The Supreme Court of South Carolina

In the Matter of David R. Shumate, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on January 7, 1991, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court dated December 5, 2006, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of David R.

Shumate shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

December 19, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 48

December 21, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

The State, Petitioner/Respondent,

v.

Kwasi Roosevelt Tuffour, Respondent/Petitioner.

ORDER

On October 4, 2006, we granted certiorari to review the decision of State v. Tuffour, 364 S.C. 497, 613 S.E.2d 174 (Ct. App. 2005). Petitioner Tuffour subsequently pled guilty to the charge involved in this matter. Therefore, we dismiss the petitions for a writ of certiorari and vacate the Court of Appeals' opinion.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

December 19, 2006

The Supreme Court of South Carolina

In the Matter of James Stone Craven, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that James M. Bagarazzi, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Bagarazzi shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Bagarazzi may make disbursements from

respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain 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 respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that James M. Bagarazzi, 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 M. Bagarazzi, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Bagarazzi's 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 19, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte:

Bruce Johnson, Appellant,

In Re:

Bank of America, N.A., Respondent,

v.

Shuyler L. Moore and Yvonne R. Moore, as Trustees for the Moore Family Trust; Schuyler L. Moore and Yvonne R. Moore; Lyn-Rich Contracting Company, Inc.; Alice Guillemet; Scott Moore; Raymond Guillemet; Gordon Rockwell; Barbara Moore; Leslie Guillemet; Shawn G. Guillemet; Brandy G. Guillemet; Andre S. Moore; and Deanna M. Moore, Defendants,

Of whom Shuyler L. Moore and Yvonne R. Moore, as Trustees for the Moore Family Trust; Schuyler L. Moore and Yvonne R. Moore; Lyn-Rich Contracting Company, Inc. are the Respondents.

Appeal From Richland County
Joseph M. Strickland, Master-In-Equity

Opinion No. 4165
Submitted September 1, 2006 – Filed October 16, 2006
Withdrawn, Substituted and Refiled December 18, 2006

AFFIRMED

Tobias G. Ward, Jr. and J. Derrick Jackson, both of Columbia, for Appellant.

Frederick A. Gertz, John M. A'Hern and Robert F. Anderson, all of Columbia, George S. Nicholson, Jr. and Patrick J. Frawley, both of Lexington, James W. Sheedy and Susan E. Driscoll, both of Rock Hill, for Respondents.

KITTREDGE, J.: In this foreclosure action, the property was sold, by way of court order, subject to the successful bidder paying the past due

property taxes and assessments. The sale resulted in surplus funds. Following the sale, Bruce Johnson, the successful bidder, sought to defeat the previously unchallenged court order and avoid responsibility for the taxes and assessments. Johnson argued to the Master, and now to us, that section 12-49-60 of the South Carolina Code (Supp. 2005) requires the payment of the taxes and assessments from the surplus funds. The Master followed the order under which all parties and bidders operated and denied Johnson's motion to satisfy the taxes and assessments from the surplus funds. We affirm.

I.

Property on Lake Murray in Richland County was encumbered by a first mortgage held by Bank of America, a mechanic's lien held by Lyn-Rich Contracting Company, Inc., and a Richland County tax lien. The tax lien amounted to $229,138.37, approximately one-tenth of the total value of the property. The Moores, the property owners, defaulted under the mortgage for failure to make payments and Bank of America subsequently brought a foreclosure proceeding.

A foreclosure hearing was held on October 27, 2004. Bank of America, Lyn-Rich, and the Moores executed a Consent Order for Foreclosure and Sale. The foreclosure order granted Bank of America judgment against the Moores, including the right to foreclose the mortgage and judicially sell the property. In addition, the foreclosure order specifically provided that "the purchaser [is] required to pay . . . for any property taxes or assessment due and payable."

On December 30, 2004, before the scheduled date of the foreclosure sale, the Moores filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. The Bankruptcy Court granted Bank of America relief from the automatic stay to complete the foreclosure in accordance with state

law. The property was then advertised pursuant to a Second Notice of Sale on May 14, 21, and 28, 2005.[1]

On July 6, 2005, the property was sold. All prospective bidders had notice of the provision requiring the purchaser to pay the property taxes. Bids were made on this basis. Johnson was the highest bidder. He purchased the property for $2.2 million dollars, which resulted in surplus funds.

Johnson made the required five percent deposit on July 6, and by July 26 had deposited the remainder of the purchase price with the Court, at which point the Master issued a deed. This deed, consistent with the prior order, also noted the property was "subject to assessments, Richland County taxes, existing easements, easements and restrictions of record, and other senior encumbrances." Johnson filed his deed for the property on August 2, 2005.

Following the sale and after delivery of the deed, Johnson sought to defeat the foreclosure order and avoid his obligation to pay the taxes and related assessments. Johnson filed a motion, pursuant to section 12-49-60 of the South Carolina Code (Supp. 2005), in an attempt to have the taxes and assessments paid from the surplus proceeds. The Master issued an Order of Disbursement and denied Johnson's motion. This appeal followed.

II.

The express terms of sale, established in the foreclosure order, set the property for sale subject to outstanding tax liens. The foreclosure order

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[1] We further note that the Second Notice of Sale also addressed payment of taxes, ordering that "the purchaser be required to pay . . . for any property taxes which become due and payable after the date of sale[.]" We view this Second Notice of Sale as consistent with the foreclosure order. Even assuming, however, that there is a conflict between the terms of the foreclosure order and Second Notice of Sale, the law is settled that the foreclosure order controls. See Bonney v. Granger, 300 S.C. 362, 364, 387 S.E.2d 720, 722 (Ct. App. 1990) ("[t]he Notice of Sale does not set forth the conditions of sale, but refers to the prior order authorizing the sale.").

stated the purchaser would be required to pay "any property taxes or assessments due and payable." This was confirmed, without challenge, at the public commencement of the sale on June 6 when all present were reminded that the property would be sold subject to any outstanding property taxes. The Master's deed issued to Johnson on July 26 also stated the property was "subject to assessments, Richland County taxes, existing easements, easements and restrictions of record, and other senior encumbrances." Thus, by the express terms of the sale, Johnson and all other bidders understood that liability for the outstanding tax liens would fall to the successful bidder.

Under these specific facts, we concur with the Master that it would be inequitable to allow Johnson to profit from his late motion. See BB & T of S. C. v. Kidwell, 350 S.C. 382, 387, 565 S.E.2d 316, 319 (Ct. App. 2002) ("An action to foreclose a real estate mortgage is an action in equity."); see also QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 202, 600 S.E.2d 105, 107 (Ct. App. 2004) (stating that while an appellate court is free to take its own view of the preponderance of the evidence in an action in equity, the court is not required to disregard the judge's findings).

At every stage of the proceedings, all interested parties were made aware that the property was being sold subject to tax liens. As noted, the foreclosure order specifically provided that "the purchaser [is] required to pay . . . for any property taxes or assessment due and payable." The Second Notice of Sale followed suit by placing responsibility for the taxes and assessments on the purchaser. The deed issued by the Master, which Johnson filed ten days prior to filing his motion under section 12-49-60, stated the property was "subject to assessments, Richland County taxes, existing easements, easements and restrictions of record, and other senior encumbrances."

To rewrite the terms of sale *after the sale* would be patently inequitable, especially to the other bidders who made bids knowing that a successful bid would result in the additional responsibility of approximately $230,000 in past due taxes. Johnson's post sale motion pursuant to section 12-49-60 came too late. By that time, Johnson had participated in the sale

under the terms of the foreclosure order, failed to make any motion prior to sale, and filed a deed which further acknowledged the terms of sale.

Assuming Johnson may have invoked section 12-49-60 prior to the sale, equity must intervene when Johnson remained silent while all bidders made bids based on the additional responsibility for the payment of the substantial past due taxes and assessments. Equity will not permit such an unwarranted windfall to Johnson under these circumstances. See generally Collins v. Sigmon, 299 S.C. 464, 468, 385 S.E.2d 835, 837-38 (1989) (applying the ancient maxim "equity aids the vigilant and diligent" and not those who sleep on their rights).

Furthermore, it is the long-established policy in South Carolina that "[t]he courts should be particularly jealous of the integrity of judicial sales." In re Wilson, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927). "[A]ny conduct on the part of those actively engaged in the selling or bidding [at a judicial sale] that tends to prevent a fair, free, open sale, or stifle or suppress free competition among bidders, is contrary to public policy[.]" Ex parte Keller, 185 S.C. 283, 291, 194 S.E. 15, 19 (1937). The filing of a motion under section 12-49-60 after the sale is contrary to such public policy under the circumstances here. Where all parties and potential bidders in a foreclosure sale have notice of, and do not challenge, a valid court order assigning responsibility for outstanding taxes to the successful bidder as a condition of the purchase, the successful bidder may not thereafter gain a windfall by a tardy attempt to invoke section 12-49-60.

III.

We further disagree with Johnson's argument that disbursement of sale proceeds must always track section 12-49-60. We find that the payment of taxes and related assessments from the sale proceeds under section 12-49-60 is not mandatory. Section 12-49-60 of the South Carolina Code (Supp. 2005) provides:

> When any real estate shall be sold under any writ, order or proceeding in any court, the court shall, on motion of any person interested in such real estate or in the purchase or proceeds of the sale thereof, order all taxes, assessments and penalties charged thereon to be paid out of the proceeds of such sale as a lien prior to all others.

The statute is not self-executing—it requires a "motion of any interested person . . . [w]hen any real estate shall be sold." The statute does not take effect unless a timely motion is made by an interested party. Just as section 12-49-60 protects and assigns priority to a tax lien, the consent order of foreclosure in this case protected the tax lien of Richland County. Thus, the policy underlying section 12-49-60 is similarly achieved by giving efficacy to the foreclosure order before us today. The foreclosure order here is in accord with well-established South Carolina law—"real property subject to taxes cannot be sold in foreclosure free of the existing tax liens, unless provision for payment is made and they are paid." Trustees of Wofford College v. Burnett, 209 S.C. 92, 107, 39 S.E.2d 155, 161 (1946). This was the law of the land in 1881, at the time the predecessor to section 12-49-60 was originally passed. See Smith v. Gatewood, 3 S.C. 333, 334 (1872) (finding purchaser of real estate purchased subject to tax lien when no provision provided otherwise and taxing authority not party to sale of property); See also 47 Am. Jur. 2d Judicial Sales § 160 (2006) ("The rule that, absent an express stipulation to the contrary in the terms of sale, a purchaser takes the property subject to valid liens ordinarily applies to liens for taxes and assessments accruing prior to the confirmation of the sale or arising after the completion of the sale.").

Johnson argues Truesdale v. Bellinger, 172 S.C. 80, 172 S.E. 784 (1934), mandates a contrary result. We disagree. In Truesdale, property was sold by the probate court in aid of assets. Id. There, the probate court notified all bidders before the sale that all debts of the estate would be paid from the proceeds. Id. at 85, 172 S.E. at 786. When the taxes due on the land were not paid from the proceeds, the successful bidder brought an action against the probate judge. Id. Although our supreme court ultimately ruled

the probate judge made an error of law in his judicial capacity that was not actionable, the court noted that a motion for payment of taxes from the proceeds of a sale (pursuant to the predecessor to section 12-49-60) may be made after the sale but before the disbursement of the proceeds. Id. at 87, 172 S.E. at 787. Unlike in the instant case, however, payment of the taxes due in Truesdale out of the proceeds from the sale would not have changed the terms of the sale upon which the bidders had relied in making their bids. We thus find Truesdale distinguishable, for application of section 12-49-60 here after the sale, would alter the terms of the sale upon which all bidders relied in making their bids.

IV.

The judgment of the Master is

AFFIRMED.

ANDERSON and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Deborah S. Davis, **Respondent,**

v.

James Kelly Davis, **Appellant.**

Appeal From Charleston County
Paul W. Garfinkel, Family Court Judge

Opinion No. 4188
Heard December 5, 2006 – Filed December 21, 2006

AFFIRMED

Michael David Wood, Patricia O'Neill DeTreville, and James Michael DeTreville, all of Charleston, for Appellant.

William J. Clifford, of North Charleston, for Respondent.

ANDERSON, J.: In this domestic action, James Kelly Davis (Husband) appeals the family court's (1) awarding Deborah Davis (Wife) alimony and attorney's fees; and (2) finding Husband in contempt for failure

to comply with the family court's orders concerning the distribution of personal property, payment of Wife's equitable share of the marital home, harassment, and communication with Wife about the children's issues. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Husband and Wife divorced on May 7, 2001 after almost twenty-one years of marriage. The couple has three sons.

Wife is a college graduate. At the time of the divorce she had worked in her father's insurance agency, primarily as the office manager, for approximately eleven years. Father retired in December, 2001 and Wife began working as a library media specialist at a middle school for a yearly salary of $31,000. She anticipated a $2000 yearly salary increase upon completion of her master's degree. In addition, Wife intends to become certified by a national board, for which she expects a $7500 yearly increase in salary. Her present income is supplemented with earnings from a part time job with Weight Watchers.

When Father retired, Wife's earnings from her work at Father's agency were near $85,000. Wife testified her income was inflated as a result of the father-daughter relationship. She enjoyed a flexible work schedule and the use of a company car. Father first mentioned his upcoming retirement in 1999, prior to Husband and Wife's divorce. Husband and Wife planned for Father's impending retirement by starting a gift basket business called Baskets of Fun. This venture was ultimately unsuccessful.

Wife explained that jobs available to her in the insurance industry would require extended periods of travel and would start at a salary of approximately $40,000 per year. She estimated her services while working in Father's business were worth $50,000 a year to a comparable insurance agency.

Husband formerly worked at Forsburg Engineering, where he earned an annual salary of $75,000, plus bonuses that brought his total yearly earnings

to approximately $100,000. Prior to Father's retirement, Husband left Forsburg and began a land surveying business, Absolute Surveying, in which he currently holds a thirty-five percent interest. On his financial declaration he indicated an annual salary of $51,000. In addition to his salary, Absolute Surveying provided Husband with a car, car insurance and maintenance, gas, health insurance, health club, cable, and credit cards. The family court determined the value of those benefits amounted to $1100 monthly. Partnership distributions from Absolute averaged $1,333.33 per month. Husband had other real estate partnership interests which he failed to include on his financial declaration. Those interests yielded $35,000 from the sale of real property in 2002 and reflected an average of $10,000 equity in each of ten (10) condominiums.

The family court approved and adopted the parties' agreement on "all issues arising from the marriage, save and except the issue of divorce," in the March 12, 2001 divorce decree. Terms of the agreement relevant to Husband's appeal included a provision for joint legal custody of their three sons and the requirement that each party keep the other informed about matters concerning the children. The litigants were restrained from harming, harassing, bothering or otherwise disturbing each other, whether at their respective residences, employment, or the like. The marital home would be the sole property of Husband and, for the purpose of equitable distribution, valued at $325,000. The home was to be refinanced to provide funds for Wife's equitable share. Husband was permitted to subtract from the $325,000 valuation of the home the first mortgage payoff, reasonably necessary closing costs, and the balance of Wife's equity loan. In addition, Husband was directed to pay Wife fifty percent of settlement proceeds from Forsberg Engineering no later than the refinance closing date. Wife was entitled to obtain from Husband certain items of personal property, and the parties were instructed to cooperate in the expeditious transfer of those items. The parties agreed to reserve the issue of alimony for a five year period, during which either party could assert a claim for alimony against the other.

Wife filed a complaint on December 10, 2001, and an amended complaint on February 19, 2002, seeking $1000 per month alimony. During the pendency of this litigation Wife initiated a number of enforcement actions

based on Husband's non-compliance with the divorce decree. In its final ruling the family court awarded Wife $635 per month in alimony, adjusted to be retroactive from the date of the temporary hearing. In addition to noting its concern over the absence of Husband's forthrightness regarding his income, the family court found Husband in contempt for failure to: (1) provide Wife with copies of family photographs, (2) pay Wife her equitable share of the marital home, (3) refrain from harassing Wife, and (4) communicate with Wife regarding issues with their children. Wife was awarded attorney's fees as well.

STANDARD OF REVIEW

In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence. Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 189, 612 S.E.2d 707, 711 (Ct. App. 2005) (citing Emery v. Smith, 361 S.C. 207, 213, 603 S.E.2d 598, 601 (Ct. App. 2004)). However, this broad scope of review does not require this court to disregard the family court's findings. Lacke v. Lacke, 362 S.C. 302, 307, 608 S.E.2d 147, 149 (Ct. App. 2005) (citing Bowers v. Bowers, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002)); Badeaux v. Davis, 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct. App 1999). Nor must we ignore the fact that the family court judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003) (citing Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E. 2d 154, 157 (1996)). However, our broad scope of review does not relieve appellant of the burden of convincing this court the family court committed error. Nasser-Moghaddassi, 364 S.C. at 190, 612 S.E.2d at 711 (citing Skinner v. King, 272 S.C. 520, 522-23, 252 S.E.2d 891, 892 (1979)).

LAW/ANALYSIS

I. Agreement

Husband argues the family court failed to effectuate the parties' intention as found within the agreement with regard to the reservation of alimony. We disagree.

In South Carolina, the construction of a separation agreement is a matter of contract law. Estate of Revis by Revis v. Revis, 326 S.C. 470, 477, 484 S.E.2d 112, 116 (Ct. App. 1997). "Where an agreement is clear and capable of legal construction the court's only function is to interpret its lawful meaning and the intention of the parties as found within the agreement and give effect to them." Bogan v. Bogan, 298 S.C. 139, 142, 378 S.E.2d 606, 608 (Ct. App. 1989). "In the enforcement of an agreement, the court does not have the authority to modify terms that are clear and unambiguous on their face." Messer v. Messer, 359 S.C. 614, 621, 598 S.E.2d 310, 314 (Ct. App. 2004). "Where an agreement has been merged into a court's decree, the decree, to the extent possible, should be construed to effect the intent of both the judge and the parties." Id. at 628, 598 S.E.2d at 318 (citing McDuffie v. McDuffie, 308 S.C. 401, 409, 418 S.E.2d 331, 336 (Ct. App. 1992)). "A court approved divorce settlement must be viewed in accordance with principles of equity and there is implied in every such agreement a requirement of reasonableness." Ebert v. Ebert, 320 S.C. 331, 340, 465 S.E.2d 121, 126 (Ct. App. 1995) (quoting 17A Am Jur. 2d Contracts § 479 (1991)).

> Unambiguous marital agreements will be enforced according to their terms . . . . The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect.

Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001) (citing Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997); Ebert v. Ebert, 320 S.C. 331, 465 S.E.2d 121 (Ct. App. 1995); Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994); Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 199 S.E.2d 719 (1973).

On the other hand, when an agreement is susceptible of more than one interpretation, it is ambiguous and the court should seek to determine the intent of the parties. Estate of Revis, 326 S.C. at 477, 484 S.E.2d at 116. Whether or not an ambiguity exists in an agreement must be determined from the language of the instrument. Steffenson v. Olsen, 360 S.C. 318, 322, 600 S.E.2d 129, 131 (Ct. App. 2004); Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997). "An ambiguous contract is one capable of being understood in more ways than one, an agreement obscure in meaning through indefiniteness of expression, or having a double meaning." Estate of Revis, 326 S.C. at 477, 484 S.E.2d at 116 (quoting Ebert, 320 S.C. at 338, 465 S.E.2d at 125).

The exact language of the agreement adopted in the divorce decree reads, in pertinent part:

> The parties agree to reserve the issue of alimony, each from the other, for a period of 5 years from the date of this hearing. During this 5-year period, either party may elect to assert a claim for alimony. If such a claim is not asserted during this 5-year period, such claim is extinguished when the 5-year period has ended.

A reservation of alimony is recognized as a mechanism to address a set of circumstances that may generate a need for alimony in the future. Donahue v. Donahue, 299 S.C. 353, 363, 384 S.E.2d 741, 747 (1989). Here, implicit in the parties' agreement is their intention to prepare for unforeseen circumstances which might generate a future need for alimony by either party. The only contingency established by the plain language of the

agreement mandates the claim be asserted within a five year period following the decree. Husband's argument that the agreement is not clear and capable of legal construction is unpersuasive. Contrary to his contention, nothing in the agreement suggests the parties intended to express or imply additional conditions under which alimony may be sought. The terms of the agreement are clear and unambiguous on its face. Moreover, Husband's suggestion the agreement failed for lack of "specifics" to assist the court in the propriety of an alimony claim is without merit. Section 20-3-130 of the South Carolina Code provides the family court with the appropriate guidelines for adjudicating such claims.

Husband next complains the family court improperly reserved jurisdiction to award alimony because an identifiable set of circumstances likely to generate a need for alimony in the reasonably foreseeable future did not exist at the time of the decree. We disagree.

In Donahue our Supreme Court announced that where "there is no need for alimony at the time of trial, and no indication of physical or mental illness, foreseeable change in need in the future, or some other extenuating circumstance, the question of alimony should not be reserved." 299 S.C. at 363, 384 S.E.2d at 747. Most frequently our appellate courts have condoned the reservation of alimony when the potential for the occurrence or recurrence of a physical or mental disability existed. See, e.g., Williamson v. Williamson, 311 S.C. 47, 50, 426 S.E.2d 758, 760 (1993) (wife had epilepsy since birth and serious problems developed in 1989; the condition could deteriorate in the future); Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988) (although the court properly denied alimony under the circumstances existing at the time of decree, husband's pre-existing disability entitled him to reservation of alimony); Lowe v. Lowe, 256 S.C. 243, 248, 182 S.E.2d 75, 78 (1971) (wife's past emotional problems, which occurred during the course of the marriage, might recur to the point where she would be entitled to alimony). In contrast, this court decided the family court erred in reserving alimony when no indication of a foreseeable need in the future existed. Hardy v. Hardy, 311 S.C. 433, 436, 429 S.E.2d 811, 813 (Ct. App. 1993). In Hardy, the wife was in good health, drawing a pension from the state, and was working part-time.

Donahue nevertheless endorses the reservation of alimony where some foreseeable future need or other extenuating circumstance exists. 299 S.C. at 363, 384 S.E.2d at 747. In the instant case the parties implicitly recognized that Father's impending retirement was likely to generate a need for alimony in the reasonably foreseeable future. Wife testified her income from employment in Father's business exceeded her earning capacity because of the father-daughter relationship. Perhaps anticipating an income more in line with her earning capacity, the parties agreed to reserve an opportunity for re-evaluating their respective needs for a period of time after the divorce.

Furthermore, the reservation of alimony in this case was accomplished pursuant to the parties' agreement. In the pivotal case of Moseley v. Mosier, our Supreme Court declared parties to a divorce "may agree to any terms they wish as long as the court deems the contract to have been entered fairly, voluntarily and reasonably." 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983).

> The parties may specifically agree that the amount of alimony may not ever be modified by the court; they may contract out of any continuing judicial supervision of their relationship by the court; they may agree that the periodic payments or alimony stated in the agreement shall be judicially awarded, enforceable by contempt, but not modifiable by the court . . . . With the court's approval, the terms become a part of the decree and are binding on the parties and the court.

Id.

Section 20-3-130(G) of the South Carolina Code instructs that 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 where the parties are living separate and apart.

S.C. Code Ann. § 20-3-130(G) (Supp. 2003).

The family court, in issuing the divorce decree, stated "the parties have expressed their desire that their agreement be approved by this Court as being fair and equitable, and that the agreement be adopted by this Court as its own Order." The decree further noted that both parties had been examined under oath as to matters related to the agreement. The litigants understood the agreement and professed it was the product of negotiation and compromise, each confirming that it was fair and equitable.

> Neither party entered into the agreement as a result of any threat, coercion or duress; rather each party entered into the agreement freely and voluntarily; . . . the [a]greement set forth . . . was entered into knowingly and intelligently by both parties, each having full understanding and appreciation of the consequences of their actions.

The family court concluded the agreement was "clearly within the bounds of reasonableness, and is fair and equitable to both parties . . . ."

According to the plain and unambiguous language of the parties' agreement reserving the issue of alimony, the family court did not fail to effectuate the intention of the parties. The divorce decree was filed on May 9, 2001, and Wife filed an amended complaint in February of 2002, well within the five year period provided in the divorce decree. The family court did not err by considering Wife's asserted claim for alimony.

II. Alimony

Husband maintains Wife is not entitled to alimony because she intentionally sought and accepted employment below her earning history and potential. We disagree.

An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002); Sharps v. Sharps, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000); Hatfield v. Hatfield, 327 S.C. 360, 364, 489 S.E.2d 212, 215 (Ct. App. 1997). "Alimony is a substitute for the support which is normally incident to the marital relationship." Spence v. Spence, 260 S.C. 526, 529, 197 S.E.2d 683, 684 (1973) (quoting McNaughton v. McNaughton, 258 S.C. 554, 558, 189 S.E.2d 820, 822 (1972)); Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). However, "[a]limony should not dissuade a spouse, to the extent possible, from becoming self-supporting." Rimer v. Rimer, 361 S.C. 521, 525, 605 S.E.2d 572, 574 (Ct. App. 2004). "It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." Allen, 347 S.C. at 184, 554 S.E.2d at 424 (citing Woodward v. Woodward, 294 S.C. 210, 217, 363 S.E.2d 413, 417 (Ct. App. 1987)).

South Carolina law provides that the family court judge may grant alimony in such amounts and for such term as the judge considers appropriate under the circumstances. Smith v. Smith, 327 S.C. 448, 462, 486 S.E.2d 516, 523 (Ct. App. 1997). Factors to be considered in making an alimony award include: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations; as well as (13) other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2003); Hatfield, 327 S.C. at 364, 489 S.E.2d at 215. The court is required to consider all relevant factors in determining alimony. Epperly v. Epperly, 312 S.C. 411, 415, 440 S.E.2d 884, 886 (Ct. App. 1994); see also Patel v. Patel, 347 S.C. 281, 290, 555 S.E.2d 386, 391 (2001) (finding the trial court's denial of alimony was

erroneous because the court did not address "several important factors" when determining no alimony should be awarded). "Our inquiry on appeal is not whether the family court gave the same weight to particular factors as this court would have; rather, our inquiry extends only to whether the family court abused its considerable discretion in assigning weight to the applicable factors." Allen, 347 S.C. at 186, 554 S.E.2d at 425. Ultimately, no one factor is dispositive. Lide v. Lide, 277 S.C. 155, 157, 283 S.E.2d 832, 833 (1981).

The record reflects that the family court considered the relevant statutory factors. However, Wife's earning history and potential are at the heart of the parties' dispute over alimony. Prior to Father's retirement Wife earned nearly $85,000 annually, but attributed her high salary to the "Daddy" factor. The family court acknowledged this employer-employee relationship was "clearly less than an arm's length transaction." Husband averred Wife could earn between $40,000 - $45,000 in the insurance industry. Instead, Wife returned to work in education at a significantly reduced salary of $31,000, plus health, disability, and retirement benefits. In addition, she began studying for her master's degree. Wife maintained that, taking state benefits into account, upon completion of her graduate degree her earnings would be roughly equivalent to those in the insurance industry. The family court found:

> [Wife's] future earnings are relatively predictable as she progresses through her educational process and employment in the field of education. Her gross income will lie between thirty-five thousand ($35,000) and forty thousand ($40,000) dollars when she completes her masters degree and begins being paid at that level.

The evidence indicates Wife's salary near the end of her employment with Father was not an accurate predictor of her earning potential, either in the education or insurance industry. We discern no abuse of discretion in the family court's award of alimony.

III. Contempt

Husband challenges the family court's finding him in contempt for violation of the divorce decree and subsequent court orders. He contends the evidence failed to demonstrate his conduct was willful, voluntary, and intentional. We disagree.

"The power to punish for contempt is inherent in all courts and is essential to preservation of order in judicial proceedings." Browning v. Browning, 366 S.C. 255, 263, 621 S.E.2d 389, 392 (Ct. App. 2005) (quoting In re Brown, 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998). "On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion." Stone v. Reddix-Smalls, 295 S.C. 514, 516, 369 S.E.2d 840, 840 (1988) (citations omitted); Lukich v. Lukich, 368 S.C. 47, 56, 627 S.E.2d 754, 759 (Ct. App. 2006). "Contempt results from the willful disobedience of an order of the court." Bigham v. Bigham, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975); Smith v. Smith, 359 S.C. 393, 396, 597 S.E.2d 188, 189 (Ct. App. 2004); S.C. Code Ann. § 20-7-1350 (Supp. 2004) (A party may be found in contempt of court for the willful violation of a lawful court order.).

"A willful act is one which is 'done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law.' " Widman v. Widman, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct. App. 2001) (quoting Spartanburg County Dep't of Soc. Servs. v. Padgett, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988)).

"In a proceeding for contempt for violation of a court order, the moving party must show the existence of a court order and the facts establishing the respondent's noncompliance with the order." Hawkins v. Mullins, 359 S.C. 497, 501, 597 S.E.2d 897, 899 (Ct. App. 2004). "[B]efore a court may find a person in contempt, the record must clearly and specifically reflect the

contemptuous conduct." Widman, 348 S.C. at 119, 557 S.E.2d at 705. "Once the moving party has made out a prima facie case, the burden then shifts to the respondent to establish his or her defense and inability to comply with the order." Id. at 120, 557 S.E.2d at 705.

"A trial court's determination regarding contempt is subject to reversal where it is based on findings that are without evidentiary support or where there has been an abuse of discretion." Henderson v. Puckett, 316 S.C. 171, 173, 447 S.E.2d 871, 872 (Ct. App. 1994). "An abuse of discretion occurs either when the court is controlled by some error of law or where the order, based upon findings of fact, lacks evidentiary support." Townsend v. Townsend, 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct. App. 2003).

Wife initiated actions during the pendency of this litigation to enforce Husband's compliance with family court's orders to: (1) distribute certain family photographs or duplicates in a quality equal to the originals; (2) pay Wife's share of the equity in the marital home; (3) refrain from harassing Wife and (4) communicate with Wife concerning children's issues.

A. Photographs

At trial Husband testified that he provided Wife with a compact disc of photographs, and Wife objected to the format rather than the quality of the photographs. Husband delivered actual photographs to Wife as well. In his testimony he acknowledged differences between the originals and those he tendered to Wife. When asked if he were willing to have exact reproductions from the negatives made by the original photographer in order to discharge the enforcement action, Husband responded:

> I don't care to buy photographs for my ex-wife. I'll do what I'm told to do. I provided, according to the order, equivalent, equal—in fact she was able to get them on high quality CD disks. That's the way they provide them now to anybody. She can—actually with the CD I gave her, she can have the pictures made in large sizes, eight and a half by eleven

> or whatever size you want. That's how good a quality they were scanned at.

In its final order dated filed June 12, 2003, the family court found, "[n]otwithstanding the prior contempt proceeding and resulting order by the Presiding Judge to provide the [Wife] the original photographs or duplicate originals from the original negatives, the [Husband] once again gave the [Wife] a compact disc with inferior reproductions." Consequently, Husband was held in contempt and advised he could purge the charge by turning the original photographs over to Wife within three days of the order. A modified final order filed on July 12, 2004 noted that Husband again gave Wife a compact disc instead of the original photographs or duplicates from the original negatives. Subsequently, the family court held Husband in contempt for failure to comply with its June 12, 2003 order.

B. Equity in Marital Home

Wife complains the closing costs charged against her equitable interest in the marital home were inflated, unfair, and unreasonable, and Husband failed to distribute the equity in the home in accordance with the parties' agreement. The pertinent portion of the divorce decree reads:

> The equity in the home is subject to division between the parties as follows: [Husband] shall be permitted to subtract from the $325,000 valuation of the home the first mortgage payoff, as well as reasonable and necessary closing costs of refinance and the cost of the equity line taken by Mother. The resulting figure shall be deemed the "net equity" and shall be divided equally between the parties, <u>with the exception that</u> the $30,000 second mortgage/equity line shall be deducted from [Wife's] 50% share and reimbursed to [Husband]. The terms and details of refinancing the home shall be at the sole election and responsibility of [Husband].

(Emphasis in original).

Husband referred the closing of the refinancing loan to attorney Eric Davidson, a boyhood friend and partner in Husband's surveying and real estate businesses. Davidson had previously acted on the parties' behalf in earlier closings, but never charged them closing fees. However, Davidson charged the parties a total of $975 in attorney's fees for closing the refinancing of the marital home following the divorce. Additional costs included a survey performed by Husband's company, Absolute Surveying, for $350, with the total closing costs amounting to over $10,000. Davidson's records reflected that he issued a check to Husband refunding Husband's portion of the fees. The family court observed "[i]t appears that this attorney directed material changes to be made to the closing statement used at the refinance of the marital home and these changes resulted in this attorney refunding money only to the [Husband] when, in fact, one half of this money was due to the [Wife]." The family court further enumerated closing costs not fairly charged to Wife "as they inured exclusively to the benefit of [Husband]." Accordingly, after the family court's analysis, $6,839.25 was considered a fair and reasonable charge for the closing costs.

Davidson calculated Wife's share of the home equity by deducting the closing costs, the first mortgage, and the balance on the home equity loan that Wife had used from the stipulated value of the home ($325,000). The resulting net equity was divided in half and Wife's share was again reduced by $30,000 for the home equity loan. When challenged at trial that his calculation resulted in deducting the equity loan twice, Davidson stated this procedure reflected his interpretation of the parties' agreement. Accordingly, the family court instructed the parties to submit post trial briefs on the method of calculating Wife's equitable share. The family court adopted Wife's analysis, which reflected only one deduction of the equity loan from her share of the net equity. The June 12, 2003 final order directed Husband to pay Wife the balance owed her as a result of the re-calculation, $20,689.19. At the time the modified final order was issued in July, 2004, Husband had not paid Wife the balance of her equitable share, and the family court found Husband in contempt.

C. Harassment

The divorce decree provided that "both parents will be restrained from harming, harassing, bothering or otherwise disturbing each other, whether at their respective places of residence, employment or the like."

Wife submitted evidence of incidents during which Husband harassed her by threatening to publish embarrassing photographs of her, by discussing her personal life with the minor children, and by making harassing phone calls. Additionally, testimony indicated Husband and their youngest son went to Wife's home late one evening when Wife's boyfriend was present. Husband later accused Wife of exposing the child to immoral behavior. Wife recounted another incident that arose when Husband returned personal property to her in the parking lot of her church, causing a disturbance by shouting obscenities at her in the presence their youngest son.

In its final and modified final orders, the family court found Husband's actions "constituted harassment in violation of the Court's prior order."

D. Communication

Pursuant to the divorce decree, the parties were required to keep each other informed about matters concerning the children and to consult with each other on matters which pertained to the children's interests. The family court noted, however, that Husband admitted two incidents when the children were involved with law enforcement. Despite repeated requests, Husband would not disclose the charges or degree of involvement to Wife.

In each of the four instances of alleged contemptuous conduct, the existence of the divorce decree and subsequent orders of the family court requiring Husband's compliance is without dispute. Testimony at trial and supporting affidavits provide further evidentiary support that Husband failed to accomplish what the law required of him. Furthermore, by the time the modified final order was issued in July, 2004, nearly one year after the family court's final order, Husband still had not paid Wife the balance of her equity

in the marital home or provided her with required photographs. Husband's failure to comply with all the family court's directives indicates his conduct was willful, voluntary, and intentional. His defense amounts to a general denial that any evidence existed of wrongdoing concerning the photographs, harassment, and communication charges. Husband professes he neither intentionally nor voluntarily inflated the closing costs charged against Wife's interest or miscalculated her equitable share of the marital home. He asseverates that, because he referred the entire transaction to the closing attorney, Husband was not responsible for the inequitable result. Additionally, Husband urges the closing attorney's calculation of Wife's equitable share was a reasonable interpretation of the language of the divorce decree and does not rise to the level of willful disobedience.

Husband's protestations are unavailing. The family court adopted Wife's method for calculating her equitable share after being briefed by both parties' on their respective interpretations. Furthermore, because the parties' agreement was adopted and incorporated into the divorce decree in its entirety, it was incumbent on the family court to effectuate not only the intention of the parties, but the intention of the presiding family court judge who issued the decree. See Messer v. Messer, 359 S.C. 614, 628, 598 S.E.2d 310, 318 (Ct. App. 2004) (agreement adopted as divorce decree should be construed to effect intent of both judge and parties). Apodictically, it strains credulity to infer the presiding judge intended for Wife's equity loan to be deducted from her share in the net equity twice.

We conclude ample evidence existed to support the family court's contempt findings on all four issues.

IV. Sidebar Conference

Husband asserts the family court erred by referencing a sidebar conference in its final and modified final order. We agree.

Sidebar conferences without the presence of a court stenographer, must be reiterated for the record. North Charleston v. Gilliam, 311 S.C. 252, 254, 428 S.E.2d 720, 721 (Ct. App. 1992).

The modified final order addresses the sidebar solely in part seven (7) of the Alimony section. The order states:

> It is noted that the Court expressed its concern in a side bar conference which is not referenced about [Husband] lying to the Court in an attempt to make it appear that he had far less income and benefits available to him than he actually had. The Court advised counsel that this matter, in all likelihood, would be referred to the Solicitor to determine if a charge of perjury was warranted. It was only then that the [Husband] submitted an amended financial declaration.

The sidebar conference referred to by the family court was not reiterated for the record. However, the erroneous mention of the sidebar does not amount to reversible error. "An error not shown to be prejudicial does not constitute grounds for reversal." Brown v. Pearson, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997). "An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." Visual Graphics Leasing Corp., Inc. v. Lucia, 311 S.C. 484, 489, 429 S.E.2d 839, 841 (Ct. App. 1993).

We caution the Bench in regard to the utilitarian efficacy of a sidebar conference. An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review. York v. Conway Ford, Inc., 325 S.C.170, 173, 480 S.E.2d 726, 728 (1997); Benton v. Davis, 248 S.C. 402, 410, 150 S.E.2d 235, 239 (1996); State v. Fletcher, 363 S.C.221, 250, 609 S.E.2d 572, 587 (Ct. App. 2005). However, it is sufficient if the party puts the grounds or arguments and the trial judge's ruling in the record at a later time during the trial. See State v. Hamilton, 344 S.C. 344, 361, 543 S.E.2d 586, 595 (Ct. App. 2001) overruled on other grounds State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Bostick, 307 S.C. 226, 288, 414 S.E.2d 175, 176 n. 1 (Ct. App. 1992); see also City of North Charleston v. Gilliam, 311 S.C. at 254, 428 S.E.2d at 721

(rulings made buy trial judge at sidebar conferences without presence of court reporter may still be preserved for appellate review if they are reiterated for the record when the case is called for trial or trail resumes).

In this case, the family court's error concerned extrinsic material and did not affect the court's actual ruling. The error is without prejudicial effect and, therefore, harmless.

V. Attorney's Fees

Husband alleges the family court erred in awarding Wife attorney's fees. We disagree.

"The Family Court is authorized by statute to order payment of suit money, including attorney['s] fees, to either party in a divorce action." Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988). Section 20-7-420(38) (Supp. 2005) of the South Carolina Code provides: "[s]uit money, including attorney's fees, may be assessed for or against a party to an action brought in or subject to the jurisdiction of the family court."

An award of attorney's fees lies within the sound discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. Patel v. Patel, 359 S.C. 515, 553, 599 S.E.2d 114, 123 (2004); Bowen v Bowen, 327 S.C. 561, 563, 490 S.E.2d 271, 272, (Ct. App. 1997). The family court, in determining whether to award attorney's fees, should consider each party's ability to pay his or her own fees, the beneficial results obtained, the parties' respective financial conditions, and the effect of the fee on the parties' standards 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 reasonable amount of attorney's fees to award, the family court must take into account the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, counsel's professional standing, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991); Lanier v. Lanier, 364 S.C. 211, 222, 612 S.E.2d 456, 461-62 (Ct.

App. 2005); see also Messer v. Messer, 359 S.C. 614, 633, 598 S.E.2d 310, 320 (Ct. App. 2004) (refusing to find an abuse of discretion as to award of attorney's fees when the family court analyzed each of the factors, detailed its findings in its final order, and those findings were supported by affidavits).

Applying the Glasscock factors, the family court noted this litigation involved multiple issues, lasted five days, and transpired over a three month period. Wife's attorney has been a member of the South Carolina Bar since 1978, his fees were consistent with legal fees for similar services, and Wife obtained a beneficial result. Moreover, Wife's financial circumstances necessitated an award of attorney's fees. The family court evaluated the reasonableness of Wife's attorney's fees and costs, her attorney's extensive experience and standing in the Bar, and the number of hours involved in this litigation against the backdrop of Husband's failure to comply with the provisions of the divorce decree and his failure to accurately report income in his financial declaration. We, therefore, affirm the family court's award of attorney's fees.

CONCLUSION

For the reasons stated herein, the family court's decision is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Theresa Claypoole, Appellant.

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

Opinion No. 4189
Heard October 10, 2006 – Filed December 21, 2006

AFFIRMED

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Shawn L. Reeves, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for Respondent.

WILLIAMS, J.: A Lexington County jury convicted Theresa Claypoole (Claypoole) of contributing to the delinquency of a minor and accessory before the fact to criminal sexual conduct with a minor. Claypoole appeals her conviction of accessory before the fact, claiming the trial court should have directed a verdict in her favor due to insufficient evidence. We affirm.

FACTS

Beginning in 1999, Kermit Claypoole (Kermit) resided with Claypoole and her two daughters from a previous marriage, K.H. and E.H. During this time, Kermit engaged in conversations with the two daughters that were sexual in nature. E.H., Claypoole's older daughter, testified that Kermit would ask the girls if they wanted to have "fun" with him, while rubbing E.H.'s arm in "a sexual sense." Both K.H. and E.H. admitted they told their mother of Kermit's actions with Claypoole's reassurance that she would talk with Kermit about his behavior.

Shortly thereafter, the girls told their biological father about Kermit's advances. Based on this information and Kermit's previous conviction of two counts of criminal sexual conduct with a minor, the court granted the biological father sole custody of the girls; however, by September of 2001, they again resided with their mother and Kermit in South Carolina.

Over the next several months, Claypoole often left the girls alone with Kermit, despite her knowledge that Kermit was a registered sex offender and that a court order prohibited any contact between him and the girls. During Claypoole's absence, Kermit re-initiated conversations with E.H. and K.H. about sex. Once again, Claypoole reassured E.H. that she would talk to Kermit about his inappropriate interactions with the girls; however, E.H.'s journal entries indicate Claypoole took no action. She wrote, "Hey, last night I heard the worst thing, the sound of my little sis f[…]ing. [M]om is not afraid of [K.H.] getting knocked up. Now that is whack[1]." While E.H. did

[1] E.H.'s journal entry, which she read during her testimony, reflects her disdain over her mother's indifference towards Kermit's illicit relationship

not engage in any sexual acts with Kermit, her younger sister, K.H., admitted to having sex with Kermit, which resulted in her pregnancy.

K.H. also acknowledged that Kermit told her mother about the sexual relationship, and her mother then told K.H. to have sex with Kermit as long as it felt good. Regarding the propriety of Claypoole's forty-nine-year-old husband sleeping with her thirteen-year-old daughter, Claypoole stated she did not know why everyone made such a big deal out of them having sex because in West Virginia, where she was raised, the older men often taught young girls about sex to prepare them for their wedding nights.

After the State's presentation of evidence, Claypoole moved for a directed verdict as to the accessory before the fact charge. Claypoole renewed this motion after the close of evidence, and the court again denied this motion. The jury found Claypoole guilty of accessory before the fact to criminal sexual conduct with a minor and contributing to the delinquency of a minor. The trial court sentenced Claypoole to concurrent terms of ten years for accessory before the fact and three years for contributing to the delinquency of a minor, all terms suspended to five-years probation. This appeal follows.

LAW/ANALYSIS

On appeal, Claypoole argues the trial court erred in failing to direct a verdict for the charge of accessory before the fact as the evidence offered by the State was insufficient as a matter of law to sustain the jury's conviction. We disagree.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."

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with K.H. The court reporter, unfamiliar with the slang term "wack," misquoted E.H. The absence of "h" in "wack" differentiates it from "whack," which means "to strike with a smart or resounding blow." See MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1344 (10th ed. 1993). "Wack," as defined in the Urban Dictionary and used in this context, means "appalling." See THE URBAN DICTIONARY 331 (2005).

State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). Furthermore, a defendant is entitled to a directed verdict at the trial level when the State does not produce evidence of the offense charged; however, if the State presents *any* evidence at trial which reasonably tends to prove the defendant's guilt, the case must go to the jury. State v. Gentry, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005); State v. Ezell, 321 S.C. 421, 424, 468 S.E.2d 679, 680 (Ct. App. 1996) (emphasis added).

In deciding whether the trial court erred in failing to direct a verdict in favor of a defendant in a criminal case, the appellate court must view the testimony in the light most favorable to the State. State v. Massey, 267 S.C. 432, 442, 229 S.E.2d 332, 337 (1976). If there is any direct or substantial circumstantial evidence tending to prove the guilt of the accused, or from which guilt may be fairly and logically deduced, the case should be submitted to the jury. Sellers v. State, 362 S.C. 182, 189, 607 S.E.2d 82, 85 (2005).

Claypoole argues the State failed to establish the requisite elements of accessory before the fact to criminal sexual conduct to justify her conviction. Criminal sexual conduct with a minor in the second degree is defined as "sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." S.C. Code Ann. § 16-3-655(2) (1984) (current version at S.C. Code Ann. § 16-3-655(B) (2005)).[2] The State must prove: (1) the accused advised and agreed, urged, or in some way aided some other person to commit the offense; (2) the accused was not present when the offense was committed; and (3) some principal committed the offense. State v. Farne, 190 S.C. 75, 84, 1 S.E.2d 912, 915-16 (1939).

Neither party presented evidence that Claypoole was present when the sexual misconduct occurred. The uncontroverted testimony establishes that the principal, Kermit, committed the substantive offense of criminal sexual misconduct. Consequently, for Claypoole to be an accessory before the fact,

[2] Because Claypoole's misconduct occurred in 2001, the court cites to the 2001 version of S.C. Code Ann. §16-3-655 as amended. While the legislature has revised this section since 2001, it did not alter the substantive statutory language for criminal sexual conduct with a minor in the second degree as applied to Claypoole.

she must have advised, agreed, urged or in some way aided Kermit to commit criminal sexual misconduct against K.H.

While Claypoole admits she was negligent in "foolishly fail[ing] to pick up on her children's hints at improper conduct," she argues the State presented no evidence that she either knew about the conduct or actively aided Kermit in his actions. We find this argument to be without merit.

Our sister state of North Carolina has dealt with a similar issue in State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982). In that case, the North Carolina Supreme Court upheld the trial court's conviction of a mother for aiding and abetting an assault with a deadly weapon by another person against her child when the mother permitted another person to severely beat her son in the mother's presence. Id.

In general, North Carolina law on aiding and abetting requires a person to say or do something to demonstrate consent to a felonious purpose and to contribute to the execution of a crime.[3] Id. at 476, 293 S.E.2d at 787. The court in Walden recognized a person is under no general duty to prevent the commission of a crime solely because that person is present; however, the court also acknowledged the nature of the parent-child relationship places a legal duty upon the parent to take all reasonable steps to protect the child

[3] In distinguishing the crime of accessory before the fact from aiding and abetting, the North Carolina Supreme Court stated: "The distinction between the two . . . lies in the elements of presence or absence at the time the crime is being committed. An accessory before the fact must be absent from the scene of the offense, while an aider and abettor must be actually or constructively present at the scene." State v. Graham, 303 N.C. 521, 525, 279 S.E.2d 588, 591 (1981). Similarly, to aid and abet in South Carolina, one must "[help], assist, or facilitate the commission of [the] crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel, or incite [the] commission [of the crime]." State v. Smith, 359 S.C. 481, 491, 597 S.E.2d 888, 892 (Ct. App. 2004) (citing Black's Law Dictionary 68 (6th ed. 1990)). While the law distinguishes these two crimes based on one's presence or lack thereof, the required substantive actions are virtually the same to render one guilty as an accessory or an aider and abettor.

from harm. Id. at 472, 293 S.E.2d at 784; Id. at 475, 293 S.E.2d at 786. Thus, a parent's failure "to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed." Id. at 476, 293 S.E.2d at 787.

Like the mother in Walden, Claypoole was aware that her child was at risk of suffering injury at the hands of another, and she was in a position to prevent the offense against her child. Unlike the mother in Walden, Claypoole was not present when the substantive offenses against K.H. were committed. However, this Court finds the North Carolina Supreme Court's reasoning in Walden persuasive and instructive in deciding this matter.

The State presented sufficient evidence that Claypoole aided and encouraged Kermit in committing criminal sexual conduct against K.H. In 1999 and 2001, E.H. told her mother about Kermit's inappropriate comments and invitations to have "fun," and Claypoole promised to talk with Kermit. K.H. testified that her mother knew about Kermit's sexual innuendos as well as her sexual relationship with Kermit. When Kermit told Claypoole about the sex, and Claypoole subsequently told K.H. it was all right as long as it felt good, [4] Claypoole was no longer a passive party. Her approval, conveyed to both K.H. and Kermit, effectively aided and encouraged Kermit in his actions against K.H.

Furthermore, Claypoole allowed Kermit to reside in the same house with the girls, thus aiding him in the commission of these acts. She was fully aware a court order prohibited any contact between Kermit and the girls, but she did nothing to prevent the situation. In addition, when Claypoole learned

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[4] Claypoole argues for the first time during oral argument that the circuit court improperly considered this statement. She argues the court should not have used the state's reply testimony in considering Claypoole's directed verdict motion. We reiterate that the court, in ruling on a directed verdict motion, can consider *any evidence* presented by the State, which tends to prove a defendant's guilt. See Ezell, 321 S.C. at 424, 468 S.E.2d at 680.

Kermit was having sex with K.H., she continued to aid Kermit by her failure to stop him from having sex with K.H. E.H.'s journal entries reveal that Claypoole agreed to this conduct by ignoring E.H.'s complaints and appearing to be unconcerned with the prospect of K.H. becoming pregnant. Finally, Claypoole showed her approval and apparent lack of concern for Kermit's actions by telling her neighbor that she did not understand why everyone was so concerned with Kermit and K.H. having sex. According to the neighbor's testimony, Claypoole stated that permitting older men to have sex with young girls was a good way to teach them about sex.

Claypoole's consistent failure to prevent this misconduct or otherwise protect K.H. and her decision to live with Kermit, despite the presence of her children, constituted consent and encouragement to the commission of this crime. Given the foregoing, sufficient evidence exists to sustain Claypoole's conviction of accessory before the fact to criminal sexual conduct with a minor.

CONCLUSION

This Court is not concerned with the weight of evidence, only its existence. The State presented direct and substantial circumstantial evidence that Claypoole was an accessory before the fact to criminal sexual conduct; thus, we hold the trial court properly denied Claypoole's motion for a directed verdict.

Accordingly, the trial court's decision is

AFFIRMED.

GOOLSBY and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard Ross, Respondent,

v.

Ligand Pharmaceuticals, Inc., Appellant.

Appeal From Charleston County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 4190
Heard October 12, 2006 – Filed December 21, 2006

AFFIRMED

Joseph D. Thompson, III, Lydia B. Applegate, of Charleston, for Appellant.

Donald Higgins Howe, Robert J. Wyndham, of Charleston, for Respondents.

HEARN, C.J.: Ligand Pharmaceuticals, Inc. appeals the circuit court's order awarding wages, treble damages, and attorney's fees to Richard

Ross for Ligand's breach of an employment contract, violation of the South Carolina Payment of Wages Act, and violation of public policy. We affirm.

FACTS

In October 1998, Ligand offered Ross a position as a Senior Oncology Specialist (SOS). The offer provided a starting salary of $7,166.67 per month and participation "in the 1998 Sales Force Incentive Plan based upon achievement of pre-agreed impact goals and/or sales objectives." The offer further provided that "[a]ny additions or modifications to these terms would have to be in writing and signed by [Ross] and the Company President." Ross accepted the offer and began work with Ligand on November 3, 1998.

Initially, Ross did not participate in a sales incentive plan because Ligand did not have an approved product for distribution; instead, Ross participated in a Management by Objective Plan that presumably provided for incentives based on non-sales related criteria. Sometime in 1999, Ligand's first product was approved. Subsequently, Ross began participating in the 1999 Sales Force Incentive Compensation Plan (1999 Plan) that permitted him to earn up to thirty-five percent of his salary. The 1999 Plan based compensation on a mathematical formula applied to sales each quarter.

Throughout his employment with Ligand, Ross participated in yearly compensation plans similar to the 1999 Plan. In 2001, however, Ligand changed the plan to provide compensation based on trimester sales. In addition, Ligand altered the compensation plan to provide: "In order to be eligible for the trimester incentive compensation payout, [an employee] must be employed at the time the trimester sales incentive compensation payouts are distributed." These changes were included in the incentive plans for 2001, 2002, and 2003.

In April of 2002, Ligand promoted Ross to Regional Business Manager (RBM). The promotion allowed Ross to participate in the Oncology Regional Business Managers Plan (RBM Plan). The RBM Plan provides: "The Incentive Plan payout will be paid following the conclusion of each trimester period according to the following estimated schedule:

Trimester 1 Payout	June 30, 2003
Trimester 2 Payout	October 31, 2003
Trimester 3 Payout	February 28, 2004."

The "target dates" for the RBM Plan mirrored the scheduled payout dates for the 2001 and 2002 incentive plans.

Ross resigned from Ligand on October 15, 2003. Ross's resignation was effective forty-five days after August 31, 2003, the date the second trimester of 2003 ended. Ligand distributed the payouts for the second trimester of 2003 sometime after November 15, 2003. Ligand declined to pay Ross the incentive plan payout of $12,000 for the second trimester of 2003 because the RBM Plan required that a person must be employed by Ligand, in good standing, at the time the incentive compensation checks were distributed.

Thereafter, Ross filed an action against Ligand alleging the refusal to pay the incentive payout breached the employment agreement and violated the South Carolina Payment of Wages Act. The circuit court held the RBM Plan violated sections 41-10-30, 41-10-40, 41-10-50, and 41-10-100 of the South Carolina Code (Supp. 2005) and public policy. The court also held Ligand breached the employment agreement. The circuit court awarded Ross $36,000 as treble damages pursuant to section 41-10-80 of the South Carolina Code (Supp. 2005), attorney's fees totaling $18,000, and costs in the amount of $837.60. This appeal followed.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The trial judge's findings are equivalent to a jury's findings in a law action. Id.

LAW/ANALYSIS

I. Payment of Wages Act

Ligand argues the trial judge erred in finding Ligand violated sections 41-10-30 and 41-10-40 of the South Carolina Payment of Wages Act. We disagree.

Section 41-10-30 provides, in relevant part:

> (A) Every employer shall notify each employee in writing at the time of hiring of the normal hours and wages agreed upon, the time and place of payment, and the deductions which will be made from the wages, including payments to insurance programs. The employer has the option of giving written notification by posting the terms conspicuously at or near the place of work. Any changes in these terms must be made in writing at least seven calendar days before they become effective. This section does not apply to wage increases.

S.C. Code Ann. § 41-10-30 (Supp. 2005) (emphasis added).

At trial, Ligand argued the establishment of the "target dates" in the RBM Plan sufficiently complied with the time and place of payment requirements of section 40-10-30. The trial judge found Ligand violated section 41-10-30's requirement to provide the date and place of payment because the estimated schedule and "target dates" in the RBM Plan did not provide a time for payment as required by the Payment of Wages Act. We find sufficient evidence supports this finding. The RBM Plan provides incentive payouts will be paid according to an estimated schedule with payment on the "target date." In addition, payouts are contingent upon an employee such as Ross being "employed at the time the [payouts] are

distributed." Ligand admitted the employee must be employed on the date it ultimately issued the checks, not on the "target date." Ligand testified:

> Q: And as I understand your position, the policy of Ligand is in order to get your incentive compensation payment for a particular trimester, you had to be employed when Ligand wrote the check?
>
> A (Ligand): That is correct.
>
> Q: Which could have been on the target date, could have been later?
>
> A: That is correct.
>
> Q: It could have been whenever Ligand decided to write that check, correct?
>
> A: Correct.
>
> Q: And your position is that if you all decided not to write this check for a year and Mr. Ross was not present, then he would not be entitled to the $12,000?
>
> A: That is correct.

Ligand added the estimated payment schedule serves "no purpose, whatsoever, other than guidance to the field." Moreover, the record demonstrates Ligand frequently distributed incentive payout checks after the date listed in the estimated schedule—with four of the previous ten payments being distributed after the "target date."

We agree with the trial judge's determination that Ligand fails to satisfy the statutory requirements of section 40-10-30 because Ligand provided employees with no time certain for when payment would occur. Ligand admitted the key to receiving the earned bonus was the date it

arbitrarily selected for distribution of the checks not the "target dates" from the estimated schedule provided to Ross. Providing estimated payment dates that serve "no purpose whatsoever" and are dependent upon employees being employed at the time payouts are distributed, whenever that may be, clearly does not provide notice of "time and date of payment." Accordingly, we affirm the trial judge's finding that the RBM Plan violates section 41-10-30.

Ligand also relies on Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995), in support of its argument that the RBM Plan complied with the time and place mandates of section 40-10-30. In Rice, an employee sought payment for commissions due on advertising contracts under the Payment of Wages Act. Id. at 95, 456 S.E.2d at 381. The parties had a contract providing that sales commissions would be paid to a departing employee only for those advertisements sold by the employee and actually broadcast in the month in which the employee left the company. Id. at 96, 456 S.E.2d at 382. When the employer refused to pay certain commissions after Rice left the company, Rice sued arguing the departure policy was void as against public policy. Id. at 100, 456 S.E.2d at 384. The supreme court disagreed and found the agreement enforceable. Id. The court found the agreement was "not arbitrary nor does it violate any law," because the agreement was customary to the industry and provided a valid economic purpose—"to ensure that the salesperson gives continuing service to the client after the sale[.] Id.

We find the factual scenario in this matter distinguishable from Rice for three reasons. First, unlike the agreement in Rice which was challenged on the ground of public policy rather than because of any violation of the Payment of Wages Act, we have found Ligand's policy violated both sections 40-10-30 and 40-10-40 of the Act. Second, the RBM Plan serves no legitimate purpose, whereas the policy in Rice had a clear, legitimate economic purpose; even Ligand admitted its policy serves "no purpose whatsoever." And third, the Rice agreement was not arbitrary as it established, in clear terms, the time certain for payment of the commission. In our case, the time for payment was entirely dependant upon Ligand's arbitrary decision of when to issue the commission check to Ross, whenever that date may be, and was not based on any economic reason. In other words,

the policy in Rice merely established the manner the company would pay admittedly owed commissions, whereas Ligand, under its policy, would not even admit the commissions were due to Ross unless he was employed by Ligand when it ultimately decided to pay them. Therefore, Ligand's reliance on Rice is misplaced.

Ligand next contends the circuit court erred in finding Ligand violated section 41-10-40. We disagree.

Section 41-10-40(D) provides "[e]very employer in the State shall pay all wages due at the time and place designated as required by subsection (A) of § 41-10-30." S.C. Code Ann. § 40-10-40(D) (Supp. 2005). The trial judge held Ligand violated this section because the company failed to provide Ross with the time that wages earned and due under the RBM Plan would be paid. Evidence exists to support this finding.

Ligand admitted the commissions Ross sought were from sales made during the final trimester in which he worked for the company, and that he was in good standing with Ligand when the trimester ended and when he resigned. Additionally, at the conclusion of Ross' final trimester, there was noting more that he was required to do or participate in to determine the amount of compensation due under the RBM Plan. The sole reason Ligand failed to pay the wages earned during Ross' final trimester was that Ross was not employed when it finally issued the compensation checks, which was several weeks after its own target date had passed. Moreover, as discussed above, Ligand's policy failed to provide the time and place for payment of commissions earned under the RBM Plan; therefore, the failure to provide the time and place of payment prevented Ligand from being able to pay wages due to Ross at the time and place designated as mandated by section 40-10-40(D). Accordingly, we affirm the trial judge's finding that Ligand violated section 41-10-40.

II. Treble Damages and Attorney's Fees

Ligand also contends the trial judge erred in awarding treble damages and attorney's fees to Ross. We disagree.

When reviewing the award of treble damages, this court can take its own view of the facts. O'Neal v. Intermedical Hosp. of S.C., 355 S.C. 499, 509-10, 585 S.E.2d 526, 532 (Ct. App. 2003) (citing The Father v. South Carolina Dep't of Soc. Servs., 353 S.C. 254, 578 S.E.2d 11 (2003)). Generally, treble damages may be awarded when the withholding of wages was unreasonable and there was no good faith dispute. Id.; see also Rice v. Multimedia, Inc., 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995).

As our courts have stated: "If there is a dispute over unpaid wages the employer acts at his peril and the court in its discretion may award treble damages when the withholding was unreasonable and there was no good faith wage dispute," and that "the legislature intended to punish the employer who forces the employee to resort to the court in an unreasonable or bad faith wage dispute." Rice, 318 S.C. at 99, 456 S.E.2d at 383. Section 41-10-80 provides for the trebling of damages for violation of the Payment of Wage Act:

> In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow. Any civil action for the recovery of wages must be commenced within three years after the wages become due.

S.C. Code Ann. § 40-10-80(C) (Supp. 2005).

Ligand admitted the key to receiving the earned bonus was the date Ligand arbitrarily selected for distribution of the checks not the "target dates" from the estimated schedule provided to Ross. We agree with the trial judge that providing estimated payment dates that serve "no purpose whatsoever" and are dependent upon employees being employed at the time payouts are distributed, whenever that may be, is arbitrary and unreasonable. Ligand admitted the commissions Ross sought were from sales made during the final

trimester in which he worked for the company, and that he was in good standing with Ligand when the trimester ended and when he resigned. Additionally, at the conclusion of Ross's final trimester, there was nothing more that he was required to do or participate in to determine the amount of compensation due under the RBM Plan. The sole reason Ligand failed to pay the wages earned during Ross's final trimester was that Ross was not employed when it finally issued the compensation checks several weeks after the target date had passed. Moreover, as discussed above, Ligand's policy failed to provide the time and place for payment of commissions earned under the RBM Plan, and this failure prevented Ligand from being able to pay wages due to Ross under the Payment of Wages Act. Accordingly, we agree with the trial judge that Ligand's policy was based on its unilateral, arbitrary decision on when to issue compensation and that no good faith dispute existed. Therefore, Ross is entitled to treble damages and attorney's fees under section 41-10-80(C).

CONCLUSION

Accordingly, the circuit court's decision is hereby

AFFIRMED.[1]

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[1] In light of our disposition of this case, we need not address Appellant's remaining issues relating to (1) the circuit court's finding that the compensation plan violates public policy or (2) the breach of contract action. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (stating appellate court need not address remaining issues when resolution of prior issue is dispositive). However, one issue that warrants discussion is whether Ross consented to the terms of the agreement and is estopped from challenging the policy after his departure. The trial judge found this argument to be without merit because the agreement was void and unenforceable under the Payment of Wages Act. We agree. Section 40-10-100 provides that "no provision of this chapter may be contravened or set aside by a private agreement." Additionally, in Futch v. McAllister Towing of Georgetown, Inc., the supreme court reiterated South Carolina's policy underlying the Payment of Wages Act, stating that

STILWELL and KITTREDGE, JJ., concur.

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our courts "refuse to allow employers to ignore the statute by claiming their employees had by contract or custom waived their statutory right to prompt payment of wages." 335 S.C. 598, 605, 518 S.E.2d 591, 594 (1999). The RBM Plan sought to set aside the requirement of the Act that Employers must provide a "time and place of payment" to employees. As we have held, the arbitrary date of the issuance of the commission checks at the discretion of Ligand is insufficient to comply with the Act. Therefore, any agreement Ross may have consented to would be void under section 40-10-100, and unenforceable against him by Ligand.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services, **Respondent,**

v.

Richard Roe, Jane Doe, John Doe, and Matthew B. (DOB: 05/30/02), **Defendants,**

Of whom Jane Doe is **Appellant.**

Appeal From Oconee County
Barry W. Knobel, Family Court Judge

Opinion No. 4191
Submitted December 1, 2006 – Filed December 21, 2006

AFFIRMED

Charles R. Griffin, Jr., of Anderson, for Appellant.

Kimberly Welchel, of Walhalla, for Respondents.

Blair L. Stoudemire, of Seneca, for Guardian Ad Litem.

ANDERSON, J.: The South Carolina Department of Social Services (DSS) initiated this termination of parental rights action against Richard, Roe, John Doe, and Jane Doe. The family court terminated Jane Doe's parental rights on the grounds: (1) she has a diagnosable condition not likely to change within a reasonable time that makes her unlikely to provide minimally acceptable care for the child and (2) termination of her parental rights is in the child's best interest.[1] We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Doe gave birth to the minor child Matthew on May 30, 2002, after twenty-four (24) weeks of gestation.[2] Matthew was placed in foster care in Georgia until November of 2003, when he was returned to Doe. In April 2004, DSS took Matthew into custody as the result of allegations of neglect and violence in the family home, including the possibility of physical abuse.

Shortly after Matthew's birth, Doe was referred to psychologist Fred W. Fussell for evaluation because of hospital personnel's concern regarding her parenting ability. Background information revealed that Doe receives a

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

[2] Defendant Richard Roe, Matthew's putative father, reportedly takes no role in Matthew's life. Roe was served by publication but did not file a responsive pleading. Consequently, the family court held Roe in default and terminated Roe's parental rights based on finding clear and convincing evidence of (1) willful failure to support or make a material contribution to the minor child's care as provided in S.C. Code Ann. § 20-7-1572(4) (1976), (2) willful failure to visit the minor child within the last six months pursuant to S.C. Code Ann. § 20-7-1572(3) (1976), and (3) the termination of Roe's parental rights would be in the best interest of the minor child.

monthly Supplemental Security Income check and has never been married or employed. She graduated from a special education curriculum at Stephens County High School. Doe's parents divorced when she was nine. Since then her home has been with her mother. Her mother's boyfriend lives in the home as well.

After Matthew was removed from Doe's custody in April 2004, Doe was evaluated by psychologist David G. Cannon. Subsequently, through the Oconee Department of Disabilities and Special Needs, Doe participated in counseling and parenting classes as part of a treatment plan.

DSS instituted this action to terminate Doe's parental rights pursuant to section 20-7-766 of the South Carolina Code (Supp. 1996, amended 1997). By order dated July 2, 2005, the family court announced, inter alia, the following findings of fact:

> (9) I find that [DSS] has proven by clear and convincing evidence and unchallenged expert psychological testimony that Defendant [Jane Doe] has a diagnosable condition of Personality Disorder NOS [not otherwise specified] with Antisocial Traits, Mild Mental Retardation, and Borderline Intellectual Functioning unlikely to change within a reasonable time and the condition makes the Defendant unlikely to provide minimally acceptable care for the child pursuant to S.C. Code Ann. § 20-7-1572(6).
>
> (14) I find it to be in the best interest of the Defendant child for the parental rights of Defendant [Jane Doe] to be terminated. The minor child has excelled in his present placement pursuant to testimony provided in that he talks constantly, knows his animal sounds, loves to play outside, eats a wide variety of foods and is potty trained. The Guardian ad Litem states that termination of parental rights is in the child's best interest.

STANDARD OF REVIEW

In a termination of parental rights (TPR) action, the best interest of the child is the paramount consideration. Doe v. Baby Boy Roe, 353 S.C. 576, 579, 578 S.E.2d 733, 735 (Ct. App. 2003). Before parental rights can be forever terminated, the alleged grounds for the termination must be proven by clear and convincing evidence. Richberg v. Dawson, 278 S.C. 356, 357, 296 S.E.2d 338, 339 (1982); S.C. Dep't of Soc. Servs. v. Parker, 336 S.C. 248, 254, 519 S.E.2d 351, 354 (Ct. App. 1999). On appeal, this court may review the record and make its own determination as to whether the grounds for termination are supported by clear and convincing evidence. S.C. Dep't of Soc. Servs. v. Cummings, 345 S.C. 288, 293, 547 S.E.2d 506, 509 (Ct. App. 2001). However, in reviewing a termination of parental rights, an appellate court is not required to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. S.C. Dep't of Soc. Servs. v. Seegars, 367 S.C. 623, 629, 627 S.E.2d 718, 721 (2006); Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996). "While we have jurisdiction in such matters to find facts based on our own view of the preponderance of the evidence, where the evidence presented in the record adequately supports the findings of the trial judge, due deference should be given to his judgment based on his superior position in weighing such evidence. This is especially true in cases involving the welfare and best interests of children." Aiken County Dep't of Soc. Servs. v. Wilcox, 304 S.C. 90, 93, 403 S.E.2d 142, 144 (Ct. App. 1991) (citations omitted). Because terminating the legal relationship between natural parents and a child is one of the most difficult issues an appellate court has to decide, great caution must be exercised in reviewing termination proceedings and termination is proper only when the evidence clearly and convincingly mandates such a result. S.C. Dep't of Soc. Servs. v. Cochran, 364 S.C. 621, 626, 614 S.E.2d 642, 645 (2005).

LAW/ANALYSIS

Doe contends that, although DSS may have shown she has a diagnosable condition, the condition can be remedied. She argues the family court erred in finding clear and convincing evidence that her parental rights should be terminated, because DSS failed to prove a diagnosable condition not likely to change within a reasonable time. We disagree.

Termination of parental rights statutes must be liberally construed in order to ensure prompt judicial procedures for freeing minor children from the custody and control of their parents by terminating the parent-child relationship. Parker, 336 S.C. at 258, 519 S.E.2d at 356 (citing S.C. Code Ann. § 20-7-1578 (Supp. 1998)). The interests of the child shall prevail if the child's interest and the parental rights conflict. Id. The family court may order the termination of parental rights upon a finding that one or more of the nine statutory grounds is met and a finding that termination is in the best interest of the child. Seegars, 367 S.C. at 629, 627 S.E.2d at 721; S.C. Code Ann. § 20-7-1572 (Supp. 2005) (emphasis added). Subsection (6) provides for termination upon clear and convincing evidence that:

> [t]he parent has a diagnosable condition unlikely to change within a reasonable time including, but not limited to, alcohol or drug addiction, mental deficiency, mental illness, or extreme physical incapacity, and the condition makes the parent unlikely to provide minimally acceptable care of the child . . . .

S.C. Code Ann. § 20-7-1572(6) (Supp. 2005).

When the diagnosable condition alleged is mental deficiency, there must be clear and convincing evidence that: (1) the parent has a diagnosed mental deficiency, and (2) this deficiency makes it unlikely that the parent will be able to provide minimally acceptable care of the child. S.C. Dep't of Soc. Servs. v. Smith, 311 S.C. 426, 428, 429 S.E.2d 807, 808 (1993); Orangeburg County Dep't of Soc. Servs. v. Harley, 302 S.C. 64, 66, 393 S.E.2d 597, 598 (Ct. App. 1990). We have determined that testimony by a

clinical psychologist provided clear and convincing evidence of a diagnosable condition of mental deficiency, unlikely to change within reasonable time, and that condition made the mother unlikely to provide minimally acceptable care of her child. S.C. Dep't of Soc. Servs. v. Humphreys, 297 S.C. 118, 122, 374 S.E.2d 922, 925 (Ct. App. 1988). In Humphreys, as in the instant case, the mother was mildly mentally deficient and the psychologist opined there was little likelihood that a course in parenting skills could ever make her capable of being primary caretaker for her child. Id. Distinguishing Humphreys, in Smith, 311 S.C. at 426, 429 S.E.2d at 807, our Supreme Court reversed the family court's termination of parental rights based on section 20-7-1572(6). Both parents in Smith were mildly mentally retarded and expert psychological testimony indicated the mother's ability to function in a parental role was poor and unlikely to improve. Id. at 428, 429 S.E.2d at 808. On cross examination, however, the psychologist opined the parents could possibly benefit from a new and innovative program for the education of the mentally retarded focusing on parenting skills, family planning, and sexuality. Id. at 429, 429 S.E.2d at 809. The DSS social worker along with the administrator of the educational program agreed, and the Court reversed, remanding the case to the family court for reconsideration of termination following the parents' participation in the program.

Our precedent has traditionally distinguished between the provisions under section 20-7-1572(2) and section 20-7-1572(6) as to the remediation of conditions that lead to a TPR action. See Harley, 302 S.C. at 66, 393 S.E.2d at 598; Humphreys, 297 S.C. at 122, 374 S.E.2d at 924-25. Subsection (2) provides that parental rights may be terminated if "[t]he child has been removed from the parent pursuant to Section 20-7-610 or Section 20-7-736, has been out of the home for a period of six months following the adoption of a placement plan by court order or by agreement between the department and the parent, and the parent has not remedied the conditions which caused the removal . . . ." S.C. Code Ann. § 20-7-1572(2) (Supp. 2005) (emphasis added). On the other hand, section 20-7-1572(6) does not expressly provide an opportunity to remedy a diagnosed condition that is "unlikely to change within a reasonable time." Id., § 20-7-1572(6). However, as Smith inculcates, even though a diagnosis of mental retardation is unlikely to

change, a parent's ability to provide minimally acceptable care for the child may nevertheless improve with specialized training.

While Smith offers some support for Does' contention that the unfortunate consequences of her diagnosed condition may be remedied, the standard by which the court must evaluate her claim remains the same. The family court must find by clear and convincing evidence that Doe has a mental deficiency, unlikely to change, that makes it unlikely she can provide minimally acceptable care for Matthew and that termination of Doe's parental rights are in Matthew's best interest.

I. Diagnosable Condition

A. Expert Testimony

Dr. Fussell's assessment was based on results from the Wechsler Intelligence Adult Scale-III, the Minnesota Multiphasic Personality Inventory-2, the Rorschach Psychodiagnostic Plates, the Bender-Gestalt Visual Motor Test, the Parent-Child Relationship Inventory, Projective Drawings, Clinical Interview, and Informant Interview. Doe's cognitive test results fell within the borderline range of intellectual functioning, with a Full Scale I.Q. score of 71. On the objective personality instruments Doe's results were appreciably defensive, requiring re-administration, but ultimately remaining defensive. Dr. Fussell's diagnostic impression was Axis II: Borderline Intellectual Functioning and Personality Disorder, NOS (not otherwise specified) (Cluster A Traits), Axis IV: Problems with Primary Support Group, Custody Issues, and Axis V: GAF = 35 (Current).

At the termination hearing Dr. Fussell addressed Doe's parenting ability in light of his findings. Questioned by DSS's attorney about the meaning of "personality disorder not otherwise specified," Dr. Fussell explicated:

> A. Well, the personality disorders are—there's nine of them, and they're grouped into three clusters. The first cluster is composed of perceptional distortions, peculiar behavior.

Cluster B, the second cluster, is composed of antisocial behaviors, borderline, behavioral aberrations, and Cluster C is dependent sorts of characteristics, and Cluster A is made up of paranoid, schizoid, and schizotypal and I'd see her [Doe] as mostly schizoid with some paranoid aspects.

Q. So, if you can describe that diagnosis of personality disorder not otherwise specified, Cluster A trait.

A. Interpersonal deficits, suspicious, untrusting, mild issues with perceptual accuracy.

Q. Okay, and you also diagnosed her as borderline intellectual functioning. Describe that.

A. Well, it's a classification below low average and above mild mental retardation. In her case she was just above the mild mental retardation. So, it's significantly below average.

Q. And on Axis V your diagnostic impression was a GAF of 35. What does that entail?

A. Someone with a GAF of 35 is going to experience significant difficulties interacting successfully with the environment, and be a number of issues present, misinterpret others, misrepresent issues.

Q. And based on your history, your interview and your testing what are your conclusions and recommendations regarding [Doe].

A. Well, at the time I performed this assessment I had considerable concern regarding her ability to care for a child, particularly one who is premature at that point, and in terms of recommendations I was not very optimistic.

Q. Okay, and what treatment or therapy would you recommend or did you recommend for [Doe]?

A. Well, at the time of assessment I did not recommend one.

Q. And is there a reason for that?

A. I didn't have much optimism it would be successful.

Q. And why did you not have much optimism that it would be successful?

A. The personality characteristics compounded by intellectual ability.

Q. And how does that work to make it to where she would not be a good . . . candidate for further counseling or treatment?

A. Well, the degree of suspiciousness she's going to have marked difficulty trusting someone enough to let them know what's happening and accept their guidance and direction, and that's further compounded by intellectual limitations as she would have difficulty understanding what's being said.

. . .

Q. And do you have an opinion as to a reasonable degree of certainty within the area of your expertise as [Doe's] ability to provide minimally acceptable care for this child at the time you saw and evaluated her?

A. I felt she did not have the ability to do that.

Q. Now, based on your observations, is it reasonably likely that this condition could be remedied in a reasonable period of time at the time you saw her?

A. No.

In June of 2004, when Matthew was again in DSS custody, psychologist David G. Cannon evaluated Doe. Dr. Cannon administered the Wechsler Adult Intelligence Scale-Revised and the Wide-Range Achievement Test-Revised, which yielded a Full Scale I.Q. score of 69, indicating Doe's intellectual functioning was in the mild range of mental retardation. At this level Dr. Cannon opined Doe should be able to master basic academic skills up to a seventh or eighth grade level. Dr. Cannon's diagnostic impressions were in accord with Dr. Fussell's. He confirmed the Axis II diagnosis of Personality Disorder NOS with Antisocial Traits. In addition, Dr. Cannon indicated an Axis I diagnosis of Neglect of Child and Rule/Out Physical Abuse of Child.

Summarizing his impressions of Doe's psychological status in his report, Dr. Cannon opined she appeared to be "heavily into denial," "manipulative and self-contradictory in her responses," and "should not be regarded as a credible respondent." Dr. Cannon cautioned, "[i]t seems unlikely that she will cooperate in any genuine manner with a rehabilitative program. She seems to possess few personal qualities at this time that would enable her to function as an effective parent." Dr. Cannon recommended Doe be required to successfully complete classes in parenting and anger management and be required to enter individual psychotherapy.

At the termination hearing Dr. Cannon testified that, in addition to his earlier assessment, he reviewed Dr. Fussell's psychological evaluation prior to the termination hearing:

Q. And were [Dr. Fussell's] diagnostic impressions on that psychological evaluation consistent with your findings two years later.

A. Yes, they were very similar.

Q. And were the treatment recommendations as indicated in your evaluation consistent with the treatment recommendations recommended at that time?

A. As I recall Dr. Fussell in his report didn't make specific recommendations. He noted as I noted in effect that the probability of change and successful intervention was very low, and his prognosis as indicated in the latter part of his report was quite poor.

Q. And after preparing your psychological evaluation and then reviewing that one, what effect did that have on your opinion regarding the chronicity of this condition and the parent's ability to provide minimally acceptable care for that child.

A. Well, unfortunately it reinforce[s] my impressions that the prognosis here is quite poor. There did not appear to be any appreciable gain or change in what was close to or going on a two-year period from the time he conducted his evaluation up to the time that I conducted mine, and that reinforced my impression that there was very little—there is very little probability of meaningful change on this lady's part.

B. Lay Testimony[3]

Kathy Baker,[4] an employee with Oconee County Department of Disabilities and Special Needs, testified she met with Doe to create a

[3] The record lists Lori Sanders, Human Service Specialist for Oconee DSS, as a witness for Respondent DSS; Lynn Baker from Disabilities and Special Needs and Doe's Mother were listed as witnesses for Appellant Doe. Testimony from these witnesses, if they in fact did testify at the termination hearing, is not included in the record on appeal.

[4] Baker, a high school graduate, did not testify as an expert witness, and the record contains no specific information on her professional qualifications.

treatment plan. Implementation of the plan began on August 13, 2004, after DSS had taken custody of Matthew. According to Baker, Doe "learned how to learn resources into the community, like libraries or paying bills and interacting with anything in the community, living skills." Baker commented that Doe "done great" in the program. She observed Doe's interactions with children and noted that Doe "would just light up" when she was around children.

Doe testified she liked working with the Disabilities and Special Needs program. When asked what they do, she responded, "[g]o to the movies, they carry me to pay bills and grocery shopping and stuff." Doe claimed she had done everything DSS asked her to do; she attended parenting classes and earned a certificate, but she could not attend anger management classes because she could not afford them. She averred she planned to continue working with Disabilities and Special Needs.

Doe maintained she visited Matthew regularly and the only visit she missed was one DSS cancelled. According to Doe, the visits were coordinated by Disabilities and Special Needs personnel, and Doe used a taxi for transportation to the visits at a cost of twenty-five dollars per trip. She explained that during her visits with Matthew she played with him, read him books, and brought him snacks. Doe professed she had hot water and a stove in her home and could cook "different things" like "spaghetti."

We agree with the family court's conclusion that clear and convincing evidence exists in the expert medical testimony to support termination of Doe's parental rights. Both psychologists confirmed Doe's diagnosed intellectual deficits and personality disorder, and both agreed the conditions were unlikely to change. In fact, no appreciable differences in Doe's condition were observed between the initial evaluation by Dr. Fussel and the assessment two years later by Dr. Cannon. In his report Dr. Fussel opined:

> [t]his assessment is indicative of a marginal individual, both intellectually and as regards to her personality organization. Such individuals are often unable to provide an adequate environment for an infant or other child. They are largely

> unaware or oblivious to the needs of others. Consequently, a significant potential for neglect exists.

Dr. Cannon subsequently explained Doe "seems totally lacking in judgment and insight" and "she did not present as a credible respondent." He noted "[i]t seems unlikely that she will cooperate in any genuine manner with a rehabilitative program. She seems to possess few personal qualities at this time that would enable her to function as an effective parent."

Dr. Fussell cautioned that, because he did not observe Doe's interaction with Matthew, his clinical impressions should be corroborated by independent observation. Accordingly, the Guardian ad Litem appointed in this case stated that termination of Doe's parental rights was in Matthew's best interest.

Finally, in contrast to the circumstances in Smith, no convincing evidence indicates the treatment available to Doe through Oconee County Disabilities and Special Needs offers the kind of specialized remediation that would enable Doe to provide minimally acceptable care for Matthew.

II. Best Interests of the Child

Doe does not challenge the family court's finding that terminating her parental rights is in the best interest of the child. We, nevertheless, review the family court's conclusion ex mero motu.

An exception to the rule that an unpreserved issue will not be considered on appeal exists where the interests of minors or incompetents are involved. State v. Passmore, 363 S.C. 568, 611 S.E.2d 273 (Ct. App. 2005). Procedural rules are subservient to the court's duty to zealously guard the rights of minors. Ex Parte Morris, 367 S.C. 56, 624 S.E.2d 649 (2006); Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000). Where the rights and best interests of a minor child are concerned, the court may appropriately raise, ex mero motu, issues not raised by the parties. Ex parte Roper, 254 S.C. 558, 176 S.E.2d 175 (1970). See also Arscott v. Bacon, 351 S.C. 44, 567 S.E.2d 898 (Ct. App. 2002) (due to role of courts in protecting minors,

the appellate court may raise ex mero motu issues not raised by the parties). The duty to protect the rights of minors and incompetents has precedence over procedural rules otherwise limiting the scope of review and matters affecting the rights of minors can be considered by this court ex mero motu. Galloway v. Galloway, 249 S.C. 157, 153 S.E.2d 326 (1967); Caughman v. Caughman, 247 S.C. 104, 146 S.E.2d 93 (1965). See also S.C. Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2001) (under South Carolina's public policy, the best interests of minor children prevail over procedural impediments to obtaining support for minor children).

Here, the family court found that Matthew has excelled in his present placement pursuant to testimony provided in that he "talks constantly, knows his animal sounds, loves to play outside, eats a wide variety of foods and is potty trained." In addition, the Guardian ad Litem advised that termination was in Matthew's best interest. The evidentiary record taken as a whole, including lay testimony, expert testimony, psychological reports, and the Guardian ad Litem's recommendation convinces us that Doe is not capable of providing the level of care Matthew needs and termination of Doe's parental rights is in his best interest.

CONCLUSION

After analyzing the facts, applicable statutory provisions, and relevant precedent with specificity, we place our imprimatur upon the ruling of the family court.

Accordingly, the family court's order is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State **Respondent,**

v.

James Pondesta White **Appellant.**

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

Opinion No. 4192
Submitted December 1, 2006 – Filed December 21, 2006

AFFIRMED

Assistant Appellate Defender, Aileen P. Clare, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Thomas E. Pope, of York, for Respondent.

ANDERSON, J.: James Pondesta White was convicted of distribution of crack cocaine and sentenced to eight years. White appeals, asserting the trial court abused its discretion by not declaring a mistrial after the jury listened to a tape of an in camera hearing that was mistakenly played in the place of trial testimony that the jury requested. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On August 14, 2003, White was involved in the sale of crack cocaine to Mike Lynn. During White's trial, the court held an in camera hearing regarding the identification of White by the State's witness, Lieutenant Jason Dalton. At the hearing, Dalton testified that on the day in question, he was inside a vacant house conducting drug surveillance with binoculars. Dalton watched a white truck drive by very slowly, turn around at the end of the street, and return. White approached the vehicle once it came to a complete stop. Dalton stated that he saw White make a motion with his hand, after which the truck drove away only to come back moments later. When called as a fact witness during trial, Dalton testified similarly.

At the trial, Lynn, the driver of the white truck, professed that when White walked up to his vehicle, he informed White he wanted to buy crack cocaine. Following White's instructions, Lynn circled the block and returned. Upon stopping, he was given crack cocaine by White's brother in exchange for twenty dollars.

In the course of its charge of the law, the court invited the jury to request any part of the trial they would like to have replayed. During deliberation, the jury asked to hear Dalton's testimony. However, the court reporter mistakenly played the testimony from the in camera hearing. In an effort to correct the error, the court inquired if White would like Dalton's trial testimony played. The court noted that if Dalton's complete trial account was replayed, the jury would ultimately hear the direct testimony two additional

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

times but the cross examination only once more. As a way to mitigate any damage possibly caused by the error, the judge suggested that only the cross-examination be heard again. White did not accept the suggestion and moved for a mistrial. The court denied this motion and issued the following curative instruction:

> Through an honest mistake what you actually heard was not the trial testimony but the testimony from a matter outside your presence, so disregard in its entirety that testimony that was just played for you, just completely disregard it, and we're going to play the correct testimony for you at this time.

Subsequently Dalton's trial testimony replayed in its entirety.

After the jury returned a guilty verdict, White moved for a mistrial and new trial on the ground that the in camera testimony had been improperly presented to the jury. The judge denied this motion.

LAW/ANALYSIS

White alleges the accidental playing of the in camera hearing violated his constitutional right to a fair trial by an impartial jury and prevented the jury from reaching its verdict only from the evidence properly presented. Specifically, White contends the tape the jury improperly heard "included factual allegations which were peripheral to the hearing's purpose but were repeated at trial as critical evidence in the overall prosecution." He avers that "[m]ost of the in camera testimony was not thoroughly cross-examined because of the hearing's limited purpose." White does not point to any specific factual allegations or testimony that required cross-examination, nor does he identify any material or substantive ways in which the in camera and trial testimony differed.

I. Mistrial

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999). Our courts favor the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851; see also State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes.").

In State v. Bilton, the South Carolina Supreme Court explained, "the proper general rule is this: 'The American cases hold generally that there must be a manifest necessity for the discharge of the jury and leave the Courts to determine in their discretion whether under all the circumstances of each case such necessity exists.' " 156 S.C. 324, 342, 153 S.E. 269, 276 (1930) (emphasis removed). Thus, a mistrial should not be ordered in every case in which incompetent evidence is improperly admitted, State v. Johnson, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999); Patterson, 337 S.C. at 227, 522 S.E.2d at 851, and our ruling must hinge on whether a "manifest necessity" for declaring a mistrial existed. See State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) ("The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment.").

The trial judge should first exhaust other methods to cure possible prejudice before aborting a trial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999); Wasson, 299 S.C. at 511, 386 S.E.2d at 256; Patterson, 337

S.C. at 227, 522 S.E.2d at 851. Our supreme court has stated, "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Kelsey, 331 S.C. 50, 70, 502 S.E.2d 63, 73 (1998).

II. Curative Instruction

"Generally, a curative instruction is deemed to have cured any alleged error." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005); see also 75B Am. Jur. 2d Trial § 1284 (1992) ("By striking the evidence and instructing the jury to ignore it, the court may often cure its error in admitting the evidence, or render such error harmless, even in criminal cases."). "A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." State v. Walker, 366 S.C. at 658, 623 S.E.2d at 130; see also Kelsey, 331 S.C. at 70, 502 S.E.2d at 73 (instruction to disregard inadmissible evidence is usually viewed as having corrected the error in its admission). "Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review." Patterson, 337 S.C. at 226, 522 S.E.2d at 850; see also State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (no issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial). If the trial judge sustains a timely objection to evidence and gives the jury a curative instruction that it be disregarded, the error is deemed to have been cured by the instruction. George, 323 S.C. at 510, 476 S.E.2d at 911-12.

State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986), addressed the issue of what constitutes a sufficient curative instruction. The supreme court reversed the trial court for its failure to give an adequate instruction after the solicitor improperly asked the psychiatrist if he was aware the defendant had refused to give a statement to the police. The judge asked the members of the jury if anyone remembered the solicitor's question. When one juror responded affirmatively, the judge simply instructed that juror to "forget it"

and not to speak with anybody else regarding the question. Id., 290 S.C. at 394, 350 S.E.2d at 924.

Reasoning that the judge's casual remark to "forget" the question did not serve as a curative instruction, the supreme court inculcated:

> Great care should be exercised in the "delicate, difficult and important matter" of instructing the jury to disregard incompetent evidence. The jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations. A mere general remark excluding the evidence does not cure the error.

Id., 290 S.C. at 395, 350 S.E.2d at 924 (internal citations omitted).

In State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999), the trial court held an in camera hearing regarding a motion to suppress an in-court identification of the defendant because of an allegedly tainted pre-trial photo lineup. Although the judge ruled that unique circumstances in the case would create an impermissible comment on the defendant's character if a particular witness were to mention when he placed the defendant's picture in the lineup, this exact information was elicited from the witness during trial. The defendant promptly objected to the improper testimony and moved for a mistrial. Finding "there [was] no manifest necessity . . . for the declaration of mistrial," the trial court denied the motion and gave a curative instruction to the jury. On appeal, this court found no error in the judge's actions, agreed that a mistrial was not required, and found "[t]he extensive curative instruction given by the trial judge cured any possible error and eliminated any conceivable prejudice." 337 S.C. at 227, 522 S.E.2d at 851.

III. Prejudice

While an instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission, a mistrial may still be required if on the facts of the particular case it is probable, notwithstanding such instruction or withdrawal, the accused was prejudiced. State v.

Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996); see also 75B Am. Jur. 2d Trial § 1284 (1992) ("Error is not always rendered harmless by instructions to the jury to disregard it or to give it only a limited effect. The test is one of prejudice.") (footnotes omitted). Analogously, even without a curative instruction, an error not shown to be prejudicial to the appellant does not constitute grounds for reversal. State v. Patterson, 367 S.C. 219, 228, 625 S.E.2d 239, 243 (Ct. App. 2006) (rehearing denied March 28, 2006); see also State v. Preslar, 364 S.C. 466, 472-73, 613 S.E.2d 381, 384 (Ct. App. 2005) ("A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant.") (citations omitted).

The South Carolina Rules of evidence provide, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of party is affected . . . ." Rule 103, SCRE. Thus, reversal on appeal is only required where a substantial right of a party has been affected. Notes to Rule 103, SCRE (citing Michael H. Graham, Handbook of Federal Evidence, § 103.1 (3rd ed. 1981)). "[E]rror which is harmless does not affect a substantial right." Id. "Error is harmless where it could not reasonably have affected the results of the trial." State v. Reeves, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990). Similarly, our appellate courts have consistently held that a trial court should only be reversed when an error is prejudicial and not harmless. See State v. Sosebee, 284 S.C. 411, 326 S.E.2d 654 (1985) (probable prejudice must be shown); Watts v. Bell Oil Co., 266 S.C. 61, 221 S.E.2d 529 (1976) (prejudice must be shown).

"Whether an offer of improper evidence requires a reversal depends upon the character and importance of the evidence offered and the good or bad faith of counsel, and each case must be judged on its own circumstances. The vital inquiry usually is whether or not the verdict was substantially influenced by the impropriety." 75A Am. Jur. 2d Trial § 502 (1991) (footnotes omitted).

"The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Douglas, 367 S.C. 498, 523, 626 S.E.2d 59, 72 (Ct. App. 2006) (citing State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005)); accord State v. Johnson, 334

S.C. 78, 91, 512 S.E.2d 795, 803 (1999) ("The prejudicial character of the error must be determined from its relationship to the entire case."). "The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence." Douglas, 367 S.C. at 520, 626 S.E.2d at 71. Insubstantial errors that do not impact the result of a case do not warrant a mistrial when guilt is conclusively proven by competent evidence. State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 889 (1971); see also State v. Gathers, 295 S.C. 476, 480, 369 S.E.2d 140, 143 (1988) (aff'd by South Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207 (1989)) (stating that in light of overwhelming evidence of the defendant's guilt, any alleged error regarding the judge's charge to the jury was harmless beyond a reasonable doubt). To warrant reversal, "the errors must adversely affect [the defendant's] right to a fair trial." Johnson, 334 S.C. at 93, 512 S.E.2d at 803.

Our supreme court has held:

> Whether the error in a given case shall be regarded as harmless on appeal may often depend on the circumstances of the particular case rather than on any definite rules of law, the materiality and prejudicial character of the alleged error being determined in its relation to the entire case. Accordingly, the appellate courts are disposed to regard as harmless intervening errors where it appears from the record that the conviction is clearly correct on the merits; where it appears on the whole case that substantial justice has been done; where the record shows that accused had a fair trial; where the record conclusively shows that the alleged error could not have resulted in prejudice; where from the whole record the guilt of accused appears to be clearly established; where no other verdict could have been returned on the evidence, and where the conviction was just and would have been reached if the errors had not been committed. So, also, where it can be said from the record that the errors complained of could not reasonably have affected the result of the trial, they may be regarded as harmless, and this particularly where proof of accused's guilt is clear.

State v. Key, 256 S.C. 90, 93-94, 180 S.E.2d 888, 889-90 (1971) (internal citations and quotations omitted).

In State v. Howard, 296 S.C. 481 374 S.E.2d 284 (1988), the prosecution impermissibly entered statements of other crimes into evidence through the testimony of a codefendant. The first time this occurred, the court properly instructed the jurors to disregard what they had heard. However, the judge gave no curative instruction when similar improper statements were given a second time. Nonetheless, on appeal the supreme court found the defendant had not been prejudiced by the error and thus a reversal was not required. Citing State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984), the court stated, "Where guilt is conclusively proven by competent evidence and no rational conclusion can be reached other than that the accused is guilty, a conviction will not be set aside because of insubstantial errors not affecting the result." Howard, 296 S.C. at 485, 374 S.E.2d at 286.

CONCLUSION

The substance of Officer Dalton's statements in front of and outside of the jury's presence were almost identical one another. A key part of Dalton's testimony, his observation of White's hand motion, was contained in both his in camera and trial testimony. Nothing material or that could have feasibly required cross-examination was said in the hearing that did not come out when Dalton took the stand. Even in the event there had been additional or differing testimony during the hearing, White has failed to show how the judge's curative instruction was insufficient to resolve the issue.

The burden is on the movant to show not only error, but resulting prejudice justifying a mistrial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Had a curative instruction not been given for the jury to have disregarded the improperly played audio tape, White would still be required to show prejudice resulted from the error. White has not demonstrated why the curative instruction was not sufficient to cure the error and how he was prejudiced by the accidental playing of Dalton's in camera hearing that was so similar to his actual trial testimony.

The judge responded with propriety and alacrity when the tape of the in camera hearing was inadvertently played for the jury. "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." State v. Mitchell, 330 S.C. 189, 119-200, 498 S.E.2d 642, 647-48 (1998) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436 (1986)). The potency of the court's curative instruction expunged and extirpated any alleged damage possibly caused by error. No prejudice was suffered. Concomitantly, White's motion for a mistrial was properly denied and his conviction is

AFFIRMED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Eddie Pauling, Appellant.

Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4193
Submitted December 1, 2006 – Filed December 21, 2006

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

John Benjamin Aplin, of Columbia, for Respondent.

STILWELL, J.: Eddie Pauling appeals the revocation of his probation. We affirm.[1]

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

FACTS

While on probation, Pauling was arrested for assault and battery with intent to kill and pointing and presenting a firearm. At the time of his probation revocation hearing, Pauling had not been tried on these charges. At the hearing, the State relied on the arrest warrants and affidavits of police officers and investigators. Relying on Crawford v. Washington, 541 U.S. 36 (2004), Pauling argued a revocation based on a mere allegation violated his right to confrontation. The trial court found the protection afforded in Crawford does not apply to probation revocation proceedings.

STANDARD OF REVIEW

The determination of whether or not to revoke probation is within the trial court's discretion. State v. Proctor, 345 S.C. 299, 301, 546 S.E.2d 673, 674 (Ct. App. 2001). "This court's authority to review such a decision is confined to correcting errors of law unless the lack of a legal or evidentiary basis indicates the circuit judge's decision was arbitrary and capricious." State v. Hamilton, 333 S.C. 642, 647, 511 S.E.2d 94, 96 (Ct. App. 1999).

LAW/ANALYSIS

Pauling argues the circuit court erred in revoking his probation in violation of his right to confront witnesses. We disagree.

"Probation is a matter of grace; revocation is the means to enforce the conditions of probation." Id. at 648, 511 S.E.2d at 97. "Thus, before revoking probation, the circuit judge must determine if there is sufficient evidence to establish that the probationer has violated his probation conditions." Id. at 648-49, 511 S.E.2d at 97. However, a probationer facing revocation is afforded only minimal due process. See State v. Hill, 368 S.C. 649, 654-60, 630 S.E.2d 274, 277-80 (2006) (providing an extensive discussion of the issue). Probation revocation is not a criminal prosecution and the defendant is not entitled to "the full panoply of rights." 23 C.J.S. Criminal Law § 1517 (2006). For instance, our supreme court recently held that the disclosure rights under Rule 5, SCRCrimP, and Brady v. Maryland, 373 U.S. 83 (1963), do not apply to probation revocation hearings. State v.

Hill, 368 S.C. 649, 654-59, 630 S.E.2d 274, 277-80 (2006). Likewise, in State v. Franks, 276 S.C. 636, 639-40, 281 S.E.2d 227, 228 (1981), the court held "the Fourth Amendment's requirement that a magistrate issue an arrest warrant does not apply to a warrant for violation of probation conditions." The court stated in Franks:

> So there is quite a difference between a criminal prosecution and a probation revocation hearing. The courts have, accordingly, recognized that the rights of an offender in a probation revocation hearing are not the same as those extended him by the United States Constitution upon the trial of the original offense.
>
> The United States Supreme Court has held a parolee is still in custody because he faces significant confinement and restraint even though he is no longer within the four walls of prison. . . .
>
> We think that while a person convicted of a crime is still restrained within the confines of his probation, he does not enjoy the same unfettered constitutional privileges available to those not so confined. It is elementary that while conviction and imprisonment do not strip the violator of his rights, those privileges are severely diminished.

Id. at 639, 281 S.E.2d at 228.

Applying similar reasoning, we find no reason to extend the right to confront witnesses to a probationer in a revocation proceeding. "The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" Crawford v. Washington, 541 U.S. 36, 42 (2004) (quoting U.S. Const. amend. VI). In State v. Williamson, this court affirmed the revocation of probation based on a criminal charge that had not resulted in a conviction. 356 S.C. 507, 509-512, 589 S.E.2d 787, 788-89 (Ct. App. 2003). The court found a sufficient evidentiary basis to support the trial

court's finding that the terms of probation were violated despite the lack of prior conviction on the criminal charge. Id. at 511-12, 589 S.E.2d at 789. The following year, the United States Supreme Court banned out-of-court testimonial statements from criminal trials unless the witness is unavailable to testify, and the defendant had a prior opportunity to cross-examine the witness. Crawford, 541 U.S. at 53.

Pauling essentially argues Williamson was overruled by Crawford. We disagree. The Seventh Circuit Court of Appeals recently addressed a similar challenge, stating:

> Crawford changed nothing with respect to revocation hearings. . . . [R]evocation hearings are not 'criminal prosecutions' for purposes of the Sixth Amendment, so the 'full panoply of rights due a defendant in such a proceeding' does not apply. This 'full panoply of rights' is precisely the list of protections found in the Sixth Amendment, which by its terms applies only to criminal prosecutions. Because revocation proceedings are not criminal prosecutions, Sixth Amendment rights are not implicated. . . . Crawford dealt with the introduction of testimonial hearsay at a criminal trial—a 'criminal prosecution[ ],' as that term is used in the Sixth Amendment. The Supreme Court did not mention revocation hearings . . . in Crawford; nothing in the case can be read to suggest that . . . revocation proceedings should now be characterized as 'criminal prosecutions' within the meaning of the Sixth Amendment.

U.S. v. Kelley, 446 F.3d 688, 691-92 (7th Cir. 2006).

We recognize that Crawford heightened the awareness of the importance of the confrontation clause in criminal proceedings. However, like the Seventh Circuit Court of Appeals, we decline to extend the Crawford analysis to probation revocation proceedings. Absent direction from our supreme court, we will not deviate from the long tradition of limiting a

defendant's rights in probation revocation proceedings, where the evidence is often limited to the testimony of a probation officer or, as is the case here, affidavits of victims or police officers. Based on the record before us, we find sufficient evidence to support the trial court's finding of Pauling's probation violations. Accordingly, the order on appeal is

AFFIRMED.

GOOLSBY and KITTREDGE, JJ., concur.