Judicial Merit Selection Commission

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House of Representatives Counsel
Nancy V. Coombs
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S. Phillip Lenski
Senate Counsel

MEDIA RELEASE
August 28, 2007

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of his/her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Chief Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

The Commission will not accept applications after **12:00 Noon on Friday, September 28, 2007.**

A vacancy will exist in the office currently held by the Honorable James E. Moore, Associate Justice of the Supreme Court, Seat 3, upon Judge Moore's retirement on or before July 31, 2008. The term of this office expires on July 31, 2008.

A vacancy exists in the office formerly held by the Honorable Donald W. Beatty, Judge of the Court of Appeals, Seat 6. The successor will fill the unexpired term of that office which will expire on June 30, 2009, and the subsequent full term which will expire on June 30, 2015.

A vacancy will exist in the office currently held by the Honorable Daniel F. Pieper, Judge of the Circuit Court for the Ninth Judicial Circuit, Seat 2 due to his election to the Court of Appeals, Seat 7 on May 23, 2007. The successor will fill the unexpired term of that office which will expire on June 30, 2012.

The term of the office currently held by the Honorable Alison Renee Lee, Judge of the Circuit Court, At-Large, Seat 11, will expire on June 30, 2008.

The term of the office currently held by the Honorable Thomas A. Russo, Judge of the Circuit Court, At-Large, Seat 12, will expire on June 30, 2008.

A vacancy exists in the office formerly held by the Honorable John L. Breeden, Jr., Judge of the Circuit Court, At-Large, Seat 13. The successor will fill the unexpired term of that office which will expire on June 30, 2008, and the subsequent full term which will expire on June 30, 2014.

The term of the office currently held by the Honorable James A. Spruill, III, Judge of the Family Court for the Fourth Judicial Circuit, Seat 3, will expire on June 30, 2008.

A vacancy exists in the office formerly held by the late Honorable Rolly W. Jacobs, Judge of the Family Court for the Fifth Judicial Circuit, Seat 3. The successor will fill the unexpired term of that office which will expire on June 30, 2013.

A vacancy exists in the office formerly held by the late Honorable Walter B. Brown, Jr., Judge of the Family Court for the Sixth Judicial Circuit, Seat 2. The successor will fill the unexpired term of that office which will expire on June 30, 2008, and the subsequent full term which will expire on June 30, 2014.

The term of the office currently held by the Honorable Jocelyn B. Cate, Judge of the Family Court for the Ninth Judicial Circuit, Seat 5, will expire on June 30, 2008.

A vacancy exists in the office formerly held by the late Honorable Mary E. Buchan, Judge of the Family Court for the Twelfth Judicial Circuit, Seat 1. The successor will fill the unexpired term of that office which will expire on June 30, 2013.

The term of the office currently held by the Honorable Robert N. Jenkins, Sr., Judge of the Family Court for the Thirteenth Judicial Circuit, Seat 5, will expire on June 30, 2008.

A vacancy will exist in the office currently held by the Honorable Jane Dowling Fender, Judge of the Family Court for the Fourteenth Judicial Circuit, Seat 2, upon Judge Fender's retirement on or before December 31, 2007. The successor will fill the unexpired term of that office which will expire on June 30, 2010.

A vacancy will exist in the office currently held by the Honorable Haskell T. Abbott, III, Judge of the Family Court for the Fifteenth Judicial Circuit, Seat 3, upon Judge Abbott's retirement on or before June 30, 2008. The term of this office expires on June 30, 2008.

The term of the office currently held by the Honorable Paige J. Gossett, Judge of the Administrative Law Court, Seat 5, will expire on June 30, 2008.

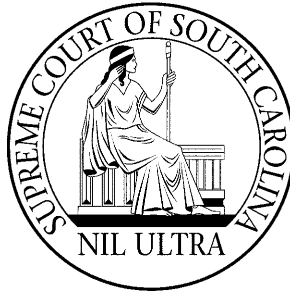
The term of the office currently held by the Honorable Robert E. Watson, Master-in-Equity for the Ninth Circuit (Berkeley County), will expire on November 7, 2008.

A vacancy exists in the office formerly held by the Honorable Benjamin H. Culbertson, Master-in-Equity for the Fifteenth Circuit (Georgetown County). The successor will fill the unexpired term of that office which will expire on January 1, 2013.

A vacancy exists in the office formerly held by the Honorable Linwood S. Evans, Jr., Master-in-Equity for the Third Circuit (Sumter County). The successor will fill the unexpired term of that office which will expire on December 31, 2010.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

* * *



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33

September 4, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Eddie Roberts, Petitioner,

v.

Glen LaConey, d/b/a Refunds Plus, Respondent.

Opinion No. 26376
Submitted August 14, 2007 – Filed September 4, 2007

IN THE ORIGINAL JURISDICTION

Harry Clayton DePew, Law Office of Harry DePew, of Columbia, for Petitioner.

Glen K. LaConey, Refunds Plus, of Columbia, for Respondent.

H. Clayton Walker, Jr., and Robert L. Reibold, of Walker & Reibold, of Columbia, for Bridgewood Homes, Inc., Amicus Curiae.

PER CURIAM: We accepted this declaratory judgment matter in our original jurisdiction, pursuant to In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. 304, 422 S.E.2d 123 (1992), to determine if respondent has engaged in the unauthorized practice of law. We also granted a motion for leave to file an amicus brief filed by Bridgewood Homes, Inc. The matter was referred to a Special Referee, by order dated May 17, 2005, to take evidence and issue a report containing proposed findings of fact and recommendations to the Court.

The Special Referee issued a Report of Proposed Findings of Fact and Conclusions of Law recommending this Court find respondent engaged in the unauthorized practice of law. Thereafter, respondent was the only party to file exceptions to the Report. A schedule for serving and filing the briefs and record in this matter was established. However, respondent failed to serve and file a record or brief as instructed.

Rule 208(a)(4), SCACR, states that if an appellant fails to file a brief, the appeal will be dismissed. Because respondent is the party objecting to the Special Referee's report by way of exceptions, and was instructed to serve and file the record and a brief addressing the exceptions, he is in the posture of an appellant. Accordingly, because he has failed to file a brief in the matter, we hereby dismiss his exceptions and, because we agree that respondent has engaged in the unauthorized practice of law, we adopt the following Report of the Special Referee as the opinion of this Court.

SPECIAL REFEREE'S REPORT OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was filed in the original jurisdiction of the Supreme Court of South Carolina. The Court appointed me as a special referee to take evidence and issue a report containing proposed findings of fact and recommendations concerning Petitioner's allegations that the Respondent has engaged in the unauthorized practice of law.

I. Petitioner's Allegations

The allegations turn on a document titled "Notice of Assignment and Assignment of Judgment," which Petitioner contends is essentially a contingency fee agreement for legal services, in which Respondent agreed to attempt to collect a judgment in exchange for a fee of approximately one-third. Petitioner contends that, under the terms of this agreement, Respondent engaged in the unauthorized practice of law in attempting to collect the judgment.

II. Proposed Findings of Fact

On January 3, 1996, Paul W. Nickoson[] obtained a judgment in the amount of $7587.67 against Eddie Roberts, d/b/a Eddie Roberts Auto Service. Respondent approached Nickoson about attempting to collect this judgment.[1] On August 17, 2004, Nickoson and Respondent executed a document entitled "Notice of Assignment and Assignment of Judgment." The document provides in important part:

> I, Paul W. Nickoson, Judgment Creditor in the above entitled actions, (hereinafter "Assignor"), do hereby transfer, assign and setover the Judgment rendered to me in this action to REFUNDS PLUS . . . (hereinafter "Assignee") in exchange for a retention of a (66.6%) interest in the amount recovered by Assignee.
>
> ***
>
> Assignee, it's agents, assigns and successors shall have full authority to settle, compromise and enforce said Judgment, and Assignor withdraws all right to same.

(Reference to exhibits omitted).

On August 27, 2004, Respondent began the process of execution of the judgment by having the Richland County Clerk of Court command the Sheriff of Richland County to satisfy the judgment out of the personal or real property of Roberts. . . . Respondent signed the Execution Against Property as "Plaintiff's Attorneys."

[1] It was not possible for the Special Referee to determine the precise manner in which Respondent solicited the opportunity to collect this judgment, because Respondent chose not to show up for the hearing. However, it is clear from the evidence that was presented that respondent solicited the business of collecting this and other judgments. This evidence includes the fact that Respondent operated under the business name of Refunds Plus.

On September 2, 2004, Respondent wrote a letter to Roberts explaining that he was going to begin efforts to collect the judgment that he claimed had been "assigned" to him. (Reference to exhibit omitted). In this letter, Respondent explains the manner in which he planned to collect the judgment, including the manner in which he planned to use the judicial process. Specifically, Respondent stated his intention to file an action in the "Master-in-Equity Court to Order you to appear with your . . . financial records . . . and testify under oath . . . ." Respondent offered several legal opinions in the letter, including that a corporation Roberts apparently owned "would be held jointly and severably liable for this debt." He also made several threats about consequences Roberts would face if he did not cooperate and willingly satisfy the judgment.[2]

On September 17, 2004, Respondent served "Plaintiff's Request for Production of Documents" on Roberts, with an attached "Exhibit A" listing seventeen categories of documents Roberts was required to produce. (Reference to exhibit omitted). Respondent amended the Request for Production on September 18, 2004. (Reference to exhibit omitted). On September 29, 2004, Respondent again wrote Roberts making additional threats about how he would use the judicial process and the consequences Roberts would face if he did not pay the judgment. (Reference to exhibit omitted).

On February 8, 2005, Respondent filed a "Notice of Motion and Motion for Supplementary Proceedings." (Reference to exhibit omitted). This motion resulted in an "Order of Reference and Rule to Show Cause" signed on February 15, requiring Roberts to attend a hearing and bring all his financial records. The Honorable Joseph Strickland, Master in Equity for Richland County, held a hearing sometime later and Respondent personally appeared as the representative of the judgment holder. Finally, on February 28, 2005, Respondent wrote Roberts again threatening consequences of not claiming mail sent to Roberts, and threatening to "have you ARRESTED and

[2] Many of these threats are entirely inappropriate, and would violate the Rules of Professional Conduct if made by a lawyer. However, this aspect of Respondent's conduct is not before me.

brought to court in restraints the way Moses was brought before Pharoah in the movie, 'The Ten commandments.'"

III. Applicable Law

"The generally understood definition of the practice of law embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts." *Brown v. Coe*, 365 S.C. 137, 139, 616 S.E.2d 705, 706-07 (2005)(*citing Doe v. McMaster*, 355 S.C. 306, 311, 585 S.E.2d 773, 775-77 (2003); *State v. Despain*, 319 S.C. 317, 319 460 S.E.2d 576, 577 (1995); *In re Duncan*, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909)). "The practice of law 'is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability.'" *Linder v. Insurance Claims Consultants, Inc.*, 348 S.C. 477, 487, 560 S.E.2d 612, 617 (2002) (*quoting State v. Buyers Services Co., Inc.*, 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987)). Other than these general statements, there is no comprehensive definition of the practice of law. *See Linder*, 348 S.C. at 487, 560 S.E.2d at 617-18. Rather, what constitutes the practice of law must be decided on the facts and in the context of each individual case.

IV. Proposed Conclusions of Law

The "Notice of Assignment and Assignment of Judgment" is not an assignment of the judgment as it purports to be. The original judgment holder retained an ownership interest in the judgment. Respondent gained an interest that had value only on the successful collection of some portion of it. Respondent paid nothing for the interest he acquired. He was to be paid, if at all, only when the judgment was collected. The practical effect of their agreement is that Respondent was to be paid a fee to collect the debt. Therefore, the supposed "assignee," Respondent, was not acting entirely on his own behalf, but on behalf of the original judgment holder. Respondent could not have been practicing law if he had been acting on his own behalf under a true assignment. However, because he was acting on behalf of the original judgment holder, his actions must be examined to determine whether they constitute the practice of law.

Respondent did many things on behalf of the judgment holder in the collection of this debt that meet the general definition of the practice of law. He prepared "pleadings, and other papers incident to actions and special proceedings." *See Brown*, 365 S.C. at 139, 616 S.E.2d at 706-07. These include "Plaintiff's Request for Production of Documents," the "Notice of Motion and Motion for Supplementary Proceedings," and the "Execution Against Judgment."

Respondent also managed the collection action "on behalf of [the judgment holder] before judges and courts." *See Id*. For example, Respondent prepared "Execution Against Judgment" and had it signed by the Clerk of the Circuit Court directing the Sheriff to satisfy the judgment. His "management" activities also include serving the Request for Production on Roberts, and filing the Motion he prepared in the Equity Division of the Circuit Court. He used the "Motion" to obtain an "Order of Reference and Rule to Show Cause." Most importantly, he appeared at a hearing before the Equity Division on behalf of the judgment holder.

In addition, Respondent developed a strategy to use in collecting the debt for Nickoson. In furtherance of this strategy, he sent letters to Roberts that were designed to induce him to pay the judgment. Some of these letters contained legal opinions formulated by Respondent. This is the type of strategic activity which the Supreme Court referred to in *Linder* as entailing "specialized legal knowledge and ability." 348 S.C. at 487, 560 S.E.2d at 617.

Finally, in determining whether someone is practicing law, it is important to consider representations the person makes about his own activity. As mentioned above, Respondent represented on the signature line of the "Execution Against Judgment" that he was acting as "Plaintiff's Attorneys." Despite the fact that this language appears to be part of the printed form Respondent was using, by signing the form as he did, Respondent made a public statement as to the role he was playing in collecting the judgment. The use of this language in a document being

served on a judgment debtor is reasonably understood to increase the chances of collecting the debt.

Other states have considered whether similar activity constitutes the unauthorized practice of law. In *Iowa Supreme Court Comm'n on Unauthorized Practice of Law v. A-1 Assocs, Ltd.*, 623 N.W.2d 803 (2001), the Supreme Court of Iowa concluded that an instrument similar to the "Notice of Assignment and Assignment of Judgment" used by Respondent was not in fact an assignment of a judgment, but was an agreement for collection services such as a lawyer would perform. The court noted that if the instrument truly had been an assignment, then the assignee could have attempted to collect the judgment without engaging in the practice of law. The court went on to state "A-1's claimed status as a bona fide assignee is defeated under this record, however, because the assignment – though absolute in form – is, in fact, a transfer intended primarily to secure payment for services rendered. (citation omitted). This is demonstrated by the fact that A-1 pays nothing for the purported 'assignment.' . . . Courts throughout the country have condemned this practice as an attempt by collection agencies to accomplish indirectly what the law otherwise prohibits." (citation omitted). 623 N.W.2d at 808. The court concluded that A-1 Associated, Ltd. had engaged in the unauthorized practice of law. "So long as A-1 is not representing its own legal interests . . ., but the legal interests of others, it is engaging – without license or other authorization – in the practice of law." 623 N.W.2d at 808-09.

In *State ex rel. State Bar of Wisconsin v. Bonded Collections, Inc.*, 36 Wis.2d 643, 154 N.W.2d 250 (1967),[3] the Supreme Court of Wisconsin considered the following issue: "Does a course of conduct whereby a collection agency takes assignments of accounts for collection, . . ., brings suit in its own name, and then pursuant to a prior agreement deducts from the proceeds, costs, and a fixed percentage as its fee and remits the balance to the creditor, constitute the unauthorized practice of law?" 154 N.W.2d at 253-54. In concluding that it does, the court stated "[i]t is sheer hypocrisy to

[3] In this case, the collection agency actually hired a lawyer to represent it in court. The basis of the court's decision, however, was that the collection agency was practicing law by representing the creditor, and the fact that the agency hired a lawyer to do so did not change that.

conclude that the percentage retained by the collection agency represents its equity or ownership share of the claim. It is its fee or charge for professional services rendered." 154 N.W.2d at 256. The Wisconsin court also noted that "[t]he collection agency by going into court representing itself as the client perpetrates a fraud on the court." *Id.*

See also State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc., 85 N.M. 521, 514 P.2d 40, 49 (1973) (assignments procured by credit bureau not truly taken to acquire title and ownership but to facilitate delivery of legal services for consideration constitute unauthorized practice of law); *State ex rel. Frieson v. Isner*, 168 W.Va.758, 285 S.E.2d 641, 651-52 (1981) (citing numerous cases to support conclusion that assignment taken solely to maintain suit on creditor's claim is sham perpetrated on court to enable unauthorized practice of law).

CONCLUSION

Based on the foregoing, we conclude respondent's actions, as outlined in this matter, constitute the unauthorized practice of law.

JUDGMENT DECLARED.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Christine Callahan, Employee, Respondent,

v.

Beaufort County School District, Employer, and S.C. School Boards Insurance Trust, Carrier, Appellants.

Appeal From Beaufort County
Curtis L. Coltrane, Circuit Court Judge

Opinion No. 26377
Heard May 22, 2007 – Filed September 4, 2007

AFFIRMED AS MODIFIED

Kirsten L. Barr, of Trask & Howell, of Mt. Pleasant, for Appellants.

William B. Harvey, III, of Harvey & Battey, of Beaufort, for Respondent.

JUSTICE PLEICONES: This is a workers' compensation appeal. The single commissioner denied workers' compensation benefits due to the claimant's failure to provide notice of her third-party suit as required by S.C. Code Ann. § 42-1-560(b) (1985). The full commission affirmed, and

claimant appealed to the circuit court. The circuit court reversed, holding that the lack of notice had not prevented the "equitable adjustment of the rights of all the parties" because the third-party suit never reached a final determination on the merits. Beaufort County School District ("Employer") appealed, and we certified the appeal pursuant to Rule 204, SCACR. We affirm as modified.

FACTS

Christine Callahan ("Claimant") alleged injuries due to exposure to chemicals at Battery Creek High School on November 14, 2002. Employer and the South Carolina School Boards Insurance Trust ("Carrier") denied workers' compensation benefits. Claimant filed a Form 50 on January 17, 2003, to request a hearing.

On January 24, 2003, Claimant filed a civil action against a third-party, Tech Clean Industries, based on the same injuries alleged in the workers' compensation action. However, it was not until July 16, 2003, that the Claimant filed and served a Form S-2, providing the Commission, Employer, and Carrier with notice of her intent to pursue both a workers' compensation claim and a third-party civil action for the same injuries. Claimant voluntarily dismissed the third-party action without prejudice in November 2003.[1]

ISSUE

Did the circuit court err by failing to find Claimant's workers' compensation claim is barred because she did not provide notice of her third-party action within thirty days of its commencement, in accordance with the requirements of S.C. Code Ann. § 42-1-560(b)?

[1] Although it is unclear from the record whether Claimant re-filed the third-party action, the Court was made aware at oral argument that Claimant later re-filed the third-party action against Tech Clean. We offer no opinion on the efficacy of this re-filing.

ANALYSIS

Review of a decision of the workers' compensation commission is governed by the Administrative Procedures Act. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). We may reverse where the decision is affected by an error of law. Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); S.C. Code Ann. § 1-23-380(A)(5)(d) (Supp. 2006).

South Carolina Code Ann. § 42-1-560 sets forth the requirements for simultaneously pursuing a third-party action and a workers' compensation claim. The statute provides:

> Notice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission].

S.C. Code Ann. § 42-1-560(b). An injured party may proceed against both the employer-carrier and against a third-party tortfeasor by complying with the requirements of § 42-1-560. Fisher v. S.C. Dept. of Mental Retardation-Coastal Center, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982); Hudson v. Townsend Saw Chain Co., 296 S.C. 17, 20, 370 S.E.2d 104, 106 (Ct. App. 1998) ("[subsection (b)] plainly requires an employee, when he or she brings a third-party action, to give notice to the Commission, the employer, and the employer's carrier of the commencement of the third-party action within 30 days of its commencement.").

In this case, Claimant did not provide the Form S-2 to the Commission, Employer, and Carrier until July 2003, nearly six months after she initially filed her third-party suit and three months after the action had been removed to federal court.

Because workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, we strictly construe the requirements of § 42-1-560 and leave it to the legislature to

amend and define its ambiguities. *Cf.* Wigfall v. Tideland Util., Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). Here, the statute clearly requires timely notice to be given to all three entities- employer, carrier, and Commission- on the Form S-2.[2]

We find the circuit court erred by excusing compliance with the statute based on the "equitable adjustment of the rights of all the parties." Even though the employer had not lost its right of subrogation against the potentially responsible third-party, the statutory provision mandates notice to the employer, carrier, and Commission within thirty days of filing the third-party suit. It was improper for the circuit court to conduct an equity analysis to carve an exception to the workers' compensation notice requirement. *See* Wigfall, *supra*; Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Commn, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) (holding that a court's equitable powers must yield in the face of an unambiguously worded statute).

Despite Claimant's failure to comply with § 42-1-560, we nonetheless affirm the circuit court's finding that her workers' compensation claim may proceed. In this case, Claimant voluntarily dismissed her third-party suit pursuant to Rule 41, FRCP. A voluntary dismissal leaves the situation as

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[2] This holding does not conflict with our past cases. This Court previously held that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had actual knowledge of the third-party suit. Fisher, *supra*; *see also* Hardee v. Bruce Johnson Trucking Co., 293 S.C. 349, 354-355, 360 S.E.2d 522, 525 (Ct. App. 1987)(discussing the facts of Fisher). Additionally, prior cases interpreting this statute have found that prejudice should not be considered. *See* Hudson, *supra* (finding claimant's prejudice argument "unpersuasive, if in fact the question of prejudice is relevant at all")(citing Stroy v. Millwood Drug Store, 235 S.C. 52, 109 S.E.2d 706 (1959)); Kimmer v. Murata, 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006)(holding that "prejudice is 'NOT' an element to be considered in regard to the failure to give mandated statutory notice.").

though no suit had ever been filed. 9 Wright & Miller, *Federal Practice & Procedure 2d* § 2367, at 321 (1995); Allen v. S. Ry. Co., 218 S.C. 291, 297-298, 62 S.E.2d 507, 511 (1950). Following this rule, the third-party suit originally filed in January 2003 became a nullity, and § 42-1-560 is not applicable. As a result, there is no violation of § 42-1-560 when the third-party suit is treated as never being filed.

CONCLUSION

We hold that § 42-1-560(b) must be strictly followed in order for a claimant to preserve her right to proceed against both an employer and a third-party. On the facts before us, Claimant's voluntary dismissal without prejudice of her third-party suit allows her to proceed with her workers' compensation claim. Accordingly, the decision of the circuit court is

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, BURNETT, JJ., and Acting Justice R. Ferrell Cothran, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sherrie Jean Floyd, Respondent,

v.

Richard Morgan, Jr., Appellant.

Appeal From Lexington County
Rolly W. Jacobs, Family Court Judge

Opinion No. 4289
Submitted May 1, 2007 – Filed August 23, 2007

AFFIRMED

J. Mark Taylor and Katherine Carruth Link, both of Columbia, for Appellant.

Richard Giles Whiting and Spencer Andrew Syrett, both of Columbia, for Respondent.

CURETON, A.J.: Richard Morgan (Father) appeals from a family court order granting Sherrie Jean Floyd's (Mother) request for a child support

reduction. Father further argues the family court erred in modifying a contractual term of the parties' settlement agreement, and in denying his request for attorney's fees. We affirm.[1]

FACTS

In August 2000, the family court granted Father a divorce from Mother on the ground of adultery. Pursuant to an agreement of the parties, the court granted sole custody of the parties' two minor children to Father, and visitation in excess of 109 overnights per year to Mother. Mother agreed to pay child support in the amount of $920 per month. The amount of child support was calculated by the parties pursuant to Worksheet A of the South Carolina Child Support Guidelines (the guidelines). Mother also agreed to pay Father $17,500 in attorney's fees and costs. All of these provisions were part of a negotiated settlement agreement approved by the family court and incorporated into the divorce decree.

In May 2004, Mother sought sole custody of the children or, alternatively, a shared or joint custody arrangement. Mother also sought modification of her child support. Upon request of both Father and Mother, the court appointed a guardian ad litem for the children. Father and Mother agreed that because Father's income had increased and Mother's income had decreased, they would temporarily reduce Mother's child support payment from $920 to $808 per month while the action was pending. This reduction was approved by the court. Again in 2006, Father and Mother agreed to modify their original agreement as to visitation, but not materially modifying the number of overnight visits the mother had with the children.

However, the parties did not reach an agreement as to two issues: (1) Mother's request to permanently modify child support, and (2) both Mother's and Father's requests for attorney's fees and costs. The parties disputed whether child support should be calculated in accordance with Worksheet A (for sole custody) or Worksheet C (for shared custody) of the guidelines.[2]

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

In June 2006, the court granted Mother's request to modify the provisions of the divorce decree regarding child support, finding the changes in the parties' incomes and the elimination of child care expenses in the amount of $544.00 per month constituted a change of circumstances. The court further held that it would exercise its discretion and calculate Mother's new child support obligation utilizing Worksheet C of the guidelines, instead of Worksheet A. Utilizing the guidelines, the court reduced Mother's child support obligation to $152 per month. The court additionally ordered that each party be responsible for his or her own attorney's fees and costs. This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, this court may find facts in accordance with our own view of the preponderance of the evidence. Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 189, 612 S.E.2d 707, 711 (Ct. App. 2005) (citing Emery v. Smith, 361 S.C. 207, 213, 603 S.E.2d 598, 601 (Ct. App. 2004)). However, this broad scope of review does not require us to disregard the family court's findings. Bowers v. Bowers, 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct. App. 2002); Badeaux v. Davis, 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct. App. 1999).

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[2] Neither party testified at the hearing before the trial court. Instead, both parties' attorneys made statements to the court, which were essentially undisputed by opposing counsel. The record on appeal contains the affidavit of Father's counsel requesting attorney fees, but we are uninformed what other documents, if any, were before the trial court. The trial court's order indicates the Mother submitted some documentation as to additional sums she spent on the children over and above the support she paid the Father.

LAW/ANALYSIS

I. Modification of Child Support

Father contends the family court erred in granting Mother's request for a reduction in child support when there was no evidence to support the court's finding of a change in circumstances with respect to the level of Mother's overnight visitation. We disagree.

The family court may always modify child support upon a proper showing of a change in either the child's needs or the supporting parent's financial ability. Upchurch v. Upchurch, 367 S.C. 16, 26, 624 S.E.2d 643, 647-48 (2006) (citing Moseley v. Mosier, 279 S.C. 348, 351, 306 S.E.2d 624, 626 (1983)). The party seeking the modification has the burden to show changed circumstances. Id. at 26, 624 S.E.2d at 648. This burden is increased where the child support award is based on a settlement agreement. Id. Moreover, changes within the contemplation of the parties at the time of the initial decree are not sufficient bases for the modification of a child support award. Id.

In the present case, the family court placed great emphasis on the substantial changes in the parties' incomes. In its June 14, 2006 order, the court noted that at the time of the divorce in 2000, Father earned $4000 per month in income, while Mother earned $4067. By the time of the initial hearing in 2004, Father's monthly income increased 29% to $5150, while Mother's income only increased 18% to $4800. By 2005, Father's income increased again to $5421, while Mother's income decreased to $4785. Then, at the time of the final hearing in 2006, Father's income increased to $5700, while Mother's income increased back to $4800. The court concluded that in 2006, Father's income increased 43% from 2000, while Mother's income increased only 18% between 2000 and 2006. Additionally, the court noted that child care expenses, which were apparently paid by Father, no longer existed and that the medical expenses had not changed substantially since the 2000 decree.

We agree with the family court that the above mentioned changes were significant enough to support a finding of a substantial or material change of circumstances warranting a modification of child support. See Rogers v. Rogers, 343 S.C. 329, 540 S.E. 2d 840 (2001) (holding Father's 21% increase in income, as compared to Mother's 8% increase in income, together with increased child care expenses warranted increase in child support).

II. Calculation of Amount of Child Support

Father contends the family court erred in modifying a contractual term of the parties' negotiated settlement agreement, from the use of Worksheet A to Worksheet C to govern Mother's child support obligation, inasmuch as the Mother's overnight visitation did not materially change. We disagree.

Whether or not the family court had discretion upon a finding of change of circumstances to change the method of calculating child support, utilizing a different guidelines worksheet when there was no material change in the number of overnight visits, is a novel issue in South Carolina. As previously stated, ordinarily, a party seeking to modify an existing child support obligation has the burden of establishing changed circumstances. Upchurch, 367 S.C. at 26, 624 S.E.2d at 648. To warrant a change in child support, the change of circumstances must be substantial or material. Townsend v. Townsend, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003).

South Carolina Code Annotated section 20-7-852(A) (Supp. 2006) states that "[i]n any proceeding for the award of child support, there is a rebuttable presumption that the amount of the award which would result from the application of the guidelines required under section 43-5-580(b) is the correct amount of child support to be awarded." A different amount may be awarded only "upon a showing that application of the guidelines in a particular case would be unjust or inappropriate." Id. Moreover, "[w]hen the court orders a child support award that varies significantly from the amount resulting from the application of the guidelines, the court shall make specific, written findings of those facts upon which it bases its conclusion supporting

that award." Id. Section 20-7-852(C) (Supp. 2006) states a court "shall" consider certain factors which ". . . may be used in determining whether a change of circumstances has occurred which would require a modification of an existing order." Among other reasons, section 20-7-852(C)(11) states the court may consider "substantial disparity of incomes in which the noncustodial parent's income is significantly less than the custodial parent's income, thus making it financially impractical to pay what the guidelines indicate the noncustodial parent should pay."

Regulation 114-4720 of the South Carolina Code (Supp. 2006) provides the court can determine the total child support obligation by adding the basic child support as provided in the guidelines to health insurance premiums and child care costs. Thereafter, "the total child support obligation is divided between the parents in proportion to their incomes." S.C. Code Ann. Regs. 114-4720(A)(15)(a) (Supp. 2006). There is no contention by the parties that the trial court did not properly compute each parent's child support obligation based upon a literal application of the guidelines.

Further, regulation 114-4730(A) of the South Carolina Code (Supp. 2006) provides that "[w]hen both parents are deemed fit, and other relevant logistical circumstances apply, shared custody should be encouraged . . . ." The regulation states further that shared custody adjustments are advisory, not mandatory. Id. Additionally, if each parent has court-ordered visitation with the children overnight for more than 109 nights each year and both parents contribute to the expenses of the children in addition to the payment of child support, the court may make a "shared custody adjustment," which "shall be calculated using Worksheet C." Id. The regulation goes on to explain that "if the 109 overnights threshold is reached for shared physical custody, this adjustment may be applied even if one parent has sole legal custody." Id.

In 2000, at the time Father and Mother entered into the agreement in question, Mother's visitations were approximately 147 overnights visits per year, which was clearly in excess of the 109 overnight visits required to put into play the shared parenting provisions of the guidelines. Despite the number of overnight visits granted, Mother agreed to pay Father $920 per

month in child support based upon figures set forth in an attached "Child Support Obligation: Worksheet A." Although Mother's attorney argued to the trial court in this case that the Mother knew nothing about the various worksheets when she signed the 2000 agreement, the agreement declares both parties entered into the agreement freely, not under duress or undue influence, and that they actively took part in the negotiations. Additionally, the family court found the agreement to be fair, equitable and reasonable, and approved the agreement as incorporated and merged into the divorce decree. Nevertheless, the 2000 decree does not explain why there was a deviation from the amount that should have presumably been awarded by application of the guidelines. Nor, did the decree or agreement in any way bind the parties to the use of worksheet A in future child support calculations based on a change of circumstances.

In the groundbreaking 1983 case of Moseley v. Mosier, supra, our supreme court stated in rather specific terms that "family courts have continuing jurisdiction to do whatever is in the best interest of the child regardless of what the separation agreement specified." Moseley, 279 S.C. at 351, 306 S.E.2d at 626. Moreover, it is clear that a merged child support agreement loses its contractual character after it is judicially decreed as mandated by Moseley. Emery v. Smith, 361 S.C. 207, 214, 603 S.E.2d 598, 601-03 (Ct. App. 2004).

While no South Carolina case touches upon the scenario of this case, the North Carolina case of Beamer v. Beamer, 610 S.E.2d 220 (N.C. Ct. App. 2005), reflects on how our sister state views the matter. In Beamer, the court reversed the trial court deviation from the guidelines for lack of specific findings of fact to support the "(1) the reasonable needs of the children and (2) the basis for the amount of child support ultimately awarded." Id. at 221. Procedurally, the court stated, however, that "[o]nce a substantial change in circumstances has been shown by the party seeking modification, the trial court then 'proceeds to follow the Guidelines and to compute the appropriate amount of child support.' " Id. at 222 (citing Davis v. Risley, 411 S.E.2d 171, 173 (N.C. Ct. App. 1991)).

The parties are in agreement that Mother has custody of the children approximately 147 overnights per year or roughly 40% of the time. The idea behind the adjustments for shared custody is that the party having custody of the children during a certain time period will take care of most of the children's needs during the time he/she has custody. See S.C. Code Ann. Regs. 114-4730(A). As we read the statute and regulation, they presume that the appropriate amount of support in a shared parenting arrangement is the amount resulting from an application of the guidelines. Since neither party claims the trial judge should have deviated from the guidelines due to any of the statutory reasons set forth in section 20-7-852(C),[3] or that the modification of Mother's support obligation will somehow adversely affect the welfare of the children, we think it was simply a mathematical calculation on the part of the trial court to establish support based on the guidelines. Therefore, we hold the trial court had discretion to apply the guidelines then in effect upon a showing of a substantial change of circumstances.

III. Attorney's Fees

Father contends the family court erred in denying him attorney's fees when he was the prevailing party with respect to the issues raised in this action. We disagree.

Attorney's fees may be assessed against a party in an action brought in the family court. S.C. Code Ann. § 20-7-420(38) (Supp. 2005); Patel v. Patel, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004). The award of attorney's fees is within the discretion of the court. Hailey v. Hailey, 357 S.C. 18, 31, 590 S.E.2d 495, 502 (Ct. App. 2003). The family court's decision regarding attorney's fees will not be disturbed absent an abuse of discretion. Green v. Green, 320 S.C. 347, 353, 465 S.E.2d 130, 134 (Ct. App. 1995).

[3] We recognize that arguably Father contends the parties' agreement from 2000 is a sufficient basis to not apply the worksheet component of the statute, but we read section 20-7-852(C)(13) to apply in the present situation to the 2000 support order only, inasmuch as the parties reached no agreement as to child support in 2006.

In deciding whether to award attorney's fees, the family court should consider: (1) each party's ability to pay his or her own fees; (2) the beneficial results obtained by counsel; (3) the respective financial condition of each party; and (4) the effect of the fee on each party's standard of living. Upchurch, 367 S.C. at 28, 624 S.E.2d at 648-49; Browning v. Browning, 366 S.C. 255, 269, 621 S.E.2d 389, 396 (Ct. App. 2005).

Here, Mother brought this action for a change in custody. Although the parties settled the custody aspect of the case, we have concluded the family court did not err in reducing Mother's child support. We thus hold that neither party prevailed. In any event, the family court ordered that each party be responsible for his or her own attorney's fees and costs. We therefore find that the family court did not err in denying Father attorney's fees and costs.

CONCLUSION

Based on the foregoing, we find the family court did not err by granting Mother's request for a reduction in child support. We also find the family court did not err by modifying a contractual term of the parties' negotiated settlement agreement, from the use of Worksheet A to Worksheet C of the child support guidelines, to govern Mother's child support obligation. Accordingly, the family court's decision is

AFFIRMED.

WILLIAMS, J., concurs.

SHORT, J., dissents in part and concurs in part in a separate opinion.

SHORT, J. (dissenting in part and concurring in part): I would reverse the family court's recalculation of child support utilizing Worksheet C in place of the originally agreed upon Worksheet A of the South Carolina

Child Support Guidelines (the Guidelines), and for that reason, I respectfully dissent. I adopt the majority's facts and standard of review, but I disagree with the analysis and would find as follows.

The majority utilizes Upchurch v. Upchurch for the proposition that the family court may always modify child support upon a proper showing of change in either the child's needs or the supporting parent's financial ability. 367 S.C. 16, 26, 624 S.E.2d 643, 647-48 (2006). While I agree with the majority that due to significant changes in the parties' income, a modification of the child support amount was appropriate, I find this modification should have been calculated under Worksheet A of the Guidelines.

In an August 30, 2000 order (the 2000 order), the family court fully approved, incorporated and merged the parties' custody, support and property settlement agreement into its order. This agreement called for Mother to pay "Father the amount of $920.00 per month in child support based upon figures set forth in the attached Child Support Obligation Worksheet A." The family court found that the parties had negotiated and entered into the agreement with "the benefit of advice and counsel" and that they "fully comprehended its terms and conditions." Further, the court found each party entered into a "fair, equitable, and reasonable" agreement "freely, knowingly, voluntarily, and without threats or coercion."

I first note that this 2000 order of the family court was never appealed. Therefore, it has become the law of the case, and any review of the propriety of utilizing Worksheet A, as noted in the parties' agreement and consequently the court's order, would be contrary to our rules of preservation.[4] The majority correctly notes regulation 114-4730(A) of the South Carolina Code

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[4] We are mindful that the appellate courts of this state have disregarded rules of error preservation where the best interests of a child were concerned. See Joiner v. Rivas, 342 S.C. 102, 107, 536 S.E.2d 372, 374 (2000). However, as the majority notes, the changing of worksheets in this matter does not effect the interests of the children; "it was simply a mathematical calculation on the part of the trial court to establish support based on the guidelines."

(Supp. 2006) provides a family court with **discretion** to apply a "shared custody adjustment" which provides for the utilization of Worksheet C to calculate child support for parents who have court ordered visitation with a child for more than 109 overnights each year. However, to review the family court's 2000 order for an abuse of discretion error at this juncture would be inappropriate. The proper query to be addressed in this matter is whether the necessary change of circumstances has occurred to modify the original order by calculating child support under Worksheet C instead of Worksheet A. Nonetheless, even were we to review the propriety of utilizing Worksheet A in the 2000 order, I believe this issue fails on its merits. The majority notes that the family court failed to provide specific findings of fact to explain why it deviated from the Guidelines in calculating the child support owed. While I agree that were the court to deviate from the Guidelines in its own discretion it would have to provide specific findings to justify this action, in this matter, **the parties agreed** to utilize Worksheet A. The parties are free to agree on child support which is greater than that as required by law. See Ratchford v. Ratchford, 295 S.C. 297, 299, 368 S.E.2d 214, 215 (Ct. App. 1988) ("A parent can contractually obligate himself beyond the support requirements imposed by law."). Where the parties agree to a greater amount of support than required by law, I fail to discern why the family court should be required to make specific findings of fact to justify such deviation from the Guidelines.[5]

Regardless of the propriety of the family court's application of Worksheet A to calculate child support under the 2000 order, as noted above, the family court retains jurisdiction to modify child support upon a proper showing of change in either the child's needs or the supporting parent's financial ability. "Where there is an agreement regarding child support, however, the family court should not decide support issues as if there is no

[5] The North Carolina Court of Appeals case (Beamer v. Beamer, 610 S.E.2d 220 (2005)), utilized by the majority to support its point that deviation from the Guidelines must be supported by specific findings of fact, is distinguishable from the matter at hand. In the Beamer case, there was no agreement by the parties as to which worksheet to apply, and the court sua sponte determined it should calculate support in a manner not consistent with the North Carolina Guidelines.

agreement." Ratchford, 295 S.C. at 299, 368 S.E.2d at 215. The parties agreed to calculate the support obligation under Worksheet A, and as reflected in the 2000 order, this calculation based on the parties then existing income, resulted in an amount of $920.00. While the dollar amount was determined through a calculation based on the parties' then existing incomes and not based on the parties' specific assent, the decision to utilize Worksheet A was agreed upon by the parties. Consequently, I believe that while the dollar amount is modifiable based on changes in the income of the parties, I do not find the use of Worksheet A to be modifiable based solely on changes in the parties income.[6] A change in worksheets should be predicated on a change in the visitation such that Mother would increase her overnights from an amount less than 109 nights to an amount in excess of 109 nights thereby providing the court with discretion to apply the shared custody adjustment as noted in regulation 114-4730(A) of the South Carolina Code (Supp. 2006). However, it is undisputed that Mother was afforded visitation in excess of 109 overnights in the 2000 order. Consequently, she agreed to calculate her support obligation under Worksheet A while already having visitation in excess of 109 overnights per year. Mother "freely, knowingly, voluntarily, and without threats or coercion" agreed to forego the possibility of a shared custody adjustment. Therefore, we have no substantial change in the visitation, and Mother is not entitled to a modification of her previously agreed to usage of Worksheet A.

[6] I again note the majority's use of Beamer to establish that "once a substantial change in circumstances has been shown by the party seeking modification, the trial court then 'proceeds to follow the Guidelines and to compute the appropriate amount of child support.'" This intimates that once a substantial change has been found, the court is free to change even the worksheet to be used. This may hold true in cases such as Beamer where there is no prior agreement of the parties as to which worksheet to use. However, in light of the precedent handed down in Ratchford dictating that where there is an agreement, the court should not decide support issues as if there is no agreement, I find Beamer to be unpersuasive under the facts of this case.

Further, the majority cites Upchurch for the notion that "changes within the contemplation of the parties at the time of the initial decree are not sufficient bases for the modification of a child support award." 367 S.C. at 26, 624 S.E.2d at 648. I agree and can discern no manner in which one could argue Mother, having been afforded over 109 overnights per year by the 2000 order and thereby potentially being entitled to a shared custody adjustment, did not have the use of a particular worksheet within her contemplation when she agreed to utilize Worksheet A.

For these reasons, I would reverse the family court's usage of Worksheet C and remand the issue of child support for calculation of a proper support obligation under the agreed upon Worksheet A. As to the other issues noted in this appeal, I concur with the majority.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dallas S. Maxwell, Jr., Appellant,

v.

Lori L. Maxwell, now known as Lori Denise Lette, Respondent.

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

Opinion No. 4290
Heard June 6, 2007 – Filed August 24, 2007

AFFIRMED

Thomas F. McDow, of Rock Hill, for Appellant.

Charles D. Lee, III, of Columbia, for Respondent.

BEATTY, J.: Dallas S. Maxwell (Husband) appeals from the family court's order dismissing his action to terminate the alimony that Lori Maxwell[1] (Wife) was awarded pursuant to a settlement agreement in the parties' prior action for separate maintenance and support. We affirm.

FACTS

Wife and Husband separated in April 2002, and Wife filed an action for separate maintenance and support in May 2002. Although Wife was the only party represented by counsel, the parties entered into a settlement agreement that was adopted by the family court by final order on June 14, 2002. The agreement granted Wife custody of the parties' three minor children with liberal visitation to Husband. As part of the agreement, Wife was granted unallocated family support of $2,600 per month for ten years and, upon the emancipation of the three minor children, alimony in an amount equal to the unallocated support. The alimony was to be reduced to $1,000 per month in January 2013. The settlement agreement provided that alimony was "non-modifiable and shall continue until the death of the Husband." The agreement further provided that: (1) if the agreement was adopted by the family court, it would be the final determination of all the financial and marital rights of the parties such that there was no need for the issues to be relitigated in a subsequent divorce action; and (2) the provisions of the agreement could not be modified by the parties or the family court except by mutual written consent of both parties in a formal agreement adopted by the family court. Neither party appealed from the order adopting the settlement agreement.

Sometime after the final order issued by the family court adopting the settlement agreement, Husband learned that Wife committed adultery prior to the adoption of the agreement. On May 23, 2003, Husband filed an action for divorce based upon adultery. In the complaint, Husband also requested termination of alimony based upon Wife's pre-agreement adultery. After a bifurcated trial, the family court first granted the parties a divorce based upon the grounds of the separation of the parties without cohabitation for greater

[1] Wife now goes by the name "Lori Lette."

than one year. In a separate order, the court considered whether Husband was barred from seeking termination of alimony. The court dismissed Husband's claim to terminate alimony with prejudice, finding: (1) Husband failed to raise or plead the avoidance or affirmative defense of adultery to Wife's claim for alimony in the separation agreement, and thus, he was barred from raising it in a subsequent action; (2) Husband's claims were barred by res judicata and collateral estoppel; and (3) the separation agreement provided that alimony was non-modifiable, and thus, the family court could not terminate alimony. Husband's motion for reconsideration was denied, and he appeals.

STANDARD OF REVIEW

On appeal from the family court, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 328, 526 S.E.2d 241, 244-45 (Ct. App. 1999). However, this broad scope of review does not require us to disregard the family court's findings. Bowers v. Bowers, 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct. App. 2002). "Nor must we ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." Lacke v. Lacke, 362 S.C. 302, 307, 608 S.E.2d 147, 150 (Ct. App. 2005); see also Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996) (noting that because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to the family court's findings where matters of credibility are involved). Our broad scope of review does not relieve appellant of his burden to convince this court that the family court committed error. Skinner v. King, 272 S.C. 520, 522-23, 252 S.E.2d 891, 892 (1979).

LAW/ANALYSIS

Husband argues the family court erred in dismissing his action to terminate alimony because adultery is listed as an absolute bar to alimony pursuant to statute. We disagree.

Whether to award alimony is a decision within the sound discretion of the family court judge and the decision will not be disturbed absent an abuse of discretion. Degenhart v. Burriss, 360 S.C. 497, 500, 602 S.E.2d 96, 97 (Ct. App. 2004). The South Carolina Code provides for an award of alimony in amounts for such terms as the family court considers appropriate and just, considering the parties' circumstances, and the circumstances of the case. S.C. Code Ann. § 20-3-130(A) (Supp. 2006). The statute further provides:

> No alimony may be awarded a spouse who commits adultery before the earliest of these two events: (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order approving a property or marital settlement agreement between the parties.

Id. The statutory bar on alimony due to adultery, however, is not absolute. See RGM v. DEM, 306 S.C. 145, 150, 410 S.E.2d 564, 567 (1991) (noting that while condonation is a defense to the statutory bar of alimony due to adultery, recrimination is not); Doe v. Doe, 286 S.C. 507, 512, 334 S.E.2d 829, 832 (Ct. App. 1985) (holding that husband could not avail himself of the statute barring alimony to an adulterous spouse where husband condoned wife's adultery, and thus wife was still eligible for alimony).

Further, the parties may enter a settlement agreement making the payment of alimony non-modifiable and not subject to subsequent modification by the family court. S.C. Code Ann. § 20-3-130(G) (Supp. 2006) (stating that the family court may review and approve all agreements bearing on support issues, including alimony, and that the parties "may agree in writing if properly approved by the court to make the payment of alimony as set forth in items (1) through (6) of subsection (B) nonmodifiable and not subject to subsequent modification by the court").[2] "While the family court

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[2] We note that this subsection was not cited by the family court judge in reaching his decision. However, this section was in existence at the time the underlying action for termination of alimony was filed. S.C. Code Ann. § 20-3-130(G) (Supp. 2002).

normally has the authority to modify alimony, 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." Degenhart, 360 S.C. at 500-01, 602 S.E.2d at 98. 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." Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997).

In the present case, the parties' agreement specifically provided that it was not modifiable by the parties or by the family court unless both parties agreed in writing to modify it by a formal procedure in the family court. Because the terms of the agreement provide that it is non-modifiable, it is irrelevant that Wife committed adultery prior to signing the separation agreement and that the statute bars alimony to an adulterous spouse. The agreement "overrides" the statutory bar to alimony. Degenhart, 360 S.C. at 500-01, 602 S.E.2d at 98. Thus, we find no error in the family court's decision to dismiss the action to terminate alimony.[3]

CONCLUSION

Because the underlying settlement agreement between the parties provided that it was non-modifiable, we find the family court did not err in dismissing Husband's action to terminate the alimony award in the agreement. Accordingly, the family court's order is

AFFIRMED.

ANDERSON and HUFF, JJ., concur.

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[3] Because we affirm the family court on this issue, we decline to address Husband's remaining grounds on appeal. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that the court need not rule on remaining issues when the disposition of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bryan Patrick Robbins, Appellant,

v.

Walgreens and Broadspire Services, Inc., Respondent.

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

Opinion No. 4291
Submitted June 1, 2007 – Filed August 24, 2007

AFFIRMED

Stephen B. Samuels, of Sumter, for Appellant.

Lana H. Sims, Jr., of Columbia, Mary Sowell League, of Columbia, for Respondents.

BEATTY, J.: In this workers' compensation case, Bryan Robbins appeals from the circuit court's order affirming the Appellate Panel of the Workers' Compensation Commission's denial of his claim for additional compensation based on a change of condition, arguing: (1) he sustained a

change of condition within the meaning of the act; and (2) he is entitled to additional medical benefits, including surgery, even if he did not sustain a change of condition because the treatment would tend to lessen his period of disability. We affirm.[1]

FACTS

Robbins was the assistant manager at a Walgreens pharmacy in Sumter. On April 13, 2003, he injured his lower back while stacking cases of two-liter sodas on a cart. He reported the injury to his employer, filed a workers' compensation claim, and received compensation for his injury. Robbins was placed on disability for two weeks and then allowed to return to work on light duty with weight restrictions. Robbins was prescribed physical therapy, anti-inflammatory medication, and muscle relaxers. His treating physician, orthopedic surgeon Dr. Rakesch Chokshi, diagnosed Robbins with degenerative disc disease at levels L1-2 and L2-3, with foraminal compression causing lumbar spine radiculopathy, and lumbar stenosis. Dr. Chokshi released Robbins at maximum medical improvement with no work restrictions on September 24, 2003, with a 10% permanent impairment rating. Robbins returned to work with some residual symptoms. Although Robbins claimed his back pain slowly worsened after returning to work, Robbins settled his workers' compensation claim with Walgreens on March 12, 2004. Robbins was terminated from his employment with Walgreens for unspecified reasons on April 12, 2004.

On April 16, 2004, Robbins went to his family physician complaining of back pain that never abated from the prior accident at work. He was diagnosed with degenerative disc disease with radiculopathy. Robbins returned to Dr. Chokshi, who diagnosed him with decreased lumbar motion secondary to facet arthropathy and degenerative changes and recommended further treatment. Dr. Chokshi recommended that Robbins not work. On May 11, 2004, Robbins filed a Form 50 request for a hearing based on a

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[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

change in condition to his back and leg and requesting further treatment. Robbins sought treatment with Dr. Jefferey Wingate, who also diagnosed Robbins with disc degeneration at L1-2 and L2-3 with loss of disc height and signal. Robbins, who had begun to work for Walden Books part-time and began taking night classes, told Dr. Wingate that his back is "shot" after working. Dr. Wingate recommended further treatment, including discography, epidural injections, and a lumbar fusion.

At the hearing, Robbins testified that his back pain was "much worse" than it was at the time he settled his original claim. He also stated that his back pain was not resolved before he settled his claim, but he was afraid to inform his employer or request additional treatment for fear of being terminated. Although he admitted that his current employment with Walden Books exhausted him, he denied that it exacerbated his condition.

The single commissioner denied Robbins' claim, finding the "greater weight of the evidence does not support a finding that the Claimant suffered a physical change of condition for the worse arising out of the original injury." The single commissioner found Robbins' complaints and the results of his MRI taken before the settlement agreement were essentially the same as his complaints and the MRI taken for the change in condition action. Thus, the single commissioner found Robbins failed to prove that he sustained a significant change in condition such that he would be entitled to further compensation or treatment. The Appellate Panel affirmed the single commissioner's decision.

Robbins appealed to the circuit court, and after a hearing, the circuit court affirmed the Appellate Panel's decision. The court found that the Appellate Panel correctly concluded that Robbins failed to carry his burden of proof that he sustained a physical change of condition for the worse arising out of his original injury. The court further found that Robbins' argument that he should be awarded continuing treatment to lessen his period of disability was not preserved because he failed to request continuing treatment for his initial injury at the time of the original settlement agreement and failed to request continuing treatment in his underlying action before the single commissioner. Robbins appeals.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard of review for decisions by the Appellate Panel of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). "In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The Appellate Panel is specifically reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence. Id.

Thus, this court will not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Therrell v. Jerry's Inc., 370 S.C. 22, 25, 633 S.E.2d 893, 894 (2006). "[T]his Court may reverse or modify the [Panel's] decision if Petitioner has suffered the appropriate degree of prejudice and the commission's decision is effected by an error of law or is 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" Id. at 25, 633 S.E.2d at 894-95 (quoting S.C. Code Ann. § 1-23-380(A)(6)(2005)). "It is not within our province to reverse findings of the [Appellate Panel] which are supported by substantial evidence." Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Rodney v. Michelin Tire Corp., 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Grant v. South Carolina Coastal Council, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

LAW/ANALYSIS

I. Change of condition

Robbins argues the circuit court erred in affirming the Appellate Panel because: (1) the undisputed evidence was that Dr. Chokshi took Robbins out of work due to his back pain in April 2004, entitling him to additional compensation; (2) the Appellate Panel erred in requiring a "significant" change in condition; and (3) the Panel's findings were not supported by substantial evidence. We disagree.

A claimant may seek to reopen an award under the Workers' Compensation Act if there has been a change in condition. S.C. Code Ann. § 42-17-90 (1985) (providing that, upon the motion of any party based upon a change of condition, any award may be reviewed and thereafter diminished or increased). "The purpose of this section is to enable the [Appellate Panel] to change the amount of compensation, including increasing compensation when circumstances indicate a change of condition for the worse." Clark v. Aiken County Gov't, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. App. 2005). "A change in condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award." Gattis v. Murrells Inlet VFW # 10420, 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct. App. 2003). Thus, the issue before the Appellate Panel is "sharply restricted to the question of extent of improvement or worsening of the injury on which the original award was based." Id.

We believe there was substantial evidence to support the denial of Robbins' claim of a change in condition. The MRI taken before Robbins' original claim for compensation showed he had degenerative disc disease at levels L1-2 and L2-3, with foraminal compression causing lumbar spine radiculopathy and lumbar stenosis. The MRI taken by Dr. Wingate after the settlement of Robbins' original claim showed that Robbins suffered from disc degeneration at L1-2 and L2-3 with loss of disc height and signal. Thus, the evidence both before and after the settlement of his claim showed the same condition. Neither Dr. Chokshi nor Dr. Wingate opined that Robbins'

condition had worsened; they only noted that his pain was continuing. Robbins testified at the hearing before the single commissioner that his pain never abated after his injury, he just failed to inform Walgreens prior to the settlement for fear of being terminated. It is irrelevant that Dr. Chokshi took Robbins out of work in April 2004 because the only evidence in the record regarding the state of Robbins' condition was that it was similar both before and after the settlement. Further, although the single commissioner's order stated that Robbins failed to prove he sustained a "significant change" in his condition, the commissioner used the correct standard in reviewing the evidence and found it did not support a finding that he suffered a "physical change of condition for the worse." Accordingly, there was substantial evidence in the record to support the finding that Robbins failed to prove a change or worsening of his condition.

II. Additional medical treatment

Robbins argues the circuit court erred in affirming the denial of his request for additional medical treatment because it would have lessened his period of disability. We disagree.

We agree with the circuit court that Robbins failed to preserve this matter for appeal. Although he requested "additional medical examination and treatment" due to a change of condition in his post-settlement Form 50, Robbins did not argue before the single commissioner that he was entitled to continuing medical treatment after the date he reached MMI in order to lessen his period of disability. The single commissioner only ruled on Robbins' change of condition claim and did not specifically rule on the alternate claim that Robbins was entitled to continuing medical treatment in order to lessen his period of disability. Although Robbins raised the issue of his entitlement to continuing medical treatment in order to lessen his period of disability in his appeal to the Appellate Panel, Robbins only argued he was entitled to compensation for a change in condition. Because the matter was not argued before the single commissioner or the Appellate Panel, Robbins waived the matter. It is not appropriate for this court to review the issue for the first time on appeal. City of Columbia v. Ervin, 330 S.C. 516, 519-20, 500 S.E.2d 483, 485 (1998) (holding than an issue not argued to an

intermediate appellate court is not preserved for review in the supreme court or the court of appeals).

CONCLUSION

There was substantial evidence in the record to support the single commissioner's and the Appellate Court's findings that Robbins failed to prove a change in condition. Further, because Robbins failed to argue that he was entitled to continuing medical treatment after MMI in order to lessen his period of disability, this issue is not preserved. Accordingly, the circuit court's order affirming the Appellate Panel is

AFFIRMED.

ANDERSON and HUFF, JJ., concur.