The Supreme Court of South Carolina

In the Matter of Anthony F. Trask, Deceased.

ORDER

Pursuant to Rule 31, RLDE, Rule 413, SCACR, Commission Counsel has filed a Petition for Appointment of Attorney to Protect Clients' Interests in this matter. The petition is granted.

IT IS ORDERED that James L. Hills, Esquire, is hereby appointed to assume responsibility for Mr. Trask's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Trask maintained. Mr. Hills shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Trask's clients. Mr. Hills may make disbursements from Mr. Trask's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Trask maintained that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Trask,

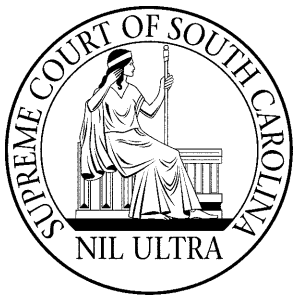
shall serve as notice to the bank or other financial institution that James L. Hills, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that James L. Hills, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Trask's mail and the authority to direct that Mr. Trask's mail be delivered to Mr. Hills' office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
December 14, 2011



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45
December 19, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Alison Dannert, Michael Blease and Michael Watts, Individually and for the Benefit of All Car Buyers Whom Paid "Administrative Fees" as Described below to Defendants Respondents,

v.

Century BMW a/k/a Sonic Automotive, Dick Dyer & Associates, Inc., Galeana Chrysler Plymouth, Inc., a/k/a Galeana Chrysler Jeep, Inc., J.L.H. Investments LP, a/k/a Hendrick Honda, Overland, Inc., d/b/a Land Rover of Columbia, Taylor Toyota, a/k/a Taylor Investments, and Toyota of Greenville, Inc., et. al. Defendants

of whom Century BMW a/k/a Sonic Automotive is the Appellant.

ON REMAND FROM THE UNITED STATES SUPREME COURT

Appeal from Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 26805
Reheard November 1, 2011 – Refiled December 19, 2011

ORIGINAL OPINION REINSTATED

Dennis M. Black, and Ryan L. VanGrack, of Williams & Connolly, of Washington, Steven W. Hamm and C. Jo Anne Wessinger-Hill, of Richardson, Plowden & Robinson, of Columbia, for Appellant.

A. Camden Lewis and Ariail E. King, of Columbia, Richard A. Harpootlian, of Columbia, Edwin Grey Wicker and Michael E. Spears, both of Spartanburg, and Gedney M. Howe, III, of Charleston, for Respondents.

JUSTICE KITTREDGE: This case returns to us on remand from the United States Supreme Court to reconsider our opinion in Herron v. Century BMW[1] in light of its decision in AT&T Mobility, LLC v. Concepcion.[2] Because the issue of preemption was not preserved for review in the South Carolina proceedings, we reinstate our initial opinion.

[1] 387 S.C. 525, 693 S.E.2d 394 (2010).
[2] 131 S.Ct. 1740 (2011).

I.

The underlying action originally came before this Court on appeal of the trial court's denial of Appellant Century BMW's motion to compel arbitration. We affirmed in result the trial court's denial of the motion to compel.[3]

Following our decision, Appellant filed a petition for rehearing, contending this Court's opinion was "inconsistent with the United States Supreme Court's recent decision in Stolt-Nielsen S.A. v. Animalfeeds International Corp."[4] Appellant stated that pursuant to Stolt-Nielsen, "[t]he [Federal Arbitration Act] clearly preempts South Carolina law, as this Court construed it" and "[i]f a party cannot be compelled to class arbitration absent an agreement to arbitrate as a class, a fortiori the FAA preempts any public policy requiring class arbitration even where the parties agreed not to arbitrate as a class." In our order denying rehearing, we emphasized that our opinion was "wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealers Act[5] and the public policy of this State." We further admonished Appellant for attempting to reframe the issues and miscast our holding as "disingenuous to the opinion and a holding we never made."

Thereafter, Appellant petitioned the United States Supreme Court for a writ of certiorari. Although the issue was not raised to the trial court or this Court, Appellant presented the following question in its certiorari petition:

> Whether the Federal Arbitration Act preempts a state law invalidating a prohibition on class arbitration contained in an arbitration agreement.

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[3] A detailed summary of the underlying facts and the Court's reasoning for that decision can be found in our original opinion.

[4] 130 S.Ct. 1758 (2010).

[5] The full title of the Act is the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. § 56-15-10 *et seq.* (2007).

This Court's opinion was vacated by the United States Supreme Court and remanded for consideration in light of its decision in AT&T Mobility, LLC v. Concepcion. Respondents argue that the matter of preemption was not preserved in the South Carolina proceedings. We agree and therefore adhere to our initial opinion.

II.

A.

Appellant contends that the issue of whether the FAA preempted state law, which it raised to the United States Supreme Court, was sufficiently preserved in the state court proceedings because Appellant referenced the state and federal policies favoring arbitration in its filings.[6] We disagree.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is "axiomatic that an issue cannot be raised for the first time on appeal." Id. Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

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[6] At oral argument on rehearing, counsel for Appellant went beyond its brief and claimed it had made the argument to the effect that "federal law controls," and that such argument was sufficient to preserve the preemption argument. We would agree that the argument was preserved if Appellant had ever made that argument in any manner related to the issue of preemption, but it did not. Just as the word "preemption" appears nowhere in the briefs filed with this Court, neither does the argument that the "federal law controls." In short, Appellant presented no argument (prior to its rehearing petition) that could reasonably be construed to embrace the matter of preemption.

Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal. Glover v. County of Charleston, 361 S.C. 634, 606 S.E.2d 773 (2004) *overruled on other grounds by* Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005); see also Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (holding that a due process claim raised for the first time on appeal was not preserved); Merriman v. Minter, 298 S.C. 110, 378 S.E.2d 441 (1989) (refusing to consider an equal protection challenge to a statute on appeal where it was not raised to the trial court).

Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue. See State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (finding issue was preserved even though defendant did not use exact words "corpus delicti" in his request for a directed verdict). Nonetheless, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733; see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007) (finding that although SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial court to rule on the issue).

Our appellate rules also offer guidance. "Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant's arguments. See Eubank v. Eubank, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001) (finding the statement of issue, when read in conjunction with the argument, sufficiently raised the issue to the court). However, "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (internal citation omitted). Similarly, a petition for

rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999)).

B.

South Carolina is not alone in its issue preservation requirements. The United States Supreme Court has "consistently refused to decide federal constitutional issues raised [to it] for the first time on review of state court decisions." Cardindale v. Lousiana, 394 U.S. 437, 438 (1969); see also Webb v. Webb, 451 U.S. 493 (1981) (holding where the Georgia Supreme Court failed to rule on federal issue, the United States Supreme Court was without jurisdiction in the case); Hill v. California, 401 U.S. 797 (1971) (refusing to reach a Fifth Amendment question when the issue was not raised, briefed, or argued at any level of state court).[7]

Moreover, the Supreme Court has stated "[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented here." Adams v.

[7] Appellant contends that because the United States Supreme Court granted certiorari, Respondents are precluded from arguing that the preemption issue is not preserved. We disagree. The Supreme Court has previously granted certiorari based on assertions in petitions and later refused to rule on the issue because it realized the issue was never raised to the state court. See Cardindale, 394 U.S. at 438 (stating that "[a]lthough certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below"); see also Webb, 451 U.S. at 494-95 (stating that because the Court disfavors the filing of the state court record, "[the Court] [is] largely dependent on assertions made by the parties as to what that record will demonstrate concerning the manner in which a federal question was raised below").

Robertson, 520 U.S. 83, 86-87 (1997) (internal citations omitted).[8] The Supreme Court has explained its reasoning for such policies:

> [I]n a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, they should be given the first opportunity to consider them.

Cardindale, 394 U.S. at 439.

C.

We have carefully re-examined the record. In all of the submissions, memoranda, and hearings before the trial court, not once was there a single mention of federal preemption as it relates to the issue before us. Certainly, Appellant cites to both the federal and state policy favoring arbitration, and no party or court has ever disputed the obvious—both the federal and state

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[8] The Rules of the Supreme Court also require a party to demonstrate the state court addressed the issue presented to it. Rule 14 states in relevant part:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Sup. Ct. R. 14(1)(g)(i).

policies do favor arbitration. However, a general acknowledgment of a policy favoring arbitration is a far cry from a specifically articulated preemption argument.[9]

Tellingly, the trial court's order denying Appellant's motion to compel states "[t]he Plaintiff and Defendant agree that Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663 (2007)[10] is the *controlling authority* of this motion." (emphasis added). In our opinion, this opening sentence to the legal analysis section of the trial court's order demonstrates Appellant and Respondents' mutual agreement that the case was to be decided by reference to state law. That finding was never challenged until the petition for rehearing.

Moreover, it is clear preemption was neither a novel nor an unknown argument to Appellant. Significantly, Appellant did raise the issue of preemption to the trial court, albeit in a different context. Respondents initially challenged the arbitration agreement on the basis that it lacked certain formatting requirements under the South Carolina Arbitration Act. However, Appellant successfully defeated that state law challenge based on preemption, specifically arguing that the FAA preempted state law due to the presence of interstate commerce. The voluminous record is otherwise silent as to *any* claim of preemption, until the petition for rehearing filed with this Court.

Simply stated, the question Appellant presented to the United States Supreme Court, namely whether the FAA preempted our state's legislative policy as set forth in the Dealers Act, was raised neither to the trial court nor

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[9] We also note that Appellant cites a provision of the FAA, 9 U.S.C. § 2 (2006), in its trial court motions for the proposition that the FAA applies to the arbitration agreement at hand. Both the trial court and this Court agreed with Appellant. Yet Appellant never cited section 2 of the FAA in any fashion that can be construed as anything akin to the preemption argument it presented to the United States Supreme Court.

[10] In Simpson, this Court denied a motion to compel arbitration, finding an arbitration clause in a vehicle trade-in contract was unconscionable and, therefore, unenforceable due to a multitude of one-sided terms. Notably, the Simpson decision, however, in no way dealt with federal preemption. The word "preemption" appears in the Simpson opinion, only to note that preemption was not involved.

to our Court. And although the issue of preemption was raised in Appellant's rehearing petition, such an attempt was untimely and improper as a party may not raise an issue for the first time in a petition for rehearing. See Kennedy, 349 S.C. at 532, 564 S.E.2d at 322 ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time."). Unquestionably, our opinion in Herron did not address federal preemption. Rather, it quite naturally resolved the matter solely on the basis of state law, just as the parties presented it to us. See State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked."). However, the absence of a preemption discussion is not attributable to this Court's failure to recognize or understand the arguments presented. Rather, Appellants failed to present the issue to us, as evidenced by our detailed order denying Appellant's petition for rehearing which rejected Appellant's attempt to recast the issues that were presented to us.

We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner. Yet, because Appellant can point to no instance where preemption was properly raised or ruled upon, to disregard our issue preservation rules under these circumstances would render them meaningless. As this Court observed, issue preservation rules "prevent[] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." I'On, 338 S.C. at 406, 526 S.E.2d at 724. Here, intentionally or by chance, Appellant kept the ace card of preemption up its sleeve until after this Court filed its opinion. Under even the most liberal approach to issue preservation principles, we could not treat Appellant's preemption argument as preserved in our courts as a matter of state law.

Because the matter of preemption was not raised to and ruled upon in any of the South Carolina proceedings, we find the issue of preemption is procedurally barred as matter of state law and further consideration in light of

AT&T Mobility, LLC v. Concepcion is unwarranted. We reinstate our original opinion and decline to revisit it.

ORIGINAL OPINION REINSTATED.

TOAL, C.J., BEATTY, HEARN, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Union County Sheriff's Office, Respondent,

v.

Jesse Henderson and Robert Baldwin, Defendants,

In Re: Willard Farr, Owner and Seven Video Machines, Appellants.

Appeal from Union County
John C. Hayes, III, Circuit Court Judge

Opinion No. 27077
Heard November 3, 2011 – Filed December 19, 2011

AFFIRMED

C. Rauch Wise, of Greenwood, for Appellants.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General T. Stephen Lynch, and Assistant Attorney General Mary Frances Jowers, all of Columbia, for Respondent.

PER CURIAM: This is an appeal from a circuit court order affirming a magistrate's court order upholding the destruction of seven video games determined to be illegal gaming devices prohibited by S.C. Code Ann. § 12-21-2710 (2000). Appellant Farr (appellant) contends the magistrate's order should have been reversed because the State could not identify which of the seven machines the confidential informant (CI) had played, and because the State could not show that six of the seven machines had a playable illegal game at the time of the seizure hearing. We affirm.

Appellant owns seven machines seized from a Union business.[1] The magistrate issued an Order of Destruction/Notice of Post Seizure Hearing and appellant timely sought a Post-Seizure Hearing. Following this evidentiary hearing, the magistrate issued an order finding the seven machines to be illegal gambling devices, and affirming the Order of Destruction. Appellant appealed to the circuit court which upheld the magistrate's order after a hearing. Appellant's motion to alter or amend was denied.

ISSUES

1. Did the circuit court err in affirming the Order of Destruction when the State could not demonstrate that any unlawful game could be played on six of the seized machines at the post-seizure hearing?

2. Did the circuit court err in finding the State met its burden of proof where the confidential informant (CI) could not identify which of the seven machines she had played?

[1] Since this forfeiture action is in rem, the proper defendants are only the seven seized machines which are the subject of the Order of Destruction.

ANALYSIS

The magistrate's factual findings, confirmed by the circuit court, must be upheld by the appellate court if supported by any evidence. South Carolina Law Enforcement Div. v. 1-Speedmaster S/N 00218, ____ S.C. ____, ____ S.E.2d ___ (Ct. App. 2011). At a post-seizure hearing, the burden is on the owner of the *res* to show why the seized property should not be forfeited and destroyed. State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000).

I. Operational at time of hearing

Appellant contends the circuit court erred in upholding the magistrate's Order of Destruction when the State was unable to prove that six of the seven machines had an illegal game installed that could actually be played at the time of the post-seizure hearing. We disagree.

The State presented evidence that although no illegal game could be played on six of the seven machines at the time of the hearing, the hard drive of each machine had an administrative record reflecting that the illegal game(s) on the machine had been played multiple times. Expert testimony established that the seized machines had been altered post-manufacture so that an individual possessing a receiver, magnet, or other device could delete the game from the machine's 'play list' while leaving the administrative record. A video introduced at the post-seizure hearing[2] showed the CI playing an illegal game on one of the machines during the State's undercover operation.

Section 12-21-2710 makes it unlawful to possess illegal gambling machines, even if they are not fully operational. The mere possession of the

[2] Appellant opted not to provide the video to this Court. It is not clear whether the video was before the circuit court. In addition, the State had eight photos that apparently were introduced at the Post-Seizure Hearing, none of which were provided to the Court.

gambling devices, or even their component parts, is unlawful. State v. 192 Coin-Operated Video Game Machines, *supra*. Moreover, testimony from the CI, the video showing illegal games being played on one of the machines, evidence that illegal games were installed on the machines, and evidence that the machines had been altered to allow the "quick" deletion of games is sufficient to uphold the lower courts' findings that the machines are illegal gambling devices under § 12-21-2710. Moreover, appellant misstates the burden of proof at the post-seizure hearing, which rests upon him to show why the machines should not be forfeited and destroyed, and not with the State to prove the machines are operable. State v. 192 Coin-Operated Video Game Machines, *supra*. Appellant is simply in error in arguing that the State must be able to play the illegal game at the post-seizure hearing.

II. Identification

The CI testified that she was given $40 before entering the Union business. She inserted the two twenties into one of the machines and then played the same game several times. She later told the cashier that she was finished playing, and based upon the number of free plays remaining on the machine, he gave her $15 from the business's till. At the hearing, the CI could not identify which machine she had played, but a SLED agent testified that the $40, which had been marked before being given to the CI, was found in one of the machines. The SLED agent could not identify from which machine the marked money was recovered.

Appellant contends that the State failed in its burden of proof because the CI was unable to identify on which of the seven machines seized she had actually played the illegal game. Appellant misunderstands the burden of proof at this post-seizure hearing, which rests solely on the owner of the seized machines to show why the machines should not be forfeited and destroyed. State v. 192 Coin Operated Video Game Machines, *supra*. There is evidence in the record to support the factual findings that all seven machines are illegal gambling devices.

CONCLUSION

The circuit court order affirming the magistrate's order is

AFFIRMED.

TOAL, C.J., PLEICONES, BEATTY, HEARN, JJ., and Acting Justice Alexander S. Macaulay, concur.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of W. Benjamin McClain, Jr., Respondent.

Opinion No. 27078
Submitted November 21, 2011 – Filed December 19, 2011

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

J. Steedley Bogan, of Bogan Law Firm, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, the Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a definite suspension not to exceed two (2) years, retroactive to March 13, 2007, the date of his interim suspension. In the Matter of McClain, 372 S.C. 518, 643 S.E.2d 680 (2007). In addition, respondent agrees to complete the Legal Ethics and Practice Program Ethics School within one year of the imposition of a sanction and to make full restitution to the Lawyers' Fund for Client Protection (Lawyers' Fund). We accept

the Agreement and impose a definite suspension of two years, retroactive to the date of respondent's interim suspension. Respondent shall complete the Legal Ethics and Practice Program Ethics School within one year of the date of this opinion and shall make full restitution to the Lawyers' Fund. The facts, as set forth in the Agreement, are as follows.

FACTS

On March 9, 2007, respondent was arrested and charged with Breach of Peace-Aggravated Nature. The charge was later remanded to municipal court. Ultimately, the State entered a nolle prosequi on the misdemeanor charge. ODC acknowledges criminal conduct could not be established.

Respondent has suffered from depression for a number of years and has been under treatment for the condition. In May of 2004, respondent suffered a massive heart attack that affected his ability to work. In addition, his wife had major health problems which strained the family's finances.

Respondent's wife worked as a bookkeeper at respondent's law office. Respondent gave a copy of Rule 417, SCACR, to his accountant and believed his wife and accountant were properly reconciling his trust account. Respondent acknowledges, however, that he failed to properly supervise his wife in her handling of his accounts and failed to ensure that his firm was operating in compliance with the provisions of Rule 417, SCACR. He further admits he was not properly reconciling his trust account in accordance with the requirements of Rule 417, SCACR.

As a result of his failure to properly supervise his wife/employee, respondent's wife was able to embezzle in excess of $75,000 of client funds from respondent's trust account over a period of years. Respondent's wife claims she took the funds to keep their household running and that she kept her misdeeds from respondent due

to his heart problems. The Lawyers' Fund has paid claims to respondent's clients totaling $80,999.65.

At some point, respondent received an email from a client. The email claimed respondent's wife was having an affair and accused her of stealing trust account funds. Initially, respondent did not believe the assertions but subsequently learned them to be true.

Counsel advised respondent to remove his wife from the office.[1] Respondent submits that before he could take any action in removing her or determining the truth about the funds, he was placed on interim suspension.

Respondent has been receiving medical treatment. The physician has cleared respondent medically to return to practice.

LAW

Respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.15 (lawyer shall safe keep client property) and Rule 5.3 (lawyer possessing managerial authority in law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that non-lawyer employee's conduct is compatible with professional obligations of lawyer and shall make reasonable efforts to ensure non-lawyer employee's conduct is compatible with professional obligations of lawyer). He further admits he violated provisions of Rule 417, SCACR. Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (it is ground for discipline for lawyer to violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers).

[1] Respondent and his wife are now estranged.

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a definite suspension of two years, retroactive to the date of respondent's interim suspension. Respondent shall complete the Legal Ethics and Practice Program Ethics School within one year of the date of this opinion and shall make full restitution to the Lawyers' Fund.[2] Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

[2] Within thirty (30) days of the date of this opinion, the Lawyers' Fund and respondent shall enter into a payment plan setting forth the terms by which respondent shall repay the Lawyers' Fund for all funds paid on his behalf.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Max B. Singleton,

Respondent.

Opinion No. 27079
Submitted November 21, 2011 – December 19, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola Disciplinary Counsel, and Sabrina C. Todd, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Max B. Singleton, of Greer, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the imposition of a public reprimand with conditions. We accept the agreement and issue a public reprimand with conditions as specified in the conclusion of this opinion. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

Respondent represented Client A on criminal charges. Respondent failed to communicate with Client A for several months and failed to timely relay a plea offer made during that time. Several months after the initial plea offer, the prosecutor made a more favorable plea offer. Respondent relayed the plea offer to Client A; Client A rejected the offer. Ultimately, the charges against Client A were dismissed.

Respondent did not respond to ODC's initial inquiry in this matter and did not respond in a timely manner to a reminder letter sent pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982).

Matter II

Client B, a criminal defense client, filed a complaint against respondent. Although the investigation did not reveal misconduct during the representation, respondent failed to respond to ODC's initial inquiry and responded only after receiving a reminder letter pursuant to In the Matter of Treacy, id..

Matter III

Respondent represented Client C on criminal charges. A dispute arose concerning the fee respondent originally quoted and the fee he collected. Respondent believed he had a written fee agreement with Client C, but failed to retain a copy as required by Rule 417, SCACR. Respondent further violated Rule 417, SCACR, by failing to retain records of the source and amount of payments received.

During the investigation, respondent failed to timely respond to several inquiries from ODC. He cited the birth of his

daughter and his wife's related medical problems for the delay of some of his responses. Respondent admits these personal issues negatively impacted his communications with Client C and other clients.

Matter IV

Respondent wrote to Client D, directly soliciting the client to hire him on pending drug charges. Client D was not an attorney and was a stranger to respondent.

Respondent did not file a copy of the letter with the Commission on Lawyer Conduct as required by Rule 7.3(c), RPC, Rule 407, SCACR. The letter contained none of the statements required by Rule 7.3(d) (1), (2), and (3), although respondent represents he included a second page with the mailing which included each of the statements required by the rule. Respondent was unable to produce a complete copy of the letter he mailed to Client D. Additionally, respondent acknowledges Rule 7.3 requires that the words "ADVERTISING MATERIAL" appear on the front of each page of the material and the words were not on the first page of the letter he sent to Client D.

Respondent filed an untimely response to ODC's initial inquiry in this matter.

Matter V

Respondent represented Client E on criminal charges. He failed to adequately communicate with Client D during the misrepresentation and was ultimately relieved at the client's request.

Respondent failed to submit a full and timely response to ODC's request for additional information in this matter.

Matter VI

Client F hired respondent to represent him on criminal charges. Sometime after respondent began work and made an appearance, the client advised he was unable to pay respondent's fee and asked respondent to step aside so he could be assigned a public defender. Respondent failed to timely respond to this request, thereby delaying the client's access to a public defender.

Respondent did not respond to ODC's Notice of Investigation. ODC sent respondent a reminder letter pursuant to In the Matter of Treacy, supra, and scheduled respondent for an interview. Respondent responded shortly before his scheduled interview, approximately two months after issuance of the reminder letter.

Matter VII

Client G hired respondent to represent her on pending criminal charges in Spartanburg County. Respondent reports he had worked out a favorable plea deal approximately eleven months into the representation, but the plea was postponed indefinitely as a result of the client's attempted suicide. By that time Client G had also been charged with a crime in Greenville County. Thereafter, she was arrested on three additional Greenville County charges.

Respondent agreed to represent Client G on all of her pending charges in both counties. At times, respondent failed to keep Client G informed of the status of her Spartanburg County charges.

Respondent failed to timely respond to ODC's Notice of Investigation in this matter, but submitted a response shortly before his interview with ODC. Before the interview, respondent spoke with Client G and they agreed she would release him from representing her on the Greenville County charges. Respondent prepared an order releasing him on three of the Greenville County charges, but failed to release him on the fourth. Believing he had been released on all of

Client G's Greenville County charges, he ceased working on the charges even though he still represented Client G on the fourth charge.

During his interview with ODC, respondent agreed to submit additional information to support his response in the matter. After the interview, ODC sent respondent a written request for the additional information on April 13, 2011. In spite of reminders by letter and telephone, respondent failed to comply with the request for additional information until August 10, 2011. His response was incomplete and required ODC to make multiple additional inquiries to obtain a complete response.

LAW

Respondent admits that, by his misconduct, he has violated the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 1.2 (lawyer shall abide by a client's decisions concerning objectives of representation); Rule 1.3 (lawyer shall act with diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter and promptly inform client of any decision or circumstance to which client's informed consent is required); Rule 1.16(d) (upon termination of representation, lawyer shall take steps to the extent reasonably practicable to protect a client's interests); Rule 7.3(c) (lawyer who uses written solicitation shall maintain a file for two years showing the basis by which lawyer knows the person solicited needs legal services and the factual basis for any statements made in the written communication); Rule 7.3(d) (every written communication from lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family, close personal or prior professional relationship, shall conform to Rules 7.1 and 7.2, RPC, and communication must contain certain statements); and Rule 8.1(b) (lawyer shall not knowingly fail to respond to lawful demand for information from disciplinary authority). In addition, respondent further admits that he violated provisions of Rule 417, SCACR. Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer

Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct) and Rule 7(a)(3) (it shall be ground for discipline for lawyer to knowingly fail to respond to a lawful demand from disciplinary authority).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. In addition, respondent shall 1) pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty days of the date of this opinion and 2) complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School within one year of the date of this opinion.

Further, within forty-five days of the date of this opinion, respondent shall hire a law office management advisor approved by the Commission. Within thirty days of retaining the advisor, respondent shall meet with the advisor to conduct a thorough review of respondent's law office management practices. Within thirty days of the review, the advisor shall file a complete report of respondent's law office management practices with the Commission. The report shall include a review, an analysis, and recommendations concerning respondent's law office management practices. Thereafter, for a period of two years, respondent shall meet with his advisor once every three months and the advisor shall file a complete report with the Commission within thirty days of each meeting. Respondent shall be responsible for payment of the advisor as well as timely submission of the advisor's reports.

Respondent's failure to comply with any of the conditions set forth in this opinion or with the advisor's recommendations shall constitute grounds for discipline.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael T. Hursey, Jr., Respondent.

Opinion No. 27080
Heard November 29, 2011 – Filed December 19, 2011

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Michael T. Hursey, Jr., of Myrtle Beach, *pro se* Respondent.

PER CURIAM: In this attorney disciplinary action, the Commission on Lawyer Conduct ("Commission") investigated Formal Charges filed against attorney Michael T. Hursey, Jr. ("Respondent") alleging misconduct in thirteen matters. We disbar Respondent based on the underlying misconduct and Respondent's abandonment of his law practice.

I. FACTS

Respondent was admitted to the practice of law in South Carolina on November 3, 2001.

On August 11, 2006, he was placed on Interim Suspension by order of this Court. *In re Hursey*, 370 S.C. 41, 634 S.E.2d 642 (2006). Upon the

petition of the Office of Disciplinary Counsel ("ODC"), the Court appointed Eldon D. Risher, III as the attorney to protect the interests of Respondent's clients by order dated November 20, 2006.[1] At that time, it was discovered that Respondent had taken all of his files and bank records with him, and ODC was unable to recover them.

Respondent was administratively suspended by the South Carolina Commission on Continuing Legal Education and Specialization effective April 1, 2007 for noncompliance with CLE reporting requirements. He was formally suspended for noncompliance effective June 1, 2007 by order of this Court dated June 6, 2007.

ODC filed Formal Charges against Respondent on May 13, 2010 alleging misconduct in thirteen matters. The matters involved his delicts in handling a variety of real estate closings, domestic actions, and a criminal case; his failure to pay a court reporter; and his posting of inappropriate comments containing nudity, profanity, and drug references on his MySpace page that identified the name and location of his law firm.

Respondent did not answer the Formal Charges despite evidence that notice was sent to him by certified mail. Respondent was held in default, and he was sent notice of the Default Order as well as notice of the scheduling of the hearing date.

The Hearing Panel conducted a hearing on May 25, 2011. Respondent did not attend and was not represented by counsel. Counsel for ODC stated repeated attempts had been made to serve Respondent at his two last known addresses in South Carolina, but they had been unable to locate him. In addition, SLED had unsuccessfully explored several leads, including reports that Respondent might have left the country.

The Hearing Panel thereafter filed a written Panel Report in which it found the factual allegations in the thirteen matters were deemed admitted due to Respondent's default and failure to appear at the disciplinary hearing.

[1] Risher was relieved from his appointment on September 18, 2008.

In summary, the Hearing Panel found Respondent had committed the following acts:

(1) mishandled real estate closings, which included having deeds improperly drawn (in some cases, mobile homes purchased remained titled in the names of the sellers as Respondent or his paralegal attempted to convey the mobile homes as part of the property instead of separately), reciting false monetary amounts in the deeds, having a $60,000 shortfall in his trust account, and failing to cooperate with purchasers and lenders who requested deeds, mortgages, title binders and policies, and other documents; Respondent failed to properly supervise the paralegal with whom he was associated; the paralegal, who owned Paralegal Services, LLC, manipulated trust accounts, forged Respondent's name to documents and checks, and lost files (The Coleman Matter, The Normandin Matter, The Baumgartner Matter, and The Lovelace Matter);

(2) failed to communicate with a client about her case and to promptly file a rule to show cause and have an order signed despite repeated requests (The Rossi-Zita Matter);

(3) failed to file a QDRO in a domestic case (The Lewis Matter); failed to file a rule to show cause and to provide a detailed billing statement in another domestic case (The Collins Matter); and obtained a temporary order in a divorce case, but then did no further work and ceased all communication with the client (The Carroll Matter);

(4) failed to communicate with a client about a civil case (The Attaway Matter); failed to adequately advise a client in a criminal matter and refused to provide a partial fee refund after agreeing to do so (The Shannon Matter); and accepted a client in another case and then did no work on the case for over two years despite repeated requests (The Rush Matter);

(5) failed to pay a court reporter $101.00 due for her services, despite repeated requests (The McCarthy Matter); and

(6) maintained a webpage on MySpace.com that contained profanity and nudity along with the name of his law firm and the city of its location;

among his comments, Respondent stated he would "take the 5th" in regards to what drugs he had done in the past as well as which drugs he had done in the past week (The Disciplinary Counsel Matter).

The Hearing Panel found the admitted acts constituted misconduct and that Respondent violated the following Rules of Professional Conduct ("RPC") contained in Rule 407, SCACR: Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.5 (fees); Rule 1.15 (safekeeping property); Rule 3.2 (expediting litigation); Rule 4.1 (truthfulness in statements to others); Rule 5.3 (responsibilities regarding non-lawyer assistants); Rule 8.1(b) (knowing failure to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (violating the RPC, knowingly assisting or inducing another to do so, or doing so through the acts of another); Rule 8.4(d) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (engaging in conduct prejudicial to the administration of justice).

The Hearing Panel further found that Respondent's conduct established grounds for discipline under the following provisions of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413, SCACR: Rule 7(a)(1) (violation of the RPC); Rule 7(a)(3) (knowing failure to respond to a lawful demand from a disciplinary authority); Rule 7(a)(5) (engaging in conduct tending to pollute the administration of justice, tending to bring the legal profession into disrepute, and demonstrating an unfitness to practice law); and Rule 7(a)(6) (violation of the Oath of Office taken upon admission to practice law in South Carolina).

The Hearing Panel recommended the sanction of disbarment based on Respondent's "underlying misconduct, Respondent's failure to fully cooperate in the disciplinary investigation, and his failure to answer the formal charges and appear at the hearing." It also recommended that, prior to filing any petition for reinstatement, Respondent be required to (1) pay the costs of these proceedings, which total $507.44; (2) pay restitution of $101.00 to the court reporter, Ms. McCarthy; and (3) reimburse the Lawyers' Fund for Client Protection for any amounts paid to Respondent's former clients as a result of his misconduct and, in the event the Fund pays less than is actually owed to a

client (because of any per attorney/per client cap), that Respondent pay the former client the difference.

II. LAW/ANALYSIS

Neither Respondent nor ODC has filed a brief with this Court taking exception to the Panel Report and the recommended sanction of disbarment.

The authority to discipline attorneys rests entirely with this Court. *In re White*, 391 S.C. 581, 707 S.E.2d 411 (2011); *see also* S.C. Const. art. V, § 4 ("The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."). The Court "has the sole authority . . . to decide the appropriate sanction after a thorough review of the record." *In re Thompson*, 343 S.C. 1, 10, 539 S.E.2d 396, 401 (2000). "The Court is not bound by the panel's recommendation and may make its own findings of fact and conclusions of law." *In re Hazzard*, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008); *see also* Rule 27(e)(2), RLDE, Rule 413, SCACR ("The Supreme Court may accept, reject, or modify in whole or in part the findings, conclusions and recommendations of the Commission.").

"A disciplinary violation must be proven by clear and convincing evidence." *In re Greene*, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); *see also* Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on the disciplinary counsel.").

Respondent was found to be in default for failing to answer the formal charges and he failed to appear at the proceeding before the Hearing Panel; consequently, he is deemed to have admitted the factual allegations contained in the Formal Charges. *See* Rule 24(a), RLDE, Rule 413, SCACR ("Failure to answer the formal charges shall constitute an admission of the factual allegations."); Rule 24(b), RLDE, Rule 413, SCACR ("If the respondent should fail to appear when specifically so ordered by the hearing panel or the Supreme Court, the respondent shall be deemed to have admitted the factual allegations which were to be the subject of such appearance and to have conceded the merits of any motion or recommendations to be considered at

such appearance."); *see also* Rule 27(a), RLDE, Rule 413, SCACR ("The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations.").

We agree with the Hearing Panel that the factual allegations, as deemed admitted, support a finding of misconduct. Having found that ODC has met the burden of establishing Respondent's misconduct by clear and convincing evidence, this Court need only determine the appropriate sanction and whether to accept the Hearing Panel's recommendation of disbarment. *In re Boney*, 390 S.C. 407, 702 S.E.2d 241 (2010); *In re Jacobsen*, 386 S.C. 598, 690 S.E.2d 560 (2010); *In re Tullis*, 375 S.C. 190, 652 S.E.2d 395 (2007).

Respondent's circumstances are similar to those of *In re Boney*, in which the attorney was charged with committing misconduct in six matters. 390 S.C. at 408, 702 S.E.2d at 241. This Court held the attorney's "abandonment of her law practice without appropriate regard for the interests of her clients, and her subsequent misconduct in failing to answer the formal charges, failing to submit to ODC's subpoena, and failing to appear at the hearing convened by the Hearing Panel, as well as her continued failure to participate in the disciplinary process, warrant[ed] her disbarment." *Id.* at 416, 702 S.E.2d at 245-46. We noted the attorney had not communicated with ODC for over two years and, according to a SLED investigator, she had left the state. *Id.* at 416, 702 S.E.2d at 246.

Likewise, disbarment was deemed appropriate in *In re Okplalaeke*, 374 S.C. 186, 648 S.E.2d 593 (2007). In that case, the attorney committed misconduct in nine matters, including failing to properly disburse settlement money, threatening criminal prosecution in order to gain advantage in a civil matter, and systematically failing to properly oversee and fulfill the financial obligation of his law practice, and then left the United States with no apparent intention of returning and with the knowledge that disciplinary action against him was imminent. *Id.* at 194, 648 S.E.2d at 597-98. The attorney never answered the Formal Charges and did not appear at the disciplinary hearing. *Id.* at 193, 648 S.E.2d at 597.

The Court agreed with the Hearing Panel "that [the attorney's] conduct indicates an obvious disinterest in the practice of law" and found that "since his departure, [he] has shown no regard for the status of his license to practice law in South Carolina." *Id.* at 194, 648 S.E.2d at 597-98. The Court stated "a central purpose of the attorney disciplinary process is to protect the public from unscrupulous or indifferent lawyers." *Id.* at 194-95, 648 S.E.2d at 598.

We concluded disbarment was warranted in *In Re Bagnell*, 393 S.C. 382, 713 S.E.2d 304 (2011), where the attorney agreed to represent a client in a dispute against a financial institution over a debt, but then abandoned the client, causing the client to suffer $28,800 in damages. *Id.* at 383-84, 713 S.E.2d at 305. The attorney did not answer the Formal Charges, and he did not appear at the proceeding before the Hearing Panel nor at oral argument in this Court. *Id.* at 384, 713 S.E.2d at 305. We cited a series of decisions supporting the principle, articulated "on numerous occasions," that an attorney who fails to answer the charges or appear to defend or explain the alleged misconduct indicates an obvious disinterest in the practice of law, and noted that attorneys who engage in such conduct will face severe sanctions. *Id.* at 386, 713 S.E.2d at 306.

In the current matter before this Court, we agree with the Hearing Panel that disbarment is justified. Due to Respondent's failure to answer the Formal Charges Respondent is deemed to have admitted the factual allegations in the thirteen matters outlined above, among them the failure to maintain his trust account, the failure to adequately supervise the paralegal with whom he was associated and to properly perform his duties as the closing attorney, and the neglect of numerous matters in his representation of clients in various real estate, domestic, and criminal cases.

Further, Respondent has abandoned his law practice without regard to the status of his law license. Respondent has never communicated with ODC, and he did not appear at the oral argument before this Court. Respondent's failure to petition this Court for reinstatement within three years

of his suspension as provided by Rule 419(g), SCACR is additional proof of his obvious indifference to the practice of law and the status of his law license.[2]

We also agree with the Hearing Panel's recommendation regarding the payment of costs, payment of restitution to the court reporter, and reimbursement to the Lawyers' Fund for Client Protection prior to filing a petition for reinstatement. The payment of costs is a crucial component of any disciplinary action, and both restitution and reimbursement to the Fund are within the scope of allowable sanctions frequently implemented by this Court. *See, e.g.*, *In re Prendergast*, 390 S.C. 395, 403-04, 702 S.E.2d 364, 368 (2010) ("find[ing] the payment of costs is a crucial component of a sanction for attorney misconduct"); Rule 27(e)(3), RLDE, Rule 413, SCACR ("The Supreme Court may assess costs against the respondent if it finds the respondent has committed misconduct."); Rule 7(b)(6), RLDE, Rule 413, SCACR (stating sanctions for misconduct may include the "assessment of the costs of the proceedings, including the cost of hearings, investigations, prosecution, service of process and court reporter services"); Rule 7(b)(5), RLDE, Rule 413, SCACR (allowing restitution); Rule 7(b)(9), RLDE, Rule 413, SCACR (providing for other appropriate sanctions).

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[2] Rule 419(g), SCACR states: "If a lawyer fails to seek reinstatement within three (3) years of being suspended by the Court, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name shall be removed from the roll of attorneys. The lawyer must thereafter comply with Rule 402, SCACR, to be readmitted to the practice of law in this state." Administrative suspensions and/or terminations are distinguishable from disbarment, and even if an attorney is no longer a member of the South Carolina Bar, the attorney is still subject to discipline by this Court for acts committed while an active member. *See* Rule 2(q), RLDE, Rule 413, SCACR (defining a lawyer subject to discipline as "anyone admitted to practice law in this state, including any formerly admitted lawyer with respect to acts committed prior to resignation or disbarment"); *In re Trexler*, 350 S.C. 483, 567 S.E.2d 470 (2002) (holding the attorney was subject to discipline for additional acts of misconduct committed prior to disbarment for misconduct in other matters).

III.

Based on the foregoing, we disbar Respondent. Prior to any petition for reinstatement being filed, Respondent must establish that he has (1) paid the costs of the disciplinary proceedings; (2) paid restitution of $101.00 to the court reporter; and (3) reimbursed the Lawyers' Fund for Client Protection for amounts paid to his former clients, as well as paid his former clients any amounts owed that were not covered by the Fund.

DISBARRED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

RE: Amendment to Rule 410 of the South Carolina Appellate Court Rules

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ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 410(d) of the South Carolina Appellate Court Rules is amended to read as follows:

> **(d) Membership.** Except as otherwise provided in the rules of this Court, no person shall engage in the practice of law in the State of South Carolina who is not licensed by this Court and a member in good standing of the South Carolina Bar. Further, no person shall be a member of the South Carolina Bar who has not been licensed to practice law by this Court.

This amendment shall be effective on December 31, 2011. On that date, the membership of all current associate members shall end and any provision of the Bylaws of the South Carolina Bar relating to associate members shall be rescinded. Nothing in this order shall be construed as preventing the South Carolina Bar from allowing lawyers or retired lawyers from other jurisdictions to attend bar functions or receive bar publications on

such terms or conditions as the South Carolina Bar may determine are appropriate.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
December 14, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Stacy W. Howard, Appellant.

Appeal From Georgetown County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4916
Heard November 3, 2011 – Filed December 14, 2011

REVERSED AND REMANDED

Appellate Defender Susan Hackett and Appellate Defender Tristan Shaffer, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Christina Catoe, all of Columbia; and John Gregory Hembree, of Conway, for Respondent.

LOCKEMY, J.: Stacy Howard appeals his conviction of assault and battery of a high and aggravated nature (ABHAN). Howard argues the trial court misapplied the Colf[1] factors when weighing the probative value and prejudicial impact of admitting his prior ABHAN convictions. We reverse and remand.

FACTS/PROCEDURAL BACKGROUND

On February 29, 2007, a Georgetown County jury found Howard guilty of ABHAN. At trial, Howard's former girlfriend testified he struck her during an argument in his truck. The victim's nose was broken in three places, and she underwent surgery for her injury. The victim initially lied and told the emergency room doctor she hit the dashboard when Howard slammed on the brakes. Howard was arrested after the victim felt safe enough to tell the police what really occurred the night of the incident. She testified Howard struck her twice with his fists. Howard testified the victim was out of control, and he unintentionally hit her while attempting to get a clear view of the road. He stated he was unsure whether his blow broke her nose or whether she hit the dashboard. Howard testified he and the victim had been drinking the day of the incident.

During trial, Howard was impeached with three prior ABHAN convictions. Over Howard's objection, the trial court ruled Howard's convictions for ABHAN from November 1995, April 2004, and December 2004 were within the ten year rule and the probative value of their admission outweighed the prejudicial effect to Howard. The trial court found this case was one of credibility, and Howard's previous ABHANs were probative on the issue of whether he was capable of committing such an act. The trial court ruled it would limit the prejudicial effect by not allowing testimony that the victims in two of the prior ABHANs were Howard's mother and the victim in this case. During Howard's testimony regarding the convictions and during final jury instructions, the trial court informed the jury that Howard's prior convictions could be used to weigh Howard's credibility but not his propensity to commit the offense.

[1] State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000).

The trial court sentenced Howard to eight years' imprisonment for the ABHAN conviction. The trial court also found Howard's ABHAN conviction violated the terms of two probationary sentences. The trial court revoked Howard's first probation case consecutively for eight years and his second probation case consecutively for four and a half years. Howard appealed his conviction to this court arguing the trial court erred in admitting his prior ABHAN convictions.

In July 2009, this court reversed the admission of Howard's prior ABHAN convictions and remanded to the trial court for an on-the-record Colf balancing test. See State v. Howard, 384 S.C. 212, 682 S.E.2d 42 (Ct. App. 2009). This court directed the trial court to conduct a hearing on the admissibility of Howard's prior convictions and carefully weigh the probative value of admitting his prior convictions for impeachment purposes against their prejudicial effect. Id. at 223, 682 S.E.2d at 48. The court noted that "[w]hile the trial court articulated that Howard's prior convictions were probative of his credibility, the trial court provided no analysis of the prejudicial impact of admitting these prior convictions." Id. The court further found that given the similarity between Howard's prior convictions and the crime charged, it could not conclude that Howard was not prejudiced by the admission of his prior convictions. Id. at 222, 682 S.E.2d at 48. The court explained that although evidence of his prior convictions may be probative of Howard's credibility, they were highly prejudicial because they involved the same conduct for which Howard was on trial. Id. at 222-23, 682 S.E.2d at 48.

On remand, a hearing was held before the trial court on January 19, 2010. After hearing arguments from both parties, the trial court discussed the five factors set forth in Colf and ruled Howard's prior ABHAN convictions were admissible because the probative value of admitting them "fairly substantially" outweighed the prejudicial effect to Howard. After ruling, the trial court gave the parties the opportunity to respond. Defense counsel made a general objection, stating "Your Honor, we take exception to that ruling." This appeal followed.

ISSUE ON APPEAL

1. Did the trial court err in applying the Colf factors?

STANDARD OF REVIEW

"The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion." State v. Swafford, 375 S.C. 637, 640, 654 S.E.2d 297, 299 (Ct. App. 2007) (citation omitted). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). "To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice." Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005).

LAW/ANALYSIS

Howard argues the trial court misapplied the Colf factors, and thus erred in admitting his prior ABHAN convictions. We agree.

According to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year imprisonment are admissible for impeaching the credibility of a defendant who testifies when "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Our Supreme Court has approved the five-factor analysis generally employed by the federal courts for weighing the probative value for impeachment of prior convictions against the prejudice to the accused. State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). The following factors, along with any other relevant factors, should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Id.

On remand, the trial court discussed the five Colf factors as well as several other factors it believed "strongly mitigate[d] in favor of the admission of the prior convictions." First, the trial court found the impeachment value of Howard's prior convictions was "rather substantial" because Howard and the victim were the only witnesses to the assault. The trial court further found the impeachment value was heightened by Howard's repeated attacks on the victim's character over objections from the State and admonition from the court. Second, the trial court found Howard's prior convictions were admissible because they occurred within ten years. The trial court stated it believed the purpose of the remoteness rule was that if someone committed a crime, served the penalty, and remained out of trouble, he should not be impeached with his prior crimes. The court noted Howard continued to be "generally difficult" after his prior convictions and did not have a "clean slate" when he came before the court for this trial. Third, the trial court acknowledged that Howard's prior convictions were "highly similar" to the present charge. However, the court noted it excluded the victims' names and gave curative instructions to lessen the prejudicial impact. Addressing the fourth and fifth Colf factors, the trial court found Howard's testimony was "very important to his case" because he was the sole witness for the defense. The court also found Howard's credibility was "pivotal" because there were no witnesses to the assault.

The trial court also stated other facts it considered in admitting Howard's prior convictions. The court found Howard was an "intelligent man" with "an unusual degree of criminal litigation sophistication." The court stated Howard "knew what he was doing" when he repeatedly brought improper matters to the jury's attention in order to "tip the scales in his favor." The trial court found the prejudicial effect of admitting Howard's prior convictions was "somewhat diminished if not negated" by Howard's use of his prior ABHANs as part of his defense.[2] The trial court also clarified a comment it made at trial regarding its reason for admitting the prior convictions. At trial, the trial court stated Howard's previous ABHANs were clearly probative on the issue of whether Howard was capable of committing the assault. On remand, the trial court explained that it failed to fully

[2] We note Howard's references to his prior ABHAN convictions occurred after the trial court admitted his prior convictions into evidence.

articulate its point, and it was aware that prior convictions were not admissible to show propensity or behavior in conformity with that propensity. The trial court explained:

> [G]iven the way this case broke and given the defenses put forward by Mr. Howard, ah, the fact that the victim was hurt in a wreck as opposed to being hurt in an ABHAN, and further that the wreck was her own fault, and further that she had been a lot of trouble to him through the years and for seven years he had looked out for her and had, 'put up with her,' that the issue of whether this is someone protecting her or attacking her is what the Court meant when the Court said that this is evidence which would show whether or not he would be capable of such an event. In other words, it is a protector versus an attacker.

The trial court concluded by stating, that after reviewing all of the above and for the reasons stated, the probative value of admitting Howard's prior convictions "substantially outweighed" the prejudicial effect. Defense counsel responded, stating "we take exception to that ruling."

First on appeal, Howard argues the trial court misapplied the first Colf factor – the impeachment value of the prior crimes. At the remand hearing, the trial court determined the impeachment value of Howard's prior ABHAN convictions was "heightened" because Howard and the victim were the only witnesses to the assault and because Howard attacked the victim's character at trial. Howard contends neither of those findings is relevant to a determination of the impeachment value of his prior ABHANs. Howard argues the trial court focused its analysis on the importance of credibility in this case and failed to make a finding as to the impeachment value of his prior convictions. We agree. [3]

[3] The State contends this issue is not preserved for our review because Howard did not specifically object to the trial court's ruling or request clarification at the hearing. We disagree. In his argument during the remand hearing, defense counsel made a specific argument regarding the first Colf

Whether the probative value of admitting prior convictions substantially outweighs the prejudicial impact is a determination the trial court should make after carefully balancing the Colf factors and articulating for the record the specific facts and circumstances supporting its decision. Here, the trial court failed to properly address the impeachment value of Howard's prior ABHAN convictions as required by Colf. While the trial court discussed the importance of credibility in this case, the court failed to state how Howard's prior ABHANs were probative of his credibility. The trial court instead focused on Howard's character, which does not affect the impeachment value of his prior crimes. A reading of the record indicates Howard's prior convictions were admitted to show he was capable of committing the charged offense. Additionally, given the similarity between Howard's prior convictions and the offense charged, we cannot conclude Howard was not prejudiced by the admission of his prior convictions. See State v. Bryant, 369 S.C. 511, 517-18, 633 S.E.2d 152, 156 (2006) (holding that when a prior offense is similar to the charged offense the "danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission"); State v. Scriven, 339 S.C. 333, 343, 529 S.E.2d 71, 76 (Ct. App. 2000) (holding that when prior convictions are "similar or identical to charged offenses . . . the likelihood of a high degree of prejudice to the accused is inescapable"). We believe the admission of Howard's prior ABHAN convictions was more prejudicial than probative, especially in light of the offense for which he was on trial. We note that while this court previously remanded to the trial court for consideration of the Colf factors, we do not see the need for an additional remand hearing. Accordingly, we reverse the trial court's admission of Howard's prior convictions and remand for a new trial.

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factor. He argued crimes not involving dishonesty or false statements are not generally probative of truthfulness, and therefore, they should not be admitted for impeachment purposes. Because this argument was raised to the trial court during the hearing and ruled upon by the court, we find it is preserved. See State v. Liverman, 386 S.C. 223, 243, 687 S.E.2d 70, 80 (Ct. App. 2009) (holding issues must be raised to and ruled upon by trial court to be preserved for review).

Howard also argues the trial court admitted his prior convictions because he "deserved to be punished and prejudiced in response to his misbehavior." Howard contends the trial court improperly considered his "inappropriate" behavior in previous court proceedings and during trial, in deciding to admit his prior convictions. Finally, Howard argues the trial court erred in admitting his prior convictions because they were highly probative in establishing Howard's propensity to commit the crime charged. Howard contends that although the trial court acknowledged that prior crimes were not admissible to show propensity, the court further stated that it was admitting his prior convictions because they were probative of whether he was capable of committing ABHAN. Because Howard failed to raise these arguments to the trial court, we find they are not preserved for our review. See Liverman, 386 S.C. at 243, 687 S.E.2d at 80 (holding issues must be raised to and ruled upon by trial court to be preserved for review); see also State v. Varvil, 338 S.C. 335, 340, 526 S.E.2d 248, 251 (Ct. App. 2000) (holding a general objection is ordinarily insufficient to preserve an issue for appeal); State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) (holding an objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error).

CONCLUSION

We reverse the trial court's admission of Howard's prior ABHAN convictions and remand for a new trial.

REVERSED AND REMANDED.

HUFF and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Bruce Scott Johnson, Appellant.

Appeal From Lexington County
William P. Keesley, Circuit Court Judge

Opinion No. 4917
Heard November 2, 2011 – Filed December 14, 2011

REVERSED

James Ross Snell, of Lexington, for Appellant.

Rachel Donald Erwin, of Blythewood, for Respondent.

PIEPER, J.: This appeal arises out of Appellant Bruce Scott Johnson's magistrate's court conviction after a jury trial for driving under the influence (DUI). The circuit court affirmed. On appeal, Johnson argues the magistrate's court erred in: (1) failing to dismiss the charge based on the State's failure to record audio until the two minute and thirty-second mark of the incident site videotape and (2) failing to dismiss the charge based on the State's failure to videotape the breath test. We need not reach the issue

regarding the incident site video as we find reversal appropriate based on the failure to videotape the administration of breath test.

FACTS

The facts in this case are undisputed. Johnson was arrested on suspicion of DUI on August 3, 2008. Prior to trial, Johnson made two motions to dismiss. First, Johnson argued the charge should be dismissed because the incident site videotape was missing audio for the first two and a half minutes. However, audio was recorded when Trooper Patterson gave Johnson a Miranda warning and performed roadside sobriety tests. Second, Johnson asked the court to dismiss the charge because Trooper Patterson moved Johnson off-camera to administer the breath test. When Trooper Patterson tried to administer the breath test he discovered the machine was not working, so he administered the test from another machine but failed to activate that machine's video camera. Johnson asserts that the viewer can hear the breath test machine running, but Johnson is not seen on the videotape.[1] Trooper Patterson did not submit an affidavit regarding either videotape.

The magistrate denied Johnson's motions to dismiss. Instead, the magistrate suppressed the breath test because Johnson was out of range of the camera during administration of the breath test. As to the incident site videotape, the magistrate denied the motion to dismiss in full. The circuit court affirmed, expressing concern that the officer did not submit an affidavit but finding Johnson failed to establish reversible error. Johnson did not file a motion to alter or amend the judgment. This appeal followed.

STANDARD OF REVIEW

In a criminal appeal from the magistrate's court, the circuit court does not review the matter de novo; rather, the court reviews the case for

[1] Johnson did not provide this court with copies of either the incident site videotape or the breath test videotape. Nonetheless, Johnson's assertions regarding the deficits in the videotapes are not contested by the State.

preserved errors raised by appropriate exception. Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 341, 713 S.E.2d 278, 282 (2011); S.C. Code Ann. § 14-25-105 (Supp. 2010). The appeal must be heard by the circuit court upon the grounds of exceptions made and the record on appeal, without the examination of witnesses. S.C. Code Ann. § 18-3-70 (Supp. 2010). The circuit court "may either confirm the sentence appealed from, reverse or modify it, or grant a new trial." Id. The appellate court's review in criminal cases is limited to correcting the order of the circuit court for errors of law. City of Rock Hill v. Suchenski, 374 S.C. 12, 15, 646 S.E.2d 879, 880 (2007).

ANALYSIS

We decide this appeal based on the officer's failure to capture Johnson on videotape during the administration of the breath test.[2] In doing so, we must address whether section 56-5-2953(A)(2) of the South Carolina Code (2006) was violated, whether the State offered a valid excuse for its failure to comply with section 56-5-2953, and whether the magistrate's remedy of suppression of the breath test was adequate.

The applicable provisions of the statute in question include:

> (A)(2) The videotaping at the breath site:
> (a) must be completed within three hours of the person's arrest for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 or a probable cause determination that the person violated Section 56-5-2945, unless compliance is not possible because the person needs emergency medical treatment considered necessary by licensed medical personnel;
> (b) must include the reading of Miranda rights, the entire breath test procedure, the person being

[2] Based on this resolution, we decline to address Johnson's remaining issue on appeal. See State v. Sweet, 374 S.C. 1, 9, 647 S.E.2d 202, 207 (2007) (declining to address the appellant's remaining arguments when the decision was dispositive as to one issue).

informed that he is being videotaped, and that he has the right to refuse the test;
(c) must include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test;

. . .

(B) Nothing in this section may be construed as prohibiting the introduction of other evidence in the trial of a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945. Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to Section 56-5-2930, 56-5-2933, or 56-5-2945 if the arresting officer submits a sworn affidavit certifying that the videotape equipment at the time of the arrest, probable cause determination, or breath test device was in an inoperable condition, stating reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county or, in the alternative, submits a sworn affidavit certifying that it was physically impossible to produce the videotape because the person needed emergency medical treatment, or exigent circumstances existed. Further, in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizens' arrests, where an arrest has been made and the videotaping equipment has not been activated by blue lights, the failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal. However, as soon as videotaping is practicable in these circumstances,

> videotaping must begin and conform with the provisions of this section. Nothing in this section prohibits the court from considering any other valid reason for the failure to produce the videotape based upon the totality of the circumstances; nor do the provisions of this section prohibit the person from offering evidence relating to the arresting law enforcement officer's failure to produce the videotape.

S.C. Code Ann. § 56-5-2953(A)(2)-(B) (2006).[3]

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." State v. Sweat, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010). "When a statute is penal in nature, it must be strictly construed against the State and in favor of the defendant." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). The court should look to the plain language of the statute. Binney v. State, 384 S.C. 539, 544, 683 S.E.2d 478, 480 (2009). If the language of a statute is unambiguous and conveys a clear and definite meaning, then the rules of statutory interpretation are not needed and the court has no right to impose a different meaning. State v. Gaines, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008). In interpreting a statute, the court will give words their plain and ordinary meaning, and will not resort to forced construction that would limit or expand the statute. Harris v. Anderson Cnty. Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009).

However, if a statute is ambiguous, courts must construe the terms of the statute. Roberts, 393 S.C. at 342, 713 S.E.2d at 283. "A statute as a whole must receive practical, reasonable, and fair interpretation consonant

[3] Section 56-5-2953 was amended effective Feb. 10, 2009. See Act No. 201, 2008 S.C. Acts 1682-85. The amended version of the statute is not applicable to Johnson's August 3, 2008 arrest.

with the purpose, design, and policy of lawmakers." Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006). The language of the statute must be read in such a way that harmonizes its subject matter and accords with the statute's general purpose. Roberts, 393 S.C. at 342, 713 S.E.2d at 283. "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Id. However, courts will reject a statutory interpretation that would lead to an absurd result not intended by the legislature or that would defeat plain legislative intention. Id.

Johnson argues the officer violated the statute when the officer moved Johnson to a different breath test machine for the administration of the breath test, such that Johnson could not be seen on the videotape. The State concedes the video did not capture the administration of the breath test.

To determine whether the officer violated section 56-5-2953(A)(2), we look at the plain language of the statute. "The videotaping at the breath site . . . must include the person taking or refusing the breath test and the actions of the breath test operator while conducting the test." S.C. Code Ann. § 56-5-2953(A)(2)(c). In light of the concession by the State, we find the officer violated section 56-5-2953(A)(2)(c) when he failed to capture the administration of the breath test on the videotape.

We must next decide if the State should be excused from its noncompliance with the videotaping requirements found in section 56-5-2953(A). Johnson claims when an officer does not provide a sworn affidavit certifying that the equipment was inoperable, that reasonable efforts were made to maintain the equipment in an operable condition, and that there was no other operable breath test facility in the county, a DUI charge must be dismissed. The State argues the magistrate and the circuit court correctly considered language in section 56-5-2953 permitting a court to consider any other valid reason for the failure to produce a video.

Pursuant to subsection (B) of section 56-5-2953,

> [n]oncompliance is excusable: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the videotape because the defendant either (a) needed emergency medical treatment or (b) exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accidents, and citizens' arrests; or (4) for any other valid reason for the failure to produce the videotape based upon the totality of the circumstances.

Roberts, 393 S.C. at 346, 713 S.E.2d at 285.

The first three excuses above are inapplicable to the present case. The State admits the officer did not submit a sworn affidavit. Further, although the State argues in its appellate brief that the officer was working at an accident scene on I-26 when Johnson nearly collided with the officer, the record does not support a finding that there was an emergency circumstance that prevented the officer from complying with the statute. The officer left the scene of the accident to pursue Johnson. Thus, we must consider whether the State offered any other valid reason for the failure to produce the videotape under the totality of the circumstances.

The magistrate noted the reason the officer asked Johnson to stand out of range of the camera was because the first machine was not working. The officer moved Johnson to another machine in the same room but failed to activate the videotape for that second machine. The officer remained on camera from the first machine the entire time. Based on these facts, the magistrate decided to suppress the breath test and deny Johnson's motion to dismiss the charges.

At the hearing before the circuit court, counsel for the State argued for the first time that the officer believed the camera was activated for the second machine and did not realize it was not activated until after he had administered the test. We find this new argument unpreserved. In considering whether the officer had a valid reason for his failure to capture Johnson's breath test on video, we consider only the grounds argued before the magistrate. See State v. Carmack, 388 S.C. 190, 200, 694 S.E.2d 224, 229 (Ct. App. 2010) ("[I]n order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.").

Here, the record does not indicate that the video recording equipment for the second datamaster machine was inoperable or that the police otherwise lacked the ability to create a videotape of the administration of the breath test. Rather, we have only the officer's assertion that the first machine was not functioning, so he moved over to the second machine. Under the totality of the circumstances, we find the State did not articulate a valid reason for the officer's failure to comply with the mandates of section 56-5-2953 when the officer moved to the second machine to administer the breath test.

Finally, we must decide the appropriate remedy for the State's unexcused failure to comply with section 56-5-2953.

In City of Rock Hill v. Suchenski, the supreme court held an inexcusable violation of section 56-5-2953 requires dismissal of the charge. 374 S.C. 12, 16, 646 S.E.2d 879, 881 (2007). On appeal, the City argued its noncompliance was excused pursuant to the exceptions listed in section 56-5-2953(B); however, the supreme court refused to consider the City's arguments because they were not preserved for appellate review. Id. at 15-16, 646 S.E.2d at 880. In finding dismissal appropriate, the supreme court stated "failure to produce videotapes would be a ground for dismissal if no exceptions apply." Id. at 16, 646 S.E.2d at 881. Suchenski has been interpreted as a case involving the failure to preserve error for appellate review. See, e.g., Roberts, 393 S.C. at 346, 713 S.E.2d at 285; State v.

Oxner, 391 S.C. 132, 135, 705 S.E.2d 51, 52 (2011); State v. Branham, 392 S.C. 225, 229 n.3, 708 S.E.2d 806, 809 n.3 (Ct. App. 2011).

In Roberts, the supreme court returned to the Suchenski decision and found that unexcused noncompliance with section 56-5-2953 mandates dismissal of a DUI charge:

> As evidenced by this Court's decision in Suchenski, the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provisions of section 56-5-2953. Notably, the Legislature specifically provided for the dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. Id. § 56-5-2953(B) ("Failure by the arresting officer to produce the videotapes required by this section is not alone a ground for dismissal of any charge made pursuant to section 56-5-2930 . . . if [certain exceptions are met]."). The term "dismissal" is significant as it explicitly designates a sanction for an agency's failure to adhere to the requirements of section 56-5-2953.
>
> Furthermore, it is instructive that the Legislature has not mandated videotaping in any other criminal context. Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.

> Thus, we hold that dismissal is the appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in Suchenski.

393 S.C. at 348-49, 713 S.E.2d at 286.

Therefore, the magistrate's remedy of suppression constitutes reversible error. Just as the supreme court found in Roberts, we also find dismissal is the appropriate sanction for the officer's unexcused violation of section 56-5-2953.

CONCLUSION

Accordingly, Johnson's conviction is hereby

REVERSED.

HUFF and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patricia Carson Lewin, Respondent,

v.

Albert Read Lewin, Appellant.

Appeal From Beaufort County
Robert S. Armstrong, Family Court Judge

Opinion No. 4918
Heard October 6, 2011 – Filed December 14, 2011

AFFIRMED

Gregory Samuel Forman, of Charleston, for Appellant.

Blake A. Hewitt and John Nichols, of Columbia, for Respondent.

LOCKEMY, J.: In this domestic action, Albert Lewin (Father) appeals the family court's award of attorney's fees and costs to Patricia Lewin (Mother). Father argues the family court erred in (1) finding Mother was the prevailing party, (2) finding Father's uncooperative conduct contributed to litigation costs, (3) considering the conduct of Father's wife, (4) determining

Father's ability to pay, (5) failing to consider Mother's assets, and (6) determining the amount of attorney's fees awarded to Mother. We affirm.

FACTS/PROCEDURAL BACKGROUND

Father and Mother were married in February 1993 and divorced in August 2000. At the time of their divorce, the parties' two children were seven and four years old. Pursuant to custody stipulations attached to the final order and decree of divorce, the parties agreed to joint legal custody of the children. The parties also agreed Mother would maintain primary physical custody of the children and Father would have visitation rights.

According to Mother, for a "considerable period of time" prior to initiating this action, she received reports from one of the children that marijuana was present in Father's home during visitation. Mother maintains the child reported Father and Father's wife (Wife) smelled of marijuana, were "wobbling" or "stumbling," and had slurred speech. According to Mother, she also received pictures taken by one of the children of marijuana in Father's home.

On February 26, 2008, Mother filed a complaint alleging Father and Wife abused illegal drugs and alcohol while the parties' children, then ages fourteen and twelve, were in Father's home for visitation. In her complaint, Mother requested (1) supervised visitation, (2) full legal and physical custody, (3) the appointment of a guardian ad litem, (4) attorney's fees and costs, and (5) discovery. Mother also filed a motion for temporary relief, requesting Father and Wife undergo alcohol abuse counseling and hair follicle drug testing. Prior to the commencement of a March 13, 2008 temporary hearing, Father and Mother reached an agreement as to several issues. In an April 29, 2008 temporary order, the family court found Father and Mother agreed (1) to submit themselves and their children to hair strand testing for illegal drugs, (2) to a cessation of the children's overnight visitation with Father until he obtained a negative drug test, and (3) that Wife was not permitted to be present during any visitation unless she provided a negative drug test.

Mother, Father, Wife, and the children were drug tested on March 17, 2008. Mother and the children tested negative for illegal drugs. Father also tested negative; however, the lab report stated Father had recently bleached his hair which could have negatively impacted the results of the hair strand test.[1] Between March and May 2008, Mother made several requests for Father to provide the test results from the secondary body hair samples taken during Father's drug test.[2] On May 15, 2008, Father produced an affidavit from Dr. Robert Bennett, the forensic toxicologist who performed the drug tests. Mother learned from Dr. Bennett's affidavit that Father was also drug tested on March 7, 2008, and tested positive for cocaine. Dr. Bennett's affidavit further revealed Father's secondary body hair sample collected during the March 17, 2008 test was positive for cocaine and marijuana. According to Dr. Bennett, Father is not "in a state of drug dependency, regular drug usage, or addiction" and the drugs detected "could be due to passive exposure." Dr. Bennett performed another drug test on Father on May 9, 2008. The test was negative.

Between June 2008 and March 2009, Mother's counsel attempted to arrange mediation between the parties, but Father failed to respond.[3] On March 27, 2009, Mother filed a motion to compel mediation. In May 2009, the family court granted Mother's motion. Although the parties were unable to resolve their dispute through mediation, they informed the family court in October 2009 that they had reached an agreement as to all issues except attorney's fees. On November 16, 2009, the parties' agreement was approved by the family court. The parties agreed Mother would continue to maintain primary physical custody of the children, while Father and Mother would maintain joint legal custody of the children. Additionally, Father agreed to undergo quarterly drug testing and not expose the children to Wife.

Mother pursued her request for attorney's fees and costs by filing a brief with the family court. In December 2009, after reviewing the parties' briefs, affidavits, and financial declarations, the family court ordered Father

[1] Wife withdrew her consent to release her test results.
[2] Father changed counsel during this time.
[3] Father changed counsel again in March 2009.

to pay Mother $15,000 in attorney's fees and $3,955 in costs.[4] The family court found Father's conduct with regard to the drug testing results and his failure to respond to Mother's attempts to discuss settlement caused Mother to incur additional attorney's fees. The family court also determined Mother received beneficial results from her counsel and was the prevailing party, and found Father's financial declaration was not credible. Father filed a motion to alter or amend the order and requested the family court hear additional testimony. The family court denied Father's motion. This appeal followed.

STANDARD OF REVIEW

"The family court is a court of equity." Lewis v. Lewis, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). In appeals from the family court, the appellate court reviews factual and legal issues de novo. Simmons v. Simmons, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." Lewis, 392 S.C. at 390, 709 S.E.2d at 654-55. However, this broad standard of review does not require the appellate court to disregard the factual findings of the trial court or ignore the fact that the trial court is in the better position to assess the credibility of the witnesses. Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Moreover, the appellant is not relieved of the burden of demonstrating error in the trial court's findings of fact. Id. at 387-88, 544 S.E.2d at 623. Accordingly, we will affirm the decision of the trial court in an equity case unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by this court. See Lewis, 392 S.C. at 390, 709 S.E.2d at 654-55.

[4] In support of her request for attorney's fees, Mother submitted an affidavit from her attorney showing she incurred $23,529.85 in attorney's fees and costs. Mother also alleged she incurred an additional $3,955 in costs for a total of $27,484.85 in attorney's fees and costs.

ISSUE ON APPEAL

1. Did the family court err in awarding Mother $18,955 in attorney's fees and costs?

LAW/ANALYSIS

I. Mother as Prevailing Party

Father argues the family court erred in finding Mother was the prevailing party. We disagree.

In deciding whether to award attorney's fees and costs, the family court should consider "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) effect of the attorney's 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). Father contends Mother obtained very little of the relief she sought in her complaint, and therefore, she is not entitled to attorney's fees. We disagree. Mother filed her complaint based on her concerns about drug use in Father's home. Although Mother did not receive all of the relief she requested, she did prevail on several issues and obtained beneficial results. The family court temporarily suspended Father's visitation rights until he provided Mother with a negative drug test. Furthermore, in its final order, the family court ordered Father to undergo quarterly drug testing, and determined Father's visitation rights would be suspended should he fail any of the drug tests. The family court also approved the appointment of a guardian ad litem and restrained Father from exposing the children to Wife. Accordingly, we do not believe the family court erred in finding Mother obtained beneficial results and was the prevailing party.

II. Father's Conduct

Father argues the family court erred in finding his uncooperative conduct contributed to litigation costs. We disagree.

"This court has previously held when parties fail to cooperate and their behavior prolongs proceedings, this is a basis for holding them responsible for attorney's fees." Bodkin v. Bodkin, 388 S.C. 203, 223, 694 S.E.2d 230, 241 (Ct. App. 2010); see also Spreeuw v. Barker, 385 S.C. 45, 73, 682 S.E.2d 843, 857 (Ct. App. 2009) (holding a party's uncooperative conduct in litigation is a proper factor for the family court to consider in deciding whether to award attorney's fees); Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989) (holding husband's lack of cooperation served 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).

The family court determined Father's actions with regard to his drug testing results, his failure to timely respond in any manner to Mother's requests for accurate test results, and Mother's numerous unanswered attempts to discuss settlement or mediation caused Mother to incur additional attorney's fees and costs. The family court noted Mother's attorney spent "considerable time making continual demands" for Father to provide his drug test results, and engaged in a long series of communications with Father's attorney asking for mediation. Father contends the family court "mischaracterized [his] behavior" and only considered facts favorable to Mother.

First, Father argues the family court erred in finding he did not reveal the results of his March 7, 2008 drug test to Mother at the March 13, 2008 temporary hearing.[5] According to Father, the results of the March 7, 2008 test were not known at the time of the temporary hearing and the "punitive tone" of the family court's finding indicates the court wanted to punish Father. We note that although Father contends the test results were not known at the time of the temporary hearing, Father did not inform Mother of the test results until Dr. Bennett's affidavit was provided two months after the test.

[5] The family court refers to this test as the March 11, 2008 test, however the test was conducted on March 7, 2008, and the report was compiled on March 11, 2008.

Father also argues the family court failed to consider all of the facts regarding Dr. Bennett's conclusion that Father's hair bleaching could negatively affect his drug test results. Father contends he has bleached his hair for years for "cosmetic purposes," and he provided secondary body hair samples during the test to resolve the issue. We note the record contains no evidence Father regularly bleached his hair. Furthermore, Father delayed turning over the secondary body hair test results for two months, thus causing Mother to incur additional attorney's fees.

Next, Father argues the family court erred in failing to find Dr. Bennett's report stated Father's positive drug test could have been the result of passive exposure. While this conclusion was noted in Dr. Bennett's report, we find the family court did not err in not including it in its findings of fact. Father's hair sample was positive for cocaine and marijuana. Dr. Bennett stated in his affidavit that a positive drug test infers usage and that a drug test cannot distinguish between active or passive consumption.

Finally, Father argues the family court's finding that he failed to respond in a timely manner to Mother's requests for accurate test results was inconsistent with the facts in evidence. Father contends he complied with the temporary order and obtained drug tests from November 2008 to January 2009 and in July 2009. However, Father failed to respond to Mother's repeated requests from March 2008 to May 2008 to provide the results of his secondary body hair samples collected on March 17, 2008. Accordingly, we find the family court did not err in finding Father's conduct caused Mother to incur additional attorney's fees.

III. Wife

Father argues the family court erred in considering Wife's conduct in awarding attorney's fees to Mother. Based on our review of the family court's order, we find the family court did not consider Wife's conduct. The family court references Wife three times in its order. First, the family court notes the temporary order provided Father was prohibited from exposing the children to Wife until she obtained a negative drug test. Second, the family court notes Wife withdrew her consent to release her drug test results. Third,

the family court notes the final order provided Father would not expose the children to Wife. The family court does not discuss Wife in the context of any of the factors relative to attorney's fees.

IV. Father's Ability to Pay and Mother's Assets

Father argues the family court erred in determining his ability to pay attorney's fees. We disagree.

In his financial declaration, Father reported his occupation as "doctor" and his employer as Varnville ENT. Father also reported total monthly expenses of $8,184.50, $2,341 in monthly loan payments, approximately $99,000 in debts, and a gross monthly income of $400. Father's assets include $2,000 in a checking account and a retirement account valued at $65,000. The family court noted Father's income was below minimum wage and found that a salary of $400 per month for a practicing physician was not credible. The court also noted Father's financial declaration was not supported by an affidavit or other verification. Because Father's financial declaration lacked credibility, the family court held it could not "determine the applicable factors regarding [Father's] ability to pay attorney fees and the effect of the payment of attorney fees on his standard of living as required by [E.D.M]." The family court found it would be "inequitable to allow [Father] to benefit" from a financial declaration which lacked credibility, and found "those issues adverse to [Father]." Later in its order, the family court stated it had "considered the respective financial conditions of each party, their abilities to pay, and the effect of the attorney fees on each of the parties' standard of living." The court further held that, subject to its findings above, Father's "standard of living will not be adversely affected by the attorney fees and costs awarded in this case."

Father argues his financial declaration was signed under oath and his relatively low income does not make his financial declaration incredulous. Father also argues the family court failed to consider the E.D.M. factors. First, because we defer to the family court on issues of witness credibility, we find no reversible error in the family court's determination that Father's financial declaration was not credible. See Avery v. Avery, 370 S.C. 304, 315, 634 S.E.2d 668, 674 (Ct. App. 2006) (deferring to the family court when

the issue was one of witness credibility). We note Father failed to explain how he can meet $8,184.50 in monthly expenses while only earning $400 per month. Additionally, we find the family court properly considered the E.D.M factors. In determining Father's ability to pay, the family court found the only evidence of Father's financial situation, his financial declaration, was not credible. Because Father failed to offer any accurate evidence of his income, we find the family court did not err in finding he had the ability to pay Mother's attorney's fees. See Spreeuw, 385 S.C. at 67, 682 S.E.2d at 854 (holding Father's refusal to provide the family court with a meaningful representation of his current income precluded him from complaining of the family court's ruling on appeal); id. (finding that "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").

Father also argues the family court failed to consider Mother's ability to pay her attorney's fees out of her own assets. Because Father failed to raise this argument to the family court, we find it is not preserved for our review. See King v. King, 384 S.C. 134, 142, 681 S.E.2d 609, 614 (Ct. App. 2009) (holding issues must be raised to and ruled upon by the family court to be preserved for appellate review).

V. Amount of Attorney's Fees

Father contends the family court erred in determining the amount of attorney's fees awarded to Mother. We disagree.

In determining a reasonable attorney's fee the family court should consider "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). Father argues the family court erred in failing to properly consider the time devoted to the case and the customary fees charged for similar services. Father contends: no substantial discovery was conducted; no depositions were taken; there was no trial on the merits;

and contempt proceedings were not required to force his compliance.[6] Mother argues the amount of attorney's fees awarded by the family court was proper considering Father's uncooperative conduct.

After the family court determined an attorney fee award was appropriate, the court noted the Glasscock factors and thoroughly detailed its calculation of attorney's fees. The court found the case was "vigorously contested," lasted more than eighteen months, and the number of hours expended by Mother's counsel and the expenses incurred were reasonable in relation to the issues before the court. The court also considered the experience and professional standing of Mother's counsel and determined her hourly rate was customary and reasonable. Finally, the court considered the beneficial results obtained by Mother and ordered Father to pay $18,955 of the $27,085 in attorney's fees and costs incurred by Mother.

We find the family court considered all of the appropriate factors in awarding Mother attorney's fees. Furthermore, evidence in the record supports each of the family court's findings. This case began over three years ago and was delayed by Father's failure to timely respond to Mother's requests for tests results and mediation. Mother also obtained beneficial test results, and Father admitted Mother's counsel was a respected member of the South Carolina Bar who charges a reasonable hourly fee. Because the evidence in the record supports the family court's findings as to attorney's fees, we find the court did not err in awarding attorney's fees and calculating the amount.

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[6] Father also argues Mother contributed to the increased litigation costs by "walk[ing] out" of mediation. We note Father failed to offer any evidence to support this argument, and he did not raise it until his brief in support of his motion to alter or amend the family court's final order on attorney's fees. Accordingly, we do not address this argument. 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.").

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

Alice Ball Fitzwater, Appellant,

v.

Lloyd A. Fitzwater, Respondent.

Appeal from Darlington County
Roger E. Henderson, Family Court Judge

Opinion No. 4919
Heard September 14, 2011 – Filed December 14, 2011

AFFIRMED

Melvin D. Bannister, of Columbia, for Appellant.

James H. Lucas, of Hartsville, and John S. Nichols and Blake A. Hewitt, of Columbia, for Respondent.

LOCKEMY, J.: In this domestic action, Alice Fitzwater (Wife) contends the family court erred in (1) failing to find Lloyd Fitzwater's (Husband) Antioch Church Road property was transmuted into marital property, (2) valuing Husband's retirement fund, (3) granting a sixty-forty division of the marital properties in favor of Husband, (4) granting Husband a

special equity interest in the Hill Billy Way property, and (5) requiring Wife to contribute to Husband's attorney's fees and costs. We affirm.

FACTS

Husband and Wife were married on September 20, 1997, and had no children. Prior to the parties' marriage, Wife was a licensed insurance agent. While Wife asserts her earnings were over $85,000 per year, Husband disputes that amount. However, the evidence in the record shows her average yearly salary was at least $40,000. After the parties married, Wife continued to earn minimal income from her insurance business,[1] and she worked on the farm at the marital home. Wife also had substantial debt and liabilities coming into the marriage. Husband, a nuclear engineering consultant, earned an average yearly income between $143,249 and $157,250 during the marriage. In addition to his salary, Husband owned several properties, including a home on Antioch Church Road in Alabama (Antioch property), a commercial property located at 205 South Broadway Street in Alabama (commercial property),[2] and a home in Darlington County located at 3941 Hill Billy Way in McBee, South Carolina (Hill Billy Way property).[3] Husband purchased the Antioch property in 1982 and the commercial property in 1992. Husband mortgaged the Antioch property to finance improvements to the commercial property. Mortgage payments on the Antioch property were paid out of the parties' joint bank account. However, Wife's name was never added to the mortgage, and therefore, she was never an obligor on the note or mortgage. Further, Husband maintained a retirement account with Megan Corporation (Megan retirement fund) valued at $14,953.93. Upon marriage, the parties moved into Husband's residence

[1] Once married, Wife sold insurance "when [she] could." Most of the income from the insurance business was earned from renewals from policies sold prior to the marriage.

[2] It is undisputed that the commercial property is marital property. The commercial property was sold during the marriage. The proceeds from the sale of the commercial property were deposited into the parties' joint bank account. A marital property on Lake Wateree was subsequently purchased with the proceeds.

[3] It is undisputed that the Hill Billy Way property is marital property. This property is the site of the marital home.

and farm on the Hill Billy Way property. Wife eventually stopped working in the insurance business to care for the farm and purchase animals for the Hill Billy Way property.

On May 9, 2007, Wife initiated an action for a Decree of Separate Maintenance and Support, requesting an equitable division of the parties' marital assets and attorney's fees. Husband denied Wife was entitled to attorney's fees but joined Wife in her request for an equitable division of the parties' marital assets. Prior to the merits hearing, the family court granted both parties' motions to supplement their pleadings to request a divorce on the statutory ground of living separate and apart for a period in excess of one year.

On June 26, 2008, the family court granted the parties a divorce and ordered an equitable division of the marital estate with Husband receiving sixty percent of the marital estate and Wife receiving forty percent of the marital estate. The family court also awarded Husband a special equity interest of $140,000 in the Hill Billy Way property. The family court found $8,224.66 of Husband's Megan retirement fund was marital property subject to equitable division. Furthermore, the family court determined Husband's Antioch property was not transmuted into marital property and ordered Wife to pay $27,500 in attorney's fees.

STANDARD OF REVIEW

"In appeals from the family court, this [c]ourt reviews factual and legal issues de novo." Simmons v. Simmons, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). Accordingly, this court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Lewis v. Lewis, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). However, "we recognize the superior position of the family court judge in making credibility determinations." Id. "Moreover . . . an appellant is not relieved of his burden to demonstrate error in the family court's findings of fact." Id. "Consequently, the family court's factual findings will be affirmed unless 'appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court.'" Id. (quoting Finley v. Cartwright, 55 S.C. 198, 202, 33 S.E. 359, 360-61 (1899)).

LAW/ANALYSIS

I. Transmutation of Antioch property

Wife argues the family court erred in failing to find the Antioch property was transmuted into marital property. We disagree.

Property acquired prior to marriage is nonmarital property and is not subject to equitable division. S.C. Code Ann. § 20-3-630 (Supp. 2010). Nonmarital property can, however, be transmuted into marital property and become subject to equitable division if the property: (1) becomes so commingled with marital property as to be untraceable; (2) is utilized by the parties in support of the marriage; or (3) is titled jointly or otherwise utilized in such a manner as to evidence an intent by the parties to make the property marital property. Trimnal v. Trimnal, 287 S.C. 495, 497-98, 339 S.E.2d 869, 870 (1986). "Transmutation is a matter of intent to be gleaned from the facts of each case." Smallwood v. Smallwood, 392 S.C. 574, 579, 709 S.E.2d 543, 545 (Ct. App. 2011) (quoting Jenkins v. Jenkins, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001)). "'The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage.'" Id. at 579, 709 S.E.2d at 545-46 (quoting Johnson v. Johnson, 296 S.C. 289, 295, 372 S.E.2d 107, 110-11 (Ct. App. 1988)). "Such evidence may include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property, using marital funds to build equity in the property, or exchanging the property for marital property." Id. at 579, 709 S.E.2d at 546 (quoting Johnson, 296 S.C. at 295, 372 S.E.2d at 111). "The mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." Id. (quoting Johnson, 296 S.C. at 295-96, 372 S.E.2d at 111).

The evidence in the record supports the family court's finding that the Antioch property was nonmarital. The parties never used the Antioch property as a marital home, never placed the property in Wife's name, and

Husband never made any substantial improvements to the property during the marriage. In addition, Husband, as the sole mortgagee, did not mortgage the Antioch property for the purpose of its acquisition, but mortgaged it to pay for improvements on the commercial property. While the parties paid the mortgage payments out of a joint bank account, Wife was never an obligor. Husband mortgaged the Antioch property to support the parties' marriage, and the record contains no other evidence of intent to treat the property as marital property.

In the alternative, Wife argues she is entitled to a special equity interest in the Antioch property because of the use of marital funds to pay for the mortgage and improvements to the property.[4] Wife's argument is unpersuasive. Section 20-3-630(A)(5) of the South Carolina Code (Supp. 2010) "allows a spouse a special equity in the increase in value of nonmarital property when the spouse contributes directly or indirectly to the increase." Pruitt v. Pruitt, 389 S.C. 250, 263, 697 S.E.2d 702, 709 (Ct. App. 2010). While the mortgage secured an interest in the Antioch property, the debt was incurred specifically for the financing of improvements to the commercial property, not for the acquisition of the Antioch property. The marital payments of that debt do not permit a special equity interest in the Antioch property. As to the marital funds used to finance improvements to the Antioch property, the evidence in the record reflects only cosmetic improvements were made during the marriage, and these would not have increased the equity. Accordingly, based on the preponderance of the evidence in the record, the family court's finding on the issue of transmutation of the Antioch property was proper.

[4] Wife specifically states, "In the alternative, the note and mortgage [on the Antioch property] should be marital property to the extent of the appreciation in the equity of the property due to reduction of debt paid with joint funds and costs of fixing up the house paid for with joint funds." This court views the contention as a request for a special equity interest in the Antioch property since the mortgage and note create a secured interest in the land. Wife asked for a "special equity interest" in the Antioch property in her Rule 59(e) motion as well.

II. Valuation of Megan retirement fund

Wife argues in her brief the family court erred in valuing Husband's Megan retirement fund. However, at the hearing, Wife conceded this argument; thus, we affirm the findings of the family court.

III. Division of Marital Estate

Wife argues the family court erred in awarding Husband sixty percent of the marital estate. We disagree.

The family court has wide discretion in determining how marital property is to be distributed. Murphy v. Murphy, 319 S.C. 324, 329, 461 S.E.2d 39, 41 (1995). It may use "any reasonable means to divide the property equitably." Id. at 329, 461 S.E.2d at 41-42. Section 20-7-472 of the South Carolina Code (Supp. 2010) provides fifteen factors for the family court to consider in apportioning marital property and affords the family court the discretion to give weight to each of these factors as it finds appropriate. "On appeal, this court looks to the overall fairness of the apportionment, and it is irrelevant that this court might have weighed specific factors differently than the family court." Doe v. Doe, 370 S.C. 206, 213-14, 634 S.E.2d 51, 55 (2006) (citing Greene v. Greene, 351 S.C. 329, 340, 569 S.E.2d 393, 399 (Ct. App. 2002)). Even if the family court errs in distributing marital property, such error will be deemed harmless if the overall distribution is fair. Id. at 214, 634 S.E.2d at 55. While a fifty-fifty division is considered appropriate guidance, it is by no means a mandatory division. Dawkins v. Dawkins, 386 S.C. 169, 172, 687 S.E.2d 52, 53-54 (2010), abrogated on other grounds by Lewis v. Lewis, 392 S.C. 381, 709 S.E.2d 650 (2011).

Citing Doe, Wife contends the parties' ten-year marriage was a long term marriage deserving of a fifty-fifty equitable division. In Doe, our supreme court held a seventy-thirty equitable division was not appropriate for a thirty-two-year marriage, and a fifty-fifty division was an appropriate starting point for long term marriages. Doe, 370 S.C. at 214, 634 S.E.2d at 56. We note the ten-year marriage at bar is of a lesser duration than the shortest marriage cited in Doe and its relevant case law. See id. at 214-15,

634 S.E.2d at 56; see, e.g., Craig v. Craig, 358 S.C. 548, 595 S.E.2d 837 (Ct. App. 2004) (upholding a fifty-fifty division of marital property following a twenty-seven year marriage), aff'd by 365 S.C. 285, 617 S.E.2d 359 (2005); Mallett v. Mallett, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996) (noting the family court's fifty-fifty split was "generous," but ultimately affirming the award, which followed a twenty-one year marriage); Kirsch v. Kirsch, 299 S.C. 201, 203, 383 S.E.2d 254, 255 (Ct. App. 1989) (affirming a fifty-fifty split for a thirty year marriage); Leatherwood v. Leatherwood, 293 S.C. 148, 359 S.E.2d 89 (Ct. App. 1987) (affirming a fifty-fifty split of marital property following a twenty-two year marriage).

Furthermore, the evidence in the record demonstrates Husband's disproportionate contributions to this ten-year marriage. Wife brought in little to no money or assets during the marriage, while Husband provided the majority of income and assets. Wife argues she sacrificed a salary of $85,000 to fulfill marital duties; however, the record shows Wife admitted to only making "forty something thousand" in the years immediately prior to the parties' marriage. According to Husband, prior to the marriage, he paid $7,158.99 to one of Wife's credit card debts, and gave her a house rent free so she could get her finances in order. During the marriage, Husband also enabled Wife to build an inventory of animals and manage the farm, against his wishes, although the farm operated at a loss. Accordingly, the evidence in the record supports the family court's finding as to the issue of equitable division.

IV. Husband's Special Equity in the Hill Billy Way Property

Wife argues the family court erred in granting a special equity in the Hill Billy Way property to Husband. This issue is not preserved for our review.

At trial, Wife admitted Husband was entitled to a credit for his substantial work on the Hill Billy Way property prior to the marriage. In her Rule 59(e) motion, Wife argued the family court erred in the valuation of the Husband's special equity interest. On appeal, Wife argues the family court erred in following the method of accounting of a special equity interest used in Cooksey v. Cooksey, 280 S.C. 347, 312 S.E.2d 581 (Ct. App. 1984),

overruled by Dawkins v. Dawkins, 386 S.C. 169, 687 S.E.2d 52 (2010). Wife contends Cooksey was overruled on the issue of accounting of a special equity interest, and the family court should have used the method explained in Toler v. Toler, 292 S.C. 374, 380, 356 S.E.2d 429, 433 (Ct. App. 1987). Because Wife failed to raise this argument in her Rule 59(e) motion, it is not preserved for our review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (stating for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge).

V. **Attorney's Fees**

Wife argues the family court erred in requiring her to contribute to Husband's attorney's fees and costs. We disagree.

In determining an award for attorney's fees, a family court should first consider the following factors as set forth in E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992) in deciding whether to award attorney's fees and costs: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; (4) effect of the attorney's fee on each party's standard of living." In addition,

> a fee award must be based upon a reasonable hourly fee. Applying the [] six factors to determine an appropriate fee award, the reasonableness of the hourly rate shall be determined according to: (1) the professional standing of counsel; and (2) the customary legal fees for similar services. The reasonableness of the number of hours billed shall be determined according to: (1) the nature, extent, and difficulty of the case; and (2) the time necessarily devoted to the case.

Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Furthermore, "[t]his court has previously held when parties fail to cooperate and their behavior prolongs proceedings, this is a basis for holding

them responsible for attorney's fees." Bennett v. Rector, 389 S.C. 274, 285, 697 S.E.2d 715, 721 (Ct. App. 2010) (citing Anderson v. Tolbert, 322 S.C. 543, 549-50, 473 S.E.2d 456, 459 (Ct. App. 1996)); see also 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"); Johnson v. Johnson, 296 S.C. 289, 304, 372 S.E.2d 107, 115 (Ct. App. 1988) (citing husband's lack of cooperation in discovery as basis for increasing wife's attorney fees award on appeal). "An adversary spouse should not be rewarded for such conduct." Anderson, 322 S.C. at 549, 473 S.E.2d at 459.

Wife argues the family court failed to consider Husband's ability to pay and the relative financial situations of the parties in ordering her to pay a portion of Husband's attorney's fees or, in the alternative, the family court did not give the appropriate weight to those factors. However, the family court considered all of the E.D.M. factors in ordering Wife to pay a portion of Husband's attorney's fees. The family court specifically addressed Husband's ability to pay and the parties' relative financial situation and found "[a]lthough Husband's earnings are superior to Wife's earnings [] it is appropriate to award to the Husband attorney's fees and costs." In addition, the family court relied on its findings that Wife raised several unsubstantiated allegations against Husband, requiring Husband to spend substantial amounts of money to defend himself against the allegations. Further, the family court found Wife refused to comply with discovery and unnecessarily prolonged the case. Accordingly, we believe the family court did not err in ordering Wife to pay a portion of Husband's attorney's fees, and therefore, we affirm the findings of the family court.

CONCLUSION

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

AFFIRMED.

HUFF and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Yancey Roof, Respondent,

v.

Kenneth A. Steele, Appellant.

Appeal from Lexington County
Richard W. Chewning, III, Family Court Judge

Opinion No. 4921
Heard September 13, 2011 – Filed December 14, 2011

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Max N. Pickelsimer, of Columbia, for Appellant.

Jean P. Derrick, of Lexington, for Respondent.

GEATHERS, J.: Kenneth A. Steele (Husband) appeals from the family court's order granting modification of alimony and attorney's fees to his former wife, Yancey Roof (Wife). Husband argues the family court erred

in modifying alimony and awarding attorney's fees. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS/PROCEDURAL HISTORY

Husband and Wife married in 1993 and divorced in 2006. They have seventeen-year-old twins. The parties' Final Decree of Divorce (Decree) incorporated a prior agreement regarding alimony, division of real and personal property, transfer of funds to "equalize the division of marital property," and responsibility for payment of debts and attorney's fees.

Regarding alimony, the Decree required Husband to make permanent periodic payments of $300 per month and to pay Wife's health insurance premiums. As to the health insurance component of alimony, the Decree provided:

> E. [Husband] shall maintain health, dental and optical insurance on [Wife] through the group policy with his current employer so long as it is available to him. Any premium paid by [Husband] for [Wife's] health, dental and optical insurance shall be considered alimony, and shall be taxable as income to [Wife], and shall be deductible by [Husband]. Currently, the premium is $87.74.

The Decree stated the family court had "questioned the parties regarding their agreement, and their understanding of its terms." Thereafter, based on the parties' testimony and evidence, the court made Findings of Fact and Conclusions of Law. With respect to the modification of alimony, the Decree stated:

> 8. [T]he parties further understand that issues of child custody, child support and visitation, as well as

> any future modification of alimony are reviewable by the Court based upon a showing of a substantial change of condition. The parties further understand that alimony may also be terminated as provided by law.

Before the parties' divorce in February 2006, Husband's employer, BlueCross BlueShield of South Carolina, confirmed that Husband could maintain Wife as a dependent on his health insurance policy following the divorce. At that time, Husband paid a monthly premium of $87.74 for Wife's insurance coverage.

In April 2008, however, Husband's employer notified employees that it would no longer provide former spouses with dependent coverage as of June 1, 2008. Upon termination of Wife's coverage, she would become eligible for nine months of comparable coverage under COBRA at a monthly premium of $462.60.

In May 2008, Wife filed a complaint seeking to modify alimony based upon the occurrence of "a substantial change in circumstances since the issuance of the Decree of Divorce." In her complaint, Wife explained that she had been diagnosed with multiple sclerosis in 2000; since then, she had required extensive health care services. Wife stated her health insurance coverage, then available through Husband's employer, would terminate on June 1, 2008. Thereafter, she would become eligible for COBRA coverage for nine months. After her COBRA eligibility terminated on February 27, 2009, Wife contended the only coverage available to her was through the South Carolina State Health Insurance Pool, "at a very substantial monthly premium." Wife asserted that following the parties' divorce, Husband's income has increased significantly, while her income has remained the same. Moreover, Wife contended Husband has acquired property, while she "has not acquired any further property, and has barely managed to make a living since the divorce." Wife asked the court to grant pendente lite and permanent relief by modifying her alimony to include payment of COBRA premiums; payment of Insurance Pool premiums upon termination of COBRA

eligibility; and payment of a portion of her uninsured medical expenses. Wife additionally asked the court to award her attorney's fees and costs.

In Husband's answer and counterclaim, he contended Wife's action was "without merit" because "the cancellation of [Wife's] coverage was anticipated at the time of the parties' divorce, and therefore does not constitute a substantial change of condition." Husband also requested attorney's fees and costs.

In June 2008, the family court conducted a hearing on Wife's request for pendente lite relief. Wife sought an order requiring Husband to pay the COBRA premium of $462.60 a month after her "regular dependent coverage is converted to COBRA coverage." The court's order stated: "The Court finds, and holds as a matter of law, that the terms of the Decree of Divorce already require [Husband] to pay this COBRA premium, to continue this BlueCross BlueShield coverage as long as it is available to [Wife]." The order stated all other issues would be decided at the final hearing on the merits.

Wife's COBRA coverage expired on March 1, 2009. Thereafter, Wife again petitioned the family court for pendente lite relief, seeking an order requiring Husband to pay her Insurance Pool premium of $1,193.93 per month. In May 2009, the court conducted a hearing on Wife's petition. Husband argued that under the express terms of the Decree, he had no obligation to pay Wife's Insurance Pool premium because the coverage was not offered by his employer. Husband contended the parties had contemplated "this lapse of coverage" at the time of their divorce, and he asserted that an "anticipated event does not constitute a change of circumstances." The court agreed that the Decree no longer obligated Husband to pay Wife's health insurance premiums: "The Court concurs in [Husband's] argument that the [Insurance Pool] coverage is not equal to the BlueCross BlueShield coverage or COBRA coverage, so [Husband] at present has no ongoing duty per se under the Decree." Yet, the court found that Wife has demonstrated "a change of circumstances and is entitled to

supplemental pendente lite relief, all without prejudice to the position of either party at a final hearing on the merits."

On February 4, 2010, the family court conducted a final hearing on the merits of Wife's request for modification of alimony and attorney's fees. At this hearing, Wife testified she was diagnosed with multiple sclerosis in 2000; she stated "it just varies day to day as how it affects me." Wife, who has a high school education, has worked since 1985 in a picture framing business, where she is a co-owner. In 2006, Wife was making $1,500 a month; she currently makes $1,080 a month and has taken out multiple loans to pay for her necessities. Wife testified that prior to the expiration of her COBRA benefits, she had requested quotes from several health insurance carriers; however, the carriers either denied coverage or offered policies that provided less coverage at a higher premium. As a result, Wife had determined the Insurance Pool, at a monthly premium of $1,247.65, provided the most economical coverage for her needs.

Husband testified he was making $60,000 in 2006; he currently makes $76,000 a year, and he owns a home, motorcycle, boat, truck, and four rental homes. Husband's mother died prior to the parties' divorce; subsequently, Husband inherited $260,000, from which he receives approximately $3,700 in annual interest. Husband also has a 401(K) account that is valued at $40,000. Husband testified the rental homes do not provide extra income to him because the rental income is used to make the mortgage payments.

Husband testified regarding his understanding of the Decree's alimony provision requiring him to pay Wife's health insurance premiums: "My understanding was that I would be required to cover her under my employer's plan as long as it was available and not after that. And, at the time, it was eighty-seven dollars a month." Husband later commented on the express wording of the health insurance provision: "The reason we put the wording in there the way it is in there is because to protect myself if I was, if the insurance was not available through my group plan."

Husband asserted: "I did what the [D]ecree said." He contends he is no longer responsible for paying Wife's health insurance premiums because: "There is no change of circumstances. It's in the [D]ecree." Husband was asked if he had expected his employer to allow him to carry Wife as his dependent indefinitely; he responded: "No, I had no idea what the future would hold, and that's why we put the wording in there, to protect myself from exorbitant health insurance premiums in the future." Husband argued that he had done exactly what the Decree required and added: "I figured the agreement gave [Wife] ample time to get a parallel policy so she would still have insurance coverage. . . . We're divorced. She has family."

Husband's counsel argued the Decree "is clear and unambiguous":

> [Husband's] obligation to provide health insurance through his employer is only so long as it's available to him through his current employer. That is the sole basis for the substantial change of circumstances that [Wife] has alleged in her complaint. We believe that . . . it's clear that a change of circumstances that's anticipated at the time of the decree cannot later be used as a change of circumstance to seek modification of that decree. . . . It's clear from [Wife's] testimony that she anticipated, she knew at the time of the decree that insurance may no longer be available to [Husband] at some point in time through his employer[,] be it through job transfer, job termination, [or] change of policy with BlueCross BlueShield.

Wife's counsel responded:

> The agreement . . . does not speak to the future about what happens if and when that coverage changes. That's the meaning of change of circumstance. We can only agree on what we know to be the present

> circumstances. None of the parties or certainly the court could anticipate the development of future events and what would happen.

Wife's counsel concluded: "[W]e have an additional need of more premium for new insurance coverage, more alimony because of larger uncovered medical expenses."

The family court issued a final order granting Wife an increase in alimony based on its findings that she had demonstrated a substantial change in circumstances and that Husband had the financial ability to pay increased alimony. The order stated:

> [Husband] at trial argued that since medical coverage was no longer available for him to carry for [Wife's] benefit through his place of employment, his obligation to maintain medical insurance coverage on her behalf was ended. However, this is not the express wording of the agreement of the parties. The Decree of Divorce is silent with respect to [Husband's] obligations, if any, when coverage is no longer available to him through his place of employment. In addition, even if the Court literally interpreted the agreement of the parties as [Husband] argues, [Wife] in this action in fact does not seek to compel [Husband] to maintain coverage, but rather requests an increase in alimony, due to her additional needs to maintain a more expensive policy of medical insurance coverage. In any event, the Court finds and concludes that [Wife] has shown, with respect to this issue, a change of condition concerning her needs for medical insurance coverage, and therefore proved her entitlement to an increased award of alimony.

The order additionally noted that Wife's continuing poor health, her decrease in income, and Husband's increase in income and assets supported modification of alimony. The court ordered Husband to pay Wife alimony equal to "the amount of her monthly [Insurance Pool] premium, in addition to the $300 per month alimony payment awarded earlier." The court stated the "amount of this insurance premium shall be treated as alimony." Furthermore, the court awarded Wife attorney's fees of $10,000. This appeal followed.

ISSUES ON APPEAL

I. Did the family court err in modifying alimony?

II. Did the family court err in awarding attorney's fees to Wife?

LAW/ANALYSIS

I. STANDARD OF REVIEW

On appeal from the family court, this court reviews factual and legal issues *de novo*. Simmons v. Simmons, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "[O]ur review of a family court's order on whether to modify support awards is *de novo*." Miles v. Miles, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011). "[W]hile retaining the authority to make our own findings of fact, we recognize the superior position of the family court judge in making credibility determinations. Moreover, consistent with our constitutional authority for *de novo* review, an appellant is not relieved of his burden to demonstrate error in the family court's findings of fact." Lewis v. Lewis, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011) (footnote omitted).

II. MODIFICATION OF ALIMONY

a. Alimony Is Modifiable

An agreement creating a spousal support obligation is modifiable by the family court unless (1) the parties have expressly designated their agreement as "non-modifiable," and (2) the family court has approved this limitation:

> The Family Court may review and approve all agreements which bear on the issue of alimony or separate maintenance and support, whether brought before the court in actions for divorce from the bonds of matrimony, separate maintenance and support actions, or in actions to approve agreement [sic] where the parties are living separate and apart. . . . The parties may agree in writing if properly approved by the court to make the payment of alimony . . . nonmodifiable and not subject to subsequent modification by the court.

S.C. Code Ann. § 20-3-130(G) (Supp. 2010).

In our case, the Decree deemed that Wife's health insurance premiums paid by Husband "shall be considered alimony." During oral argument, Husband acknowledged that his payments for Wife's health insurance premiums were alimony, and he conceded that alimony was modifiable by the court.

b. Modification of Alimony Requires "Changed Circumstances"

South Carolina law limits the modification of alimony to situations where "the circumstances of the parties or the financial ability of the spouse

making the periodic payments shall have changed since the rendition of such judgment" of divorce. S.C. Code Ann. § 20-3-170 (1976 & Supp. 2010). The law grants great latitude to the family court to modify alimony by making "such order and judgment as justice and equity shall require, **with due regard to the changed circumstances and the financial ability of the supporting spouse**, decreasing or increasing or confirming the amount of alimony provided for in such original judgment or terminating such payments." Id. (emphasis added).

Our courts have further refined the conditions warranting modification of alimony to additionally require that a "substantial" change in circumstances has occurred since the parties' divorce. "The change in circumstances must be substantial or material in order to justify a modification of the previous alimony obligation."[1] Thornton v. Thornton, 328 S.C. 96, 111, 492 S.E.2d 86, 94 (1997). "In addition to the changed circumstances of the parties, the financial ability of the supporting spouse to pay is a specific factor to be considered." Riggs v. Riggs, 353 S.C. 230, 236, 578 S.E.2d 3, 6 (2003).

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[1] Prior to the supreme court's recent holding in Miles v. Miles, our courts had traditionally placed a higher burden on parties seeking modification of alimony when the alimony had been established by an agreement. 393 S.C. 111, 711 S.E.2d 880 (2011). However, in Miles the court stated it was disavowing "the line of cases that articulate an even higher burden on the party seeking modification when an agreement is involved." Id. at 120, 711 S.E.2d at 885. Furthermore, the court in Miles stated: "Today, we clarify that while the burden to prove entitlement to a modification of spousal or child support is a substantial one, the same burden applies whether the family court order in question emanated from an order following a contested hearing or a hearing to approve an agreement." 393 S.C. at 120-21, 711 S.E.2d at 885. Consequently, the Miles opinion "disavowed" the following cases: Floyd v. Morgan, 383 S.C. 469, 681 S.E.2d 570 (2009); Upchurch v. Upchurch, 367 S.C. 16, 624 S.E.2d 643 (2006); and Townsend v. Townsend, 356 S.C. 70, 587 S.E.2d 118 (Ct. App. 2003). 393 S.C. at 120, 711 S.E.2d at 885.

The Decree expressly stated that alimony could be modified by the court "upon a showing of substantial change in condition." Husband does not contest the court's authority to modify alimony; rather, he challenges the court's finding that the evidence presented demonstrates that the circumstances of the parties have substantially changed since the parties' divorce in 2006.

Husband's argument relies on his contention that even if a substantial change in circumstances has occurred, the change was "anticipated" at the time of the parties' divorce. Husband asserts:

> The requirement that a change in circumstances be unanticipated in order to justify modification of an alimony award is a long standing and well established rule of law dating back more than thirty years. See Schadel v. Schadel, 268 S.C. 50, 56, 232 S.E.2d 17, 19 (1977) (holding that husband was not entitled to modification of alimony, as his retirement from the Air Force was anticipated when he entered into the agreement with his former wife).

Husband contends modification of alimony is not warranted because Wife's loss of health insurance coverage under Husband's employer's plan was anticipated at the time of their divorce. Husband contends that because health insurance for Wife is no longer available through his employer, his only alimony obligation is the $300 monthly payment to Wife. Moreover, Husband contends the court is powerless to modify his future alimony obligation because the change in circumstances was precipitated by an anticipated event: "[B]ecause the discontinuation of insurance coverage in the future was a given, [Wife's] need to purchase new insurance cannot be considered a change in circumstances."

We agree that under the Decree, Husband is no longer responsible for paying Wife's health insurance premiums because coverage is no longer available through his employer. However, we disagree with Husband's

contention that he has no further alimony obligation simply because the parties had anticipated that Wife could lose coverage.

The parties' arguments turn not on whether a "substantial change in circumstances has occurred," but instead on whether the law requires that the substantial change in circumstances had to be "unanticipated" at the time of the parties' divorce in order for the family court to consider modification of alimony. This very issue was addressed squarely, and answered clearly, by a unanimous supreme court in Sharps v. Sharps, 342 S.C. 71, 535 S.E.2d 913 (2000), rev'g Op. No. 99-UP-081 (Ct. App. 1999).

In Sharps, the family court found a substantial change in circumstances occurred following the emancipation of the parties' children, and that the change warranted an increase in Wife's alimony from $150 to $475 a month. Id. at 74, 535 S.E.2d at 915. The family court based Wife's increase in alimony upon "the increase in Husband's income, a decrease in Husband's expenses, the increase in Wife's expenses, the thirteen-year length of the marriage, and their respective ages." Id. at 75, 535 S.E.2d at 915. Husband appealed the increase in alimony, and the court of appeals reversed, holding: "[T]he trial court improperly relied on the termination of child support to find a change in circumstances." Id. at 75, 535 S.E.2d at 915. The court of appeals also found "general inflation and Husband's increase in salary were not sufficient to warrant a modification of alimony." Id. at 75, 535 S.E.2d at 915.

The supreme court reversed the court of appeals' decision in Sharps and reinstated the family court's order increasing Wife's alimony. In the Sharps opinion, the supreme court admonished: "Using Calvert,[2] courts have refused to adjust alimony where the substantial change alleged was known by the parties at the time of the decree." 342 S.C. at 76, 535 S.E.2d at 916. The supreme court noted: "Prior to Calvert, the Court of Appeals even found the increase in expenses to the husband as a result of the wife's immediate relocation with her new spouse to Virginia could not be considered in

[2] Calvert v. Calvert, 287 S.C. 130, 336 S.E.2d 884 (Ct. App. 1985).

determining whether a substantial change existed because the parties contemplated her move during the divorce." Id. at 76, 535 S.E.2d at 916.

The supreme court reasoned that there are some changes anticipated by parties at the time of divorce that cannot be adequately addressed by the Divorce Decree:

> In light of Calvert and subsequent Court of Appeals cases, courts usually consider only those changes that were unknown to the parties at the time of the separation decree in determining if a substantial change has occurred warranting a modification of alimony. The original divorce decree generally addresses these expected changes. However, there are some future changes which may be in contemplation of the parties at the time of the decree but, due to other considerations, cannot be addressed at that time in the divorce decree.
>
> The termination of child support in the current case is one situation where, even though the future event was known at the time of the separation, the trial court could not properly address that expected change in the divorce decree. Because a court cannot always know what conditions will exist in the future, it would be arbitrary to automatically increase alimony or child support in the far distant future based on the happening of anticipated events.

Id. at 76-77, 535 S.E.2d at 916. The supreme court further explained:

> [I]f the original divorce decree had attempted to increase Wife's alimony following the emancipation of the children, the amount of that increase would have been arbitrary and unenforceable in light of the

> substantial amount of time between the original decree and the emancipation. Also, had the original decree in this case granted Wife a greater amount of periodic alimony, it may have unfairly exceeded Husband's financial ability to pay the child support, the alimony, and support himself as well.

Id. at 77-78, 535 S.E.2d at 917. The court additionally instructed: "As a general rule, a court hearing an application for a change in alimony should look not only to see if the substantial change was contemplated by the parties, **but most importantly whether the amount of alimony in the original decree reflects the expectation of that future occurrence**." Id. at 78, 535 S.E.2d at 917 (emphasis added).[3]

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[3] We believe that the court's precise guidance in Sharps concerning the analysis of whether a substantial change in circumstances warrants modification in alimony has not been overruled by subsequent cases that continue to refer to the substantial change in circumstances that warrants modification in alimony as "unanticipated," without further explanation of this factor. See Miles v. Miles, 393 S.C. 111, 120, 711 S.E.2d 880, 885 (2011) (citing Butler v. Butler, 385 S.C. 328, 336, 684 S.E.2d 191, 195 (Ct. App. 2009)) (stating a party is entitled to modification of a support obligation if the party "can show an unanticipated substantial change in circumstances").

Furthermore, the facts here are distinguishable from the facts in Floyd v. Morgan, where the supreme court found a modification to Mother's child support obligation was not warranted where the purported changes in circumstances were within the parties' contemplation at the time of their initial divorce decree. 383 S.C. 469, 681 S.E.2d 570 (2009). In Floyd, the court stated: "[G]iven the children's young ages at the time of the initial decree, we believe the parties would have foreseen the eventual elimination of the $544 child care expense used to calculate Mother's initial child support obligation." Id. at 477, 681 S.E.2d at 574. By contrast, in this case, even if the parties were able to anticipate that Wife's health insurance might become unavailable in the future, the impact of that substantial change in

In our case, Husband argues the family court erred in finding a substantial change in circumstances existed to support modification of the Decree because termination of Wife's health insurance was within the contemplation of the parties at the time of their divorce.[4] Guided by the clear analysis in Sharps, we conclude Wife is not barred from modification of alimony simply because the parties had anticipated that she may become ineligible—at some unknown point in the future—for health insurance coverage under Husband's employer's policy. Based on the applicable statute, and our supreme court's statutory interpretation, we hold the proper inquiry of the court when considering a request to modify alimony is whether "the circumstances of the parties or the financial ability of the spouse making the periodic payments shall have changed since the rendition of such judgment . . . ." S.C. Code Ann. § 20-3-170.

Applying the instruction in Sharps to our case, the **amount of alimony in the original decree**, i.e., $300 per month, does not consider Wife's needs should she lose access to health insurance coverage. To the contrary, in light of Wife's significant chronic health problems, it is clear the Decree did not address Husband's responsibility should Wife lose coverage under Husband's employer's health insurance plan. The modest alimony award of $300 does not reflect the parties' future expectation that Wife would become responsible for obtaining her own health insurance coverage. Indeed, this interpretation is consistent with the testimony of both parties, who indicated that while they could not predict the future, they had "hoped" at the time of their divorce that Husband would be able to continue providing Wife's health insurance through his current employer. The language in the Decree demonstrates the parties' realization that continuation of coverage was ultimately beyond their

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circumstances could not have been both anticipated and quantified at the time of the parties' divorce.

[4] Additionally, Husband contends the family court erred in denying his motion for involuntary non-suit, pursuant to Rule 41(b), SCRCP. Husband asserts Wife failed to present evidence of an unanticipated change of circumstances. Husband's argument is without merit.

control. Importantly, the Decree remains silent as to what modification of alimony, if any, becomes warranted upon the change in circumstances that would necessarily follow Wife's loss of health insurance coverage.

We accept Husband's testimony that the language in the Decree was crafted carefully "to protect [him] from exorbitant health insurance premiums in the future." At the time of the parties' divorce, Wife's health insurance needs were met fully by Husband's employer and Husband's minimal premium payments of $87.74 per month. At that time, the Decree specified that Husband's alimony responsibility was comprised of monthly payments of $300 and payment of Wife's monthly health insurance premiums for as long as coverage was available through Husband's employer. As the family court's order noted: "The Decree is silent with respect to [Husband's] obligations, if any, when coverage is no longer available to him through his place of employment." Moreover, any attempt by the court in 2006 to quantify the financial impact to Wife of the potential loss in coverage in 2010—or beyond—simply would have been "arbitrary."

Now, four years later, coverage for Wife is no longer available through Husband's employer and premiums for comparable coverage have increased from $87.87 to $1,247.65 per month—an increase of over 1,000%. During the same period, Husband's monthly income has increased from $5,000 to $6,357.48, an increase of 27%, while Wife's income has decreased significantly.

We find that the family court's reliance on the cessation of Wife's health coverage through Husband's employer, combined with findings that Wife's income had decreased while Husband's income had increased, was sufficient to support a determination that Wife had successfully demonstrated a substantial change in circumstances that warranted an increase in alimony. Furthermore, we find the family court properly determined that Husband has the financial ability to provide additional alimony to Wife. These findings satisfy the statutory guidelines for alimony modification, as stated in § 20-3-170.

In our view, however, the family court's method of determining the amount to modify Wife's alimony was improper. While we agree that an increase in alimony is warranted, we do not believe the amount of the modification should be tied to the ever-changing market value of Wife's health insurance coverage—especially in light of Husband's valid argument that his obligation to pay Wife's health insurance premiums ended after coverage was no longer available through his employer. Our review of the court's pendente lite orders in this case demonstrates just how fluid such a basis for alimony modification becomes when tied to adjustments in Wife's health insurance premiums. Moreover, tethering the modification of alimony to an adjustment of insurance premiums provides a disincentive to Wife to control her health care costs.

Accordingly, we affirm the family court's determination that Wife demonstrated a substantial change in circumstances that warrants the modification of alimony; however, we reverse the family court's order requiring Husband to pay Wife's health insurance premiums. Instead, we remand the case to the family court to determine the appropriate monetary modification of alimony that reflects both the substantial change in the parties' circumstances and Husband's financial ability to pay alimony.[5]

III. Attorney's Fees

Husband contends the family court erred in awarding attorney's fees of $10,000 to Wife.

> In awarding attorney's fees, the court should consider each party's ability to pay his or her own fee, the

[5] Following oral arguments, Husband filed a Petition for a Writ of Supersedeas asking this court to stay any future determination by the family court that Husband was responsible for paying future increases in Wife's health premiums during the pendency of this appeal. Husband's Petition is now moot.

> 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 also 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; [and] (6) customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Smith v. Smith, 386 S.C. 251, 270, 687 S.E.2d 720, 730-31 (Ct. App. 2009).

Because we have remanded the issue of modification of alimony to the family court, we remand the issue of attorney's fees as well. The outcome of the alimony modification may impact the family court's award of attorney's fees. See Sexton v. Sexton, 310 S.C. 501, 504, 427 S.E.2d 665, 666 (1993) (remanding issue of attorney's fees where beneficial results were reversed on appeal, and "express[ing] no opinion" on whether the original award of attorney's fees was appropriate); Smith, 386 S.C. at 271, 687 S.E.2d at 731 (stating that the family court's decision on remand may alter its "analysis of the 'beneficial results obtained at trial'").

CONCLUSION

Based on the foregoing, the decision of the family court is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

South Carolina Department of Social Services, Respondent,

v.

Mother and Father, Defendants,

of whom Mother is the Appellant.

In the interest of three minor children under the age of 18.

Appeal from Lancaster County
W. Thomas Sprott, Jr., Family Court Judge

Opinion No. 4922
Heard September 13, 2011 – Filed December 16, 2011

REVERSED AND REMANDED

Sally A. Carver-Young, of Rock Hill, for Appellant.

Angela M. Killian, of Lancaster, for Respondent.

Coreen B. Khoury, of Lancaster, for Guardian ad Litem.

PER CURIAM: Mother appeals from the family court's order requiring the South Carolina Department of Social Services (SCDSS) to forego reunification efforts and to file a petition to terminate Mother's parental rights to her eight-year-old twins. We reverse this portion of the family court's order and remand the case to the family court for further proceedings consistent with this opinion.[1]

FACTS/PROCEDURAL HISTORY

Mother and Father (Parents) are legally separated; together, they have five biological children.[2] Only their eight-year-old twins (Twins) are subject to this action.[3]

SCDSS became involved in this case in June 2007, after Parents' fourth child tested positive for cocaine and marijuana at birth. The baby was presumed to be an abused or neglected child, and SCDSS immediately placed

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[1] The family court's order pertained to Mother and Father; however, only Mother appeals from the order. Accordingly, this opinion has no effect on the family court's order as it pertains to Father. See S.C. Code Ann. § 63-7-2590(B) (2010) ("The relationship between a parent and child may be terminated with respect to one parent without affecting the relationship between the child and the other parent.").

[2] At oral argument, Mother's counsel stated that Parents remain separated, but have not divorced.

[3] The family court's order also required SCDSS to file a petition to terminate Parents' parental rights to a third child. On September 17, 2010, Parents voluntarily relinquished their rights to this child, and on December 9, 2010, the child was adopted by his foster parents, the Roes. At oral argument, the parties stipulated to these facts. As a result, sections of the family court's order related to permanency planning for this child are now moot.

the child in emergency protective custody (EPC).[4] Pursuant to alternative caregiver agreements, Parents' two-year-old child was placed with family friends, the Roes, and Twins, then four years' old, were placed with their grandmother.[5]

On July 31, 2007, the family court conducted a merits hearing concerning the emergency removal of Parents' newborn child.[6] At this hearing, the family court appointed Dennis Foley to serve as guardian ad litem (GAL) for the child. Regarding Parents' Twins and two-year-old child (Children), the court found Parents had physically neglected Children; however, it determined their neglect was not "willful or reckless." While Children remained with their alternative caregivers, Parents were ordered to complete a treatment plan (Plan), which included substance abuse counseling and random drug screening.

In January 2008, Parents moved from Lancaster County, South Carolina to Charlotte, North Carolina. On May 7, 2008, SCDSS filed a complaint for removal of Children after learning Parents had violated Twins' alternative caregiver agreement and were being investigated by the North Carolina Department of Social Services (NCDSS) for using marijuana and cocaine in Twins' presence. In its complaint, SCDSS alleged Parents had

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[4] See S.C. Code Ann § 63-7-1660(F)(1)(a) (2010) (stating it is presumed that a newborn child, whose blood or urine test shows the presence of a controlled substance that is not the result of medical treatment, is an abused or neglected child who cannot be protected from further harm without being removed from the custody of the mother).

[5] The Roes later became this child's foster parents, and they adopted the child on December 9, 2010.

[6] The court found that Mother had physically abused her newborn child through her prenatal use of drugs. As a result, the court ordered Mother's name entered into the Central Registry of Child Abuse and Neglect.

failed to comply with their Plan and each had tested positive for cocaine. Parents were then expecting the birth of their fifth child.

On May 30, 2008, Mother gave birth to her fifth child. This child was born in North Carolina and tested positive for cocaine at birth. The child was immediately placed in EPC with NCDSS. This child continues to reside in foster care in North Carolina.

On June 3, 2008, Twins were placed in EPC with SCDSS. Two weeks later, the family court conducted a hearing on the merits of their removal from Parents' home. At this hearing, the court found Children were "at substantial risk of physical neglect" due to Parents' continued drug use. Following the hearing, the court granted SCDSS custody of Children. Twins were placed in foster care with the Does, while the younger child remained in the Roes' home. The court appointed Dennis Foley to serve as Children's GAL.[7]

The court granted Parents supervised visitation with Children and ordered them to complete a Placement Plan (Plan) within twelve months.[8] The Plan required Parents to: (1) submit to random drug screens; (2) complete psychological evaluations; (3) pay child support; and (4) obtain and maintain suitable housing. The Plan expressly required Mother to obtain and maintain employment, and to continue her participation in outpatient substance abuse treatment. The Plan ordered Father to maintain employment, complete parenting classes, and obtain a substance abuse evaluation. Finally, the court ordered SCDSS to pursue concurrent plans for family reunification

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[7] Dennis Foley was then serving as GAL for Parents' fourth child, who had tested positive for drugs at birth in June 2007 and was residing in foster care. In July 2008, the family court terminated Parents' rights to this child.

[8] If the court orders that a child be removed from the custody of a parent, the court must approve a placement plan at the removal hearing or within ten days after the hearing. S.C. Code Ann. § 63-7-1680(A) (2010 & Supp. 2010).

and termination of parental rights (TPR).[9] The court's order stated: "[Parents] have two choices, their children or the drugs, and they will not regain custody of their children if they choose the drugs."

The family court conducted its initial permanency planning hearing on May 19, 2009.[10] The court found Mother had complied with most of her Plan's requirements, including: consistently visiting Children; successfully completing an outpatient drug treatment program; testing negative for drugs; successfully completing a parenting program; obtaining and maintaining stable employment; and completing a domestic violence counseling program. Although Father had visited Children consistently and had completed a parenting program, he had failed to maintain steady employment, and—one month after completing an intensive outpatient substance abuse treatment program—he twice tested positive for cocaine. The court found it could not allow Children to return home because Parents had not yet obtained suitable housing; furthermore, Father had not maintained employment and had tested positive for cocaine. The GAL recommended that Children remain in foster care while SCDSS continued family reunification efforts.

The family court's permanency planning order found the "best interests of [C]hildren would be served for [Parents] and SCDSS to continue to work towards return of [C]hildren to the home." Therefore, the court granted the parties a six-month extension to complete the Plan, and it ordered SCDSS "to

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[9] SCDSS may proceed concurrently with efforts to "make it possible for the child to return safely to the home" and with efforts to place a child for adoption or with a legal guardian. S.C. Code Ann. § 63-7-1640(D) (2010 & Supp. 2010).

[10] At the initial permanency planning hearing, the court reviews the status of a child placed in foster care and the progress being made toward the child's return home or toward another permanent plan approved by the family court at the removal hearing. The permanency planning hearing must be held no later than one year after the child is first placed in foster care. S.C. Code Ann. § 63-7-1700(A) (2010 & Supp. 2010).

continue to pursue the permanent plan of reunification for [Children] concurrent with [TPR] and adoption." The court's order noted: "It is clearly not in [C]hildren's best interests for SCDSS to initiate [TPR] at this time because [Parents] have made some progress towards removing the risk of harm to [C]hildren." The court added: "Based on [Parents'] progress, I find that if all parties comply with the terms of this order during the next six months, unreasonable risk of harm should be removed." The court further advised: "[R]eturn of [C]hildren to [Parents] may be expected if [Parents] make those changes in circumstances, conditions, and/or behavior detailed in the Treatment/Placement Plan."

On July 9, 2009, Mother and Father signed a Contract of Separation and Property Settlement Agreement. Thereafter, Father moved to his mother's home in Gaston County, North Carolina, and Mother obtained housing in Charlotte.

The family court conducted its second permanency planning hearing in February and March 2010; the hearing lasted for four days. After the first day, Father informed the court that he consented to termination of his parental rights; as a result, the remainder of the hearing focused on whether it was in Children's best interests for the court to order SCDSS to pursue termination of Mother's parental rights.

At the hearing, SCDSS foster care manager Tracy Rabon testified that Twins had been in foster care with the Does for the past twenty-one months. Rabon acknowledged that Mother had fulfilled the requirements of her Plan, including: completing a drug treatment program; consistently testing negative for drugs; making material contributions of food, clothing, and gifts to Children; and maintaining employment. Rabon expressed concern, however, that Mother's housing was not suitable because Father recently had moved to a nearby residence. Rabon reported that Twins suffered anxiety following

visits with Mother and had expressed interest in remaining with the Does. Rabon stated, in her opinion, TPR was in the best interests of Children.[11]

Psychologist Lisa Jackel also testified at the hearing; Dr. Jackel had evaluated Children in June 2009. Dr. Jackel testified that TPR was in Children's best interests because their foster families were providing stability. Dr. Jackel stated she would not recommend "disrupt[ing] that without any good and substantial evidence that the alternative environment would be just as well [sic]." Dr. Jackel acknowledged that she had evaluated Children only once and had formed her recommendation without speaking to either Mother or Children's GAL.

Dennis Foley testified that he had served as Children's GAL since their emergency removal in June 2008. After his appointment as GAL, Foley visited Children twice a month and had observed their interactions with Mother and their respective foster families. Foley testified, in his opinion, termination of Mother's parental rights was not in the best interests of Children. Foley explained that Mother, now age thirty-nine, had made dramatic changes following the birth and subsequent emergency removal of her fifth child in May 2008. According to Foley, Mother made a:

> [H]erculean effort to overcome her drug problem and to do what she needed to do to get her children back. I believe her children love her. I believe her children are attached to her, and I believe her children would be happy to be with her, so, therefore, as [C]hildren's advocate, I would recommend reunification.

Regarding Mother's ability to support Children, Foley testified that Mother works as a waitress, and she has a good support network to assist her in caring for Children. When Foley was asked if he had concerns that Mother worked the "third shift," he responded: "No . . . [M]other did everything that

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[11] During the permanency planning hearing, the court was considering the Plan for each of Mother's three children. As a result, the testimony often related to the Twins and their brother, who was later adopted by the Roes.

we asked in the treatment plan. She completed her plan. She [has] done what she was asked to do, so no, I don't have any concerns." Foley described Mother's Charlotte residence as providing a clean and safe environment, noting Mother had already set up appropriate furniture for Children. Foley emphasized that Mother had remained drug-free for twenty months, adding: "She's been through drug court and all those programs and I think she's made a really remarkable recovery." Foley did acknowledge, however, having concerns that Father had moved to a residence near Mother's home, stating: "[I] notified the guardian ad litem of Mecklenburg to make her aware and she told me that she's never seen any evidence of [Father] at [Mother's] home and would continue to monitor that."

Mother testified that she and Father were currently separated, and they planned to divorce.[12] Mother acknowledged having had a drug problem since age sixteen; however, she explained that, for the past two years, she consistently had tested drug-free. Mother asserted that she has a strong bond with Twins, had successfully completed all the goals in her Plan, and had completed an intensive drug treatment program through the Mecklenburg County drug court. Mother attends Narcotics Anonymous (NA) regularly and remains in contact with her NA sponsor.

Since the removal of the Twins in June 2008, they have resided in foster care with the Does. Mr. Doe testified regarding his observations of the visits between Twins and Mother: "I observed a couple [of] little boys that love their Mom." Mr. Doe stated he had no concerns about Twins returning to Mother's home, and he contended reunification with Mother was in their best interests:

> I'm kind of biased in that. I was orphaned when I was little, and I've known all my life that . . . there's nothing that can substitute a biological mother for anyone. There's something about a biological mother that has an unconditional love for their children . . . .

[12] At oral argument, Mother's counsel stated that Mother and Father had not yet divorced.

Mrs. Doe acknowledged Twins had experienced some anxiety about returning to Mother's home. She explained, however, that she had experience raising other foster children and was able to reduce Twins' anxiety by providing them with a caring environment, while setting boundaries that emphasized that their placement with the Does was temporary.

The family court filed its permanency planning order on June 4, 2010. Although the court expressed having some reservation, it determined TPR was the proper permanent plan for Twins. As a result, the court ordered SCDSS to initiate TPR proceedings against Parents and to terminate efforts to reunify the family. Thereafter, the family court denied Mother's motion for a new trial and her subsequent motions to reconsider pursuant to Rules 52, 59, and 60, SCRCP. This appeal followed.

LAW/ ANALYSIS

1. STANDARD OF REVIEW

In deciding an appeal from the family court, "this Court may find facts in accordance with its own view of the preponderance of the evidence." Miles v. Miles, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011). As a result, the standard for appellate review of the family court's decision is de novo:

> [W]hile retaining the authority to make our own findings of fact, we recognize the superior position of the family court judge in making credibility determinations. Moreover, consistent with our constitutional authority for *de novo* review, an appellant is not relieved of his burden to demonstrate error in the family court's findings of fact. Consequently, the family court's factual findings will be affirmed unless "appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court."

Lewis v. Lewis, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011) (quoting Finley v. Cartwright, 55 S.C. 198, 202, 33 S.E. 359, 360-61 (1899)); see also Simmons v. Simmons, 392 S.C. 412, 414-15, 709 S.E.2d 666, 667 (2011) (citing Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992)) ("In appeals from the family court, this Court reviews factual and legal issues de novo.").

II. PERMANENCY PLANNING

Mother argues the family court erred in ordering SCDSS to proceed with TPR rather than finding that she had remedied the conditions that caused Twins' removal. We agree.

"The South Carolina Children's Code sets forth this State's policy regarding reunification." Loe v. Mother, Father, & Berkeley County Dep't of Soc. Servs., 382 S.C. 457, 463, 675 S.E.2d 807, 810 (Ct. App. 2009) (reversing the family court's order to terminate Mother's parental rights after finding Mother had successfully completed her placement plan and had remedied the conditions that led to her children's removal).

> It is the policy of this State to reunite the child with his family in a timely manner, whether or not the child has been placed in the care of the State voluntarily. Moreover, the Children's Code shall be liberally construed to the end that families whose unity or well-being is threatened shall be assisted and protected, and restored if possible . . . .

Id. at 463, 675 S.E.2d at 810 (internal citations and quotation marks omitted).

At a permanency planning hearing, the family court "review[s] the status of a child placed in foster care upon motion filed by the department to determine a permanent plan for the child." S.C. Code Ann. § 63-7-1700(A) (2010 & Supp. 2010).

> If the court determines at the permanency planning hearing that [1] the child may be safely maintained in the home in that the parent has remedied the conditions that caused the removal[,] and [2] the return of the child to the child's parent would not cause an unreasonable risk of harm to the child's life, physical health, safety, or mental well-being, the court **shall** order the child returned to the child's parent. The court may order a specified period of supervision and services not to exceed twelve months.

S.C. Code Ann. § 63-7-1700(D) (2010 & Supp. 2010) (emphasis added).

If the court determines the criteria in section 63-7-1700(D) are not yet met, "but that the child may be returned to the parent within a specified reasonable time not to exceed eighteen months after the child was placed in foster care," the court may order an extension for reunification. S.C. Code Ann. § 63-7-1700(F) (Supp. 2010). However, the statute restricts the conditions under which the family court may grant an extension for reunification:

> [I]n no case may the extension for reunification continue beyond eighteen months after the child was placed in foster care. An extension may be granted pursuant to this section **only** if the court finds:
>
> (1) that the parent has demonstrated due diligence and a commitment to correcting the conditions warranting the removal so that the child could return home in a timely fashion;

> (2) that there are specific reasons to believe that the conditions warranting the removal will be remedied by the end of the extension;
>
> (3) that the return of the child to the child's parent would not cause an unreasonable risk of harm to the child's life, physical health, safety, or mental well-being;
>
> (4) that, at the time of the hearing, initiation of termination of parental rights is not in the best interest of the child; and
>
> (5) that the best interests of the child will be served by the extended or modified plan.

S.C. Code Ann. § 63-7-1700(F) (Supp. 2010) (emphasis added).[13]

At the initial permanency planning hearing, conducted in May 2009, the family court found Twins' best interests would be served if Parents and SCDSS "continue[d] to work towards return of [C]hildren to the home." As a result, the court granted a six-month extension of the Plan and ordered SCDSS to continue providing services, while concurrently planning for reunification with Parents and TPR. The court noted Parents had made progress towards removing the risk of harm to Children and could expect Children to return if they made the changes required by the Plan.

If, after a permanency planning hearing, the court has extended foster care for the purpose of reunification with the parent, the court must select a permanent plan for the child other than another extension for reunification purposes at the next permanency planning hearing. S.C. Code Ann. § 63-7-1700(I)(2) (2010 & Supp. 2010).

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[13] This provision was added by South Carolina Laws Act 160, section 4, which became effective on May 12, 2010.

The court conducted its second permanency planning hearing in February 2010.[14] In its permanency planning order, filed on June 4, 2010, the family court determined TPR was the appropriate permanent plan for Twins. The court stated that the initial permanency plan had anticipated that Father "would be part of the family unit and would help raise these children." Regarding Parents' separation, the court stated:

> On the one hand, this separation is viewed as a positive thing in that the father would be away from the mother and children, so they would no longer be exposed to his drug abuse. On the other hand, it meant there would be no father in the home to help with the children. The anticipated stability in having two parents in the home was lost. . . . The plan never anticipated that the father would not be involved. . . . The mother, along with whatever social services may be available, is left alone. As much as she loves these children and as much as they care for her, her ability to provide for them has been severely reduced by the loss of the anticipated help of the father. . . . Without the help of the father, the mother's ability to provide is strained.

In ordering SCDSS to initiate TPR proceedings against Parents and to terminate efforts to reunify the family, the court expressed concern that, at the hearing, Mother had appeared "totally unprepared" to enroll her children in school. The court acknowledged that the psychologist's recommendation in favor of TPR had influenced its determination that TPR was in Children's best interests. The court also stated it had "weighed the [GAL's] recommendation heavily and it is not without a great deal of deliberation that this court decided not to follow his recommendation."

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[14] The second permanency planning hearing was scheduled to be held "on or before November 19, 2009"; however, it was continued until February 23, 2010.

Our review of the record indicates Mother successfully fulfilled each requirement of her Plan. Most importantly, Mother completed an intensive drug treatment program, tested negative for drugs for twenty consecutive months, and obtained suitable housing for Twins. Moreover, in July 2009, Mother legally separated from Father, who had not become drug-free. Guardian ad litem Dennis Foley, who had worked with Children continuously since June 2008, testified Mother's residence provided a clean and safe environment for Twins. Foley stated he was not concerned about Mother's ability to arrange appropriate care for Twins while she worked. Although SCDSS had expressed concern that Mother lacked knowledge of schools available for Twins, Foley testified Mother had "told [him] the name of the school and showed [him] where [Twins] would get on the bus." Foley added that Mecklenburg County had educational and social services in place that would supervise and reinforce the successful reunification of Mother and Twins.

In our view, returning Twins to Mother's home is statutorily required because their return "would not cause an unreasonable risk of harm to [Twins'] life, physical health, safety, or mental well-being." Although concerning, we cannot characterize Mother's limited financial ability and Father's proximity as causing an "unreasonable risk of harm" to Twins—of such magnitude that TPR is required. We are influenced by the GAL's testimony that Mother has remedied the conditions that caused Twins to be removed from her custody. We also note that both the GAL and Twins' foster father stated TPR was **not** in Twins' best interests.

In sum, we believe a preponderance of the evidence supports returning Twins to Mother's home and ordering SCDSS to continue providing supervision and services for twelve months. Accordingly, we find the family court erred in ordering SCDSS to initiate TPR proceedings against Mother.[15]

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[15] In light of our decision, we need not address Mother's remaining issues on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining this court need not review

CONCLUSION

We reverse the family court's order requiring SCDSS to initiate TPR proceedings against Mother, and we remand this case to the family court for proceedings consistent with this opinion. Accordingly, the decision of the family court is

REVERSED and REMANDED.

SHORT, WILLIAMS, and GEATHERS, JJ., concur.

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remaining issues on appeal when its determination of a prior issue is dispositive).