OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 34
August 3, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Diana Ardis and William David Ardis, Respondents,

v.

Edward L. Sessions, D.C., Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 26695
Heard February 3, 2009 – Filed August 3, 2009

REVERSED

Charles E. Hill, and R. Hawthorne Barrett, both of Turner, Padget, Graham & Laney, of Columbia, for Petitioner.

Ellis I. Kahn, and Justin S. Kahn, both of Kahn Law Firm, of Charleston, for Respondents.

JUSTICE KITTREDGE: In this chiropractic malpractice action, the court of appeals reversed a defense jury verdict based on an erroneous

jury instruction. *Ardis v. Sessions*, 370 S.C. 229, 633 S.E.2d 905 (Ct. App. 2006). We granted a writ of certiorari to review the decision of the court of appeals. We reverse and reinstate the defense verdict, for we hold Respondents were not prejudiced by the jury charge.

I.

Diana Ardis suffered a herniated disk which resulted in surgery on February 29, 1996. Ardis sued Dr. Edward L. Sessions in negligence for chiropractic malpractice, claiming Sessions caused the herniated disk when he performed a spinal manipulation on February 19, 1996.[1] Sessions denied he performed a manipulation on February 19, and the trial centered on who was telling the truth about the February 19 office visit.

Ardis reported on February 19 to Sessions (and separately to his office assistant) "that she had slipped off of a ladder hurting her left low back and leg." Ardis admitted she made the statements about falling off a ladder, but purportedly only in jest. "At trial, Sessions testified that instead of a manipulation that day, he used a less invasive treatment, which would have been insufficient to herniate [Ardis'] disk."[2] *Ardis*, 370 S.C. at 231, 633 S.E.2d at 906.

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[1] Ardis' husband, William David Ardis, filed a loss of consortium claim.

[2] Specifically, Sessions testified that on February 19 Ardis had "paraspinal spasms. We did some posterior pressure on the sacrum. I diagnosed it with a sprain strain and told her to rest and use some ice." When Sessions was asked if he had adjusted Ardis on February 19 or "do[ne] anything that would aggravate her if she had a ruptured disk[,]" he answered no. Sessions was additionally asked why he did not perform a manipulation of the "full spine or the cervical thoracic" on February 19, as he had routinely done on prior appointments. Sessions replied, "her signs and symptoms did not indicate that I should adjust her." Those "signs and symptoms" included Ardis' being "bent to the right side" and her claim of falling off a ladder. In light of Ardis' reported injury on February 19, we view Sessions' testimony as an implicit acknowledgement that it would have been inappropriate to perform a full manipulation on that day.

The jury returned a defense verdict. Ardis appealed, challenging the "good faith" portion of the jury charge, the refusal to charge the jury as requested, and certain evidentiary rulings. A panel majority of the court of appeals reversed and remanded based on its view that the "good faith" jury charge was erroneous and prejudicial. One member of the appellate panel dissented, noting that "[w]hen reviewing a jury instruction for alleged error, the appellate court must consider the charge as a whole in light of the evidence and issues presented at trial." *Ardis*, 370 S.C. at 234, 633 S.E.2d at 907 (Beatty, J. dissenting).

II.

A.

The challenged jury charge is as follows:

> I . . . charge you that a mistake in diagnosis of itself will not support a verdict in a malpractice suit. I charge you that a physician is not ordinarily liable for making an incorrect diagnosis where it is made in good faith and there is reasonable doubt as to the nature of the physical conditions involved or as to what should be done in accordance with recognized authority in good current practice or where it is made in good faith on observation of the patient and based upon physical evidences and symptoms which would warrant such diagnosis by a reasonably prudent and informed physician.[3]

The court of appeals agreed with Ardis and found the jury instruction erroneous and prejudicial.

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[3] The trial court frequently used the term "physician," although this case dealt with a claim of chiropractic malpractice. There is no suggestion of error in this regard, for legal principles concerning professional malpractice claims generally remain constant from one profession to another.

We agree with the court of appeals majority that a "good faith" jury charge in a professional malpractice case is improper due to the implication that "an error in judgment is actionable only if made in bad faith." *McCourt ex rel. McCourt v. Abernathy*, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995). The "good faith" instruction requires a plaintiff in a malpractice action to demonstrate not only a departure from the standard of care, but additionally that such error was made in bad faith. The "good faith" instruction impermissibly adds a subjective component contrary to our objective professional negligence law.

B.

The "good faith" instruction, while erroneous, did not prejudice Ardis.

When an appellate court reviews an alleged error in a jury charge, it "must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (citations omitted). This holistic approach to jury instructions is linked to the principle of appellate procedure that "[a]n error not shown to be prejudicial does not constitute grounds for reversal." *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997); *see also Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) (reciting the rule that a charge must be erroneous and prejudicial to warrant reversal); *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961) (noting that a jury "charge, even if erroneous, on a matter not in issue, is not always considered prejudicial").

The "good faith" jury instruction was limited to liability associated with "an incorrect diagnosis." *Ardis*, 370 S.C. at 232, 633 S.E.2d at 906. At best, the malpractice claim of Ardis only tangentially concerned an incorrect diagnosis. Because the outcome of the malpractice claim turned on who was telling the truth about the February 19 office visit, the trial focused on the conflicting testimony and the records of the February 19 visit.

As counsel for Sessions argued to the jury, "we come back to this piece of paper [concerning the February 19 office visit] because the case turns on the accuracy of this document." Sessions' counsel further argued in closing that "the bottom line issue is[,] did she get a chiropractic adjustment on February the 19th, 1996? Because if she didn't, her whole case is gone."[4]

Most professional negligence actions involve scrutiny of the professional's exercise of judgment. This case, however, presents an exception to the typical professional malpractice claim in that the outcome of this malpractice claim turned on who was telling the truth about the February 19 office visit. Accordingly, when the challenged jury charge is viewed "in light of the evidence and issues presented at trial[,]" it becomes apparent that the challenged "good faith" jury charge resulted in no prejudice to Ardis. *Keaton*, 334 S.C. at 497, 514 S.E.2d at 575.

C.

Because the court of appeals reversed the defense verdict based on the "good faith" jury charge, the court of appeals did not reach Ardis' other appellate issues. We have reviewed the record and find no prejudicial errors in the exclusion of evidence or the trial court's refusal to give a requested instruction. We affirm the trial court pursuant to Rule 220(b)(1), SCACR, and the following authorities: Issues II, III, and V: *Gamble v. Int'l Paper Realty Corp. of S.C.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996) ("The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal."); and Issue IV: *Daves v. Cleary*, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct. App. 2003) (noting that an appellate court must review a challenged jury instruction as a whole, and that a trial court's failure to charge a "properly requested charge is reversible error only where the requesting party can demonstrate prejudice from the refusal").

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[4] The closing argument by Ardis' counsel is not in the record on appeal. The record, nevertheless, leaves no doubt that the case turned on whether Sessions performed a manipulation on Ardis on February 19.

III.

In a professional negligence action, a "good faith" jury instruction that imposes on a plaintiff the additional burden of showing bad faith improperly introduces a subjective element to our objective test of liability. Here, the "good faith" charge was erroneous, but not prejudicial. Nothing in the charge casts doubt on the jury's ability to objectively and fairly determine the truth concerning the February 19, 1996 office visit. When the "good faith" charge is viewed "in light of the evidence and issues presented at trial[,]" it is apparent that the jury charge resulted in no prejudice to Ardis. *Keaton*, 334 S.C. at 497, 514 S.E.2d at 575. We therefore reverse the decision of the court of appeals and reinstate the defense verdict.

REVERSED.

TOAL, C.J. and Acting Justice BURNETT, concur. PLEICONES, J., dissenting in a separate opinion in which WALLER, J., concurs.

JUSTICE PLEICONES: I respectfully dissent. While I agree with the majority that the "good faith" jury instruction was erroneous, I also find that the charge was prejudicial and would affirm the Court of Appeals.

If the jury believed Ardis's assertion that Sessions performed a manipulation under the circumstances she described, the jury must still have found that her version of the facts demonstrated negligence on the part of Sessions, in order for Ardis to prevail. See Hurd v. Williamsburg Co., 353 S.C. 596, 615, 579 S.E.2d 136, 146 (Ct. App. 2003), *aff'd*, 363 S.C. 421, 611 S.E.2d 488 (The burden of proof in a negligence action is on the plaintiff to establish the negligence of the defendant). At trial, Ardis presented evidence to show not only that Sessions performed the manipulation, but also that in doing so he breached the standard of care. The trial court's "good faith" instruction directly addresses this aspect of the case and, therefore, prejudiced Ardis.

I disagree with the majority's reading of Sessions's testimony as acknowledging that it would have been malpractice to perform a manipulation on February 19 in light of Ardis's reported injury that day. Contrary to the majority's reading, the record indicates that Sessions believed the issue whether the actions alleged by Ardis constituted negligence to be very much in dispute. At the conclusion of his case, Sessions moved for a directed verdict, arguing that, even assuming that Sessions performed an adjustment, as Ardis claimed:

> [t]here has been absolutely no testimony in this case from [Ardis's expert] or anyone else that if Ms. Ardis presented to Doctor Sessions on February the 19th in the condition that she says that she was in, that there was any contraindication for Doctor Sessions to give her an ordinary chiropractic adjustment on that day. There is absolutely no testimony that there was a deviation from the standard of care by Doctor Sessions on February 19 in giving this lady an adjustment.

We simply do not know whether the jury, in rendering a defense verdict, believed Sessions's testimony that no manipulation was performed on the day in question or believed Ardis's testimony that a manipulation was performed, but found that to perform a manipulation under the circumstances did not constitute malpractice. In my opinion, the use of the subjective "good faith" element in the jury instruction imposed an unrealistic burden on Ardis in her effort to prove negligence, and the jury may have found against Ardis due to her failure to meet such a standard. See McCourt by and through McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995). I would therefore affirm the Court of Appeals.[5]

WALLER, J., concurs.

[5] In briefs and in oral arguments, both parties also addressed various evidentiary issues from the trial court. Because evidentiary holdings of the initial trial are not binding on remand, I would find it unnecessary to address these points. See Hosford v. Wynn, 26 S.C. 130, 1 S.E. 497, 499 (1887) (new trial opens anew all questions in the case).

The Supreme Court of South Carolina

In the Matter of Clyde A. Eltzroth, Jr., Respondent.

ORDER

Respondent was suspended on April 27, 2009, for a period of ninety (90) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Daniel E. Shearouse
Clerk

Columbia, South Carolina

August 3, 2009

The Supreme Court of South Carolina

In the Matter of Elizabeth
Mason Smith, Respondent.

ORDER

Respondent, the Beaufort County Clerk of Court, was indicted for misconduct in office and embezzlement of public funds. The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, because she poses a substantial threat of serious harm to the public or the administration of justice.

IT IS ORDERED that the petition is granted and respondent is suspended, pursuant to Rule 17(b), RLDE, Rule 413, SCACR, from the practice of law in this State until further order of this Court.

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

July 31, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joann Fredrick, Appellant,

v.

Wellman, Inc., Self-Insured Employer, Respondent.

Appeal From Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 4599
Heard April 22, 2009 – Filed July 28, 2009

AFFIRMED

Stephen J. Wukela, of Florence, for Appellant.

Kirsten L. Barr, of Mt. Pleasant, for Respondent.

GEATHERS, J.: Appellant Joann Fredrick challenges a circuit court order upholding a determination of the Appellate Panel of the Workers' Compensation Commission that Fredrick is not entitled to benefits because

she concealed her history of back problems when seeking employment with Respondent Wellman, Inc.[1] We affirm.

FACTS/PROCEDURAL HISTORY

Beginning in 1991, Fredrick worked for Wellman as a spinning operator for approximately thirteen years. During the latter part of this time period, Fredrick began seeking treatment for lower back pain from her family physician, Dr. Jerry Crosby. Dr. Crosby's December 2, 1998 office notes indicate that Fredrick reported problems with lower back pain, which she attributed to being shot in the chest several years earlier and having the bullet lodge near her lower spine. The notes also indicate Fredrick complained of occasional radiation down her right lower extremity. Dr. Crosby diagnosed Fredrick with lower back pain and prescribed medication for the pain. In subsequent visits to Dr. Crosby, Fredrick continued complaining of pain in her right leg and lower back. Dr. Crosby then referred Fredrick to Dr. Gregory Jones for further treatment.

Dr. Jones' June 4, 1999 notes indicate that Fredrick complained of worsening right leg sciatica and lower back pain. The notes also indicate that Fredrick had a lengthy history of lower back pain after a bullet from a gunshot lodged in her lower lumbar region. Dr. Jones recommended Fredrick undergo an MRI scan. On June 12, 1999, Fredrick underwent a lumbar spine MRI that revealed a disc herniation at the L4/L5 location of the spine. On August 26, 1999, Fredrick underwent a right L4/L5 lumbar epidural steroid injection, but she experienced a recurrence of pain several days later.

In early 2004, Wellman laid off several employees, including Fredrick. In August 2004, however, Wellman rehired Fredrick and placed her in the position of "blender-operator," which required heavy lifting, bending, and twisting, unlike her previous position as a spinning operator. During the

[1] Wellman is self-insured as permitted by S.C. Code Ann. § 42-5-20 (Supp. 2008).

hiring process, Wellman gave Fredrick a conditional offer of employment and then required her to complete a medical history form. The form included the following language:

> Wellman, Inc. requires post-offer medical examinations which are given to all employees in a particular category of employees, after an offer of employment has been made, but prior to the time an employee begins work for Wellman, Inc. The results of this medical examination will not be used to exclude an employee from his or her particular position unless the results reveal the employee does not satisfy the employment criteria for the position, and Wellman, Inc. can only provide a reasonable accommodation which will allow the employee to perform the essential functions of the job.

The form also included the following question: "HAVE YOU HAD BACK TROUBLE OF ANY KIND?" Fredrick responded "NO."

Subsequently, on October 18, 2005, Fredrick was at work when she and a coworker tried to lift a box onto a stand and, as a result, a roll of plastic fell from the stand. When Fredrick attempted to "grab" the roll and lift it back to the stand, she immediately felt a sudden onset of pain in her back. On November 15, 2005, Fredrick sought treatment from Dr. Anthony Alexander, complaining of lower back pain with radiation into the right leg. On January 19, 2006, Fredrick filed a written claim for workers' compensation benefits (Form 50), alleging she had injured her back and legs during the October 18 incident.

Wellman's answer to Fredrick's claim (Form 51) admitted minor lower back injury but denied any injury to either leg.[2] Under item 11 of Form 51,

[2] South Carolina Code Regs. 67-203 (Supp. 2008) requires the employer to file Form 51, Employer's Answer to Request for Hearing, when it seeks to file a response to the employee's notice of claim or request for a hearing.

which allows the employer to set forth further contentions or grounds of defense, Wellman stated it reserved the right to amend the completed form. Wellman began paying temporary benefits to Fredrick on February 28, 2006 while it investigated her claim.

After months of conservative treatment failed to relieve Fredrick's pain, Dr. Alexander referred her to Dr. W.S. Edwards, Jr., for a surgical consultation on March 14, 2006. Fredrick indicated that she wanted to proceed with surgery as soon as possible, and the surgery was scheduled for July 24, 2006. In the interim, Fredrick reconsidered her decision to have the surgery due to the risks involved.[3] On July 11, 2006, Fredrick called Dr. Edwards' office to advise him that she wanted to cancel the surgery.

On August 1, 2006, Wellman filed a written request for a hearing to (1) terminate temporary compensation based on Fredrick's refusal of medical treatment; (2) determine the issue of permanent compensation; and (3) request credit for overpayment of temporary compensation (Form 21).[4] Wellman indicated on the Form 21 that the issue of "permanent loss of use (if any)" was ripe for determination. Wellman also indicated that it was going to suspend temporary compensation on August 3, 2006.

A hearing was originally scheduled for October 3, 2006. On September 18, 2006, Wellman filed a prehearing brief (Form 58) indicating that the issues to be determined at the upcoming hearing were (1) whether Fredrick's claim should be barred due to her concealment of her history of back

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[3] In 2001, Fredrick learned that she had AIDS. Therefore, after consulting with Dr. Edwards about the surgery option, she became concerned about her increased risk of infection from the surgery.

[4] South Carolina Code Regs. 67-208(C) (Supp. 2008) requires an employer to file a Form 21, Employer's Request for Hearing, when the employer seeks a hearing for permission to terminate temporary compensation after the expiration of 150 days from the employer's notice of the injury. Form 21 sets forth a checklist of alternative reasons for the employer's hearing request.

problems prior to beginning her position as a blender-operator with Wellman; and (2) whether Fredrick's refusal of medical treatment, namely, the surgery offered by Dr. Edwards, was unreasonable.

Fredrick failed to appear at the October 3 hearing, but counsel for both parties participated in a prehearing conference conducted by the single commissioner, which included discussion of Wellman's fraud defense. The single commissioner rescheduled the hearing for November 15, 2006. According to Wellman's counsel, on October 31, 2006, Wellman advised Fredrick and the Commission that it would rely on its previously filed prehearing brief, which indicated Wellman was asserting fraud as a defense.

After the November 15 hearing, the single commissioner issued a written decision denying Fredrick's claim for benefits due to her concealment of her prior back problems when she applied for the blender-operator position with Wellman. The single commissioner did not address the issue of Fredrick's refusal of medical treatment. The Commission's Appellate Panel adopted the single commissioner's findings of fact and rulings of law and incorporated the single commissioner's decision into its order. The circuit court affirmed the Appellate Panel's decision and specifically concluded that Wellman was not aware of Fredrick's concealment of her prior back problems until it reviewed medical records that had been subpoenaed during the discovery process of the case. Neither the Appellate Panel nor the circuit court addressed the issue of Fredrick's refusal of medical treatment. This appeal followed.

ISSUES ON APPEAL

1. Was Wellman's fraud defense properly before the single commissioner during the November 15, 2006 hearing?

2. Does the evidence support the Appellate Panel's findings on the elements of Wellman's fraud defense?[5]

STANDARD OF REVIEW

I. Propriety of fraud defense

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Specifically, South Carolina Code Section 1-23-380 (Supp. 2008) provides that this Court may reverse when the decision is affected by an error of law. See Hamilton v. Bob Bennett Ford, 336 S.C. 72, 76, 518 S.E.2d 599, 600-01 (Ct. App. 1999) (interpreting section 1-23-380), modified on other grounds, 339 S.C. 68, 528 S.E.2d 667 (2000).

II. Findings on elements of fraud defense

Because Wellman asserts that Fredrick's concealment of her prior back problems vitiated their employment relationship, we review the Appellate Panel's findings on the relationship's existence according to our own view of the preponderance of the evidence. See Brayboy v. Workforce, Op. No. 26675 (S.C. Sup. Ct. filed June 22, 2009) (Shearouse Adv. Sh. No. 28 at 33, 36) (citing Glass v. Dow Chem. Co., 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997); Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993); Givens v. Steel Structures, Inc., 279 S.C. 12, 13, 301 S.E.2d 545,

[5] Because we affirm the circuit court on both of these issues, we need not reach the third issue raised by Fredrick on appeal—whether Fredrick was justified in refusing medical treatment. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (holding that the appellate court need not address the remaining issues of an appeal when the resolution of a prior issue is dispositive).

546 (1983); Cooper v. McDevitt & St. Co., 260 S.C. 463, 466, 196 S.E.2d 833, 834 (1973); Chavis v. Watkins, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971); and Hon. Jean Hoefer Toal et al., Appellate Practice in South Carolina 170 (2d ed. 2002)) ("The existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits reviewable under the preponderance of the evidence standard of review."). In Brayboy, our Supreme Court applied the preponderance of the evidence standard of review to an employer's assertion that the employment relationship had been vitiated by the employee's fraud in his employment application. Id. at 34, 36-38.[6] However, even under this broad standard of review, the final determination of witness credibility is usually reserved to the Appellate Panel. Dawkins v. Jordan, 341 S.C. 434, 441, 534 S.E.2d 700, 704 (2000); Hernandez-Zuniga v. Tickle, 374 S.C. 235, 243-44, 647 S.E.2d 691, 695 (Ct. App. 2007).

LAW/ANALYSIS

Fredrick challenges the circuit court's order, which upheld the denial of benefits, on three grounds: (1) Wellman's fraud defense was not properly before the single commissioner at the November 15, 2006 hearing; (2) the evidence does not support the Appellate Panel's findings on the elements of the fraud defense; and (3) her refusal of medical treatment was justified. We conclude that Wellman's fraud defense was properly before the single commissioner at the November 15, 2006 hearing. We further conclude that the evidence supports the Appellate Panel's findings on the elements of Wellman's fraud defense. Therefore, we need not reach the issue of whether

[6] In a previous case, Jones v. Georgia-Pacific Corp., 355 S.C. 413, 416-19, 586 S.E.2d 111, 113-14 (2003), the Supreme Court applied the substantial evidence standard of review to the issue of whether an employee's claim was barred due to her fraud in completing an employment application. We note that in the instant case, the evidence allows us to affirm the Appellate Panel's findings under either the preponderance of the evidence standard or the substantial evidence standard.

Fredrick was justified in refusing medical treatment. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (holding that the appellate court need not address the remaining issues of an appeal when the resolution of a prior issue is dispositive).

I. Propriety of fraud defense

Fredrick asserts that Wellman's fraud defense was not properly before the single commissioner at the November 15, 2006 hearing because (1) the fraud defense was time-barred due to Wellman's failure to assert this defense within 150 days from the date the injury was first reported, as allegedly required by S.C. Code Ann. § 42-9-260 (Supp. 2008); and (2) Wellman failed to raise the fraud defense in its Form 21, Employer's Request for Hearing, which Wellman filed on August 1, 2006. We disagree.

A. Whether fraud defense was time-barred

Section 42-9-260 authorizes separate sets of procedures for terminating or suspending temporary disability payments. The particular set of procedures to be applied depends on the time that has passed since the injury was first reported. Within 150 days after the injury was first reported, the payments may be suspended or terminated **immediately** without a prior hearing, and the employee may later request a hearing to have the payments reinstated. S.C. Code Ann. § 42-9-260(B) and (C) (Supp. 2008) (emphasis added). However, after 150 days have expired, an evidentiary hearing **must** be provided to the recipient **before** payments may be terminated or suspended. S.C. Code Ann. § 42-9-260(F) (Supp. 2008) (emphasis added). In any event, an employer may **request** a hearing **at any time** to address termination or reduction of temporary disability payments. S.C. Code Ann. § 42-9-260(E) (Supp. 2008) (emphasis added).

South Carolina Code Regs. 67-504, -505, and -506 (Supp. 2008) implement the procedures authorized by S.C. Code Ann. § 42-9-260 (Supp. 2008). Regs. 67-504 governs the termination of temporary compensation

during the first 150 days after the employer's notice of the injury. Regs. 67-505 governs the suspension of temporary compensation **after the first 150 days**, and Regs. 67-506 governs the termination of temporary compensation **after the first 150 days**. Further, South Carolina Code Regs. 67-208(C) (Supp. 2008) requires an employer to file a Form 21, Employer's Request for Hearing, when the employer seeks a hearing for permission to terminate temporary compensation after the expiration of the first 150 days pursuant to 25A S.C. Code Ann. Regs. 67-506 (Supp. 2008). Form 21 sets forth a checklist of alternative reasons for the employer's hearing request.

Fredrick argues that once 150 days from the first report of injury have expired, payments may be terminated or suspended for only those reasons set forth in Regs. 67-505 and -506 and Form 21. Fredrick claims that Wellman could not terminate her benefits on the ground of employee fraud because such a ground is not specifically enumerated in Regs. 67-505 or -506 or in Form 21 as a reason for suspension or termination of benefits. However, South Carolina Code Section 42-9-260(F) (Supp. 2008) allows suspension or termination of payments after the 150 days have expired for any cause:

> After the one-hundred-fifty-day period has expired, the [C]ommission shall provide by regulation the method and procedure by which benefits may be suspended or terminated **for any cause**, but the regulation must provide for an evidentiary hearing and [C]ommission approval prior to termination or suspension unless such prior hearing is expressly waived in writing by the recipient or the circumstances identified in Section 42-9-260(B)(1) or (B)(2) are present.

(emphasis added). Therefore, the fact that Regs. 67-505, -506 and Form 21 list only certain grounds for termination or suspension of payments is more of a curiosity than a binding statement of exclusive grounds for termination or suspension of payments—it is beyond question that the plain language of the enabling statute is controlling. See S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 380 S.C. 349, 375, 669 S.E.2d 899, 912

(Ct. App. 2008) (holding that administrative agencies' regulations cannot conflict with or alter the statute conferring authority). Because South Carolina Code Section 42-9-260(F) permits an employer to terminate benefits for any cause after the expiration of the 150 days, Wellman's fraud defense was properly before the single commissioner at the November 15 hearing.

B. Omission of fraud defense from Form 21

Fredrick also argues that even if the fraud defense could still be raised after the expiration of 150 days from the first report of injury, the omission of Wellman's fraud defense from its Form 21, Employer's Request for Hearing, precluded the single commissioner from considering the defense at the November 15 hearing. We disagree.

South Carolina Code Regs. 67-208(C) (Supp. 2008) requires an employer to file a Form 21 when the employer seeks a hearing for permission to terminate temporary compensation after the expiration of 150 days from notice of the employee's injury pursuant to 25A S.C. Code Ann. Regs. 67-506 (Supp. 2008). Further, South Carolina Code Section 42-9-260(E) allows an employer to request such a hearing **at any time**.

Here, Wellman filed its Form 21 on August 1, 2006. The Form 21 request for a hearing on termination of temporary compensation was based solely on Fredrick's refusal of medical treatment—Fredrick's concealment of her prior back condition is the very reason Wellman did not discover the prior condition until after it filed its Form 21. In any event, Wellman's prehearing brief, which was filed on September 18, 2006, ultimately provided Fredrick and the Commission with almost two months advance notice that Wellman was **seeking a hearing on its fraud defense** as well.[7]

[7] Although the hearing on Wellman's request to terminate temporary compensation was originally scheduled for October 3, 2006, the hearing was continued to November 15 because Fredrick failed to appear on October 3.

Further, Wellman had reserved the right to amend its Form 51 Answer, and the prehearing brief effectively amended the Answer. Moreover, on October 3, the single commissioner and counsel for both parties discussed Wellman's assertion of the fraud defense, and on October 31, Wellman advised Fredrick and the Commission that it would rely on its previously filed prehearing brief. Therefore, Fredrick was provided with ample notice that Wellman intended to raise the fraud defense at the November 15 hearing.

Based on the foregoing, Wellman's fraud defense was properly before the single commissioner at the November 15 hearing.

II. Findings on elements of fraud defense

Fredrick argues that the Appellate Panel and the circuit court erred in finding that the evidence supported the elements of Wellman's fraud defense. We disagree.

An employee's false statement in an employment application will bar workers' compensation benefits when: (1) the employee knowingly and willfully made a false representation as to his physical condition; (2) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and (3) there was a causal connection between the false representation and the injury. Cooper, 260 S.C. at 468, 196 S.E.2d at 835. Here, there is ample evidence to support the Appellate Panel's findings on the Cooper elements.

A. Knowing False Representation

The evidence in the record supports the Appellate Panel's finding that Fredrick knowingly falsified her preemployment medical questionnaire as to her previous back problems. Fredrick's medical records from December 1998 to September 1999 show she received significant testing and treatment for lower back pain and a disc herniation. However, the medical history form she completed for Wellman in 2004 indicated she had no prior back

problems—she responded "NO" to the question "HAVE YOU HAD BACK TROUBLE OF ANY KIND?" Additionally, none of the past injuries or illnesses that she, in fact, listed on the form could have reasonably alerted a prospective employer to any impact on her spine. Likewise, Fredrick confirmed her written responses on the form when questioned by a staff nurse at Wellman. Further, there is no credible evidence in the record that indicates Fredrick had significant memory problems when she completed the form or that otherwise explains the appearance of deception on Fredrick's part. Therefore, the record as a whole supports the Appellate Panel's finding that Fredrick knew she was concealing the truth from Wellman when she completed the medical history form.

B. Employer's Reliance

Fredrick argues that because she completed her medical history form after she had been hired, Wellman could not have relied on the form in hiring her and that, therefore, there could be no fraud as a matter of law. However, Wellman's use of the phrase "conditional offer of employment" on the front of its medical history form indicates an intent to condition the offer of employment for a specific position on the results of a medical examination:

> The results of this medical examination will not be used to exclude an employee from his or her particular position **unless the results reveal the employee does not satisfy the employment criteria for the position**, and Wellman, Inc. can only provide a reasonable accommodation which will allow the employee to perform the essential functions of the job.
>
> . . .
>
> DO NOT COMPLETE UNTIL A **CONDITIONAL** OFFER OF EMPLOYMENT HAS BEEN MADE[.]

(emphasis added). Thus, Wellman's reliance on the medical history form was

undoubtedly a substantial factor in hiring Fredrick for the specific position in which she was placed. In fact, Wellman's Human Resources Representative, Eugene Carmichael, stated that if Fredrick had revealed her back problems, he would have checked to see if there was another open position in the plant that she was capable of filling. He also testified that a blender-operator was required to do repetitive lifting of 50 pounds and that there were not many reasonable accommodations that Wellman could make for someone with a history of lower back problems. Further, Linda Parsons, a staff nurse for Wellman, testified that if Fredrick had revealed her history of treatment for lower back problems, Parsons would not have cleared Fredrick to work as a blender-operator without a further investigation.

Based on the foregoing, the Appellate Panel properly found that Wellman relied on the misrepresentation Fredrick made after she received the conditional offer of employment and that it was a substantial factor in her hiring.

C. Causal Connection

Additional testimony from Parsons and Carmichael supported the Appellate Panel's finding that there was a causal connection between Fredrick's concealment of her condition and her injury. The testimony of both witnesses established that Fredrick would not have been exposed to the risks of lifting heavy objects and would not have been in the position to be injured had she been truthful about her medical history. Additionally, Fredrick's treating physician, Dr. W.S. Edwards, Jr., testified that Fredrick's preexisting disc herniation was the same disc herniation for which he treated her following her October 18, 2005 work accident. He further testified that if he had been Fredrick's treating physician before Wellman rehired her, he would have recommended she avoid any work requiring repetitive bending, lifting, twisting, or turning.

As to the determination of witness credibility, the single commissioner found that Fredrick was not credible, and the Appellate Panel adopted that

finding. In contrast, the single commissioner implicitly found Dr. Edwards, Linda Parsons, and Eugene Carmichael to be credible and used the testimony of those witnesses to support her findings.

Based on the foregoing, the evidence supports the Appellate Panel's findings on the elements of Wellman's fraud defense. Therefore, we affirm the Appellate Panel's findings.

CONCLUSION

Accordingly, the circuit court's order upholding the Appellate Panel's findings of fact and conclusions of law is

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John S. Divine, IV, Respondent,

v.

Josette A. Robbins, Appellant.

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

Opinion No. 4600
Heard June 9, 2009 – Filed July 28, 2009

AFFIRMED

K. Douglas Thornton, of Conway, for Appellant.

Martha L. Hamel, of Pawleys Island, for Respondent.

GEATHERS, J.: Josette Robbins (Mother) appeals the family court's decision to award John Divine (Father) sole custody of their six-year-old child (Daughter) because it was against Daughter's best interests. Mother asserts the family court placed undue reliance on Father's expert witness and erred in several evidentiary rulings, which resulted in the family court

making improper credibility determinations regarding the parties and their witnesses. Mother also contends her counsel's ineffective representation prevented her from having a meaningful final hearing in violation of her due process rights. We affirm.

FACTS

At present, Mother is 40 years old and Father is 42 years old. Mother and Father were involved in a romantic relationship from 1998 until 2002 but never married or lived together. The parties first met when Mother was a waitress at one of the restaurants that Father owns in the Myrtle Beach area.[1] While Mother and Father stated they were initially in love, their relationship progressively deteriorated due to Mother's erratic behavior, jealousy issues, and physical violence towards and harassment of Father. As a result of Mother's behavior, Father ended the relationship in February 2002. Despite the break-up, the parties still maintained contact, and in July 2002, Mother became pregnant. Daughter was born on May 4, 2003. In addition to Daughter, each party has one daughter from another relationship.

At the final hearing, Mother testified that Father initially denied being Daughter's father and urged Mother to have an abortion on several occasions. Mother also stated that Father provided no emotional support during her pregnancy and did not provide any financial support until several months after Daughter's birth. In contrast, Father stated that while he was initially uncertain whether Daughter was his child due to the status of his relationship with Mother when she became pregnant, he readily accepted responsibility for Daughter as soon as a paternity test identified him as Daughter's father.

[1] Throughout this litigation, Father has been the president of the Divine Dining Group, a corporation with numerous restaurants and other food and beverage establishments in the Myrtle Beach area. Mother is a college graduate. For the majority of the parties' relationship, Mother managed one of Father's liquor stores, in which Mother contends she has partial ownership. At the time of the final hearing, she was seeking employment and planning to attend real estate school.

To provide financial support, Father paid Mother's medical bills; purchased baby furniture for Mother's home; bought maternity clothes for Mother; sent Mother a $3,000 check for Daughter in July 2003, which Mother tore up and mailed back to Father; and sent Mother a $4,000 check approximately six months after Daughter's birth for her support, which Mother accepted. Despite Father's earnest efforts to be involved in Daughter's life, Mother allowed Father to visit Daughter only in Mother's home and at times convenient to Mother. Mother testified that she wanted Father to visit Daughter in her home because Daughter was a premature baby and Father had no previous experience with small children. Father claimed that Mother told him the only way he could see Daughter on a regular basis was if he agreed to marry Mother. Mother, on the other hand, testified that she initially attempted to establish a regular visitation schedule with Father, but Father was unwilling to come on set days because his schedule changed often due to his business.

Father initially attempted to resolve the custody and visitations issues directly with Mother. When this was unsuccessful, Father employed an attorney in October 2003 to contact Mother to establish a regular visitation schedule and to offer $1,400 per month in child support. In response, Mother told Father that she would only permit regular visitation of Daughter if ordered to do so by a judge. Mother then denied Father visitation with Daughter for a period of five weeks in an effort to "push him to come up with a schedule."

As a result of the visitation issues, Father filed the instant action on November 17, 2003, requesting joint custody of Daughter, visitation, the establishment of child support obligations, the right to conduct discovery, and mutual restraining orders. On December 18, 2003, the parties agreed to give Mother temporary custody of Daughter pending a final hearing on the merits and specified visitation arrangements and child support. The following day, Mother filed an answer and counterclaim, requesting custody, child support, and attorney's fees.

As time passed, Father became increasingly concerned about Mother's psychological state and its effect upon her ability to parent and care for Daughter. Consequently, on May 19, 2004, Father moved to amend his

pleadings to request sole custody of Daughter and sought a court-ordered psychiatric evaluation for Mother and a court-appointed guardian ad litem for Daughter. In response, the family court permitted Father to amend his pleadings to request sole custody of Daughter and confirmed the parties' choice of Melissa Emery as Daughter's guardian ad litem.[2] The family court did not require Mother to submit to a psychiatric evaluation at that time.

On June 21, 2004, Mother's counsel filed a motion to be relieved as counsel, citing his inability to effectively communicate with Mother. The family court then granted Mother's first of three requests to continue the final hearing originally set for November 4, 2004 in order to find substitute counsel. To accommodate Mother, the family court rescheduled the final hearing two more times prior to the final hearing.

In March 2005, Father filed a motion to compel discovery, and he again requested a psychiatric evaluation for Mother. On April 18, 2005, the family court granted Father's request to compel discovery and ordered Mother to submit to a psychiatric evaluation at Father's expense. On June 22, 2005, C. Barton Saylor, PhD., a licensed clinical psychologist and diplomate in forensic psychology, conducted a psychiatric evaluation of Mother and testified as to his conclusions at the final hearing.

The final seven-day hearing took place on September 12 and 15, 2005, and then reconvened on October 13, 14, 25, 27, and 28, 2005. In its thirty-two page final order, the family court made numerous findings in support of its decision to award sole custody of Daughter to Father. Although the family court acknowledged that joint custody was a permissible alternative, based on the continued hostilities between the parties and the lack of Mother's ability to maintain a cooperative co-parenting relationship with

[2] On July 2, 2005, less than three months prior to the final hearing, Mother filed a motion seeking removal of Ms. Emery as guardian ad litem, alleging a conflict of interest and the appearance of impropriety. The family court found that Mother failed to substantiate either of these claims, but to ensure that the final hearing focused on the best interests of Daughter and not on any perceived conflict of interest, the family court substituted Carroll Padgett as guardian for Daughter.

Father, the family court found Daughter's best interests would be served by granting Father sole custody of Daughter. This appeal followed.

ISSUES ON APPEAL

Mother presents the following arguments as to why the family court's decision to award sole custody to Father was erroneous:

(1) The family court's award of custody was against Daughter's best interests.

(2) The family court placed undue reliance on Father's expert witness, whose testimony was incomplete and biased in favor of Father.

(3) The family court erred in several evidentiary rulings, which prevented Mother from presenting complete and probative evidence at the final hearing.

(4) The family court's undue reliance on Father's expert witness and improper evidentiary rulings resulted in the family court making improper credibility determinations regarding the parties and their witnesses.

(5) The family court failed to provide Mother with a meaningful final hearing in violation of her substantive due process rights due to her counsel's lack of preparation and ineffective representation at the final hearing.

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. Epperly v. Epperly, 312 S.C. 411, 414, 440 S.E.2d 884, 885 (1994). However, this broad scope of review does not relieve the appellant of the burden of convincing us that the family court committed error. Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 189-90, 612 S.E.2d 707, 711

(Ct. App. 2005). Nor are we required to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimonies. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

With respect to custody determinations, the appellate courts have consistently shown deference to the family court in electing between fit parents. Altman v. Griffith, 372 S.C. 388, 393, 642 S.E.2d 619, 621 (Ct. App. 2007). "In gauging between fit parents as to who would better serve the best interests and welfare of the child in a custodial setting, the family court judge is in a superior position to appellate judges who are left only to review the cold record." Altman, 372 S.C. at 393, 642 S.E.2d at 622. For this reason, custody decisions are matters left largely to the discretion of the family court. Stroman v. Williams, 291 S.C. 376, 378, 353 S.E.2d 704, 705 (Ct. App. 1987).

LAW/ANALYSIS

I. Best Interests of Daughter

Mother argues the family court's decision to grant Father sole custody of Daughter was against Daughter's best interests. We disagree.

In all child custody controversies, the controlling considerations are the child's welfare and best interests. Cook v. Cobb, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978). In determining custody, the family court "must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child." Woodall v. Woodall, 322 S.C. 7, 11, 471 S.E.2d 154, 157 (1996). Because all relevant factors must be taken into consideration, the family court should also review the "psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects" of the child's life. Id. In other words, the totality of circumstances unique to each particular case "constitutes the only scale upon which the ultimate decision can be weighed." Parris v. Parris, 319 S.C. 308, 310, 460 S.E.2d 571, 572 (1995).

In the case at hand, the family court clearly considered the totality of circumstances in determining that Daughter's best interests would be served by awarding custody to Father. In a very thorough final order, the family court made numerous in-depth findings to support its decision to award custody of Daughter to Father, including: Daughter's welfare, the parties' history of domestic violence, the parties' conduct, Dr. Saylor's expert opinion, the fitness of each party to handle Daughter's physical and emotional needs, the willingness of each party to facilitate the relationship between Daughter and the other parent, the financial and physical resources of the parties, the stability of each party's home, the amount of time each party has to spend with Daughter, each party's family network of support, child care availability, the loving relationship between Daughter and each party, religious training, primary caretaker status, immoral conduct of each party, the guardian ad litem's opinion, and each party's respect for court orders. The family court's in-depth findings show that it properly considered the fitness of each parent and the relevant factors that would affect Daughter's best interests in making its custody determination. See Pirayesh v. Pirayesh, 359 S.C. 284, 296, 596 S.E.2d 505, 512 (Ct. App. 2004) ("When determining to whom custody shall be awarded, the court should consider all the circumstances of the particular case and all relevant factors must be taken into consideration.").

The family court stressed that each party came before the court on equal footing, but after "[h]aving adequate opportunity to carefully consider all relevant factors relating to custody . . . the best interest of the child would be served by granting sole legal and physical custody to Plaintiff Father." (emphasis in original). See Brown v. Brown, 362 S.C. 85, 90, 606 S.E.2d 785, 788 (Ct. App. 2004) (“The paramount and controlling factor in every custody dispute is the best interests of the [child].”). Mother claims that "the pivotal issue [in determining custody] became who was to blame for the outbursts and altercations between the parties." However, the family court's order considered Mother's behavior and the tumultuous nature of the parties' relationship as only one of many factors in its decision, as is statutorily required in resolving custody issues. See S.C. Code Ann. § 63-15-40 (Supp. 2008) (formerly S.C. Code Ann. § 20-7-1530) (stating that in making a decision regarding child custody, the family court must, in addition to other factors, give weight to evidence of domestic violence).

A majority of Mother's argument on appeal centers around the lengthy and dramatic history of the parties' relationship with little focus on why Mother is better suited to be Daughter's primary caretaker. While much of both parties' testimony at the final hearing focused on the parties' relationship, Mother has failed to sufficiently highlight evidence proving that the family court's award of custody to Father was contrary to Daughter's best interests. See Jones v. Ard, 265 S.C. 423, 426, 219 S.E.2d 358, 359-60 (1975) (finding that when both parties are fit and proper to have custody, the family court must make the election, and this Court must defer to its decision when the family court's findings and conclusions are supported by the record). Therefore, Mother has failed to sustain her burden of convincing this Court that the family court did not consider the Daughter's welfare and best interests in its custody decision. See Shorb v. Shorb, 372 S.C. 623, 628, 643 S.E.2d 124, 127 (Ct. App. 2007) ("The burden is upon the appellant to convince this Court that the family court erred in its findings of fact.").

II. Dr. Saylor's Testimony

Mother asserts the family court abused its discretion by placing undue weight and reliance on Husband's expert witness, Dr. Saylor, because Dr. Saylor's testimony was biased and imbalanced. We disagree.

At the final hearing, Dr. Saylor testified as to his conclusions from his meeting with Mother. After being qualified as an expert in clinical psychology, Dr. Saylor stated that in his twenty-three years of practice, he had conducted over 1,500 parental capacity evaluations in cases when child custody was an issue. Dr. Saylor stated that Mother described herself as "pretty laid back," which was not consistent with his observations that she was "defensive, argumentative, and evasive." He also stated that she failed to provide information to him in a straightforward manner, and when he pointed out inconsistencies in her own statements, she became very defensive and accused Dr. Saylor of misunderstanding her. In concluding that Mother had a narcissistic personality disorder,[3] Dr. Saylor said that this disorder could be a

[3] According to Dr. Saylor's report, an individual diagnosed with Narcissistic Personality Disorder may exhibit the following: (1) a grandiose sense of self-importance; (2) a requirement of excessive admiration; (3) a sense of

liability to parenting because Mother was inclined to focus on how a situation affected her as opposed to Daughter. Additionally, he believed Mother was not open to honest self-exploration, refused to admit any legitimate problems, faults, or weaknesses, and tended to project responsibility for her own actions onto others.

In reviewing Dr. Saylor's testimony at the final hearing, the family court stated that although it "by no means . . . delegated any decision as to custody to any expert[,]" it was particularly concerned with Dr. Saylor's opinion that Mother "'appeared to have no concept of how to maintain a cooperative co-parenting relationship with the father of her child and no motivation to develop a more cooperative relationship unless it was on her own terms.'" Further, the family court found these issues could interfere with Daughter's best interests based on Dr. Saylor's opinion that "[Mother] is likely to continue to maintain a hostile, suspicious, and provocative attitude when dealing with [Father], which may create drama and disturbance for their daughter and could lead to long-term emotional problems for the child."

Mother's argument concerns the question of credibility and the probative value to be placed upon Dr. Saylor's testimony. Resolving questions of credibility is the function of the family court judge who heard the witnesses' testimony. Terwilliger v. Terwilliger, 298 S.C. 144, 147, 378 S.E.2d 609, 611 (Ct. App. 1989). Because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to the family court's findings when matters of credibility are involved. Shirley v. Shirley, 342 S.C. 324, 329, 536 S.E.2d 427, 429 (Ct. App. 2000). "This is especially true in cases involving the welfare and best interests of children." Aiken County Dep't of Soc. Servs. v. Wilcox, 304 S.C. 90, 93, 403 S.E.2d 142, 144 (Ct. App. 1991).

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entitlement, i.e., an unreasonable expectation of especially favorable treatment or automatic compliance with expectations; (4) an interpersonal exploitativeness, i.e., a willingness to take advantage of others to achieve the individual's needs; (5) a lack of empathy; (6) an envy towards others or a belief that others envy the individual; and (7) arrogant and haughty behaviors or attitudes.

Mother alleges that Dr. Saylor's conclusions were "carefully constructed" to favor Father, but she has presented no credible evidence to substantiate this claim. Dr. Saylor stated that his conclusions and assessment of Mother's mental state were based on four specific tests that are customarily used and accepted in the clinical psychology field. Mother never objected to Dr. Saylor's qualification as an expert in clinical psychology or to the methods employed by Dr. Saylor in evaluating Mother's mental state. Furthermore, Dr. Saylor's conclusions could not have been influenced by Father as Dr. Saylor testified that he never spoke to or even met Father prior to the final hearing.

Dr. Saylor acknowledged that Father's attorney and Daughter's guardian ad litem provided him with witness affidavits prior to the evaluation, but he initially reviewed them only to determine whether there was any foundation for an interview. Dr. Saylor stated that his conclusions in his report were drawn from information provided to him directly by Mother at the evaluation. He specifically confirmed that it was "beyond the scope of [his] evaluation" to determine the accuracy of the witness affidavits, but they "at least appear[ed] to be the foundation that the concerns about [Mother's] behavior and temper were not simply the product of a series of manufactured claims by the father of her daughter."

Dr. Saylor's report and statements at the final hearing do not indicate a predisposed bias in favor of Father, but rather serve to substantiate his conclusion as to Mother's mental state. The family court, as the trier of fact, properly weighed Dr. Saylor's testimony against all the other evidence presented at the final hearing in determining the weight that his testimony should be afforded. See Terwilliger, 298 S.C. at 147, 378 S.E.2d at 611 (stating that the family court, as the fact finder, determines the weight to be given to testimony); Altman, 372 S.C. at 401, 642 S.E.2d at 626 (finding that because an expert's testimony was not the only evidence tending to establish that the mother was self-absorbed and self-pitying, the family court's consideration of the expert's testimony in conjunction with other evidence was proper in its decision to award custody of child to the father).

Mother also contends that Dr. Saylor's evaluation was imbalanced by design because Dr. Saylor failed to evaluate Father and failed to interview

Daughter or any witnesses with personal knowledge of the parties' interactions. Despite this contention, Mother never attempted to request an evaluation of Father or to object to the accuracy of Dr. Saylor's evaluation of her based on Dr. Saylor not evaluating Father or interviewing other witnesses. Nor did she present any contrary rebuttal evidence of her own to refute Dr Saylor's conclusions. Furthermore, Dr. Saylor's failure to interview other witnesses did not compromise his evaluation of Mother because the purpose of Mother's court-ordered psychological evaluation was not to make a custody recommendation. As stated in his report, Dr. Saylor conducted the evaluation for "the purpose of . . . provid[ing] information regarding [Mother's] current psychological adjustment."

If the exclusive purpose of Dr. Saylor's interview had been to make a custody recommendation, the better practice would have been to interview Father; however, the failure to interview Father would not in itself be fatal. See Terwillinger, 298 S.C. at 147, 378 S.E.2d at 611 (refuting father's claim that the family court erred in its custody decision by giving undue consideration to the testimony of mother's expert witness, a clinical psychologist, despite psychologist not testing or communicating with the father). In sum, because it was the family court's duty to resolve credibility issues, the family court did not err in assessing the probative value of Dr. Saylor's testimony in its custody determination. See Thompson v. Brunson, 283 S.C. 221, 228, 321 S.E.2d 622, 626 (Ct. App. 1984) (finding the family court was in the best position to assess the veracity of the testimony of witnesses).

III. Evidentiary Rulings

Mother objects to several statements at the final hearing on the grounds that the admission of these statements was both erroneous and prejudicial. We disagree on all claims of error.

To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both error and resulting prejudice. Altman, 372 S.C. at 401, 642 S.E.2d at 626.

A. Dr. Saylor's Qualifications

Mother first contends that the family court erroneously qualified Dr. Saylor as an expert in child speech developmental delay because (1) his resume fails to support this qualification; and (2) no notice was given to Mother that Dr. Saylor would be called as an expert in this field. We disagree.

While Mother objects to the family court recognizing Dr. Saylor as an expert on child speech developmental delays, Mother sets forth no argument or supporting authority to indicate how the family court's ruling was in error or how it prejudiced her at the final hearing. See Hunt v. Forestry Comm'n, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) (holding that issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal); Jenkins v. E.L. Long Motor Lines Inc., 233 S.C. 87, 94, 103 S.E.2d 523, 527 (1958) (stating that the trial court's ruling on the qualification of an expert would not be disturbed in the absence of an abuse of discretion and prejudice to the complaining party). Thus, this issue is deemed abandoned on appeal. See Rule 208(b)(1)(D), SCACR (requiring the citation of authority in the argument portion of an appellant's brief); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal).

Additionally, Mother's argument regarding notice is not preserved for review because she never objected to Dr. Saylor's testimony on this ground at the final hearing. In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court."); Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."). Even if Mother preserved this issue, she fails to set forth any argument as to how a lack of notice regarding the family court's qualification of Dr. Saylor as an expert in child speech developmental delay prejudiced her. See Doe v. Doe, 324 S.C. 492, 499, 478

S.E.2d 854, 858 (Ct. App. 1996) (holding that appellant seeking reversal must show both error and prejudice).

B. Guardian Ad Litem's Statements

Next, Mother argues the guardian ad litem's statement that Mother was "insanely jealous" was improper because she was neither qualified to give such an opinion pursuant to Rule 701, SCRE, nor was Mother provided with notice that the guardian would be testifying as an expert witness. We disagree.

At the final hearing, Daughter's guardian ad litem, Mr. Padgett, questioned the previous guardian ad litem, Ms. Emery, regarding her assessment of Mother's behavior towards Father, specifically asking, "Would this be a fair statement to characterize [Mother's] anger problems or things that she has done as some woman who is insanely jealous over the father of her baby?" In response, Ms. Emery stated, "That would be fair." Mother's counsel did not interpose an objection. Father's counsel then followed up Mr. Padgett's questioning to Ms. Emery with the following: "Does it appear to be behavior that goes beyond insane jealousy?" In response, Mother's counsel objected that Ms. Emery was not qualified to comment beyond her opinion as to Mother's "insane jealousy." Despite counsel's objection, the family court permitted Ms. Emery to answer the question.

Ms. Emery's testimony was not required to be presented by an expert witness because her statement was within the range of permissible lay testimony. Pursuant to Rule 701, SCRE, lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness's perception, will aid the trier of fact in understanding testimony, and do not require special knowledge, skill, experience, or training. Ms. Emery's opinion regarding Mother's behavior was based on her personal interaction with Mother as Daughter's guardian and was probative in determining which parent was best suited to obtain custody of Daughter. See State v. Douglas, 380 S.C. 499, 502-03, 671 S.E.2d 606, 608-09 (2009) (finding that a witness did not need to be qualified as an expert in the field of forensic interviewing when the witness testified only as to her personal observations and as to her interview with the victim); cf.

Honea v. Prior, 295 S.C. 526, 531, 369 S.E.2d 846, 849 (Ct. App. 1988) (finding that a social worker was qualified to give an opinion as to the defendant's mental state despite not being a psychiatrist because she had adequate opportunities to observe and interview the defendant). Moreover, this Court is aware that the family court was free to accept or reject Ms. Emery's opinion as to whether Mother was "insanely jealous" based on its assessment of Ms. Emery's and Mother's testimony at the final hearing. Davis v. Davis, 356 S.C. 132, 135, 588 S.E.2d 102, 103 (2003) (stating that when reviewing a child custody order, this Court is mindful that the family court observed the witnesses and was in a better position to judge their credibility and assign comparative weight to the testimony).

Regarding Mother's argument that Father did not notify her of his intent to call Ms. Emery as an expert witness, Father was not required to notify Mother in this regard because Ms. Emery was not testifying as an expert witness. But see Rule 33, SCRCP (stating that a party may serve a written interrogatory upon another party to request identification of any potential expert witnesses whom the party proposes to use as a witness at trial); Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991) ("There is, however, a continuing duty to supplement responses with new information concerning the identity of persons having knowledge of discoverable matters and persons expected to be called as expert witnesses."). Mother never objected to Ms. Emery's testimony on this ground at the final hearing, thus it is not preserved for this Court's review. See In re Michael H., 360 S.C. at 546, 602 S.E.2d at 732 ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.").

C. Father's statement

Mother next asserts that the family court erred in permitting Father to testify as to whether Father's personal observations were consistent with Dr. Saylor's testimony. We disagree.

Father's counsel asked Father on direct examination, "And how did [Dr. Saylor's] impressions in that report relate to your impressions of Josie?" Mother's counsel objected on the grounds that Father was not qualified as a

forensic psychologist to testify on the accuracy or validity of Dr. Saylor's conclusions. The family court then instructed Father that he could testify as to his own impressions and feelings but not as to whether Dr. Saylor's report was valid. In turn, Father stated, "[The report] was extremely representative of what I have experienced and what I've had to – what I've been dealing with. . . ."

Father was in a position to testify as to whether his personal observations and experiences with Mother were similar to the conclusions in Dr. Saylor's report. His response was based on first-hand knowledge acquired during the parties' four-year tumultuous romance and continued interaction following Daughter's birth. See Rule 602, SCRE (stating that a witness must have personal knowledge of a matter in order to testify about it). Father's statements were not of the nature that would require specialized knowledge such that he would need to be qualified as an expert before testifying because his opinion was rationally based on his perception of Mother as a result of their relationship. See Rule 701, SCRE (limiting a lay witness's testimony to opinions or inferences that (1) are rationally based on the witness's perception; (2) are helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (3) do not require special knowledge, skill, experience, or training). Consequently, the family court did not err in permitting Father to respond to this line of questioning.

D. Aunt's Testimony

Mother argues the family court erred in limiting the testimony of Mother's sister-in-law, Leslie Caldwell (Aunt), at the final hearing because Aunt's statements were neither speculative nor outside the realm of testimony agreed upon during discovery. We disagree.

Daughter's guardian ad litem, Mr. Padgett, asked Aunt how Daughter would be affected if she was placed in Father's custody and taken away from Daughter's half-sister. In response, Father's counsel objected, arguing that Aunt's response would be speculative, and unless there was an expert witness to testify as to how Daughter would feel or react, it was outside the scope of permissible lay testimony. The family court sustained Father's objection,

finding that her previous testimony did not indicate she had either the educational expertise or interaction with the parties to be able to testify on that issue.

Aunt's testimony was properly excluded as she had no personal knowledge of how Daughter's custody placement would affect Daughter. Daughter never lived with Aunt, and Aunt testified that she only saw Daughter three or four times a year for less than a week at a time. While Aunt clearly has a personal relationship with Daughter, she lacks the daily interaction and first-hand knowledge that is necessary to properly testify on how Daughter living with Father would affect Daughter's relationship with her half-sister. See Rule 701, SCRE. Consequently, the family court did not abuse its discretion in limiting Aunt's testimony on this issue.

Additionally, Mother's counsel did not proffer Aunt's testimony after it was excluded. We have previously refused to address an issue on appeal when no proffer is made after the family court excludes evidence. See Zaragoza v. Zaragoza, 309 S.C. 149, 153, 420 S.E.2d 516, 518 (Ct. App. 1992) (an alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in the absence of an adequate proffer of evidence to the family court). In any event, the family court was presented with a plethora of testimony relating to how custody placement would affect Daughter, such that the exclusion of this testimony did not prejudice Mother.

E. Grandmother's Testimony

Mother next contends that the family court abused its discretion in limiting the scope of her mother's (Grandmother) testimony at the final hearing. We disagree**.**

During Grandmother's testimony, Mother's counsel asked Grandmother whether she "had an occasion to see [Daughter] after she's been on visitation with [Father] in this case." Father's counsel objected, stating that per Mother's discovery responses, Grandmother would only be testifying to Mother's characteristics as a parent and her specific observations of Father. The family court sustained Father's objection.

In response to Mother's argument on appeal, Father claims the introduction of Grandmother's observations regarding Daughter would create unfair surprise and prejudice. While we do not believe the introduction of Grandmother's testimony on this point would ultimately prejudice Father, Grandmother's testimony is admittedly outside the scope of testimony presented in Mother's discovery responses. Mother was free to supplement her discovery responses prior to the final hearing to enlarge the scope of her witnesses' testimony, and her failure to do so should not work to the detriment of Father. Furthermore, the family court permitted Grandmother to testify extensively about the parties' relationship and her observations of Father and Mother, both individually and with Daughter. As a result, we do not view the family court's limitation on this small portion of Grandmother's testimony as prejudicial error.

F. Mother's testimony

Mother lastly submits that the family court erred in limiting Mother's initial statement concerning her wishes for Daughter's custody placement. We disagree.

During the final hearing, Mother's counsel asked Mother, "What is your desire for this Court to order in regard to custody of [Daughter], primary custody of [Daughter]?" In response, Mother stated, "I pray that the Court awards me primary custody of [Daughter]." Mother then proceeded to explain why she was entitled to primary custody of Daughter. Father's counsel objected that her statements were not responsive to the question, and the family court sustained the objection. Mother briefly contends that the court's ruling demonstrates bias and prejudice; however, Mother fails to explain how she was prejudiced by the court's ruling. See First Sav. Bank, 314 S.C. at 363, 444 S.E.2d at 514 (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal). Regardless, we perceive no error or prejudice to Mother as the family court then immediately allowed Mother, at her counsel's prompting, to explain in detail to the court why she was seeking primary custody of Daughter.

IV. Credibility Determinations

Mother summarily argues that the family court completely disregarded the probative value and credibility of Mother and her witnesses, which improperly influenced the family court's custody determination. We disagree.

Mother cites no authority for this argument, merely stating at the outset that she incorporates the arguments from all of the previous issues. See First Sav. Bank, 314 S.C. at 363, 444 S.E.2d at 514 (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal). Regardless, the family court's assessment of witness credibility and the weight it apportioned to certain witness's testimony was proper. The family court specifically stated in its final order, "Certain witnesses were found by the Court to be credible and compelling, while other witnesses were found by the Court not to be so." Although Mother claims that the family court completely disregarded the credibility of Mother and all of her witnesses, the only witness the family court explicitly found to be less credible was Mother. Based on Mother's conflicting testimony, which was highlighted in the family court's final order, the family court was well within its delegated authority to assign less weight to Mother's testimony in making its decision. See Ball v. Ball, 312 S.C. 31, 35-36, 430 S.E.2d 533, 536 (Ct. App. 1993) (stating that the family court has the advantage of hearing all the testimony presented and thus is able to best weigh the testimony in making its decision). Thus, we find no abuse in the family court's exercise of discretion in resolving these credibility issues at the final hearing.

VII. Ineffective Assistance of Trial Counsel

Mother claims her trial counsel's ineffective representation prevented her from having a meaningful final hearing in violation of her due process rights.[4] We disagree.

[4] In Mother's reply brief, she asserts for the first time that the family court also deprived Daughter of her due process rights. The reply brief is not the appropriate vehicle to raise new issues on appeal; thus, we decline to address

Mother attempts to improperly transform her dissatisfaction with her trial counsel's presentation of her case before the family court into a claim of legal error on the part of the family court. Any dissatisfaction she has with her trial counsel is not the proper subject of review on appeal from the family court's custody decision. See generally Lanier v. Lanier, 364 S.C. 211, 215, 612 S.E.2d 456, 458 (Ct. App. 2005) (finding that the appellant has the burden to convince this Court that the *family court committed legal error* on appeal in a child custody case) (emphasis added).

Furthermore, Mother's speculative claim that "adequate preparation of her case for trial may have avoided trial . . . [and] most probably have brought about a different result" is insufficient to establish that she was deprived of a meaningful hearing in violation of her due process rights, particularly when she never raised this issue to the family court. See Grant v. S.C. Coastal Council, 319 S.C. 348, 356, 461 S.E.2d 388, 392 (1995) (finding appellant's argument that hearing below was conducted in such a way as to deprive him of his constitutional due process rights was never mentioned prior to his appeal and consequently was not preserved for review). In addition to Mother's failure to raise this issue below or to cite any authority to support her claim that the family court violated her due process rights, we note that the family court went to great lengths to provide Mother with an opportunity to adequately prepare her case as demonstrated by the court's willingness to grant Mother's multiple requests for continuances. Additionally, we find that the family court clearly afforded Mother and Father a meaningful, thorough, and fair hearing, as evidenced by the seven-day final hearing and ensuing thirty-two page final order. Therefore, Mother's argument on this issue is without merit.

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this argument. Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief.").

CONCLUSION

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

AFFIRMED.

HUFF and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amrik Singh & SBPS, Inc.
d/b/a Travel Inn, Respondents,

v.

City of Greenville, Appellant.

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

Opinion No. 4601
Heard April 23, 2009 – Filed July 29, 2009

REVERSED AND REMANDED

Ronald W. McKinney, of Greenville, for Appellant.

James W. Fayssoux, Jr., and Ryan L. Beasley, both of Greenville, for Respondents.

HEARN, C.J.: The City of Greenville appeals an order from the circuit court granting Amrik Singh and SPBS, Inc., (collectively Singh), a second set of business license revocation hearings. We reverse and remand.

FACTS

Singh is the president and sole shareholder of SBPS, Inc., which owns and operates the Travel Inn Motel located at 755 Wade Hampton Boulevard in Greenville, South Carolina. In 2006, Jonathan Simons, Interim Director of Office Management and Budget for the City, notified Singh that his business license to operate the Travel Inn Motel was to be revoked.[1] Thereafter, Singh requested a hearing pursuant to section 8-44(b) of the City of Greenville Code of Ordinances.[2]

A revocation hearing was held, and the City presented evidence that Singh had held a business license for the Travel Inn from 2004 to 2006. The City also presented testimony from Lieutenant Randle Evett, of the City of Greenville Police Department, who stated there was an abnormally high amount of calls for service coming from the Travel Inn since the beginning of 2004. Specifically, Evett testified the police department received 918 calls for service from the Travel Inn between April of 2004 and June of 2006.[3] Evett noted that in 2004 he had spoken to Singh's daughter, who was manager of the Travel Inn, about the number of calls, but that following the conversation, the number of calls for service actually increased.

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[1] Section 8-43(b) of the City of Greenville Code of Ordinances gives the City the power to revoke a business license where the licensee's business amounts to a public nuisance.

[2] Section 8-44(b) provides in relevant part: "The applicant or licensee may, within five working days from the date of the notice, request a hearing to contest the grounds or request an extension of time to close the business. The hearing shall be held within 15 days unless additional time is allowed by the city manager."

[3] A call for service is defined as a call or occurrence requiring an on-the-scene Police response.

According to Simons, of the 918 calls, 194 required an incident report, including forty-six drug-related violations; thirty-four trespass after notice and notice given violations; twelve assaults; two assault and batteries with intent to kill; two armed robberies; nine stolen vehicles; fifteen petty larcenies; four disorderly conducts; and two controlled purchases of crack-cocaine by Singh's daughter.

In response, Singh presented evidence that he owned the subject property for only three months prior to receiving the letter revoking his business license. Singh further stated that, while he managed the Travel Inn during the time frame in which the calls for service were accumulated, he did not have the authority to make the changes needed to address the issues. Singh maintained the letter from Simons was the first formal notice he had received informing him his business constituted a nuisance.

At the close of evidence, the hearing officer recommended Singh's business license revocation be upheld. Pursuant to section 8-44(c) of the Greenville Code of Ordinances,[4] Singh appealed that decision to the city council. In the meantime, Singh also unsuccessfully sought a temporary injunction in an effort to continue his business operations during the pendency of his appeal.

On appeal to the city council, the city manager's decision to revoke Singh's business license was modified, allowing Singh to provisionally re-open his business for sixty days under a "Conditional Business License." The city council expressly allowed the city manager to establish the conditions[5]

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[4] Section 8-44(c) of the Greenville Code of Ordinances provides in relevant part: "An appeal, which shall not stay the revocation, may be taken upon the written record to the city council. Notice of such appeal shall be served upon the city clerk within five days from the final action by the city manager, specifying the grounds for appeal and the action requested. . . ."

[5] The conditions included: (1) Maintain a log of persons placed on trespass notice, which Police will be able to inspect at anytime without notice and refuse to rent rooms to any person on this list; (2) require presentation of identification and motor vehicle tag number from all patrons upon registering

with which Singh had to comply, and stated that any deviation from the conditions would result in the automatic revocation of Singh's conditional license. The council further stated that after the sixty-day period, the Travel Inn would be placed on a "six-month Probation Period," as long as the city manager certified the business had been in complete compliance with the conditions during the sixty days. The city council gave the city manager full discretion to determine whether the conditions were in fact violated, with the police department to report any violations directly to the city manager.

Upon expiration of the sixty-day period, the chief of the Greenville Police Department submitted an evaluation concerning the Travel Inn's compliance with the conditions set forth in the agreement. The evaluation stated the Department's vice and narcotics squads checked the Travel Inn and its premises on a daily basis, and ultimately found Singh had met the conditions outlined in the agreement.

Following the chief of police's report, the city manager extended the probationary period for one year under the existing terms and conditions. Approximately one month later, the city manager wrote to Singh informing him the Travel Inn's business license would be revoked based upon Singh's

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for lodging; (3) require a $100.00 security deposit for patrons residing at Travel Inn for more than one week continuously; (4) prohibit hourly room rates; (5) maintain security cameras and record all activity for retrieval, as well as monitoring cameras twenty-four hours per day and allowing Police to monitor the cameras at anytime without prior notice; (6) provide written documentation that security personnel used by Travel Inn are licensed and bonded by the State of South Carolina and that security personnel must be on duty twenty-four hours per day, seven days per week, monitoring all parking lots and the sidewalk in front of Travel Inn to reduce prostitution; (7) submit names and addresses of security personnel and Travel Inn employees to the Police, and the employees must not have criminal convictions; (8) Police will be able to inspect all rooms before reopening November 20, 2006; (9) property owner and manager are responsible for maintaining the grounds and complying with the property maintenance code; (10) enforce all conditions in the Travel Inn policy submitted to the City of Greenville.

"inability or unwillingness to maintain a safe, drug-free, and crime-free environment." The letter referenced four incidents which the manager determined constituted a continued nuisance, thereby necessitating revocation. Thereafter, Singh requested an appeal to the city council pursuant to section 8-44(c). The City denied Singh's request for a hearing, believing Singh's previous hearing constituted his appeal for this matter under section 8-44(c). Singh again sought a temporary injunction to allow him to continue to operate his business. Upon denial of this request, Singh appealed the revocation of his business license to the circuit court pursuant to Rule 74, SCRCP.[6]

On appeal, Singh argued the revocation of his business license and the City's subsequent decision to deny a rehearing of his appeal, violated his right to procedural due process and thus was arbitrary. Singh further argued the City's abdication of its monitoring responsibilities, in ceding complete discretion to the city manager, created a means of evading meaningful appellate review.

The City again maintained that the entire process should not be viewed as anything other than one complete revocation process, and, therefore, Singh had already received a hearing before the city council in compliance with Rule 74 and attendant procedural due process. Additionally, the City argued the circuit court did not have jurisdiction to hear the appeal by virtue of an additional suit pending before it.

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[6] Rule 74, SCRCP provides in relevant part:

> Except for the time for filing the notice of appeal, the procedure on appeal to the circuit court from the judgment of an inferior court or decision of an administrative agency or tribunal shall be in accordance with the statutes providing such appeals. Notice of appeal to the circuit court must be served on all parties thirty days after receipt of written notice of the judgment, order or decision appealed from.

The circuit court found the city council was under no obligation to grant Singh a provisional license, but upon doing so, the provisional license acted as a new business license with its own set of unique conditions. Consequently, the circuit court reversed the city council's revocation of Singh's business license, finding that due process entitled Singh to a second hearing regarding the revocation of his conditional license. This appeal followed.

STANDARD OF REVIEW

In reviewing the discretionary decision of a legislative body, our courts have been hesitant to substitute their judgment for that of elected representatives. McSherry v. Spartanburg County Council, 371 S.C. 586, 590, 641 S.E.2d 431, 434 (2007). "When the city council of a municipality has acted after considering all of the facts, this court should not disturb the finding unless such action is arbitrary, unreasonable, or an obvious abuse of its discretion." Gay v. City of Beaufort, 364 S.C. 252, 254, 612 S.E.2d 467, 468 (Ct. App. 2005).

LAW/ANALYSIS

The City contends the circuit court erred in finding the one year provisional business license acted as a new license thereby entitling Singh to a second set of business license revocation hearings. We agree.

At the initial hearing, the city manager revoked Singh's business license under section 8-43(b) finding the Travel Inn constituted a public nuisance. On appeal, city council voted to hold the revocation in abeyance provided Singh complied with the conditions as set forth by the city council. Following the initial 60-day probationary period, the city manager reviewed the police department's recommendation and ultimately extended Singh's conditional license by an additional year. In so extending, the city manager retained sole discretion to revoke Singh's license immediately for non-compliance. Within one month of extending Singh's conditional license, the Travel Inn accumulated four additional incident reports. As a result, the city manager reinstated the revocation of Singh's license.

These facts clearly demonstrate the one year extension of the provisional license did not act as a new business license; instead, it was merely a continuation of the previous revocation process. The four incidents that occurred within the month after the extension of the conditional license cannot, and should not, be viewed in isolation from the 918 other calls for service on which the license was initially revoked. Consequently, it was error for the circuit court to find the conditional business license issued by the city council acted as a new license.

Based on our decision that the revocation was one continuous process, Singh's concerns about the violation of his due process rights are misplaced. Singh still had the right to appeal the revocation to circuit court for a determination of whether or not the decision was arbitrary, unreasonable, or an obvious abuse of discretion. That review did not take place because the circuit court erroneously viewed the ultimate revocation as a new proceeding.

Therefore, on remand, the circuit court should review the initial complaints against Singh, in addition to the four subsequent complaints, in order to determine whether the city's decision to revoke Singh's license was arbitrary, unreasonable, or an obvious abuse of discretion. In reaching its decision, the court may also consider the actions of city council in relinquishing complete discretion to the city manager to determine issues of compliance, and the ability to extend the period for the conditional business license. Accordingly, the decision of the circuit court is

REVERSED and REMANDED.[7]

PIEPER, J., and LOCKEMY, J., concur.

[7] The city also argues the circuit court lacked subject matter jurisdiction to hear this matter by virtue of Singh filing two appeals. Subject matter jurisdiction is defined as "the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). Pursuant to Rule 74, SCRCP, it is clear the circuit court may hear an appeal from an inferior court, administrative agency, or tribunal. See Rule 74, SCRCP (providing the procedures for appeal to the circuit court from inferior courts, administrative agencies, and tribunals). Accordingly, we hold the circuit court had subject matter jurisdiction to hear this appeal.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Diana Spreeuw, Respondent/Appellant,

v.

Douglas Barker, Appellant/Respondent.

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

Opinion No. 4602
Heard March 5, 2009 – Filed July 29, 2009

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Gregory S. Forman, of Charleston, for Appellant/Respondent.

Russell S. Stemke, of Isle of Palms, for Respondent/Appellant.

HEARN, C.J.: This is a protracted custody suit where an order issued in 2002 is only just now being reviewed on appeal.

FACTS

During their ten-year marriage, Diana Spreeuw (Mother) and Douglas Barker (Father) lived in Charleston and had two children: Daryn, born January 1, 1990, and Dylan, born March 20, 1997. Mother, the family's primary breadwinner, worked in the field of health-care finance, while Father worked as an attorney. After the birth of the parties' second child, their marriage began deteriorating. To further complicate matters, Mother learned her employer, the last remaining health-care provider with financial operations in the area, would soon leave Charleston for Nashville. Mother immediately began searching for comparable employment in the area; however, her efforts were unsuccessful.[1] Soon thereafter, on June 25, 1999, Father commenced a divorce action.

Prior to the divorce hearing, Mother and Father reached an agreement regarding custody and child support. With her oldest child expressing a desire to finish elementary school in Charleston and no employment opportunities in the area, Mother agreed to give Father primary custody of the children, while sharing joint legal custody with him. In addition, Mother agreed to pay Father $1,000 in child support per month. Meanwhile, Mother accepted the closest employment opportunity available in Nashville. The parties were divorced and the agreement was approved by order of the family court dated December 17, 2001.

Following the divorce, Mother moved to Nashville to begin her job. While there, she routinely sent letters to the children and called them daily. Approximately two months later, Father married Daphne Burns. Thereafter, Daphne began living with Father and the children in Charleston. Daphne described her time in the house as filled with "tension, anger, and ugliness." Six months after moving in, Daphne moved out of the house. Over the next year, Daphne moved back into the house on two occasions only to permanently move out of the house in the spring of 2001.[2] Jo Marie

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[1] The specialization required in her field of health-care finance did not translate to other finance positions.

[2] Despite Daphne's transient living arrangement, the children maintained a "very close" relationship with her.

Hartman, a neighbor of Father, telephoned Mother and informed her of Daphne's permanent departure from the home. Mother called Father and expressed concern about the impact the move would have on the children.

A few months later, the children arrived at Mother's house for summer visitation. While there, her oldest child begged Mother to return to Charleston. In June 2001, Mother decided to return to Charleston and called Father to inform him of her decision. Shortly thereafter, Mother placed her home in Nashville on the market and began searching for employment. In contemplation of her return, Father scheduled a mediation session to revisit the existing visitation schedule. For some unknown reason, the mediation never took place, and the current visitation schedule remained in effect.

By September, Mother still had not sold her house and had failed to find comparable employment in the Charleston area. Nevertheless, Mother, believing her children needed her, took the first job she could find and moved into a friend's house on Daniel Island.[3] Mother, who earned $74,000 a year in Nashville, was then working in a fabric store earning $6.50 an hour. Mother supplemented her income by substitute teaching at local schools for $50 a day. All the while, Mother continued her search for a financial management position in the area. She solicited the service of head-hunting agencies, sent out numerous job applications, looked through employment advertisements in the newspaper, and networked with friends in search of employment. Eventually, Mother accepted a position as an accounts receivable clerk with RoHoHo Incorporated, a franchisee of Papa John's Pizza, earning $26,000 per year.

A month after Mother's return to Charleston, Father still refused to amend the existing visitation schedule.[4] On October 31, 2001, Mother filed a complaint against Father seeking a change in custody and modification of child support. At the temporary hearing, Father alleged his monthly income was $3,600 per month, while Mother indicated her monthly income was

[3] Mother bought her own home approximately a month later.

[4] Under the 1999 order, visitation consisted of monthly weekend visitations and longer periods of visitation during the summer and on school vacations. The 1999 order did not include a normal weekly sharing of custody between the parties due to the distance between their residences.

$903.59. The Honorable F.P. Segars-Andrews issued a temporary order granting Mother overnight visitation with the children every Wednesday night and on alternating weekends. In addition, Mother's child support payments were reduced from $1,000 to $500 per month.

In October of 2001, Father commenced a romantic relationship with Jennifer Helm. As the relationship progressed, Jennifer began spending more and more time at Father's home with the children present. On some occasions, Father acknowledged Jennifer stayed past the children's bedtime. According to the testimony of Mother and the Guardian ad Litem ("Guardian"), the parties' oldest child did not like Jennifer and felt uncomfortable with her in the house. By contrast, Father testified that his children loved Jennifer.

The parties' lives remained virtually unchanged until August 6, 2002 when Father, pursuant to the parties' prior understanding, picked up the children from Mother's house at 9:00 A.M. to take their oldest child to register for school. By the time Father arrived at Mother's residence, she had already departed for work, and the children, ages twelve and five, were alone. However, the children were provided with a list of names and telephone numbers of nearby neighbors they could contact in case of an emergency. After arriving at Mother's house, Father immediately called Mother and informed her he was keeping the children for the remainder of the day. Father also attempted to contact the Guardian, who was unable to take his phone call at the time. Thereafter, Father visited his attorney's office and instructed him to prepare a motion for an ex parte order. In his motion, he alleged "the children were to be left alone all day while [Mother] was at work."[5] On that same day, Judge Segars-Andrews issued an emergency ex parte order preventing the children from being left home alone.

A mere five days before the parties' September 10, 2002 trial date, Father, on his own initiative and without prior notice or approval, took the

[5] Father had not discussed with Mother what plans she had for the children after school registration. Therefore, his statement that they were to be left alone "all day" is speculative. However, it is accurate to say the children were left alone for about an hour from the time Mother left for work until Father picked up the children.

children to the office of Dr. Barton Saylor, a forensic psychologist, to be assessed and interviewed. From his interview with the children, Dr. Saylor concluded that the children were well-adjusted and did not display any significant emotional problems. At trial, Dr. Saylor made it clear that he did not conduct a custody evaluation or make a comparison of the parents.

Prior to trial, the Guardian submitted her written report to both parties. The Guardian's written report was the culmination of a five-month investigation of the family, consisting of numerous interviews, observations, and in-home visits.[6] The Guardian did not submit a recommendation regarding custody of the children in her report. Instead, the Guardian, through her attorney, informed the court she wished to reserve the right to make a custody recommendation at the conclusion of the testimony. At that time, the Guardian orally recommended that primary custody of the children be awarded to Mother. The Guardian based her recommendation on numerous factors including: the oldest child's stated preference to live with Mother; Father's refusal to allow Mother to share in parental decision-making; Father's testimony that Mother should not have more time with the children beyond the existing visitation schedule; the children's disposition while in the care of both parties; and her concerns about the impact Father's relationship with Jennifer had on the children.

At the end of trial, the family court issued an order modifying custody and child support. The court's order awarded the parties joint physical custody, designated Mother as the primary physical custodian, and granted her final decision-making authority. In addressing the child support issue, the family court declined to impute income to Mother, finding she was not voluntarily underemployed due to her leaving a high-paying job in Nashville to return to Charleston. Next, the court determined the amount of money Father withdrew from his law firm in 2001 represented only 80% of his total income for that year as reported in his income tax return.[7] Therefore, when Father alleged he withdrew $6,000 per month in 2002, the family court,

[6] Although the Guardian requested that both parties provide her with a written list of witnesses to interview, neither party did so.

[7] At trial, Father admitted withdrawing $53,000 from his law firm in 2001. By contrast, his 2001 corporate income tax return reported his income for the year equaled $66,372.

operating under the assumption that this amount represented only 80% of his gross income, concluded Father's income for 2002 equaled $7,500 per month (80% of $7,500 = $6,000). Then, the family court determined Father improperly included $1,474.47 of items as expenses that should have been reported as part of his gross monthly income in his financial declaration. As a result, the family court concluded Father earned $8,974.47 per month for child support purposes and required him to pay $804 per month in child-support to Mother. Lastly, the family court ordered Father to pay Mother $43,675 in attorney's fees and costs in light of the vigorous defense asserted by him and the beneficial results obtained by Mother.

Thereafter, both parties filed motions to alter or amend the judgment. Before the court could rule on the motions, Father also filed a motion for relief from judgment based on newly discovered evidence. The family court denied both parties' motions to alter or amend the judgment on February 28, 2002. Father filed a notice of appeal on March 13, while Mother filed a notice of appeal on March 27. On April 7, the family court denied Father's motion for relief from judgment based on newly discovered evidence. Subsequently, Father filed a second notice of appeal on April 11. On May 8, Court of Appeals Judge Cureton issued an order consolidating Father's two appeals.

After trial, this case encountered many delays during its almost seven year journey to our docket. Immediately following the family court's order, Father sought a determination from the United States Bankruptcy Court as to whether the family court's award of attorney's fees should be designated as a priority debt. This case was stayed until 2005 during the pendency of the bankruptcy proceedings. From there, the parties and their counsel managed to delay resolution of this case even further by filing more than twenty-five motions with this court.

STANDARD OF REVIEW

In an appeal from the family court, this court may correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. Semken v. Semken, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct. App. 2008). We are not, however, required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate

their credibility and assign comparative weight to their testimony. Marquez v. Caudill, 376 S.C. 229, 239, 656 S.E.2d 737, 742 (2008). In particular, an appellate court should be reluctant to substitute its own evaluation of the evidence on child custody for that of the family court. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

LAW/ANALYSIS

I. TIMELINESS OF MOTHER'S APPEAL

Father argues Mother did not timely file her motion to alter or amend the final order pursuant to Rules 52 and 59(e), SCRCP. Assuming the motion was timely filed, Father contends Mother failed to timely file a notice of appeal. We disagree.

Father's arguments are wholly without merit and warrant little discussion. First, Mother timely made her Rule 59(e) motion by serving Father ten days after receiving notice of the judgment. See Rule 59(e), SCRCP ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.") (emphasis added). Second, because Mother timely made a motion pursuant to Rule 59(e), the time to serve her notice of appeal did not run until she received written notice of the order granting or denying that motion. See Rule 203(b)(1), SCACR (noting if a party makes a timely Rule 59 motion, the time for appeal is stayed and does not begin to run until the receipt of written notice of the order granting or denying such motion). Therefore, Mother had thirty days to file a notice of appeal after receiving written notice of the order denying her Rule 59(e) motion. Id. Because she served her notice of appeal within the thirty day time period, her notice of appeal was timely.

II. CUSTODY

A. Final Decision-Making Authority

Father asserts the family court erred in awarding final decision-making authority to Mother. According to Father, the family court misconstrued the previous order as silent on the issue of final decision-making authority.

Father claims the previous order implicitly granted him final decision-making authority when it granted him primary custody.

Unless otherwise stated by agreement of the parties or order of the family court, the power to make final decisions for children is necessarily vested in the custodial parent. Thus, Father correctly points out that the previous order implicitly granted him final decision-making authority by virtue of granting him primary legal custody. Accordingly, the family court misconstrued the previous order when it stated that it was silent as to final decision-making authority. Nevertheless, the family court awarded Mother primary legal custody based on a finding of a substantial change in circumstances. Therefore, the fact that the family court misconstrued the previous order makes no difference on appeal because the change in primary legal custody, and with it the grant of final decision-making authority, was predicated on a finding of a substantial change in circumstances, not on an interpretation of the previous order. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Accordingly, the family court did not err in awarding final decision-making authority to Mother.

B. Primary Legal Custody

Father argues the family court erred in awarding primary legal custody of the children to Mother, asserting the family court failed to consider or improperly considered a number of factors in the best interests of the child analysis. Specifically, Father contends the court erred by: determining he excluded Mother from the decision-making process when he held final decision-making authority; failing to take into account Mother left the children alone at home; relying on the report and recommendation of the Guardian; and considering the preference of the oldest child.[8] Lastly, Father alleges his decision-making for the children was proper, and they were doing very well in his care. We disagree.

[8] We note that Father's argument concerning the family court's reliance on the Guardian's report and recommendation is not preserved for appellate review. This issue is addressed directly under the "Fees" section of this opinion.

The paramount and controlling consideration in a custody dispute is the best interests of the child. Cole v. Cole, 274 S.C. 449, 453, 265 S.E.2d 669, 671 (1980). The family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they affect the child. Hollar v. Hollar, 342 S.C. 463, 472-73, 536 S.E.2d 883, 888 (Ct. App. 2000). Psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life should also be considered. Wheeler v. Gill, 307 S.C. 94, 99, 413 S.E.2d 860, 863 (Ct. App. 1992). In sum, the totality of circumstances unique to each particular case constitutes the only scale upon which the ultimate decision can be weighed. Paparella v. Paparella, 340 S.C. 186, 189, 531 S.E.2d 297, 299 (Ct. App. 2000).

In order for a court to grant a change in custody, the moving party must demonstrate changed circumstances occurring subsequent to the entry of the order in question. Kisling v. Allison, 343 S.C. 674, 679, 541 S.E.2d 273, 275 (Ct. App. 2001). 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. Shirley v. Shirley, 342 S.C. 324, 330, 536 S.E.2d 427, 430 (Ct. App. 2000). "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." Latimer v. Farmer, 360 S.C. 375, 381, 602 S.E.2d 32, 35 (2004).

The family court awarded primary legal custody of the children to Mother based on a finding of a substantial change in circumstances. In making this finding, the family court determined the best interests of the children would be served by awarding primary legal custody to Mother. For the reasons set forth below, we believe the family court properly considered the best interests of the children in awarding primary legal custody to Mother.

Initially, even though the previous order granted Father final decision-making authority, this power did not excuse him from the responsibility of co-parenting with Mother. Therefore, this was a relevant inquiry in the court's analysis. Contrary to Father's assertions, the family court recounted the episode where the children were left alone while in Mother's care in great detail. We decline to assign additional weight to this incident on appeal as the record merely indicates the children were left alone for a short period of

time while they waited for their Father to pick them up. Next, the family court properly considered the oldest child's stated preference to live with Mother in performing the best interests analysis. See Brown v. Brown, 362 S.C. 85, 93, 606 S.E.2d 785, 789 (Ct. App. 2004) ("In determining the best interests of the child, the court must consider the child's reasonable preference for custody."). At the time of trial, the parties' oldest child was nearly thirteen years-old and by all accounts very mature for her age. Accordingly, the family court properly attached significance to her wishes in awarding custody to Mother. See Smith v. Smith, 261 S.C. 81, 85, 198 S.E.2d 271, 274 (1973) ("The significance to be attached to the wishes of the child in a custody dispute depends upon the age of the child and the attendant circumstances.").

Lastly, Father alleges his decision-making for the children was proper, and they were doing very well in his care. However, the record reveals Father made many decisions to advance his own interests without regard to how they affected the children. For example, Father continually allowed his girlfriend, Jennifer, to come to his home while the children were there even though this disturbed the oldest child. In addition, he allowed Jennifer to stay at his house past the children's bedtime. Thus, while the children were doing well in school and healthy while in Father's care, we find that the family court properly considered their best interests in awarding primary legal custody to Mother.

C. Physical Custody

On cross-appeal, Mother argues the family court erred in awarding both parties joint physical custody of the children without making a finding of extraordinary circumstances. Mother contends it would be in the best interests of the children for sole physical custody to be awarded to her. We disagree.

The family court, although awarding both parties joint physical custody, failed to make a finding of exceptional circumstances to support its decision. See Patel v. Patel, 359 S.C. 515, 528, 599 S.E.2d 114, 121 (2004) (noting joint custody should only be ordered under exceptional circumstances); Courie v. Courie, 288 S.C. 163, 168, 341 S.E.2d 646, 649 (Ct. App. 1986) ("Divided custody is avoided if at all possible, and will be

approved only under exceptional circumstances."). Absent exceptional circumstances, the law regards joint custody as typically harmful to the children and not in their best interests. Scott v. Scott, 354 S.C. 118, 125, 579 S.E.2d 620, 624 (2003).

We believe the exceptional nature of this case demands that we affirm the family court's award of joint physical custody. In this case, a seven year delay occurred between the issuance of the family court's final order, dated December 19, 2002, and oral argument before this panel on March 5, 2009. The reasons for the delay in this case range from the acceptable—Father's bankruptcy proceeding—to the unacceptable—the rash of motions filed by both parties. Since the family court's final order, the children have grown from the ages of five and twelve to the ages of twelve and nineteen. Undoubtedly, many things have changed in the children's lives since 2002. However, the custodial arrangement has remained constant. At this point, we are reluctant to order a change in the custody arrangement based on a record which most certainly has become cold. Accordingly, we affirm the family court's decision to award both parties joint physical custody of the children.

III. SUPPORT

A. Imputing Income to Mother

Father argues Mother voluntarily left a job earning $74,000 in Nashville for a low-paying job in Charleston. As a result, Father contends the family court erred in refusing to impute income to Mother. If the court refuses to impute income to Mother based on a finding of voluntary underemployment, Father alleges Mother's income should be increased to reflect the raise she received from her employer, RoHoHo, Inc. We disagree.

"If the court finds that a parent is voluntarily unemployed or underemployed, it should calculate child support based on a determination of potential income which would otherwise ordinarily be available to the parent." S.C. Code Ann. Regs. 114-4720(A)(5) (Supp. 2008). A parent seeking to impute income to the other parent need not establish a bad faith motivation to prove underemployment. Arnal v. Arnal, 371 S.C. 10, 13, 636 S.E.2d 864, 866 (2006). However, the motivation behind any purported

reduction in income or earning capacity should be considered in determining whether a parent is voluntarily underemployed. Id. "[T]he common thread in cases where actual income versus earning capacity is at issue is that courts are to closely examine the payor's good-faith and reasonable explanation for the decreased income." Kelley v. Kelley, 324 S.C. 481, 489, 477 S.E.2d 727, 731 (Ct. App. 1996).

A trial court may relieve a party from a final judgment, order, or proceeding based on newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). Rule 60(b)(2), SCRCP. The motion must be made within a reasonable time and not more than one year after the judgment was entered. Rule 60(b), SCRCP. To obtain relief based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) is of such magnitude that had the court known of it earlier, the outcome would likely have been different; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. Lanier v. Lanier, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2004).

The trial court did not err in refusing to impute income to Mother. The overwhelming evidence reveals the motivating factor prompting Mother's resignation from her job in Nashville was the wishes of the parties' oldest child. See Kelley, 324 S.C. at 489, 477 S.E.2d at 731 (noting courts should consider the parties' good-faith and reasonable explanation for the decreased income in determining whether to impute income to the party). Immediately prior to summer visitation with Mother, the children endured a traumatic episode when Father's third wife, Daphne Burns, permanently moved out of Father's residence. Thereafter, upon arriving in Nashville, the parties' oldest child begged Mother to return to Charleston, and Mother did so. Once she returned to Charleston, Mother found her employment opportunities in the field of health-care finance remained non-existent in the Charleston area. Because of this, Mother earns significantly less in Charleston than she earned in Nashville. Nonetheless, before arriving in Charleston and up to the time of trial, Mother searched and continued searching for a financial management position in the area by soliciting the service of head-hunting agencies, sending out numerous job applications, looking through employment advertisements in the newspaper, and networking with friends. Based on

these facts, we conclude that Mother was not voluntarily underemployed. Consequently, we do not believe the family court erred in refusing to impute income to Mother.

In addition, we do not believe the family court erred in denying Father's motion to increase Mother's income from $26,000 to $31,200 based on newly discovered evidence. We believe Father could have, through the exercise of due diligence, discovered Mother's raise in time to move for relief pursuant to Rule 59. See Rule 60(b)(2), SCRCP (stating a party cannot obtain relief from a final judgment based on newly discovered evidence if the evidence could have been discovered through the exercise of due diligence in time to move for a new trial under Rule 59(b)); Lanier, 364 S.C. at 220, 612 S.E.2d at 460 (defining due diligence as "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation."). In this case, the trial ended on September 22, 2002. In November 2002, Mother received a raise from her employer. On December 19, 2002, the family court issued its amended final order. Thus, the evidence of Mother's raise was in existence during the time period in which Father could have sought relief pursuant to Rule 59. See Rule 59(b), SCRCP (noting in non-jury actions, a party has ten days after the receipt of written notice of the entry of judgment to serve a motion for a new trial). On appeal, Father fails to offer any reason why Mother's raise could not have been discovered during this time. In fact, on January 17, 2003, Father ultimately discovered Mother's raise by subpoena of loan documents prepared by Mother in November 2002. Therefore, the family court properly denied Father's motion for relief from judgment based on newly discovered evidence.[9] See State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) (noting our jurisprudence recognizes the gatekeeping role of the trial court in determining the credibility of post-trial motions); State v. Pierce, 263 S.C. 23, 33, 207 S.E.2d 414, 419 (1974) ("The credibility of newly-discovered evidence offered in support of a motion for new trial is a matter for determination by the circuit judge to whom it is offered.").

[9] In his Rule 60(b)(2) motion, Father also sought relief from judgment because Mother moved from her residence and continued to leave the children alone at home. We believe the family court acted within its discretion in refusing to grant Father relief on these grounds.

B. Imputing Income to Father

The family court concluded Father earned $7,500 per month in gross income, exclusive of additions for in-kind benefits received by Father. Father asserts the family court committed several errors in arriving at this figure. First, because his income varies from month to month, Father alleges the family court erred by using his highest-ever eight month income, the $6,000 a month he withdrew from his law practice in 2002, as a base-line figure for its child support calculations. Instead, Father asserts his income should have been averaged over a longer period of time. Additionally, Father claims the family court erred in determining the $6,000 per month he withdrew from his law firm in 2002 represented only 80% of his gross income for that year. According to Father, this error caused the family court to conclude his gross income equaled $7,500 per month (80% of $7,500 = $6,000).

"Child support awards are within the sound discretion of the trial judge and, absent an abuse of discretion, will not be disturbed on appeal." Mitchell v. Mitchell, 283 S.C. 87, 92, 320 S.E.2d 706, 710 (1984). An abuse of discretion occurs when the court's decision is controlled by some error of law or where the order, based upon the findings of fact, is without evidentiary support. Kelley, 324 S.C. at 485, 477 S.E.2d at 729. Ordinarily, the family court determines income based upon the financial declarations submitted by the parties. S.C. Code Ann. Regs. 114-4720(A)(6) (Supp. 2008). However, where the amounts reflected on the financial declaration are at issue, the court may rely on suitable documentation to verify income, such as pay stubs, receipts, or expenses covering at least one month. Id. The Child Support Guidelines specifically address how to determine income from someone who is self-employed:

> For income from self-employment . . . gross income is defined as gross receipts minus ordinary and necessary expenses required for self-employment or business operation . . . . However, the court should exclude from those expenses amounts allowed by the Internal Revenue Service for accelerated depreciation of investment tax credits for purposes of the guidelines and add those amounts back in to determine gross income. In general, the court should

> carefully review income and expenses from self-employment . . . to determine actual levels of gross income available to the parent to satisfy a child support obligation. As may be apparent, this amount may differ from the determination of business income for tax purposes.

S.C. Code Ann. Regs. 114-4720(A)(4) (Supp. 2008).

Based on the evidence submitted at trial, the family court did not abuse its discretion in determining Father's gross income. The evidence presented at trial and Father's own testimony revealed his 2001 financial declaration did not accurately reflect his gross income for that year. In his 2001 financial declaration, Father reported withdrawing an average of $3,600 per month from his law firm from January 1 through October 31. While this amount was accurate for the ten-month period, Father withdrew $17,000 from his law firm during the remaining two months of 2001. Thus, his total withdrawals from his law firm equaled $53,000 for 2001. His corporate income tax return revealed his law firm earned $66,372 for that same year. During cross-examination, Father admitted "the best documentation of my income for the year 2001 would be the preliminary tax returns that were prepared for the year 2001." For 2002, Father produced only a financial declaration as evidence of his gross income for that year. In that document, Father claimed to withdraw an average of $6,000 a month from his law firm from January 1 through August 31.

By the end of trial, a few things were apparent. First, by virtue of his testimony and the evidence presented at trial, Father vastly understated his gross income in his 2001 financial declaration. This fact necessarily called into question the veracity of his 2002 financial declaration. Second, the amount of money Father withdrew from his law firm in 2001, $53,000, represented about 80% of what he claimed to be his true gross income for that year, $66,372, as evidenced by his 2001 corporate income tax return. Third, Father's 2001 corporate income tax return served as the only credible evidence to demonstrate his gross income. Still, the family court was faced with the difficult task of determining Father's current gross income, and the only evidence depicting his gross income for the current year was his 2002 financial declaration. To determine Father's current gross income, the family

court relied on the historical relationship between Father's 2001 withdrawals and his 2001 corporate income tax return. From this evidence, the family court determined Father's withdrawals amounted to only 80% of his actual gross income for that year (80% of $66,372 = $53,097.60). Thus, when Father claimed to withdraw an average of $6,000 a month from his law firm from January 1, 2002 through August 31, 2002, the family court, operating under the assumption that this amount equaled only 80% of his income, concluded Father's gross income totaled $7,500 per month (80% of $6,000 = $7,500).

The family court relied on the lone piece of credible evidence, Father's 2001 financial declaration, in determining Father's income for child-support purposes. We cannot conclude the family court abused its discretion in making this determination. See Kelley, 324 S.C. at 485, 477 S.E.2d at 729 (stating an abuse of discretion occurs when the court's decision is controlled by some error of law or where the factual findings are without evidentiary support). In addition, Father only provided the court with a financial declaration to evidence his current income for 2002. Father's testimony and the evidence presented at trial demonstrated his 2001 financial declaration understated his income for that year. Thus, the veracity of his 2002 financial declaration was also called into question.[10] As a result, Father's refusal to provide the family court with a meaningful representation of his current income precludes him from complaining of the family court's ruling on appeal. See Patrick v. Britt, 364 S.C. 508, 513, 613 S.E.2d 541, 544 (Ct. App. 2005) (affirming the family court's determination of Father's income where he refused to provide the court with any meaningful representation of his current income). Lastly, even if the family court erred in determining Father's gross income, such error was caused by Father's failure to provide the court with accurate financial information. See Cox v. Cox, 290 S.C. 245,

[10] This is not the first time Father has failed to provide candid financial information to the family court. During a hearing before the office of disciplinary counsel, Father acknowledged he did not make full financial disclosure when initially seeking a divorce from Mother. See In re Barker, 352 S.C. 71, 74, 572 S.E.2d 460, 461 (2002) (suspending Father from the practice of law for six months).

248, 349 S.E.2d 92, 93 (Ct. App. 1986) ("A party cannot complain of an error which his own conduct has induced."). Accordingly, we affirm the family court's decision to impute income to Father.

C. Father's Expenses

Father argues the family court improperly added ordinary business expenses to his gross income. Specifically, Father claims the court erred in adding $7,884.37 worth of automobile expenses, $1,960 in parking expenses, and $2,400 in annual debt repayment from Daphne Burns to his gross income.

The court should count as income expense reimbursements or in-kind payments received by a parent from self-employment if they are significant and reduce personal living expenses, such as a company car, free housing, or reimbursed meals. S.C. Code Ann. Regs. 114-4720(A)(3)(c) (Supp. 2008).

The family court correctly determined Father's vehicle expenses for 2001 totaled $7,884.37. Initially, Father contends he reported his vehicle expenses of $2,462.95 as gross income in his 2001 corporate income tax return; therefore, he asserts the family court erred in adding this amount back to his gross income. Father fails to cite to a specific page in his corporate income tax return to support his argument. Moreover, after reviewing the record, we have been unable to find where Father listed this amount as income on his tax return. Accordingly, we conclude this evidence does not appear in the record and cannot be considered on appeal. See Rule 210(h), SCACR (stating an appellate court may not consider a fact which does not appear in the record).

Next, Father argues his 2001 lease payments equaled $4,428, and his total vehicle expenses amounted to $7,037, not $7,884.37 as set forth by the family court. No evidence in the record shows the amount of lease payments paid by Father. Instead, Father has "automobile expenses" itemized as an expense in the amount of $7,884.37. Assuming Father is correct, automobile expenses, not just lease payments, paid by his law firm on his behalf would still qualify as in-kind income and would be subject to imputation as gross income. If the family court erred by using the term "lease payments" in lieu

of the term "automobile expenses," the error is without consequence. See McCall, 294 S.C. at 4, 362 S.E.2d at 28 ("[W]hatever doesn't make any difference, doesn't matter."). While Father's Form 2106-EZ indicates his total vehicle expenses for 2001 were $7,037, Father, in another piece of evidence, acknowledges his vehicle expenses for the same year totaled $7,884.37. In light of the contradictory evidence submitted by Father to the family court, we cannot conclude the family court erred in determining his vehicle expenses for 2001 equaled $7,884.37. Moreover, Father's Form 2106-EZ appears only as an attachment to his Rule 59(e) motion. Accordingly, it cannot be considered on appeal. See Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."). Therefore, the family court properly added $7,884.37 to Father's gross income.

However, the family court erred in adding Father's parking charges to his gross income. The record reveals Father's law firm spent $1,960 annually so he could park his car downtown near his office. Unlike an automobile, a parking space for work qualifies as an ordinary and necessary business expense and is properly deductible from the gross receipts of Father's business. See S.C. Code Ann. Regs. 114-4720(A)(4) (noting a self-employed parent's gross income for child support purposes equals gross receipts minus ordinary and necessary expenses required for business operation). Additionally, the family court erred in counting the $2,400 Father received from his former wife, Daphne Burns, as income. Father's amended financial declaration specifically notes this money was for repayment of a debt. We do not believe payment received in satisfaction of a debt qualifies as gross income under the child-support guidelines. On remand, these expenses should be deducted from Father's gross income, and the family court should recalculate child support pursuant to this order.

D. Reimbursement of Child Support Paid By Mother

On cross-appeal, Mother argues Father understated his income at the temporary hearing before Judge Segars-Andrews in 2001. As a result,

Mother claims Father should reimburse the $6,000 she paid in child support pursuant to the temporary order. We disagree.

Mother never raised a claim for retroactive reimbursement of child support at trial and presented this argument to the court for the first time during her post-trial motions pursuant to Rule 59 and Rule 60. Accordingly, Mother's arguments are not preserved for appellate review. See Hickman, 301 S.C. at 456, 392 S.E.2d at 482 ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.").

IV. FEES

A. Guardian ad Litem Fees

Father argues the family court erred in relying on the Guardian's report and recommendation. Father contends the Guardian conducted her investigation in a biased manner. In addition, Father claims the Guardian's report was incomplete because it failed to include a custody recommendation. Because her report was flawed, Father contends the issue of Guardian's fees should be remanded to the family court. We disagree.

In Patel v. Patel, the Supreme Court of South Carolina set forth base-line standards a Guardian should follow in developing a recommendation to the family court. 347 S.C. 281, 288-89, 555 S.E.2d 386, 390 (2001). Pursuant to Patel, the Guardian shall:

> (1) 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; (2) advocate for the child's best interests by making specific and clear recommendations, when necessary, for evaluation, services, and treatment for the child and the child's family; (3) attend all court hearings and provide accurate, current information directly to the court; (4) maintain a complete file with notes rather than relying upon court files; and (5) present to the court and all other parties clear and comprehensive written reports, including but not limited to a final report regarding the child's best interest, which includes conclusions and recommendations and the facts upon which the reports are based.[11]

Id.

Father's arguments are not preserved for appeal. While Father complained of the Guardian's bias during his testimony, he never made a motion to relieve the Guardian of her duties based on bias.[12] See Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (stating issues not raised and ruled upon in the trial court will not be considered on appeal). In addition, Father never asserted the Guardian's report was incomplete or otherwise objected to her report because it lacked a recommendation. See Webb v. CSX Transp., Inc., 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005) (noting a contemporaneous objection is required to preserve issues for appellate review). Accordingly, these arguments are not preserved for appellate review. Therefore, we affirm the family court's award of fees to the Guardian.

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[11] We note the statutory Guardian ad Litem guidelines only apply to guardians appointed on or after January 15, 2003. Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 193-94, 612 S.E.2d 707, 713 (Ct. App. 2005). The Guardian in this case was appointed on November 13, 2001. Consequently, Patel and its progeny control.

[12] Father's lone motion to relieve the Guardian was on the basis of her move to Washington.

B. Attorney's Fees

Father argues the family court erred in awarding attorney's fees to Mother. In the alternative, Father asserts that the amount of attorney's fees awarded were excessive. We disagree.

"The award of attorney's fees is left to the discretion of the trial judge and will only be disturbed upon a showing of abuse of discretion." Upchurch v. Upchurch, 367 S.C. 16, 28, 624 S.E.2d 643, 648 (2006). In awarding attorney's fees, the court should consider each party's ability to pay his or her own fee, the beneficial results obtained by the attorney, the parties' respective financial conditions, and the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). In determining the amount of attorney's fees to award, the court should consider the: (1) nature, extent, and difficulty of the case; (2) time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

The family court did not err in awarding $43,675 in attorney's fees to Mother. Contrary to Father's assertions, Mother obtained beneficial results both at the temporary hearing and at trial. At the temporary hearing, Judge Segars-Andrews reduced Mother's child support payments by 50% and awarded her overnight visitation with the children one day a week and on every other weekend. Before the temporary hearing, the visitation schedule in effect was established based on Mother's residence in Nashville. Consequently, the visitation schedule did not allow Mother to see the children on a weekly basis. At trial, Mother received additional beneficial results in gaining joint physical custody of the children, primary legal custody of the children, and child support from Father.[13] Accordingly, Mother obtained beneficial results at trial.[14]

[13] On appeal, Father claims Mother failed to obtain beneficial results at trial because she received no more than Father offered in settlement negotiations—joint physical custody of the children. While we disagree with Father's argument, we also note that statements made during settlement

Next, Father contends the amount of attorney's fees awarded were excessive in light of his income. Typically, we would be very concerned by an award of attorney's fees representing approximately 40% of Father's annual income. See Rogers v. Rogers, 343 S.C. 329, 334, 540 S.E.2d 840, 842 (2001) (reversing the family court's award of attorney's fees where the award represented 16% of Mother's annual income, and some of the beneficial results obtained by Mother in the litigation were reversed on appeal). However, in this case, the family court based its award of attorney's fees, not only on the factors set forth in Glasscock, but also on Father's uncooperative conduct in discovery and his evasiveness in answering questions with respect to his financial situation. A review of the record reveals that Father's uncooperative conduct greatly contributed to the litigation costs associated with this action. During discovery, Father failed to respond to basic requests for production of documents on two occasions. In both instances, Father's obstructionist tactics caused Mother to incur the unnecessary expense of drafting motions and attending court proceedings. To compound matters, Father gave evasive answers to questions about his finances. At one point during cross-examination, Father answered that he could not remember how much money he withdrew from his law firm in 2001. Taking into account that Father's uncooperative conduct greatly increased the cost of litigation, we affirm the family court's award of $43,675 in attorney's fees to Mother. See Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989) (holding husband's lack of cooperation serves as an additional basis for the award of attorney's fees); Anderson v. Tolbert, 322 S.C. 543, 549-50, 473 S.E.2d 456, 459 (Ct. App. 1996) (noting an uncooperative party who does much to prolong and hamper a final resolution of the issues in a domestic case should not be rewarded for such conduct).

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negotiations are inadmissible. See Rule 408, SCRE ("Evidence of conduct or statements made in compromise negotiations is likewise not admissible.").

[14] In addition, we note that this controversy between Mother and Father developed into a highly contentious litigation. In the end, the trial lasted for five full days. During this time, twenty-one witnesses were called, and sixty-four exhibits were presented to the court.

V. RELIEF FROM DISCOVERY / EX PARTE ORDERS

Mother asks us to vacate discovery orders from seven years ago, and an ex parte order, which Father and the judge who issued it, acknowledge is moot. We decline to do so because such an order from this court would have no practical legal effect. See Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (noting an issue becomes moot when a decision, if rendered, will have no practical legal effect upon the existing controversy). Accordingly, the decision of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

PIEPER, J., and LOCKEMY, J., concur.