years prior to this conviction. We affirm.

FACTS

On the evening of September 28, 2002, the victim left a fast food restaurant in West Columbia and was walking toward a video poker parlor when a man pushed her to the ground and raped her. The victim fought back and eventually caused her perpetrator to flee by throwing sand in his eyes. When the perpetrator fled, he took with him the victim's purse and her newly purchased food. A police officer on patrol found the victim shaking and crying on the side of the road, and he called an ambulance. The victim was transported to the hospital where a rape protocol kit was prepared. A week later, the victim helped the police draw a composite sketch of her assailant, which was used to arrest Rogers.

The victim, who was fifty-seven years old at the time of the attack, has been deaf since the age of eight. As a result, her speech is difficult to understand, and she communicates through some vocalization combined with gestures. Because of this unique system of communication, both the solicitor and Rogers' counsel had problems eliciting testimony from the victim at trial. To cope with the problems, the trial court allowed the extensive use of leading questions during the victim's direct examination. During cross-examination, however, leading questions alone did not facilitate

communication between the victim and defense counsel. Thus, the court found it necessary to allow the victim's son to serve as an interpreter.

Rogers was convicted on all charges and sentenced concurrently to fifteen years for robbery and four sentences of life without possibility of parole for the other charges. We affirm.

STANDARD OF REVIEW

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

LAW/ANALYSIS

Rogers raises six issues on appeal: (1) the failure to appoint an interpreter during the victim's direct-examination; (2) the use of the victim's son as an interpreter during the victim's cross-examination; (3) the denial of a motion for new trial after discovering jury misconduct; (4) the admission of the victim's purse into evidence; (5) the admission of fingerprint evidence; and (6) the propriety of a life without parole sentence.

1. Victim's direct examination.

Rogers first argues the trial court erred in failing to supply an interpreter for the victim during direct examination. We find this issue is not preserved for our review.

Because of the victim's communication problems, the trial court allowed the solicitor to use leading questions. Defense counsel repeatedly objected to the use of leading questions; however, counsel never objected to the court's failure to appoint an interpreter, nor did counsel recommend an

interpreter be appointed. Now, Rogers asks this court to find error in the trial court's failure to do what was never asked of it.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002).

Here, Rogers never raised the issue of using an interpreter during direct examination to the trial court. Therefore, this issue is not preserved for appellate review.

2. Victim's cross-examination

Rogers also argues the trial court erred by failing to supply the victim with a qualified interpreter during cross-examination. Rogers contends the interpreter was not qualified because he was the victim's son. We disagree.

Soon after Rogers' counsel began cross-examining the victim, it became apparent that the victim could not understand many of counsel's questions. When the victim did comprehend the questions, defense counsel could not understand her responses. Because of these problems, the solicitor offered the victim's sister and the victim's son as interpreters, as they were the only two people available who could interpret the victim's unique method of communication. Defense counsel objected to the use of the sister because she was also a witness in the case. Counsel also objected to the son because he was related to the victim. The court appointed the victim's son as interpreter, after finding that it was in the best interest of the witness and in the best interest of justice. We find no error in this decision.

Section 15-27-15 of the South Carolina Code (Supp. 2003) regulates the use of interpreters in criminal proceedings. This section requires the use of qualified interpreters, who are defined in part as not being family members of the deaf witness. S.C. Code Ann. § 15-27-15(B)(1) (Supp. 2003). However, the requirement of a qualified interpreter can be waived by the deaf person or by the judge in the fulfillment of justice. S.C. Code Ann. § 15-27-15(A) (Supp. 2003). Specifically, the statute states that "[i]f a person elects to use an interpreter other than a qualified interpreter provided for in this section, the court must first make a determination that this action is in the best interest of the individual and is in the best interests of justice." In this case, the trial court understood the required findings and made the determination that the use of the victim's son as interpreter was in the best interest of the victim and of justice.

The trial court was confronted with a difficult situation at trial and fashioned a solution that protected the interests of the victim and justice (as the statute governing interpreters requires) while also affording Rogers with a means to cross-examine his accuser. Thus, we find no error.

3. Trial Publicity

Rogers next argues the trial court erred when it denied his motion for new trial after jury misconduct was discovered. We disagree.

During the course of the trial, it came to the court's attention that a newspaper containing an article about the ongoing trial was in the jury room. At the beginning of proceedings on the day of the article's publication, the trial court spent considerable time questioning the jury if any members had either read, seen, or had the article mentioned to them. Six jurors answered these questions in the affirmative. These six jurors were then questioned individually by the court. Three of them had not even seen the article, but had been apprised of its existence by others. These three jurors stated that they did not read or discuss the article because it would have been inappropriate. They further testified they had not formed any opinion in this case as a result of this limited exposure to the article's existence.

The three other jurors all stated they had looked at the article. One juror stated he saw the headline of the article, but did not read it because of the court's instructions. He further said he did not see anyone in the jury room read the paper and nothing had caused him to form an opinion in this case. Another juror admitted that she was to blame for bringing the newspaper into the jury room. She explained that when a fellow juror told her the newspaper contained an article on the trial, she found the appropriate section of the newspaper, folded it, and placed it in her purse. During this action, she said she was only exposed to the headline. This juror also testified nothing caused her to form an opinion in this case.

Finally, the sixth juror admitted she scanned the article though she did not remember any information regarding Rogers. Importantly, she remembered having read details in a paragraph following one referencing Rogers' prior record. As a result, the judge excused this juror.

"The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court whose ruling will not be disturbed on appeal in the absence of an abuse of discretion amounting to an error of law." State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989). In evaluating news articles appearing during trial, the trial court must determine if they are prejudicial and whether jurors read the articles. Id. at 511, 386 S.E.2d at 256. If such prejudicial exposure has occurred, the court must craft an appropriate curative measure. Id. In Wasson, our supreme court affirmed the denial of a mistrial where two jurors had read an article discussing the defendant's other pending charges because the jurors had stated the article did not affect their decision to find the defendant guilty. Id. at 511, 386 S.E.2d at 257.

In this case, five of the six jurors had very limited exposure to the article, and all testified it had not caused them to form any opinions. The final juror was dismissed because she had read most of the article. We find the trial court thoroughly evaluated each juror's exposure to the news article and took the appropriate measures to safeguard Rogers' right to a fair trial. Therefore, we find no error.

4. Admission of victim's purse

Rogers next argues that the admission of the victim's purse into evidence was error because it had not been identified by the victim. We disagree.

The purse was entered into evidence during the testimony of Mark Jones, the police officer who retrieved the purse after a homeowner called and reported finding it in his yard. The purse was admitted at trial after Jones testified that it was the purse he retrieved, that the purse matched a description given by the victim, and that it contained an item displaying the victim's name. The victim's description of the missing purse and the discovery of items bearing her name within it link the purse to the victim and the crime. Therefore, admission of the purse at that time was not erroneous.

Moreover, the victim eventually identified the purse as belonging to her. Thus, even if the purse had been admitted without a proper foundation, the foundation was ultimately provided, and there would be no prejudice to Rogers. See State v. Pollard, 261 S.C. 389, 200 S.E.2d 233 (1973) (finding no prejudice where drugs were entered into evidence prior to testimony of a complete chain of custody because the chain was eventually provided); see also Rule 104(b), SCRE (allowing admission of evidence subject to the introduction of other supporting evidence). Therefore, we find no error in the trial court's admission of the purse into evidence.

5. Admission of fingerprint evidence

Rogers also argues the trial court erred by allowing fingerprint results into evidence without a proper chain of custody. We disagree.

Rogers' fingerprint was found on a slip of paper in the victim's purse and these results were entered into evidence through the testimony of a fingerprint analyst. Rogers contends the evidence should be excluded because the purse's chain of custody was defective.

Initially, we note that because the purse is a non-fungible piece of evidence, chain of custody is not required for its admission. State v. Glenn, 328 S.C. 300, 305, 492 S.E.2d 393, 395 (Ct. App. 1997) ("[W]here the issue is the admissibility of non-fungible evidence – that is, evidence that is unique and identifiable – the establishment of a strict chain of custody is not required . . . ."). However, even if a chain needed to be established, it had been. At trial, every individual who had possession of the purse, which contained the slip of paper, testified to having it and denied tampering with it.

Rogers points to a period of one week when law enforcement had returned the purse to the victim before retrieving the purse again and performing fingerprint tests on its contents. Apparently, Rogers' concern is that some form of tampering might have occurred while it was in the victim's possession. However, the proof of chain of custody does not have to negate all possibility of tampering. The State only needs to establish a complete chain of evidence as far as practicable. Id. The period of time during which the purse was returned to the victim is accounted for by the testimony of the victim's sister, who lives with the victim. The sister testified that during the week the purse was in her home, the bag containing the purse was never opened. Additionally, the officer who returned the purse testified that when she went to retrieve it, the bag containing the purse was where she had left it.

South Carolina law does not require testimony as to the exclusion of any possibility of tampering. Rather, "where the identity of persons handling the specimen is established, . . . evidence regarding its care goes only to the weight of the specimen as credible evidence," not to the admissibility of the evidence. State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). Accordingly, we find no error in the admission of the fingerprint results.

6. Life without parole

Finally, Rogers argues a sentence of life without parole is cruel and unusual punishment under this set of facts. We disagree.

Rogers was sentenced to life without parole pursuant to section 17-25-45(A) of the South Carolina Code. Section 17-25-45(A) requires that "upon a conviction for a most serious offense . . . a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has one or more prior convictions for: (1) a most serious offense."

Nineteen years prior to the convictions addressed in this opinion, Rogers was convicted of assault and battery with intent to kill, which is a "most serious offense." S.C. Code Ann. § 17-25-45(C)(1) (Supp. 2003). However, Rogers argues this prior offense was too remote in time to be used to enhance his sentence for the current crime.

In State v. Burdette, 335 S.C. 34, 37-38, 515 S.E.2d 525, 527 (1999), the supreme court affirmed imposing a life without parole sentence where the appellant's prior offense occurred seventeen years before the triggering offense, just two years less than the span of time in our case. Furthermore, section 17-25-45(A) has withstood repeated constitutional challenges, including assertions of cruel and unusual punishment. See, e.g., State v. Jones, 344 S.C. 48, 56-59, 543 S.E.2d 541, 545-47 (2001) (holding "two-strikes" law constitutional under separation of powers, cruel and unusual punishment, equal protection and ex post facto challenges). Thus, we find no error in imposing a life without parole sentence in this case.

CONCLUSION

For the reasons stated above, Rogers' convictions and sentences are

AFFIRMED.

STILWELL, J. and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Byron B. Slater, Appellant.

Appeal From Charleston County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 3855
Heard April 7, 2004 – Filed August 9, 2004

REVERSED AND REMANDED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Senior Assistant Attorney General William Edgar Salter, III, all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

BEATTY, J.: Byron Slater appeals his conviction on a murder charge, alleging, *inter alia*, that the trial court erred in failing to charge the jury on self-defense. We reverse and remand.

FACTS

Appellant Byron Slater was with some friends on the evening of February 3, 2001, at a school gymnasium where there had been a dance. Following the dance, Slater went outside, where he started talking with "some females." While there, he became aware of a disturbance near a truck. Slater walked to his car, retrieved a gun, and started to walk toward the truck.[1] Slater then changed his mind. He walked back toward his car, where three friends, Ellis Judon (the driver), Kenyon Nichols, and Deshawn Brown, were waiting for him. Moments later, Slater noticed that another disturbance was taking place in an adjacent parking lot and wanted to see what was going on. Slater asked Judon to drive there.[2] In that second parking lot, an apparent robbery was unfolding. The victim was on the ground, being stomped by five men. Slater knew neither the victim nor his attackers.

Slater testified that he walked up to the robbery and surprised one of the attackers. The man then turned around and pointed a gun toward Slater. Slater quickly turned around and started running back toward his car. As he ran, he heard a gunshot and responded by shooting his own gun behind him. Slater got into the car where his friends were waiting for him.[3] He continued shooting in the air as the car pulled away. In the

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[1] Slater testified that he retrieved the gun "to shoot it in the air . . . something that young people be doing like after parties or clubs or whatever."

[2] There is some dispute as to these facts. Slater contends that he never returned to his car because he realized another confrontation was taking place in another parking lot and walked over there instead, still carrying his gun.

[3] Nichols and Brown, too, had gotten out of the car, but apparently returned before Slater.

ensuing chaos, the victim of the attempted robbery lay dying on the ground. He had been shot twice.

Back in the car, Slater said that he thought he had "hit" someone. Slater and his three friends drove to Slater's house, where Slater left the gun. The four then went back to the parking lot where the shooting had occurred. On the way, the police stopped them and searched the car but did not find any weapon.

Early the next morning, detectives from the city of North Charleston went to Slater's residence to arrest him. Following the arrest, they obtained a search warrant for Slater's house. The detectives recovered various ammunitions from Slater's yard and from inside his house, including two guns, some projectiles, bullets, and shell casings.

At the police station, Slater told the police that he "didn't shoot anybody." However, a ballistics expert testified at trial that the fatal bullets came from Slater's gun, as did the ones retrieved from the crime scene. Additionally, numerous witnesses placed Slater at the crime scene with a gun. Slater himself admitted to shooting his gun, but insisted that he did not mean to shoot anyone. The jury convicted Slater of murder, though the trial judge had included a manslaughter option in the jury charge.[4] The trial judge expressly refused to include a self-defense charge.

ISSUES

I. Did the trial judge err in refusing to include a self-defense charge, reasoning that Slater had brought about the difficulty?

II. Did the trial judge err in allowing the victim's mother to testify that her son did not have a criminal record?

[4] The jury also convicted Slater on one count of possession of a firearm during the commission of a violent crime.

III. Did the trial judge err in allowing a detective to testify that an eyewitness to the crime had denied hearing any gunshot other than Slater's?

LAW/ANALYSIS

Slater argues that the trial judge committed reversible error in refusing to include a self-defense charge. We agree.

The evidence presented at trial determines the law to be charged. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). If there is any evidence in the record to support self-defense, the issue should be submitted to the jury. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002); State v. Hill, 315 S.C. 260, 261, 433 S.E.2d 848, 849 (1993). A trial judge's failure to do so is reversible error. State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000). Additionally, "[c]urrent law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt." Burkhart, 350 S.C. at 261, 565 S.E.2d at 303 (citing State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 494 (1998)).

For a defendant to argue self-defense, the record must demonstrate that "(1) [he] was without fault in bringing on the difficulty; (2) [he] actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) [he] had no other probable means of avoiding the danger." State v. Chapman, 336 S.C. 149, 153, 519 S.E.2d 100, 103 (1999). Moreover, "[o]ne who provokes or initiates an assault cannot escape criminal liability by invoking self-defense." State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). However, a defendant can restore his right to self-defense if he withdraws from the conflict and communicates that decision to the opponent. Id.

Here, there was some evidence to support a self-defense charge. Slater maintains that when he approached the altercation between the victim and his attackers, an attacker pointed a gun at Slater. Slater then

turned and ran. While running away, Slater heard gunshots and returned fire, not looking in the direction where he was firing. Slater testified, "when I walked up on him, I guess I surprised him and he turned to me and he had a gun in his hand. And I see his gun and I started running." He added, "Yeah, when I walked up on him like here, like he turned to me, like had the gun pointed at me like he surprised." Additionally, Mark Nelson, a friend of the victim, testified that he saw one of the attackers – someone other than Slater – with a gun.

The State insists that Slater bears some responsibility for the tragedy because he was in unlawful possession of a gun and carried that gun into the altercation. However, the mere unlawful possession of a firearm, with nothing more, does not automatically bar a self-defense charge. See State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (explaining that "a person can be acting lawfully, even if he is in unlawful possession of a weapon"). As importantly, Slater testified that he turned and started to run away from the attacker holding the gun. Therefore, even if Slater initially contributed to the difficulty, that he turned and ran away would restore his right to self-defense. See Bryant, 336 S.C. at 346, 520 S.E.2d at 322 (explaining that an appellant's attempt to leave the scene of a confrontation would signal that the "appellant truly intended to withdraw" from the situation). See also State v. Rogers, 329 S.C. 520, 525, 466 S.E.2d 360, 363 (1996) (reasoning that Rogers faced no overt threat because his opponent was moving away from him and said nothing to evince a threat).

The dissent contends that Slater "provoked a conflict by running toward an altercation while conspicuously holding a cocked and loaded gun." The record provides otherwise. Slater testified, "I walked up on [the attacker] . . . [the gun] was by my side . . . in my right hand." That testimony is uncontroverted. The dissent apparently assumes that (1) one of the attackers saw Slater's gun; (2) was afraid for his own safety; and (3) started to shoot as a result. That scenario is plausible, but the

record fails to establish it.[5] It is just as likely that Slater's gun was inconspicuous, especially given that the regrettable events of that evening occurred when "it was pretty dark" and that Slater had his gun by his side.

Citing Bryant, the dissent argues that "Slater failed to effectively communicate his intent to withdraw" to the attacker with the gun. We disagree. In Bryant, the victim apparently caught the appellant breaking into the victim's truck. Id. at 343, 520 S.E.2d at 321. The two struggled, and the appellant stabbed the victim to death with a screwdriver. Id. at 344, 520 S.E.2d at 321. The appellant argued that he was entitled to a self-defense charge because he had dropped his knife to the ground before the fight began. Id. According to him, that gesture indicated his intent to withdraw and restored his right to self-defense. Id. Our supreme court rejected the argument.

The court initially found that the appellant brought on the difficulty because the attempted break-in was "in violation of law and reasonably calculated to produce the occasion." Id. at 345, 520 S.E.2d at 322. The court clarified, however, that, "'[i]f, after commencing the assault, the aggressor withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire, he is restored to his right of self-defense.'" Id. (citation omitted). In that case, the appellant himself admitted that the victim did not see him drop the knife, and therefore could not have known about the alleged withdrawal. The court reasoned, as said earlier, that "[i]f appellant truly intended to withdraw he could have easily left the open parking lot." Id. at 346, 520 S.E.2d at 322.

Here, Slater merely walked toward the altercation; he threatened or assaulted no one.[6] More importantly, Slater immediately "turned and

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[5] The men involved in the robbery were apparently never apprehended. They did not participate in the proceedings, so what they may have seen is unclear.

[6] If the gun was indeed inconspicuous (see earlier discussion), it is difficult to imagine how Slater's act of walking toward the robbery was

ran" after seeing the attacker's gun. Slater did exactly what the supreme court looked for in Bryant: he left – quickly.

Admittedly, as the dissent posits, the attacker may have thought that Slater was withdrawing simply "to gain [some] tactical advantage." However, our task is not to determine the attacker's state of mind. Rather, as instructed by our supreme court, we are to see only whether "any evidence" in the record supports a self-defense charge.[7] Day, 341 S.C. at 416, 535 S.E.2d at 434. We find that there is some. The trial judge, therefore, erred in not including the charge.

Having found that the exclusion of the requested self-defense charge was error, we need not address Slater's remaining issues.

CONCLUSION

Based on the foregoing, we **reverse** and **remand** for a new trial on both charges.[8]

ANDERSON, J., concurs and HEARN, C.J., dissents separately.

"in violation of law and reasonably calculated to produce" the difficulty. The cases cited by the Bryant court all involved robbers or other felons claiming self-defense when the would-be victims tried to defend themselves. See id. at 345, 520 S.E.2d at 322.

[7] Additionally, the supreme court cautioned that "a trial judge should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant." Day, 341 S.C. at 418, 535 S.E.2d at 435.

[8] See Burkhart, 350 S.C. at 264, 565 S.E.2d at 304 (ordering a new trial on charges of possession of a firearm during the commission of a violent crime after overturning the underlying conviction on the violent crime).

HEARN, C.J., dissenting: Because Slater failed to effectively communicate his intent to withdraw after he provoked a dangerous situation, I do not believe he was entitled to a charge of self-defense. Therefore, I respectfully dissent.

A person who provokes an assault cannot claim a right to self-defense unless that person "'withdraws in good faith from the conflict and announces in some way to his adversary his intention to retire.'" State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999) (quoting 55 A.L.R.3d at 1003). Here, all the evidence, including Slater's own testimony, indicates that he provoked a conflict by running toward an altercation while conspicuously holding a cocked and loaded handgun, even though he had no personal connection to the people involved in the fight.[9]

Slater argues that he withdrew from the conflict because (1) he began to run when a man involved in the turmoil pointed a gun at him, and (2) he did not shoot his gun until he heard someone else fire first. However, in his testimony, Slater admitted that the events - his running, hearing the shot, and firing back - all "happened so fast." Slater further admitted that he not only shot backwards as he was running away, but that he also shot in the air after he had gotten inside a car and was riding away from the scene. In my view, even if Slater intended to withdraw, neither his words nor his actions communicated this intent. See id. ("One's right to self-defense is restored after a withdrawal from the initial difficulty with the victim if that withdrawal is communicated to the victim by word or act."); State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973).

While the trial court is required to charge the jury on self-defense if there is any evidence supporting the charge, all the evidence in the record shows that Slater provoked a dangerous situation and no evidence indicates that he ever communicated his withdrawal after the

[9] Slater made no claim of "defense of others at trial," nor did his testimony in any way reflect an intention to enter the conflict in defense of those being attacked.

provocation. Despite Slater's claim that he attempted to retreat, he admitted that he still had a cocked and loaded gun in his hand. With a dangerous weapon readily available for Slater to use, the person whom Slater had approached could not have known whether Slater was withdrawing from the conflict or whether Slater was retreating to gain tactical advantage. See 40 C.J.S. Homicide § 125 (1991) ("As long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to accept any act or statement as indicative of an intent to discontinue the assault."); see also Bryant, 336 S.C. at 346, 520 S.E.2d at 322 (finding the defendant failed to effectively communicate his withdrawal even though he threw down his knife because the defendant admitted the victim did not see him drop the knife). Because Slater failed to communicate his intent to withdraw, his right to use self-defense was never restored. Therefore, I find no error in the trial court's refusal to charge self-defense.

Because I disagree with the majority's decision to reverse on the failure to charge self-defense, I briefly address Slater's additional arguments on appeal. In addition to his argument regarding self-defense, Slater also contends the trial court erred by allowing the victim's mother to testify that her son did not have a criminal record.

Rule 404(a)(2), SCRE, states that although character evidence is generally not allowed, "[e]vidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case [is admissible when it is used] to rebut evidence that the victim was the first aggressor." Here, because the gist of Slater's defense at trial was that he had been shot at first, evidence regarding the victim's character was properly offered to rebut the inference that the victim may have been the initial shooter.[10] Therefore, I find no error in the trial court allowing this testimony.

[10] After the victim's mother testified, Slater presented testimony that powder residue on the victim's hands could have resulted from the victim firing a weapon, further indicating that the defense's strategy was to implicate the victim as the initial shooter.

Slater's final argument on appeal is that the trial court erred by admitting hearsay testimony of a police officer. I disagree.

At trial, Deshawn Brown, who was accompanying Slater on the night of the incident, testified he heard a gunshot earlier in the evening when he and Slater were "standing by the school by the gym." On redirect examination, Brown testified that he remembered giving a statement to the police. When asked whether he told the investigating officers that he heard gunshots earlier that night, Brown replied that he did not. Brown explained that he never told anyone about the gunshots he heard because, until the trial, he had never been asked about hearing any other gunshots that night.

At a later point in Slater's trial, the State questioned one of the officers who had questioned Brown, and the following exchange occurred:

> Q: Did you ask them about guns at the scene of the crime?
> A: Yes, I did.
> Q: Did you ask them about anybody else shooting at the scene of the crime?
> A: Yes, I did.
> Q: Well, when you were interviewing Deshawn Brown, did he ever tell you that he heard anybody else shooting out there?
> Defense Counsel: Objection, your Honor, that's not proper.
> The Court: No, sir, I will – no, sir, I'll permit that question. Go ahead.
> Q: Did he ever tell you that?
> A: I interviewed Deshawn Brown. He never once told us about anybody else shooting at the scene.

Slater contends on appeal that the above testimony was inadmissible hearsay because it refers to a statement "other than one made by the declarant while testifying at trial or hearing, offered into evidence to prove the truth of the matter asserted." See Rule 801(c), SCRE.

While the above testimony regarding the statements of Brown is hearsay, we find that it is admissible under Rule 613(b), SCRE. This rule provides, in pertinent part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

Rule 613(b), SCRE (emphasis added). When a witness is presented with the requisite circumstances surrounding an alleged inconsistent statement and nevertheless continues to deny before the court ever making the statement, another person's testimony that the witness did, in fact, make that statement is admissible under Rule 613(b), SCRE. See State v. Fossick, 333 S.C. 66, 69-70, 508 S.E.2d 32, 33 (1998).

In the case before us, the investigating officer testified that he asked all the witnesses (including Brown) about whether anyone else was shooting a weapon at the scene of the crime. He testified Brown had not told him about anyone else shooting. Because Brown denied ever being asked this question after he was presented with all the requisite circumstances, the officer's testimony constituted extrinsic evidence of a prior inconsistent statement and was admissible under Rule 613(b). Thus, the judge acted properly in overruling Slater's objections to the testimony.

Accordingly, based on the foregoing, I would affirm Slater's conviction.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Paul V. Degenhart, Appellant,

v.

Debra V. Burriss (f/k/a Debra V. Degenhart), Respondent.

Appeal From Richland County
Walter B. Brown, Jr., Family Court Judge

Opinion No. 3856
Heard June 24, 2004 – Filed August 16, 2004

AFFIRMED

J. Mark Taylor and M. Ronald McMahan, Jr., both of West Columbia, for Appellant.

Sandra R. Parise, of Columbia, for Respondent.

HEARN, C.J.: Paul V. Degenhart appeals a family court order denying his request for termination of alimony. We affirm.

FACTS

Paul V. Degenhart and Debra V. Burriss were married in 1989. The couple separated and entered into a written separation agreement in August 1999. Following one year of separation, they were divorced. The final divorce order incorporated the written separation agreement verbatim. The section of this agreement pertaining to alimony reads as follows:

> Husband agrees to pay Wife alimony in the amount of $2,500.00 per month payable on the 1st day of each month beginning with the month of September, 1999 for a period of the earlier of seven years or upon the remarriage of Wife.

Under the heading "Modification and Binding Effect of Agreement," the agreement provides:

> The provisions of this AGREEMENT shall not be modified or changed except by mutual consent and agreement of the parties expressed in writing.

Prior to the couple's divorce, but after entering into the separation agreement, Wife met William R. Hall. The two began spending the night together on a regular basis in November 1999, and they continue to share an exclusive sexual relationship. Wife and Hall began cohabitating in a rental house in September 2000, around the time of Husband and Wife's divorce. One year later, Wife and Hall purchased a home. The house was jointly titled and mortgaged, and the two equally divided the down payment and the tax deduction for the mortgage interest. Additionally, they have taken numerous vacations together. Despite their sexual relationship and cohabitation, Wife and Hall maintain separate bank accounts and do not hold themselves out to be married.

In August 2002, Husband initiated the underlying action for termination of his alimony obligation, based solely on the cohabitation of Wife and Hall. The family court denied his request, and Husband appeals.

STANDARD OF REVIEW

Questions concerning alimony rest within the sound discretion of the family court judge whose conclusion will not be disturbed absent a showing of abuse of discretion. Bryson v. Bryson, 347 S.C. 221, 224, 553 S.E.2d 493, 495 (Ct. App. 2001); Bannen v.Bannen, 286 S.C. 24, 26, 331 S.E.2d 379, 380 (Ct. App. 1985). "An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support." Bryson, 347 S.C. at 224, 553 S.E.2d at 495; McKnight v. McKnight, 283 S.C. 540, 543, 324 S.E.2d 91, 93 (Ct. App. 1984).

LAW / ANALYSIS

Based on the terms of Husband and Wife's agreement and the law of alimony modification, the family court determined it did not have the authority to modify Husband's alimony obligation. We agree.

Section 20-3-130 of the South Carolina Code (Supp. 2003) outlines in great detail the nature of alimony awards under South Carolina law. Subsection (G) states in relevant part: "The parties may agree in writing if properly approved by the court to make the payment of alimony as set forth [in this statute] **nonmodifiable and not subject to subsequent modification by the court**." S.C. Code Ann. § 20-3-130(G) (Supp. 2003) (emphasis added). While the family court normally has the authority to modify alimony,[1] once an alimony agreement that specifically disallows modification is approved by the court and merged into a judicial order, it is binding on the parties and the court and is not subject to modification. Moseley v. Mosier, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983) ("The parties may specifically agree that the amount of alimony may not ever be modified by the court . . .

[1] See, e.g., S.C. Code Ann. § 20-3-170 (1985) (providing that changed conditions may warrant a modification of alimony); Jeanes v. Jeanes, 255 S.C. 161, 164-65, 177 S.E.2d 537, 538 (1970) (modifying alimony due to cohabitation *in a situation where the agreement did not specifically deny the court the authority to do so*).

."); Croom v. Croom, 305 S.C. 158, 161, 406 S.E.2d 381, 383 (Ct. App. 1991).

In Croom, this court reversed the modification of an alimony obligation because the court-adopted alimony agreement provided "the terms and conditions of the agreement and **any court order approving it** 'shall not be modifiable by the parties **or any court** without written consent of the Husband and Wife.'" 305 S.C. at 159, 406 S.E.2d at 382 (emphasis added). Husband would have us find Croom inapposite to the case before us because this agreement lacks language specifically stating that the family court cannot modify the agreement. We disagree.

While this agreement does not expressly state that the family court *cannot* modify the agreement, it is clear and specific about how the agreement *can* be modified, that being "by mutual consent and agreement of the parties expressed in writing." Because the family court "must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully," we see no reason to require "magic words" for an unambiguous agreement to gain efficacy. Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997). The agreement here, by stating that its terms "shall not be modified or changed except by mutual consent," clearly denies the family court the jurisdiction to modify the agreement by its own authority or at the behest of only one of the parties. Therefore, it was properly enforced.

Husband also contends that recent case law and amendments to section 20-3-150 of the South Carolina Code may, in certain situations, trump the longstanding rule that alimony agreements can be made nonmodifiable by agreement of the parties. Again, we disagree.

In the case of Bryson v. Bryson, 347 S.C. 221, 224-25, 553 S.E.2d 493, 494 (Ct. App. 2001), this court held certain relationships, although not legal marriages, could by their nature constitute relationships "tantamount to marriage" and warrant alimony modification pursuant to section 20-3-170. See also S.C. Code Ann. § 20-3-170 (1985) (providing that changed

circumstances may warrant a modification or termination of alimony). A substantial element of determining whether a relationship is tantamount to marriage is the cohabitation of the parties. See Bryson, 347 S.C. at 226 n.7, 553 S.E.2d at 496 n.7. Later amendments to section 20-3-150, further defining "cohabitation" as previously applied in Bryson, read as follows:

> [U]pon the remarriage **or continued cohabitation** of the supported spouse the amount fixed in the decree for his or her support shall cease, and no further alimony payments may be required from the supporting spouse.
>
> **For purposes of this subsection and unless otherwise agreed to in writing by the parties, "continued cohabitation" means the supported spouse resides with another person in a romantic relationship for a period of ninety or more consecutive days.**

(Emphasis added to relevant 2002 amendments.)

We first note that Bryson did not concern an alimony agreement with terms that made the agreement nonmodifiable by the family court and therefore is not specifically applicable to the case at bar. Nothing in this court's holding in Bryson changed the longstanding rule that parties could agree to make alimony nonmodifiable. See Bryson, 347 S.C. at 224-25, 553 S.E.2d at 495 ("Thus, the doctrines of law of the case and res judicata do not apply to those family court actions **that are modifiable** based on changes in circumstances.") (emphasis added). Furthermore, because "the legislature cannot create a statute which applies retroactively to divest vested rights," the 2002 amendments to section 20-3-150 have absolutely no bearing on Husband and Wife's agreement, which was incorporated into an order in 2000. Russo v. Sutton, 310 S.C. 200, 205 n.5, 422 S.E.2d 750, 753 n.5 (1992).

Accordingly, the order of the family court is

AFFIRMED.

STILWELL, J. and CURETON, A.J., concur.