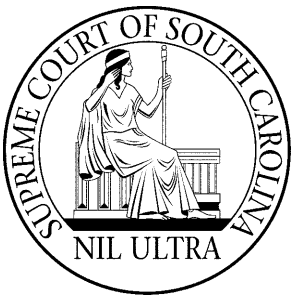

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 51
December 29, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The Linda Mc Company, Inc., Respondent,

v.

James G. Shore and Jan Shore, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lancaster County
William T. Moody, Circuit Court Judge
Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 26878
Heard February 16, 2010 – Re-filed December 29, 2010

AFFIRMED AS MODIFIED

John Martin Foster, of Rock Hill, for Petitioners.

James Ross Snell, of Lexington, for Respondent.

CHIEF JUSTICE TOAL: In this case, the Court granted James G. Shore and Jan Shore's (Petitioners) request for a writ of certiorari to review the court of appeals' decision in *Linda Mc Company, Inc. v. Shore*, 375 S.C.

432, 653 S.E.2d 279 (Ct. App. 2007) affirming the trial court's issuance of an order to execute and levy a judgment against Petitioners. Petitioners have submitted a petition for rehearing which we now deny. Also, this opinion is submitted in place of the opinion previously issued in this case.

FACTS/PROCEDURAL HISTORY

On December 8, 1994, Petitioners agreed to give The Linda Mc Company, Inc. (Respondent) a judgment by confession as settlement of litigation over unpaid sales commissions. That judgment was entered June 2, 1995,[1] and provided in pertinent part:

> 1. [Petitioners] confess judgment to [Respondent] in the amount of $110,000.00 and hereby authorize the Clerk of Court for Lancaster County, South Carolina, to enter judgment in favor of [Respondent] against [Petitioners], jointly and severally, for such amount, plus such costs and reasonable attorneys' fees incurred by [Respondent] in enforcing the unconditional guaranty, a copy of which is attached hereto as Exhibit 1 (the "Guaranty"). [Petitioners] further waive the service of any summons and complaint praying for such judgment.
>
> 2. [Petitioners] agree that [Respondent] may immediately, by affidavit through its attorneys, set forth the correct amount of this Judgment by adjusting the amount stated above for any credits previously applied by [Respondent], and that [Respondent] may apply to a court of competent jurisdiction for a judgment against [Petitioners], jointly and severally, in the amount of the total sum due and owing hereunder, plus costs and reasonable attorneys' fees incurred by [Respondent] in enforcing the Guaranty, without further notice to [Petitioners] and without further authority from [Petitioners]; provided, however, that in no event may said sum exceed $110,000.00, plus costs and reasonable attorneys' fees incurred by [Respondent] in enforcing the Guaranty. [Petitioners] authorize the entry of judgment for the amount due

[1] The judgment was subject to execution and levy until June 2, 2005.

> and owing as set out in the affidavit, which judgment will continue to bear interest at the highest legal rate permitted by law. The Judgment by Confession is not contingent upon any other considerations or proceedings and the Court is authorized to enter judgment for the amount set forth in the affidavit.

Sometime after the judgment was entered, Petitioners paid Respondent $55,000. On February 20, 2004, Respondent wrote a letter to Petitioners acknowledging an agreement to waive all post-judgment interest if Respondent received the remaining $55,000 before May 7, 2004. Petitioners paid Respondent $26,750 by check dated May 13, 2004.[2]

On July 29, 2004, Respondent filed a petition for supplemental proceedings alleging that Petitioners possessed assets subject to execution on the judgment. Petitioners issued a check to Respondent in the amount of $28,500 on August 3, 2004. On August 9, 2004, the trial court granted Respondent's petition for supplemental proceedings and referred the matter to a special referee.

On October 1, 2004, the special referee conducted a hearing to determine whether Petitioners had any assets that could satisfy the balance of the judgment. Petitioners filed a motion to dismiss under Rule 12(b)(1), SCRCP, alleging the judgment was void. Petitioners' motion was denied and the special referee concluded the judgment was valid and enforceable.

On May 24, 2005, the special referee conducted another hearing at which Petitioners argued the February 20, 2004 agreement was modified by a phone message left by Jan Shore (Jan) to Respondent's attorney such that the parties reached an accord and satisfaction. Jan testified that on May 13, 2004 she called and left a message on Respondent's attorney's answering machine

[2] The sheriff sought to execute on the judgment, but the execution was returned nulla bona. Nulla bona is "[a] form of return by a sheriff or constable upon an execution when the judgment debtor has no seizable property within the jurisdiction." *Black's Law Dictionary* 1172 (9th ed. 2009).

stating she intended to split the remainder of the balance into two payments and "that if there was any problem with that to please call me."[3] In that message she also stated she would pay the balance by the end of the next quarter, which would have been July or August. Respondent's attorney testified that he recalled receiving phone calls from Petitioners but did not know what they were about and never called them back.[4]

On June 3, 2005, the special referee issued his report to the circuit court finding Petitioners owed interest outstanding from the entry of the judgment to date, as well as costs and attorneys' fees, and there had been no accord and satisfaction. On that same day, the circuit court issued an order to execute and levy upon assets owned by Petitioners. Petitioners did not raise the matter of the judgment's expiration in the trial court.

Petitioners appealed to the court of appeals, which held: (1) the absence of an affidavit did not render the judgment void; (2) because Petitioners did not argue that S.C. Code Ann. § 15-39-30 (2005) deprived the judgment of active energy to the trial court, that issue was not preserved for appellate review; (3) there was no accord and satisfaction; and (4) because estoppel was not presented to and ruled upon by the trial court, it was not preserved for appellate review. *Linda Mc Company, Inc.*, 375 S.C. at 437-42, 653 S.E.2d at 281-84.[5] This appeal followed.

ISSUES

I. Was the entry of the judgment void because Respondent failed to follow the terms of the parties' agreement to fix the amount of the judgment?

---

[3] Under the February 20, 2004 agreement the balance was due on May 7, hence the May 13 partial payment and phone message came after the date the balance was to be paid.

[4] He testified that his secretary would check and log his messages, but often did not include the substance of the message.

[5] The court of appeals affirmed the circuit court.

II. Does section 15-39-30 deprive the judgment of active energy?

III. Was there an accord and satisfaction?

IV. Should Respondent be estopped from arguing that there was no accord agreement because it did not respond to the phone message?

V. Did the expiration of the judgment render it and any supplemental proceedings to it moot?

VI. Did the expiration of the judgment deprive the circuit court of jurisdiction to proceed with supplemental proceedings or execution?

VII. Did the court of appeals decision establish an unworkable rule of procedure?

STANDARD OF REVIEW

"The question of subject matter jurisdiction is a question of law." *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007) (citations omitted). "The issue of interpretation of a statute is a question of law for the court." *Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 438, 633 S.E.2d 143, 146 (2006) (citation omitted). An appellate court may decide questions of law with no particular deference to the trial court. *In re Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citation omitted).

LAW/ANALYSIS

I. Terms of the Parties' Agreement

Petitioners argue Respondent failed to follow the terms of the parties' agreement to fix the amount of the judgment. Thus, its entry was void and the court's actions flowing from that entry are without jurisdiction. We disagree.

S.C. Code Ann. § 15-35-360 (2005) states:

> Before a judgment by confession shall be entered a statement in writing must be made and signed by the defendant and verified by his oath to the following effect:
> (1) It must state the amount for which judgment may be entered and authorize the entry of judgment therefor;
> (2) If it be for the money due or to become due, it must state concisely the facts out of which it arose and must show that the sum confessed therefor is justly due or to become due; and
> (3) If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and must show that the sum confessed therefor does not exceed the liability.

Rule 60(b)(4), SCRCP provides the court may relieve a party or his legal representative from a final judgment, order, or proceeding if the judgment is void. "The definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996) (citations omitted).

Petitioners contend the lack of an affidavit from Respondent setting forth the exact amount due under the judgment renders the judgment void.[6] However, the language pertaining to the affidavit in the judgment is permissive and not mandatory. It states an affidavit setting forth the correct amount of the judgment "may" be submitted by Respondent. The judgment complies with the statutory requirements of section 15-35-360 because it was made in writing, signed by Petitioners, and verified by their oath. Moreover, the lack of an affidavit does not render the judgment void under Rule 60, SCRCP, because the absence of an affidavit has no bearing on the subject matter jurisdiction of the court. Hence, because the judgment satisfies

[6] Petitioners argue that the judgment required Respondent to submit an affidavit setting forth the exact amount due under the judgment.

section 15-35-360 and the submission of an affidavit was permissive and not mandatory, the court of appeals correctly held the judgment was not invalid for lack of an affidavit.

II. Section 15-39-30

Petitioners argue section 15-39-30 deprives the judgment of active energy and execution may not issue thereon because ten years have passed since the entry of the judgment. We disagree.

The court of appeals held this argument was not presented to the trial court and was therefore not preserved for appellate review. *Linda Mc Company, Inc.*, 375 S.C. at 438, 653 S.E.2d at 282. In reaching this conclusion the court of appeals found "our supreme court construes the ten-year time limit on judgments in section 15-39-30 as a statute of limitations." *Id.* at 440, 653 S.E.2d at 283. Moreover, the court of appeals noted Petitioners had the opportunity to raise the defense in a motion to amend their pleadings or a motion to alter, amend, or vacate and did not do so. *Id.* at 439, 653 S.E.2d at 282. In reaching this conclusion, the court of appeals relied on *LaRosa v. Johnston*, 328 S.C. 293, 493 S.E.2d 100 (Ct. App. 1997), in which the debtor did assert the statutory defense as it became available by way of a motion to alter. Because the issue was preserved in that case, the court of appeals reversed the court below and held the judgment expired seven days before a master's order was filed compelling payment of LaRosa's judgment. *LaRosa*, 328 S.C. at 297, 493 S.E.2d at 102. Thus, the judgment expired and could not be enforced. It is clear from the court of appeals' holding in the present case that if Petitioners had filed a motion to alter, amend, and vacate in the trial court, its decision would have favored Petitioners. While the proper interpretation of section 15-39-30 will have no impact on the present case's outcome because Petitioners lost on issue preservation grounds in the court of appeals, it will have an impact on future litigants.

Section 15-39-30 states:

> Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any

> renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions.

In *Hardee v. Lynch*, 212 S.C. 6, 46 S.E.2d 179 (1948), this Court dismissed the argument that the statutory period in which an execution may issue served as a statute of limitations, which would be considered waived unless pleaded. The Court in that case stated:

> In order for a law to be a statute of limitations, it must contain within itself a specific statement limiting the time within which an action is to be brought. . . . [The statute at issue] provides no limitation period, but completely destroys any right of action upon judgments. The logical result of the [statute] was to utterly extinguish a judgment after the expiration of ten years from the date of entry.

Hardee, 212 S.C. at 16-17, 46 S.E.2d at 183. Therefore, the court of appeals in this case committed error when it found section 15-39-30 is a statute of limitations.

However, the Court in *Hardee* also stated our state's statutes "clearly evince the legislative purpose to nullify the effective force of a judgment after ten years, unless revived, or suit thereon be brought before the expiration of the period allowed by law." *Id.* at 14, 46 S.E.2d at 182; *see also Hughes v. Slater*, 214 S.C. 305, 312, 52 S.E.2d 419, 422 (1949) (indicating filing an action preserves lien even though statutory period expires while the matter is pending). *But see Garrison v. Owens*, 258 S.C. 442, 446-47, 189 S.E.2d 31, 33 (1972) ("A judgment lien is purely statutory, its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by the statute, if such time expires before the action is tried.").[7] Hence, while section 15-39-30 is not a statute of limitations, it operates like a statute of limitations under the facts presented here. We want to stress that this is a

[7] The better and more equitable approach is that taken in *Hardee*. The *Garrison* approach produces harsh results for those seeking to enforce judgments.

narrow holding limited to facts similar to those at issue in this case. Hence, when a party has complied with the applicable statutes, as Respondent did in this case, and is merely waiting on a court's order regarding execution and levy, the ten year limitation found in section 15-39-30 is extended to when the court finally issues an order. To hold otherwise would put those trying to enforce their judgments at the mercy of the court system to conclude the matter within the ten-year period.[8]

In this case, the judgment was entered June 2, 1995 and the order was issued June 3, 2005. While the order came after the ten-year period, a petition for supplemental proceedings was filed before the ten-year period expired. Therefore, the judgment had active energy on June 3, 2005 because that order was the result of the supplemental proceedings filed during the ten-year period. This result renders the court of appeals application of issue preservation in this case moot.

In conclusion, section 15-39-30 is not a statute of limitations but it does operate similar to one under these factual circumstances. Furthermore, if a party takes action to enforce a judgment within the ten-year statutory period of active energy, the resulting order will be effective even if issued after the ten-year period has expired. Hence, regarding this issue the decision of the court of appeals should be affirmed as modified.

III. Accord and Satisfaction

Petitioner contends the court of appeals erred in affirming the special referee's decision that there was no accord and satisfaction. We disagree.

"In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997) (citation omitted). The elements of an accord and satisfaction are (1) an agreement between the parties to settle a dispute and (2) the payment of the consideration which

[8] *LaRosa* and *Garrison* are overruled to the extent they are inconsistent with this opinion.

supports the agreement. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 430, 673 S.E.2d 448, 455 (2009) (citation omitted). Like any contract, in order to constitute an accord and satisfaction, there must have been a meeting of the minds. *Id.* (citation omitted). "The debtor must intend and make unmistakably clear that the payment tendered fully satisfies the creditor's demand." *Tremont Const. Co., Inc. v. Dunlap*, 310 S.C. 180, 182, 425 S.E.2d 792, 793 (Ct. App. 1992) (citation omitted). "Without an agreement to discharge the obligation there can be no accord, and without an accord there can be no satisfaction." *Id.* (citation omitted).

Petitioners argue that due to Jan's phone messages to counsel for Respondent, Respondent was aware of Petitioners' proposal to modify the accord agreement, and by not responding, Respondent accepted that proposal allowing for the remaining payment to be late. The special referee found there was never a meeting of the minds such that an accord and satisfaction occurred. Moreover, the special referee found Petitioners did not comply with the terms of the February 20, 2004 agreement because payment of the outstanding balance came after the date called for in the agreement. The court of appeals correctly affirmed the special referee's decision because there was never a meeting of the minds regarding the alleged modification of the February 20 agreement. It was never unmistakably clear that the late payment and telephone message left to Respondent's attorney modified the agreement. Because there is evidence to support the special referee's finding, the court of appeals correctly affirmed the special referee.

IV. Estoppel

Petitioners argue Respondent should be estopped from denying a modification of the agreement took place. This issue has not been preserved for review.

Petitioners contend Respondent had a duty to respond to Jan's phone message, and by not responding they are now estopped from denying a modification of the agreement. The court of appeals found this argument was neither presented to nor addressed by the trial court and thus not preserved for appellate review. *See In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to

and ruled upon by the trial court."); *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."). The court of appeals correctly held this issue is not preserved for appellate review because it was not raised to and ruled upon below.

V. Mootness

Petitioners contend the expiration of the judgment renders it and any proceedings supplemental to it moot. We disagree.

"An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (citation omitted). "Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable." *Id.* (citation omitted). "'A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.'" *Id.* at 567-68, 549 S.E.2d at 596 (quoting *Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)).

Petitioners argue an actual controversy ceased to exist upon the expiration of the statutory period making the case moot. Even if this Court agreed with Petitioners' interpretation of section 15-39-30, there would still be a dispute regarding issue preservation. Nonetheless, there is an actual controversy between the parties and expiration of the ten-year time limit did nothing to extinguish that controversy or render this Court unable to grant effectual relief.

VI. Subject Matter Jurisdiction

Petitioners argue the expiration of the judgment deprived the circuit court of jurisdiction to proceed with either the supplemental proceedings or execution. We disagree.

"Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 472 A.2d 21, 22 (Conn. 1984)). The issue of subject matter jurisdiction may be raised at any time including when raised for the first time to an appellate court. *See Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002).

Even if this Court were to hold that the expiration of the judgment foreclosed Respondent's ability to enforce the judgment, it would not affect the subject matter jurisdiction of the circuit court to hear the dispute. The running of the ten-year period does not influence the power of the circuit court to hear disputes related to section 15-39-30.

VII. Unworkable Rule of Procedure

Petitioner argues the effect of the court of appeals decision is to establish an unworkable rule of procedure. This issue has not been preserved for review.

An argument not made to an intermediate appellate court and ruled on by that court is not preserved for review in this Court. *See City of Columbia v. Ervin*, 330 S.C. 516, 519-20, 500 S.E.2d 483, 485 (1998). Because this issue was not presented to the court of appeals, it is not preserved for our review.

CONCLUSION

For the aforementioned reasons, the decision of the court of appeals is affirmed as modified.

Acting Justices James E. Moore and John H. Waller, Jr., concur.
BEATTY, J., concurring in part, dissenting in part in a separate opinion.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE BEATTY: While I concur in parts I, III, IV, V, VI, and VII of the majority opinion, I disagree with the majority's analysis in part II dealing with the import and interpretation of section 15-39-30. The majority is correct in concluding that section 15-39-30 is not a statute of limitation. In my view, the majority is incorrect in concluding that it operates similar to one under the facts of this case.

Section 15-39-30 is not a statute of limitation, but it is clearly a statute of repose. There is a significant difference between the two. A statute of limitation is an affirmative defense that allows a party to avoid suit. A statute of limitation has no effect on the validity of the claim; it only effects the claim's enforcement. In contrast, a statute of repose is not a claim-avoidance mechanism. Instead, a statute of repose extinguishes the claim, in this case the judgment. As we have stated:

> A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time. Langley v. Pierce, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993). **A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body**. Id. at 404, 438 S.E.2d at 243.

Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (emphasis added); Harrison v. Bevilacqua, 354 S.C. 129, 138, 580 S.E.2d 109, 113-14 (2003).

This Court has repeatedly stated that a statute of repose is not tolled for any reason. Langley v. Pierce, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993); Capco, 368 S.C. at 142, 628 S.E.2d at 41. Therefore, in my view, the majority's reliance on Hardee v. Lynch, 212 S.C. 6, 46 S.E.2d 179 (1948) and Hughes v. Slater, 214 S.C. 305, 52 S.E.2d 419 (1949) is misplaced. Neither case supports extending the life of a judgment after the expiration of the statute of repose. Furthermore, the majority's reference to language in

Hardee stating that our state's statutes "clearly evince a legislative purpose to nullify the effective force of a judgment after ten years, unless revived, or suit thereon be brought" is taken out of context. Hardee, 212 S.C. at 14, 46 S.E.2d at 182. Additionally, it ignores the fact that the statutory scheme referred to in Hardee has been repealed and its obsolescence acknowledged by the Hardee court. Id. at 13, 46 S.E.2d at 182. The Hardee court was referring to the way judgments were treated prior to the change in the law. Although the judgment in Hardee was more than ten years old, the applicable law affecting the judgment allowed the judgment to be revived for another ten years if suit was brought. After the expiration of twenty years, there was a presumption of payment. This presumption of payment was effective unless the judgment creditor brought suit prior to the expiration of the twenty-year period. Id. at 12, 46 S.E.2d at 181. The law, however, subsequently changed and eliminated the possibility of suit on the judgment after twenty years. The statute that allowed for the revival of a judgment was also repealed, thus ending the active energy of a judgment after ten years. Id. at 13, 46 S.E.2d at 182.

In reaching its conclusion, the Hardee court referred to its decision in United States Rubber Company v. McManus, 211 S.C. 342, 45 S.E.2d 335 (1947), for an understanding of the effects of Act No. 516 of the Acts of the General Assembly for the year 1946, 44 Statutes at Large, 1436. Hardee, 212 S.C. at 13, 46 S.E.2d at 181. In recognizing that Act 516 radically changed the operation and effect of existing statutes governing judgments, the McManus court stated:

> Prior to the passage of the 1946 Act . . . the limitation for bringing an action on a judgment was twenty years, Section 387, subsection 1. Section 743, subsection 1, provided that judgments shall constitute a lien on the real estate of the judgment debtor for ten years from date of entry. And the procedure was set forth in subsections 2, 4, 5, 6 and 7 of Section 743 as to how judgments could be renewed or revived within the period of ten years by the service of a summons upon the judgment debtor. Section 745 permitted an action on a judgment after the lapse of twenty years from the date of its entry.

> By Act of the general assembly approved March 22, 1946, 44 Stat. at Large 1436, the legislature repealed subsection 1 of Section 387, thus taking away the right to bring an action upon a judgment within twenty years. The Act likewise repealed subsections 2, 4, 5, 6 and 7 of Section 743 of the Code, which authorized the renewal or revival of judgments within the period of ten years, and also repealed Section 745 of the Code, which permitted an action upon a judgment after a lapse of twenty years from the date of the original entry thereof.

McManus, 211 S.C. at 345-46, 45 S.E.2d at 336.

As noted by the Hardee court, "[t]he logical result of the 1946 enactment, 44 Stats. 1436, was to utterly extinguish a judgment after the expiration of ten years from the date of entry." Hardee, 212 S.C. at 17, 46 S.E.2d at 183.

The Hardee court specifically declined to address the question of what happens when a timely-filed action to enforce a judgment is not concluded prior to the expiration of the ten-year repose period as it was unnecessary to resolve the issue before it. Hardee, 212 S.C. at 13, 46 S.E.2d at 182. But, the Court in Garrison v. Owens, 258 S.C. 442, 189 S.E.2d 31 (1972), squarely confronted the question and concluded that an action to enforce the lien will not preserve it beyond the time by statute if such time expires before the action is tried. Id. at 446-47, 189 S.E.2d at 33 ("A judgment lien is purely statutory, its duration as fixed by the legislature may not be prolonged by the courts and the bringing of an action to enforce the lien will not preserve it beyond the time fixed by the statute, if such time expires before the action is tried."). I believe the Garrison court was correct and, thus, I would uphold its decision. If the law is to be changed, it must be done by the Legislature not the Court.

JUSTICE PLEICONES: I respectfully dissent, and would vacate the Court of Appeals' opinion and the circuit court's "Order to Execute and Levy" filed June 3, 2005. I concur fully in Justice Beatty's analysis of S.C. Code Ann. § 15-39-30 (2005). Moreover, any question whether a judgment can be enforced more than ten years after it was filed is answered conclusively by S.C. Code Ann. § 15-39-130 (2005). This statute provides that the sheriff's or other officer's authority to levy and execute final process ceases when the judgment's "active energy" ends "as provided by law," i.e. ten years after the original entry of judgment. In fact, an officer who fails to return the process at the first regular term of common pleas after the expiration of the judgment is subject to penalties for neglect of duty. S. C. Code Ann. § 15-39-140 (2005).

Since the judgment cannot be enforced by execution and levy after ten years, it is futile to continue court proceedings after that date. Upon the passage of ten years, the judgment is unenforceable as a matter of law, and all process related to it, whether in the courts or in the hands of the sheriff or other officer, must cease. Such a bright line rule[9] benefits debtors, creditors, and other commercial entities by allowing all interested parties to review the judgment rolls and know with certainty the date upon which a judgment will lose its efficacy.

Since the "Order to Execute and Levy" cannot be performed as the judgment upon which it is predicated has no "active energy," I would vacate both the decision of the Court of Appeals and that order itself.

I respectfully dissent.

[9] I am unclear as to what action by a debtor can extend a judgment's "active energy." Either the period is extended so "long as a party has taken steps within the ten year period to enforce the judgment" or such an extension is limited to the majority's "narrow holding" and "limited to facts similar to those at issue in this case."

The Supreme Court of South Carolina

Sandra Blanding, Petitioner,

v.

Long Beach Mortgage Company, Washington Mutual, Inc., Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust, Respondents.

ORDER

This Court issued a writ of certiorari to review the opinion of the South Carolina Court of Appeals in Blanding v. Long Beach Mortgage Co., 379 S.C. 206, 665 S.E.2d 608 (Ct. App. 2008). The parties have now advised this Court that this matter has been settled and petitioner requests that this matter be dismissed.

The request is granted and this matter is dismissed. Further, we hereby vacate the opinion of the Court of Appeals. The remittitur will be sent as provided by Rule 221, SCACR.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ Kaye G. Hearn J.

Kittredge, J., not participating.

Columbia, South Carolina
December 2, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In The Interest Of Tracy B., A Juvenile Under The Age Of Seventeen, Appellant.

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

Opinion No. 4769
Heard September 16, 2010 – Filed December 20, 2010

AFFIRMED

Chief Appellate Defender for Capital Appeals Robert M. Dudek, of Columbia, and Megan S. Ehrlich, of Charleston, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

GEATHERS, J.: Tracy B. appeals his juvenile convictions for murder, unlawful possession of a handgun, and unlawful possession of a handgun by a minor. He argues that the family court erred in (1) failing to suppress an inculpatory statement he gave to police, (2) failing to find that he acted in self-defense, and (3) denying his motion for a new trial. We affirm.

FACTS

Appellant's convictions stem from the shooting death of Larry Jenkins on August 11, 2007. At approximately 2:00 a.m. on the day of the incident, a group of young people—mostly teenagers—were sitting on the front porch of a home in North Charleston, South Carolina. The members of the group included, among others, Appellant, "Twin," Kayron, and two sisters named Ebony and Edginee.[1] Both Twin and Kayron were carrying guns. At some point during the evening, Twin handed his gun to Appellant, who was fourteen years old at the time.

A green Lincoln Town Car arrived at the house. Two of the occupants of the car got out and began speaking with Appellant and the other teenagers on the porch. The conversation was "polite." Twin gave one of the Town Car occupants a "dap," or a friendly fist bump, as he approached the porch.[2] The individuals from the car then stated that they were going to the store, and they left.

About ten to fifteen minutes later, the teenagers sitting on the front porch saw the same Town Car return, with Jenkins sitting in the back seat. As the vehicle approached, an individual sitting in the front passenger seat of the car fired three shots into the air. The group on the porch scattered, and some of the teenagers tripped over each other in their attempts to enter the

[1] Ebony and Edginee both resided at the house where these events occurred.

[2] "Dap" is defined in the Urban Dictionary as "[t]he knocking of fists together as a greeting, or form of respect." AARON PECKHAM, URBAN DICTIONARY 98 (2005).

house and avoid the gunfire. When the Town Car was approximately two houses past Ebony and Edginee's house, Appellant ran from the front porch to the front gate and fired the gun in the direction of the departing car. The single gunshot struck Jenkins in the back of his head as he sat in the back seat of the Town Car, killing him.

A few days later, while at football practice, Appellant was picked up by police and brought to the North Charleston police station for questioning. A North Charleston police detective, Greg Gomes, advised Appellant of his Miranda[3] rights and informed Appellant that witnesses had implicated him in Jenkins' death. Appellant denied being in the area when the shooting occurred. After further questioning, Appellant informed Detective Gomes that he wanted to speak to a lawyer. Detective Gomes stopped questioning Appellant at that time and left the interview room.

Detective Gomes later returned to the interview room to take Appellant, who was still wearing some of his football gear, to the restroom so that Appellant could change into more comfortable attire. Detective Gomes accompanied Appellant back to the interview room after Appellant changed his clothes. As Detective Gomes was leaving the interview room, Appellant asked him, "How serious is this?" Detective Gomes stated that it was really serious because someone had died. Appellant then asked to speak with his mother.

Shortly thereafter, Lieutenant Melvin Cumbee, who was serving as watch commander at the police station, brought Appellant's mother to the interview room where she spoke with Appellant for five to ten minutes. When Appellant's mother left the interview room, she advised Lieutenant Cumbee that "he wanted to talk to y'all." Lieutenant Cumbee entered the interview room and sat beside Appellant. He informed Appellant that his mother mentioned that Appellant wanted to talk to the police, and he asked Appellant if he still wanted to talk. Appellant stated that he did want to talk, and he asked Lieutenant Cumbee about the potential length of his jail sentence. Lieutenant Cumbee informed Appellant that he did not know how

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

long he could be incarcerated. Lieutenant Cumbee then asked Appellant what he wanted to talk about. Appellant responded by stating that he had "shot the gun at the car" and that he "just pointed the gun and shot it." Lieutenant Cumbee asked Appellant if he had been advised of his Miranda rights and Appellant said yes. Lieutenant Cumbee then asked Appellant if he wanted to tell his side of the story and Appellant stated that he did. At that point, Lieutenant Cumbee exited the interview room and asked Detective Gomes to obtain a formal statement from Appellant.

Appellant subsequently gave a statement to Detective Gomes in which he admitted that "[a]fter the car passed by me I shot at the car one time." He further stated that he did so because he "thought they were shooting at me." Appellant was arrested and subsequently charged with murder, unlawful possession of a handgun, and unlawful possession of a handgun by a minor.

During a pre-trial Jackson v. Denno[4] hearing, defense counsel moved for the suppression of Appellant's inculpatory statement to police. Defense counsel contended that Appellant's statement was not voluntarily made, and she emphasized Appellant's age, his educational level, and the fact that Appellant never signed a form waiving his rights. Defense counsel also noted that Appellant had invoked his right to counsel prior to making his statement. After hearing testimony, the family court denied Appellant's motion, finding that Appellant knowingly waived his rights and that his statement to police was voluntarily given.

The family court held Appellant's trial in December of 2007. At the conclusion of the State's case, Appellant moved for a directed verdict, contending, among other things, that the State failed to disprove that Appellant was acting in self-defense. The family court denied Appellant's motion. Appellant renewed his motion for a directed verdict at the conclusion of his case, and the family court again denied the motion.

The family court subsequently found Appellant guilty of murder, unlawful possession of a handgun, and unlawful possession of a handgun by

[4] 378 U.S. 368 (1964).

a minor. Appellant moved for a new trial based on "all previous motions and lack of evidence." After Appellant's motion for a new trial was denied, Appellant was committed to the Department of Juvenile Justice for an indeterminate period not to exceed his 21st birthday. This appeal followed.

ISSUES ON APPEAL

1. Did the family court err in failing to suppress Appellant's statement to police?

2. Did the family court err in finding Appellant guilty of murder beyond a reasonable doubt when the State failed to disprove self-defense beyond a reasonable doubt?

3. Did the family court err in denying Appellant's motion for a new trial based on lack of evidence presented at trial?

LAW/ANALYSIS

I. Appellant's Statement

Appellant argues that the family court erred by refusing to suppress his inculpatory statement to the police. Specifically, he contends that his statement should have been suppressed because the police interrogated him after he invoked his right to counsel. He also claims that his statement to police was not voluntarily made. We proceed to address each of these arguments in turn.

A. Invocation of Fifth Amendment Right to the Presence of an Attorney during Custodial Interrogation

Appellant contends his statement should have been suppressed because the police interrogated him after he invoked his right to have an attorney present. We disagree.

The Fifth Amendment's privilege against self-incrimination provides an individual who has been accused of a crime the right to consult with an attorney and to have an attorney present during custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 478-79 (1966). This privilege has been extended to the States via the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964) ("[T]he Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."). Once an accused has invoked his right to have an attorney present during custodial interrogation, he may not be subjected to further police interrogation "unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

In contrast, "[t]he Sixth Amendment right to counsel 'attaches only at or after the initiation of adversary judicial proceedings against the defendant.'"[5] State v. Stahlnecker, 386 S.C. 609, 620, 690 S.E.2d 565, 571 (2010) (quoting United States v. Gouveia, 467 U.S. 180, 187 (1984)). "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." Stahlnecker, 386 S.C. at 620, 690 S.E.2d at 571 (quoting Rothgery v. Gillespie Cnty., 554 U.S. ___, 128 S. Ct. 2578, 2592 (2008)). Here, while Detective Gomes had informed Appellant that he planned to charge him, Appellant had not been formally charged or arraigned at the time he made his statement to police. In fact, the record indicates that Appellant gave his inculpatory statement to Detective Gomes less than two hours after the initial interrogation began.

In the present case, Appellant argues that he did not reinitiate communication with police after he invoked his right to an attorney, but rather that the police reinitiated contact with him. In making this argument, Appellant cites State v. Anderson, 357 S.C. 514, 593 S.E.2d 820 (Ct. App.

[5] The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI (emphasis added).

2004). Initially, we note that the Anderson decision was based upon the Sixth Amendment right to formal representation by counsel rather than the Fifth Amendment right to consult an attorney during custodial interrogation that is at issue in the present case. Id. at 517-18, 593 S.E.2d at 822. In addition, the Anderson opinion hinges upon the bright-line rule set forth in Michigan v. Jackson that once a defendant invokes his or her Sixth Amendment right to counsel, any subsequent waiver is presumed invalid if secured pursuant to police-initiated conversation. See Anderson, 357 S.C. at 518-19, 593 S.E.2d at 822 (citing Michigan v. Jackson, 475 U.S. 625, 636 (1986)).

Jackson was recently overruled by Montejo v. Louisiana, 556 U.S. ___, 129 S. Ct. 2079, 2091 (2009). In Montejo, the Supreme Court concluded that Jackson's expansion of the Edwards rule was not warranted in light of the "marginal benefits" and "substantial costs" of that expansion.[6] Id. at 2091. The Montejo Court remanded to permit Montejo to argue whether or not he initiated the subsequent police interrogation in accordance with Edwards. Id. at 2091. Therefore, the additional protection afforded by Edwards is currently applicable in both Fifth Amendment and Sixth Amendment contexts.

Accordingly, although Anderson was a Sixth Amendment right to counsel case, we believe the facts of Anderson are relevant to the question presented here (i.e., whether police violated the Edwards rule by reinitiating contact with Appellant). Thus, a comparison of the facts of Anderson with those of the present case is warranted. Anderson was arraigned for murder

[6] Michigan v. Jackson set forth a bright-line rule that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." Jackson, 475 U.S. at 636 (emphasis added). Montejo v. Louisiana overruled Jackson, noting the marginal benefits of a bright-line policy designed to prevent coerced confessions were "dwarfed by" the substantial societal costs of hindering the conviction and punishment of those who violate the law. Montejo, 129 S. Ct. at 2089.

and completed documentation requesting the services of a public defender. Anderson, 357 S.C. at 518, 593 S.E.2d at 822. Later the same day, the defendant's aunt visited him at the police station. Id. After the visit, his aunt suggested to one of the police officers investigating the crime that he "go talk to [the defendant] again." Id. The officer went to talk to the defendant again, read him his Miranda warnings, and asked him if "anything had changed since the last time [they] talked." Id. The defendant subsequently made a self-incriminating statement. Id.

We believe the facts of Anderson are distinguishable from the present case. In Anderson, the defendant's aunt merely suggested to police that they go talk to Appellant. Id. She did not indicate to police that the defendant himself wanted to talk to them. Here, in contrast, after speaking to Appellant, Appellant's mother informed police that "he wanted to talk to y'all." Moreover, before questioning Appellant, the police confirmed that Appellant still wanted to talk to them. Therefore, while Anderson arguably did not reinitiate contact via his aunt, we believe Appellant did reinitiate contact through his mother.

Most other jurisdictions addressing the issue have held that defendants can, after invoking their Fifth Amendment right to counsel, reinitiate contact with police via a third party. See, e.g., Van Hook v. Anderson, 488 F.3d 411, 428 (6th Cir. 2007) (holding when police receive information from a third party which might evince a willingness and a desire to talk by the suspect, this is enough to justify a limited inquiry with the suspect to confirm or disaffirm that belief); Owens v. Bowersox, 290 F.3d 960, 962-64 (8th Cir. 2002) (holding that defendant initiated contact with police where defendant's mother informed police that the defendant wanted to talk to them); United States v. Michaud, 268 F.3d 728, 735-38 (9th Cir. 2001) (holding that defendant initiated communication with police where defendant's cellmate told police that defendant wanted to speak to someone "about a murder"); United States v. Gaddy, 894 F.2d 1307, 1310-11 (11th Cir. 1990) (holding that "no police-initiated interrogation occurred" where police interrogated defendant after being notified by the defendant's aunt that the defendant "wished to speak"); Ex parte Williams, 31 So. 3d 670, 683 (Ala. 2009) (holding that under Edwards an accused can initiate further interrogation

through a third party); Harvell v. State, 562 S.E.2d 180, 182 (Ga. 2002) (observing that defendant initiated further contact with police through his mother).

The facts of Harvell are substantially similar to the present case, and warrant some discussion. In Harvell, the defendant's mother informed police that the defendant wished to give them a statement. Id. at 182. A police officer thereafter asked the defendant, who had previously requested a lawyer, if he had "changed his mind." Id. The defendant stated that he had. Id. The defendant then signed a waiver form and gave an inculpatory statement. Id. The statement was admitted at trial and the defendant was convicted of various offenses. Id. On appeal, the Georgia Supreme Court held that the Edwards rule was not violated by the admission of the defendant's statement. Id. at 182-83. It explained:

> Appellant contends that, by asking whether he had changed his mind, the officer violated the mandate of Edwards. However, the obvious purpose of this limited inquiry was to determine whether the information relayed by Harvell's mother was correct. By merely confirming her report that he was willing to make a statement, the officer did not reinitiate interrogation. Under these circumstances, Harvell reinitiated the questioning—albeit through his agent, his mother.

Id. at 182 (internal citations and quotations omitted). Other jurisdictions have also held that when the police receive information from a suspect or a third party that appears to show the suspect is willing to talk to them, they may inquire into whether the suspect was reinitiating communication. See Van Hook, 488 F.3d at 428; Michaud, 268 F.3d at 735-36.

Here, as in Harvell, the record demonstrates Appellant reinitiated communication with police, and not vice-versa. After meeting with Appellant, Appellant's mother informed Lieutenant Cumbee that Appellant wanted to speak with authorities. Shortly thereafter, Lieutenant Cumbee

asked Appellant whether he still wanted to speak with police, and Appellant answered in the affirmative. In making this limited inquiry, Lieutenant Cumbee was not reinitiating communication with Appellant; he was merely confirming that the information he received from Appellant's mother was accurate. Appellant then asked Lieutenant Cumbee about the length of his potential jail sentence—further proof that Appellant did in fact want to talk to police about the investigation. Cf. Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983) (plurality opinion) (holding that the defendant evinced a desire for a generalized discussion about the investigation by asking, "Well, what is going to happen to me now?"). After informing Appellant that he did not know how long Appellant could be incarcerated, Lieutenant Cumbee asked Appellant what he wanted to talk about—a relatively innocuous question that could prompt any number of non-incriminating responses. At that point, Appellant admitted he had fired a single shot at the car. Based upon these facts, we find Appellant reinitiated communication with police.

Furthermore, we believe this conclusion comports with the purposes of the Edwards rule. The United States Supreme Court has stressed "the Edwards rule is not a constitutional mandate, but judicially prescribed prophylaxis." Maryland v. Shatzer, 559 U.S. ___, 130 S. Ct. 1213, 1220 (2010). As such, it is "justified only by reference to its prophylactic purpose." Id. (quoting Davis v. United States, 512 U.S. 452, 458 (1994)). According to the Court, the purpose behind the Edwards rule is "to prevent police from badgering a defendant into waiving his previously asserted Miranda rights." Michigan v. Harvey, 494 U.S. 344, 350 (1990). Stated differently, "[t]he rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures." Minnick v. Mississippi, 498 U.S. 146, 151 (1990).

In the present case, we do not believe the actions taken by police can fairly be characterized as "coercive." After being told by Appellant's mother that Appellant wanted to speak to police, Lieutenant Cumbee asked Appellant if he still wanted to talk and, if so, what Appellant wanted to talk about. There is no evidence that either Lieutenant Cumbee or Detective Gomes pressured Appellant into implicating himself. Detective Gomes testified that Appellant was not "threatened in any way" when he gave his formal

statement. Detective Gomes also allowed Appellant to change out of his football pants into shorts so that Appellant would be more comfortable, and gave him a protein drink when Appellant said he was hungry. Lieutenant Cumbee asked Appellant if he had been advised of his Miranda rights before any further questioning, and Appellant said yes. Lieutenant Cumbee testified that he did not make any promises to Appellant to tell the family court judge about Appellant's cooperation.

Based on the foregoing, we do not believe the police's actions in this case constituted "badgering" or "coercive pressure." Accordingly, we find the Edwards rule does not mandate the suppression of Appellant's statement to police.

B. Voluntariness of Appellant's Statement

Appellant next argues the family court erred in failing to suppress his statement to police because it was not voluntarily made. We disagree.

"A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (citing Jackson v. Denno, 378 U.S. 368, 377 (1964)). In conducting the due process analysis, "courts look to the totality of circumstances to determine whether a confession was voluntary." Withrow v. Williams, 507 U.S. 680, 693 (1993). The pertinent circumstances include "the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep." Pittman, 373 S.C. at 566, 647 S.E.2d at 164 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)). No one factor is determinative; each case requires careful scrutiny of all the surrounding circumstances. Pittman, 373 S.C. at 566, 647 S.E.2d at 164 (citing Schneckloth, 412 U.S. at 226).

A confession of a juvenile is not per se involuntary simply because it is obtained without the presence of counsel, a parent, or other interested adult.

See In re Williams, 265 S.C. 295, 300, 217 S.E.2d 719, 721-22 (1975) (declining to adopt a rule in which any inculpatory statement made by a minor in the absence of counsel, parent, or other friendly adult is per se inadmissible). But cf. Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (noting the opportunity to receive adult advice in the form of a lawyer or an adult relative or friend would afford a juvenile additional protection and put him on "a less unequal footing with his interrogators").

"Although courts have given confessions by juveniles special scrutiny, courts generally do not find a juvenile's confession involuntary where there is no evidence of extended, intimidating questioning or some other form of coercion." Pittman, 373 S.C. at 568, 647 S.E.2d at 165. When the only evidence presented is the young age of the appellant, this alone is not probative of coercion. See id. at 569, 647 S.E.2d at 166; accord Williams v. Peyton, 404 F.2d 528, 530 (4th Cir. 1968) ("Youth by itself is not a ground for holding a confession inadmissible.").

Here, upon reviewing the totality of the circumstances, we believe the family court correctly determined that Appellant's inculpatory statement was made voluntarily. First, as discussed above, the police did not act in an intimidating or coercive fashion in this case. There is no evidence that police put undue pressure on Appellant; in fact, Detective Gomes specifically testified that Appellant was not threatened in any way. Moreover, there is no evidence that Appellant was subjected to any sort of physical punishment. Rather, the record shows that the police attempted to make Appellant comfortable by allowing him to change out of his football gear and giving him a protein drink.

Second, the length of Appellant's interrogation was relatively short. Appellant was advised of his Miranda rights at 8:35 p.m. and he asked for an attorney forty minutes later at 9:15 p.m. Questioning then ceased. At approximately 10:15 p.m., Lieutenant Cumbee asked Detective Gomes to obtain a formal statement from Appellant. That task was completed at 10:20 p.m. Thus, only an hour and forty-five minutes elapsed between the time that Appellant's initial interrogation began and the time that he gave his statement

to Detective Gomes. In addition, Appellant was not subjected to interrogation by police for about an hour of that period.

Third, Detective Gomes advised Appellant of his Miranda rights before he initially began questioning Appellant, and Appellant signed a form stating that he understood those rights. Detective Gomes testified that he had no reason to believe that Appellant did not understand his rights. Although Lieutenant Cumbee did not re-Mirandize Appellant when questioning recommenced, he did ask Appellant whether he had been previously advised of his Miranda rights, and Appellant said yes. At that time, less than two hours had transpired since Appellant was initially Mirandized.

Fourth, although Appellant was only fourteen years old at the time he made the inculpatory statement, this fact alone does not make his statement inadmissible. Rather, Appellant's age is just one factor that must be considered along with other circumstances such as "his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement." Williams, 265 S.C. at 300, 217 S.E.2d at 722 (citations and quotations omitted). Here, it does not appear that Appellant suffered from low intelligence; the last grade he completed was eighth grade, which is typical for a fourteen-year-old. Appellant was apprised of his Miranda rights and was told that anything he said could be used against him in a court of law. Detective Gomes testified that Appellant did not seem to be confused or to be under the influence of any substance.

Finally, the fact that police allowed Appellant to speak to his mother provided him with additional protection and put him on a "less unequal footing" with his interrogators. See Gallegos, 370 U.S. at 54. Appellant asked if he could speak to his mother, and he was given the opportunity to do so. The police were not present while Appellant spoke to his mother, and no evidence was presented to suggest the police used Appellant's mother as an agent to obtain her son's confession. Cf. Spano v. New York, 360 U.S. 315, 322-24 (1959) (finding a defendant's confession involuntary when the police directed a childhood friend of the defendant to falsely tell the defendant that his job with the police department was in jeopardy if defendant did not confess, and the interrogation process continued for eight straight hours).

Accordingly, upon a review of the totality of the circumstances, we hold that Appellant's statement to police was made voluntarily.

II. Self-Defense

Appellant argues the family court erred in finding him guilty of murder beyond a reasonable doubt when the State allegedly failed to disprove self-defense beyond a reasonable doubt. We disagree.

A. Evidence of Murder

Murder is statutorily defined as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2003). "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). "It is the doing of a wrongful act intentionally and without just cause or excuse." Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002).

Malice can be inferred from conduct which is so reckless and wanton as to indicate a depravity of mind and general disregard for human life. State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957). In the context of murder, malice does not require ill-will toward the individual injured, but rather it signifies "a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief." Id. at 662, 99 S.E.2d at 675-76 (quoting State v. Heyward, 197 S.C. 371, 375, 15 S.E.2d 669, 671 (1941)).

The evidence presented at trial demonstrated Appellant shot a gun in the direction of an occupied vehicle, thereby killing Victim. In his statement, Appellant admitted he saw "an arm come out the passenger window of the car and start shooting." Immediately thereafter, Appellant ran towards the vehicle in the street and fired a single shot in the direction of the vehicle. We believe this was sufficient evidence of reckless conduct and wanton disregard for human life from which the family court could infer malice. Accordingly,

the family court did not err in finding the State proved Appellant guilty of murder beyond a reasonable doubt.

B. Evidence of Self-Defense

Appellant argues the State failed to disprove self-defense beyond a reasonable doubt. We disagree.

In In re Winship, 397 U.S. 358, 368 (1970), the United States Supreme Court held that juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when they are charged with a violation of a criminal law. "Current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt." State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002) (quoting State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-93 (1998)).

"To establish self-defense in South Carolina, four elements must be present." State v. Bryant, 336 S.C. 340, 344, 520 S.E.2d 319, 321 (1999). The four elements are: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger. Id. at 344-45, 520 S.E.2d at 321-22.

We believe the State presented sufficient evidence to disprove two of the four elements of self-defense beyond a reasonable doubt. We acknowledge that Appellant presented some evidence demonstrating he actually believed he was in imminent danger of serious bodily harm, and that a reasonably prudent person of ordinary firmness and courage would have entertained the same belief. Bryant, 336 S.C. at 344, 520 S.E.2d at 321. In

his statement to Detective Gomes, Appellant claimed that he shot at the car because "I thought they were shooting at me." The other teenagers sitting on the front porch that night testified they were afraid as well, and Kayron admitted that he tripped over either Ebony or Edginee in his frenzied attempt to enter their home to avoid the gunfire.

However, the State presented evidence to disprove the first element of self-defense beyond a reasonable doubt. Specifically, we do not believe Appellant was without fault in bringing on the difficulty. Bryant, 336 S.C. at 344, 520 S.E.2d at 321. The record reflects that the initial difficulty had passed by the time Appellant chose to fire the fatal shot. According to Ebony's estimate, the Town Car had passed their house and was two houses beyond when Appellant ran out to the front gate and fired his gun. Appellant admitted in his statement to Detective Gomes that he shot at the car "[a]fter the car passed by me." In addition, the State presented evidence that Appellant was in unlawful possession of a pistol on the evening in question. Although this fact alone does not automatically bar a self-defense charge, it is evidence of an unlawful activity which can preclude the assertion of self-defense. State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52-53 (2007).

Finally, the State disproved the fourth element of self-defense beyond a reasonable doubt. Appellant plainly had other means of avoiding the danger. Bryant, 336 S.C. at 345, 520 S.E.2d at 322. The other teenagers sitting on the front porch ran into the house when the first shots were fired from the Town Car. Appellant was the only teenager sitting on the front porch that evening who ran towards the departing car and fired a gun in its direction. Under these circumstances, Appellant could easily have avoided further confrontation.

Based upon the foregoing, we believe the State disproved self-defense beyond a reasonable doubt. See Burkhart, 350 S.C. at 261, 565 S.E.2d at 303. Specifically, the State presented evidence to disprove the first and fourth elements of self-defense. Bryant, 336 S.C. at 344-45, 520 S.E.2d at 321-22. The State need only disprove one of the four elements of self-defense beyond a reasonable doubt. State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010) ("Because all of the elements are required to establish

self-defense . . . [i]t is an axiomatic principle of law that [self-defense] has not been established if any one element is disproven."). Therefore, we affirm Appellant's murder conviction as the State disproved self-defense beyond a reasonable doubt.

III. New Trial

Lastly, Appellant argues the family court erred in denying his motion for a new trial based on lack of evidence presented at trial. We disagree.

"[T]he grant or refusal of a new trial is within the discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of that discretion." State v. Smith, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993). "An abuse of discretion occurs when the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." Wright v. Craft, 372 S.C. 1, 36, 640 S.E.2d 486, 505 (Ct. App. 2006); accord State v. Anderson, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009).

Here, the State presented evidence of malice for purposes of murder, and the State presented evidence that disproved self-defense beyond a reasonable doubt. Therefore, the family court did not abuse its discretion in denying Appellant's motion for a new trial based on lack of evidence presented at trial.

CONCLUSION

For all of the foregoing reasons, we affirm.

FEW, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Henry L. Pridgen, Respondent,

v.

Robert Ward, Charles Sheppard, and Karen Hair, Appellants.

Appeal From Lexington County
John M. Milling, Circuit Court Judge

Opinion No. 4770
Heard October 7, 2010 – Filed December 22, 2010

AFFIRMED

Andrew F. Lindemann and Lake Eric Summers, both of Columbia, for Appellants.

J. Lewis Cromer, of Columbia, for Respondent.

LOCKEMY, J.: Robert Ward, Charles Sheppard, and Karen Hair (the Appellants) appeal the trial court's denial of their motions for directed verdict and judgment notwithstanding the verdict with regard to Henry Pridgen's civil conspiracy claim. The Appellants argue (1) they acted at all

times within the scope of their employment, (2) Pridgen failed to present evidence of a joint assent by the Appellants to carry out a conspiratorial objective, and (3) they were entitled to immunity under the South Carolina Tort Claims Act. We affirm.

FACTS/PROCEDURAL BACKGROUND

On May 24, 2004, Pridgen was fired by the South Carolina Department of Corrections (SCDC) from his position as the Associate Warden of Operations at the Lee Correctional Institution (Lee). SCDC charged Pridgen with gross misconduct and intentional improper behavior after an internal "shakedown" investigation at Lee in January 2004. Pridgen filed this civil conspiracy action in December 2005. In his complaint, Pridgen alleged the Appellants "met, schemed, planned and conspired and put together an agenda to purposely harm [him] and cause him to be terminated."

The conflict between Pridgen and the Appellants began after a hostage situation occurred at Lee in October 2003. Ward, SCDC's Deputy Director of Operations, Sheppard, SCDC's Inspector General, and Hair, an SCDC Investigator, all responded to the hostage situation. According to Pridgen, Ward and Sheppard were dissatisfied with the performance of Laurie Bessinger, the Director of Training and Security for SCDC. Following the hostage situation, Pridgen maintains Ward told him he had problems with Bessinger and if Pridgen told anyone he would call Pridgen a liar. Pridgen also contends Lee's Warden, Calvin Anthony, told him Ward wanted Pridgen to provide false and derogatory information about Bessinger in the After Action Report he was compiling about the hostage situation. Pridgen refused to comply with Ward's request.

Hair was assigned to Lee as an Investigator in Fall 2002. Pridgen and Hair had a strained relationship, and Hair did not get along with other employees at Lee. Pridgen had several meetings with Ward and Sheppard to discuss the problems he had with Hair. Anthony also met with Ward about resolving the problems between Pridgen and Hair. According to Anthony, Ward told him it was a fight he could not win.

In January 2004, Ward authorized a shakedown inspection at Lee. Contrary to custom, Anthony and Pridgen were not given prior notice of the shakedown. During the shakedown, Ward and Hair went directly to inspect the boiler room. According to an SCDC memo prepared by Sheppard, the boiler room inspection revealed a number of unauthorized items including computers, software, cameras, bulk food items, and an electric frying utensil. The memo also stated inmates had been allowed in the boiler room unsupervised, and that inmates in the boiler room had access to the internet. In addition, the investigation revealed an inmate had, on prior occasions, been in possession of security keys.

Pridgen was suspended as a result of the discoveries made during the shakedown and transferred to the Wateree Correctional Institution. After Pridgen received notice of his suspension, investigators removed files from his office. Included in the confiscated files was a file Pridgen kept on Hair. Hair's file contained complaints Pridgen received from other employees about Hair, and the notes Pridgen took during his meetings with Sheppard and Ward. According to Pridgen, Sheppard was upset Pridgen kept a file on Hair and told Pridgen he would find a way to have him fired. Several months after his transfer to Wateree, Pridgen's employment was terminated.

During trial in April 2008, the trial court denied the Appellants' motion for a directed verdict. Following trial, the jury returned a verdict in favor of Pridgen and awarded him $372,000 in actual damages. The Appellants' post-trial motions for a judgment notwithstanding the verdict (JNOV), a new trial absolute, and a new trial nisi remittitur were all denied. This appeal followed.

STANDARD OF REVIEW

"When reviewing the denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court." Gibson v. Bank of America, N.A., 383 S.C. 399, 405, 680 S.E.2d 778, 781 (Ct. App. 2009). "The Court is required to view the evidence and inferences that reasonably can be drawn from the evidence in the light most favorable to the non-moving party." Id. "The motions should be denied when the evidence yields more than one inference or its inference is in doubt." Id. "An appellate court

will only reverse the [trial] court's ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law." Id.

LAW/ANALYSIS

I. Scope of Employment

The Appellants argue the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict because they acted at all times within the scope of their employment. We disagree.

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." McMillan v. Oconee Memorial Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006); Cricket Cove Ventures, LLC v. Gilland, Op. No. 4730 (S.C. Ct. App. Filed Aug. 25, 2010). "It is well-settled in South Carolina that the tort of civil conspiracy contains three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) causing plaintiff special damage." Cowburn v. Leventis, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005). "In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." Id.

"A civil conspiracy cannot be found to exist when the acts alleged are those of employees or directors, in their official capacity, conspiring with the corporation." McMillan, 367 S.C. at 565, 626 S.E.2d at 887. As a result, "no conspiracy can exist if the conduct challenged is a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment." Id. However, although a corporation cannot conspire with itself, "the agents of a corporation are legally capable, as individuals, of conspiracy among themselves or with third parties." Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 14, 344 S.E.2d 379, 383 (Ct. App. 1986).

While the Appellants argue Pridgen failed to present evidence they acted outside the scope of their employment, Pridgen maintains the evidence

in the record indicates the Appellants conspired against him for personal reasons that constitute intentional acts outside the scope of their employment. Pridgen alleges the Appellants lied and conspired to have his employment with SCDC terminated. Specifically, Pridgen maintains Ward desired to get rid of Bessinger and developed a personal vendetta against him when he refused to provide false information in Anthony's After Action Report. Pridgen also contends the Appellants' decision to ignore custom and not give notice of the shakedown at Lee is suggestive of personal, rather than professional, motives. The Appellants argue Pridgen failed to present any evidence they had personal, non-employment related reasons for investigating Pridgen's conduct.

"An act is within the scope of a servant's employment where [it is] reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business." Armstrong v. Food Lion, Inc., 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006). "On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment." Crittenden v. Thompson-Walker Co., Inc., 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986).

We find the evidence in the record creates more than one reasonable inference as to whether the Appellants acted outside the scope of their employment. The jury could infer from the evidence presented that the Appellants' actions were personally, not professionally, motivated, and were wholly disconnected from the business of SCDC. The jury could determine from the Appellants' deviation from custom in failing to give notice of the shakedown, Pridgen's refusal to comply with Ward's request that Pridgen provide false information about Bessinger in the After Action Report, and Pridgen's poor relationships with the Appellants and their subsequent meetings regarding Pridgen, that the Appellants had personal motives for harming Pridgen and their conduct was not necessary to accomplish the purpose of their employment. Ultimately, the jury could find the Appellants intended to harm Pridgen, and thus, their conduct served an independent purpose, wholly disconnected from the business of SCDC. Therefore, viewing the evidence in the light most favorable to Pridgen, we find the trial

court properly denied the Appellants' motions for directed verdict and judgment notwithstanding the verdict.

At the conclusion of their argument regarding scope of employment, the Appellants assert Pridgen's civil conspiracy claim fails because he was an at-will employee.[1] The Appellants rely on Angus v. Burroughs & Chapin Co., 358 S.C. 498, 596 S.E.2d 67 (Ct. App. 2004), to support their contention that the termination of an at-will employee cannot support a cause of action for civil conspiracy. In Angus, this court affirmed the trial court's dismissal of Angus' civil conspiracy claim against four members of the Horry County Council (Council). 358 S.C. at 503, 596 S.E.2d at 70. Angus, the Horry County Administrator, was terminated from her employment by the Council. Id. at 500-01, 596 S.E.2d at 69. Relying on Ross v. Life Insurance Co. of Virginia, 273 S.C. 764, 259 S.E.2d 814 (1979), the Angus court held an at-will employee could not maintain an action against a former employer for civil conspiracy that resulted in the employee's termination. 358 S.C. at 503, 596 S.E.2d at 70. This court also determined Angus' argument that she was suing them not as council members, but in their individual capacities, was unpersuasive. Id. This court noted Angus' employment agreement specified that she served "at the will" of the Council. Id. Therefore, because the council members acted within their authority when they fired Angus, they could not be sued for doing what they had the right to do. Id.

Here, Pridgen's civil conspiracy claim was not against his employer. Rather, Pridgen's claim was against the Appellants, who did not have the power to terminate his employment. Because Pridgen did not serve at the will of the Appellants, they were not immune from suit by Pridgen for civil conspiracy. Therefore, the trial court did not err in denying Appellants' motions for a directed verdict and a judgment notwithstanding the verdict.

II. Joint Assent

The Appellants argue the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict because Pridgen

[1] In its pre-trial order denying the Appellants' motion for summary judgment, the trial court determined Pridgen was not an at-will employee.

failed to present any evidence of a joint assent by the Appellants to carry out a conspiratorial objective. We disagree.

"In order to establish a conspiracy, evidence, either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." Cowburn, 366 S.C. at 49, 619 S.E.2d at 453. "Conspiracy may be inferred from the nature of the acts committed, the relationship of the parties, the interests of the alleged conspirators, and other relevant circumstances." Moore v. Weinberg, 373 S.C. 209, 228, 644 S.E.2d 740, 750 (Ct. App. 2007). "Because civil conspiracy is 'by its very nature covert and clandestine,' it is usually not provable by direct evidence." Id. (quoting Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987)).

The Appellants argue Pridgen failed to present any evidence, direct or circumstantial, by which the jury could reasonably infer a joint assent by the Appellants to have Pridgen's employment terminated. They maintain Pridgen's claims against them amount only to "mere speculation." In response, Pridgen argues the relationship of the Appellants and the nature of the acts they committed are evidence of a conspiracy. According to Pridgen, the Appellants "met to discuss [him] numerous times, and the Appellants acted together, in concert, in a course of action that was contrary to the normal policy and procedure at SCDC, but which furthered their own personal objective to harm [him]."

We find the evidence in the record creates more than one reasonable inference as to whether the Appellants engaged in a joint assent to have Pridgen's employment terminated. First, we note the record contains evidence the Appellants had motive to harm Pridgen. Pridgen testified he refused Ward's request to discredit Bessinger by including false statements about Bessinger in Anthony's After Action Report. Furthermore, Pridgen and Hair had an unfriendly relationship. According to Terry Taylor, SCDC's Assistant Division Director of Investigations and Hair's direct supervisor, Hair took her concerns about Pridgen directly to Sheppard instead of bringing them to him first. We also note that, according to Pridgen, Sheppard was

upset Pridgen kept a file on Hair and told Pridgen he would find a way to have him fired.

The jury also heard testimony regarding meetings between the Appellants. Prior to the shakedown, Ward and Sheppard met with Hair on several occasions regarding problems between Pridgen and Hair. Hair also e-mailed Sheppard in January 2004 regarding Pridgen and the conditions in the boiler room at Lee. Sheppard admitted he forwarded Hair's e-mail to Ward. Furthermore, Ward and Sheppard had a professional friendship and the two men ate lunch together several times a week.

We also note the record contained evidence that not all of the unauthorized items Ward and Hair found in the boiler room were contraband. Anthony testified the surveillance cameras located in the boiler room were approved by Ward to monitor inmate movement. Additionally, Pridgen testified Honeywell brought computers into the boiler room to maintain Lee's HVAC system. Also, in a memo posted in the boiler room, Anthony approved a request to allow inmates to work unsupervised in the boiler room. According to Pridgen, inmates had been allowed to work unsupervised in the boiler room since before he began working at Lee.

Viewing the evidence in the light most favorable to Pridgen, we find the trial court properly denied the Appellants' motions for a directed verdict and a judgment notwithstanding the verdict. The jury could infer from the nature of the acts committed by the Appellants as well as the relationships and interests of the Appellants that they conspired to have Pridgen's employment terminated. Although the evidence presented was circumstantial, there was at least some evidence to the support the trial court's denial of the Appellant's motions.

III. Tort Claims Act

The Appellants argue the trial court erred in failing to find they were entitled to immunity under the South Carolina Tort Claims Act (SCTCA) as a matter of law.[2] We disagree.

[2] S.C. Code Ann. §§ 15-78-10 to -200 (2005).

Pursuant to section 15-78-70(a) of the South Carolina Code (2005), "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b)." Section 15-78-70(b) provides:

> Nothing in the chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.

S.C. Code Ann. § 15-78-70(b) (2005). Section 15-78-30(i) defines "scope of official duty" as "(1) acting in and about the official business of a governmental entity and (2) performing official duties." S.C. Code Ann. § 15-78-30(i) (2005).

The Appellants contend Pridgen failed to introduce any evidence they acted outside the scope of their official duty. They argue Pridgen, as the Associate Warden for Operations, was the subject of a legitimate investigation with respect to the operation of the boiler room, and the discoveries made during the shakedown represented clear and actionable violations of SCDC policy. Additionally, the Appellants argue the "intent to harm" exception in section 15-78-70(b) should not apply in cases where a supervisor or co-employee takes action within his authority to investigate and discipline another employee. Pridgen argues the Appellants' actions were outside the scope of their employment and were committed with the intent to harm him. Pridgen alleges the Appellants had personal motives and conducted a biased investigation.

As discussed above, there was at least circumstantial evidence in the record to support a finding by the jury that the Appellants acted outside the scope of their employment and with the intent to harm Pridgen. The jury could infer from the relationship of the Appellants, as well as the nature of their actions, that they intended to harm Pridgen and conspired to have his employment terminated for personal reasons, wholly disconnected from the

furtherance of SCDC's business. Accordingly, the trial court did not err in determining the Appellants were not entitled to immunity under the SCTCA as a matter of law.

CONCLUSION

The trial court's denial of the Appellants' motions for directed verdict and judgment notwithstanding the verdict is

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert A. Sanderson, Appellant,

v.

Delia M. Sanderson, Respondent.

Appeal From York County
Robert E. Guess, Family Court Judge

Opinion No. 4771
Heard September 15, 2010 – Filed December 22, 2010

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Rebecca West, of Lexington, for Appellant.

James Wilson Tucker, Jr., of Rock Hill, for Respondent.

KONDUROS, J.: Robert Sanderson (Husband) appeals the family court's findings regarding Delia Sanderson's (Wife's) financial need and the imputing of income to him in the amount of $64,000. Husband also appeals

the retroactive award of alimony and child support. We affirm in part, reverse in part, and remand.

FACTS

Husband and Wife married in 1984 in Wife's native country, Honduras. The parties had three children including their oldest son, Kyle, who was nineteen at the time of trial.[1] Husband began an adulterous relationship with a paramour, and the divorce was granted on that basis. The parties separated in July 2005 and Wife filed an action for divorce seeking child support, alimony, and custody of the parties' children.[2] Although he had moved out of the marital home, Husband continued to pay for Wife's and the children's household expenses. He did so until February 2006 when his position as Corporate Director of Quality with the Cooley Group was eliminated because of corporate downsizing. Husband continued paying the household expenses until April 1, 2006, using funds from his severance package. Husband then, by agreement of the parties, began paying $75 per week in child support using his unemployment benefits. When those benefits were exhausted, Husband stopped paying child support.

When Husband's employment was terminated, he was earning a gross income of $95,000, plus additional funds for teaching as an adjunct professor at area colleges. Wife earned approximately $33,000 per year in a clerical position.

At the time of trial, Husband was unemployed and living with his paramour. Husband testified he had looked for employment but could find nothing. He indicated he had applied for positions for which he was overqualified and was rejected based on the employer's belief that he would only work temporarily in such a position until a better job became available. According to the record, Husband brought to the family court a file

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[1] Kyle turned twenty in the interim between the two hearing dates.

[2] In October 2005, Husband filed a complaint seeking to pay a reasonable amount of child support and requesting placement of the parties' children with Wife. The actions were eventually consolidated for trial.

containing copies of numerous letters he sent seeking employment.[3] Wife testified she believed Husband could find a job because he was from this country and knew how to "manipulate the system." In determining the issues of alimony and child support, the family court concluded the parties enjoyed a comfortable standard of living during the marriage, and Wife required financial assistance from Husband to meet her necessary living expenses. The family court imputed income to Husband of $64,000 per year, noting he had earned at least that much in annual salary since 1994. Using that figure, the family court awarded alimony in the amount of $650 per month, retroactive to March 1, 2006, with payment of $25 bi-monthly applying toward the arrearage. The family court ordered child support in the amount of $168 per week in accordance with the guidelines and made the award retroactive to August 1, 2006, with payment of $15 per week going toward the arrearage. This appeal followed.

STANDARD OF REVIEW

On appeal in family court matters, the appellate court's scope of review extends to the finding of facts based on its own view of the preponderance of the evidence. Thomson v. Thomson, 377 S.C. 613, 619, 661 S.E.2d 130, 133 (Ct. App. 2008). "Questions concerning alimony rest within the sound discretion of the family court judge whose conclusion will not be disturbed absent a showing of abuse of discretion." Degenhart v. Burriss, 360 S.C. 497, 500, 602 S.E.2d 96, 97 (Ct. App. 2004). Questions concerning child support are likewise ordinarily committed to the discretion of the family court, whose conclusions will not be disturbed on appeal absent an abuse of discretion. Blackwell v. Fulgum, 375 S.C. 337, 347, 652 S.E.2d 427, 432 (Ct. App. 2007).

[3] Husband did not enter the letters into evidence at trial, and they are not included in the appellate record.

LAW/ANALYSIS

I. Section 20-3-130[4] Factors

Husband maintains the family court erred in its conclusions as to several of the statutory factors to be considered in awarding alimony and child support. We will address each argument in turn.

A. Standard of Living

Husband argues the family court erred in concluding the parties enjoyed a comfortable standard of living. This issue is not preserved for our review.

Husband did not argue this point at trial, and his motion for reconsideration does not ask the family court to reconsider this finding. Husband's Rule 59(e), SCRCP, motion urges that Wife's living expenses as presented at trial were inflated. However, this point goes to the issue of Wife's financial need as opposed to the standard of living enjoyed by the parties during the marriage. A point not specifically raised to and ruled upon by the trial court will not be considered on appeal. See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (stating to be preserved for appellate review, issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity).

B. Husband's Income

Husband argues the family court abused its discretion in imputing income to him of $64,000 per year. We agree.

[4] S.C. Code Ann. § 20-3-130 (Supp. 2009).

Without question, the family court has the discretion to impute income to a party with respect to awards of alimony or child support.

> If the obligor spouse has the ability to earn more income than he is in fact earning, the court may impute income according to what he could earn by using his or her best efforts to gain employment equal to his capabilities, and an award of alimony based on such imputation may be a proper exercise of discretion even if it exhausts the obligor spouse's actual income.

Dixon v. Dixon, 334 S.C. 222, 240, 512 S.E.2d 539, 548 (Ct. App. 1999); see also Blackwell v. Fulgum, 375 S.C. 337, 347, 652 S.E.2d 427, 432 (Ct. App. 2007) (stating imputing income to a party who is voluntarily unemployed or underemployed is appropriate when determining child support obligations).

According to the South Carolina Child Support Guidelines (Guidelines), "[i]n order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earnings level of the parent based on that parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community." S.C. Code Ann. Regs. 114-4720(A)(5)(B) (Supp. 2009). A bad faith motivation is not required for a finding of voluntary underemployment. Arnal v. Arnal, 371 S.C. 10, 13, 636 S.E.2d 864, 866 (2006). "However, the motivation behind any purported reduction in income or earning capacity should be considered in determining whether a parent is voluntarily underemployed." Spreeuw v. Barker, 385 S.C. 45, 62, 682 S.E.2d 843, 851 (Ct. App. 2009). When actual income versus earning capacity is at issue, courts should closely examine a good-faith and reasonable explanation for the decreased income. Id.

In this case, Wife does not dispute Husband lost his job through no fault of his own. Furthermore, Husband paid all the household expenses from the time of separation in July 2005 until the loss of his job on February

2, 2006. Husband continued to pay the household expenses for two more months, February and March, using funds from his severance package. Husband then, by agreement of the parties, began paying $75 per week in child support using his unemployment benefits. When those benefits were exhausted, Husband stopped paying child support. The record contains little evidence Husband's failure to be employed is motivated by bad faith.[5] However, a finding of bad faith is not required to establish a party is voluntarily underemployed or unemployed. Therefore, we will continue our analysis by examining the factors listed in the Guidelines to determine if the family court abused its discretion in imputing a $64,000 annual income to Husband.

1. Recent Work History

As the family court noted, Husband earned $95,000 annually at his most recent job. He had been employed with that company for three years. In addition, Husband traditionally earned several thousand dollars a year by teaching as an adjunct professor at area colleges. According to the record, he had earned $82,000 plus teaching pay in 2004. Prior to that, Husband's annual salary is a little difficult to discern, but he appears to have earned a total income of $66,000 in 1997 and approximately $64,000 in 1994.

2. Occupational Qualifications

Husband has a master's degree in technology and an undergraduate degree in career occupations. He was employed through his enlistment in the Air Force prior to 1991. According to Husband's testimony, his skill set and education were most suited for work in the manufacturing sector.

[5] Husband earned approximately $1,800 teaching a course at DeVry Institute between the first and second dates of this hearing. He did not provide any portion of that money to Wife, testifying he used it to repair his car and pay past-due car payments and insurance.

3. Prevailing Job Opportunities

The only evidence in the record on this point is Husband's testimony that he has applied for numerous positions, including those for which he is over-qualified, and he has been unable to find a job. Husband testified he had applied for jobs at Lowe's and Home Depot but was rejected because the employer believed he would leave the position once he found a better job. Husband admitted he had not applied for work at McDonald's or other comparable establishments because he believed the cost of gas to get to work, when subtracted from his earnings, would not permit him to make his $75 per week payment.

4. Earning Levels in the Community

The record contains no evidence on this point other than Wife's assertion that because Husband knew how to "manipulate the system," he should be able to earn what he had earned at his most recent employment with the Cooley Group.

Little evidence is present of bad faith on Husband's part. While that is not determinative of the issue, it is to be considered and goes to the credibility of his testimony that he has attempted to find work and has been unable to do so. The record is bereft of any testimony establishing the job opportunities or earning levels in the community that might contradict his testimony. Husband has a good recent work history, but his qualifications, while high, are confined to a specific area.

When Husband earned $64,000 per year, it was in the field in which job opportunities have significantly decreased. That earning capacity, even though it may have been accurate a decade earlier, does not clearly translate into a job market in which similar jobs are no longer readily available. That being said, Husband is not permitted, as Wife argues, to simply do nothing because the job market has changed. Furthermore, Husband admitted he had not sought all employment as he eschewed McDonald's because of the low

wages and high price of gas for transportation. That Husband cannot find any employment is somewhat incredible. The record shows he did earn some income from teaching although it was not full-time. Based on all of the foregoing, we conclude the family court abused its discretion in imputing $64,000 annually to Husband. Accordingly, we remand this matter to the family court for it to calculate Husband's income based on the evidence in the record.

C. Wife's Financial Need

Husband also argues the family court erred in finding Wife required financial assistance in order to meet her reasonable living expenses. We disagree.

Husband contends Wife offered contradictory testimony regarding some of the expenses listed on her financial declaration. However, Husband does not dispute Wife is the custodial parent to the two minor children and the parties' son Kyle was living with Wife while he was attending college. Nor does Husband dispute the mortgage payment for the marital home was about $1,000 per month and Wife's net income was approximately $1,987 per month. Furthermore, Husband never indicated in his testimony Wife would not need assistance to meet her reasonable living expenses. He simply testified he had encouraged Wife to downgrade her lifestyle since their separation. Based on these figures and deferring to the family court's judgment as to Wife's credibility, we find the family court did not err in concluding Wife needed financial assistance from Husband to meet her reasonable living expenses. See Doe v. Roe, 386 S.C. 624, 630-31, 690 S.E.2d 573, 577 (2010) (stating the family court is in a better position "to evaluate [witness] credibility and assign comparative weight to their testimony").

II. Retroactivity

Finally, Husband contends the family court erred in making the award of child support and alimony retroactive. We disagree.

Initially, this issue is not fully preserved for our review. In his motion for reconsideration Husband states:

> Plaintiff[] request[s] that the [c]ourt reconsider its findings as to the amount of child support ordered. The amount is based upon an imputed income that Plaintiff does not receive and applies retroactive to August 2006. There was no evidence of "bad faith" on Plaintiff's part in being discharged from employment or in not being able to find employment.

While the retroactive application of the child support award is mentioned, Husband fails to mention the retroactive application of the alimony award. Therefore, any question regarding the retroactive award of alimony is not preserved. See S.C. Dep't of Transp., 372 S.C. at 301-02, 641 S.E.2d at 907 (stating to be preserved for appellate review, issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity).

With respect to the retroactive award of child support, the only argument Husband sets forth in his appellate brief is that the family court erred in creating such a substantial arrearage when he has no means to pay it. We discern no abuse of discretion in making the child support award retroactive, but we note the amount of any arrearage must be adjusted to reflect Husband's income as determined on remand. See Thornton v. Thornton, 328 S.C. 96, 115, 492 S.E.2d 86, 96 (1997) ("The decision to order retroactive support rests within the sound discretion of the family court and should not be reversed absent an abuse of discretion by the family court.").

CONCLUSION

We find the family court did not err in determining Wife requires financial assistance from Husband to meet her reasonable living expenses,

and we conclude the issue regarding the parties' standard of living during the marriage is not preserved for our consideration. We reverse and remand the issue of the amount of income to be imputed to Husband to the family court to be determined in accordance with the evidence presented at trial. We further find the family court did not abuse its discretion in making the alimony and child support awards retroactive. However, any arrearages should be calculated based on the amount of income imputed to Husband on remand.

Accordingly, the decision of the family court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WILLIAMS, J., concurs.

PIEPER, J., concurs in a separate opinion.

PIEPER, J., concurring:

I concur in the decision to remand. However, I write separately because I would clarify that the party asserting voluntary underemployment or voluntary unemployment should carry the initial burden of proof on the issue.

South Carolina has not yet addressed this issue; however, other states have found that the party asserting voluntary underemployment or voluntary unemployment shoulders the burden of proof at the time of the initial determination. See, e.g., Pisco v. Stroup, 3 A.3d 316, 320 (D.C. 2010) ("When one parent seeks to impute income to another who has involuntarily lost her job, the burden is on the party seeking the imputation to prove that the other parent was voluntarily foregoing more gainful employment by showing that more lucrative work was currently available.") (internal quotation marks and citation omitted); McCants v. McCants, 984 So. 2d 678, 681 (Fla. Dist. Ct. App. 2008) (noting the party asserting the voluntary

underemployment of his or her spouse shoulders the burden of proof); Burkley v. Burkley, 911 So. 2d 262, 269 (Fla. Dist. Ct. App. 2005) (finding when the wife offered no evidence of the husband's ability to be gainfully employed and relied solely on the fact that he had previously worked, the wife's claim of voluntary underemployment must fail because she wrongly attempted to shift the burden of proof); Staffrey v. Smith, 2010-Ohio-1296, 2010 WL 1177647 at *7 (Ohio Ct. App. Mar. 25, 2010) ("When one parent claims that the other parent is voluntarily underemployed, the parent making this claim has the initial burden of proof. . . . Once the parent making the voluntary underemployment claim has met this burden, the burden shifts to the underemployed parent to show that he or she is working at his or her potential.") (internal citations omitted); Wine v. Wine, 245 S.W.3d 389, 394 (Tenn. Ct. App. 2007) (reversing the denial of the petition to reduce child support because the trial court erroneously placed the burden on the father to prove that he was not willfully underemployed when the burden of proof was on the mother); In re B.R., No. 04-09-00362-CV, 2010 WL 2105346 at *4 (Tex. App. May 26, 2010) ("Once the obligor has offered proof of his current wages, the obligee bears the burden of demonstrating the obligor is intentionally underemployed."); In re J.G.L., 295 S.W.3d 424, 427 (Tex. App. 2009) (describing the analysis for voluntary underemployment and noting that once the obligor's wages are established, the burden shifts to the obligee to demonstrate the obligor's intent to decrease income for the purpose of reducing child support payments); Mir v. Mir, 571 S.E.2d 299, 304 (Va. Ct. App. 2002) ("The burden is on the party seeking the imputation to prove that the other parent was voluntarily foregoing more gainful employment, either by producing evidence of a higher-paying former job or by showing that more lucrative work was currently available.") (internal quotation marks and citation omitted); Blackburn v. Michael, 515 S.E.2d 780, 784 (Va. Ct. App. 1999) (holding the court may impute income to the party asserting a need for support based on a finding of voluntary underemployment, but the burden of proof is on the party seeking imputation).

Accordingly, in the best interests of the parties' children and because this burden of proof issue has not been addressed in our jurisprudence, I

would allow the record to be reopened on remand with the burden appropriately noted.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kathryn Luchok, Respondent,

v.

Rebecca Ann Vena, Appellant.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 4772
Heard September 16, 2010 – Filed December 22, 2010

REVERSED

R. Hawthorne Barrett and Shannon F. Bobertz, both of Columbia; for Appellant.

D. Michael Kelly and Brad Hewett, both of Columbia; for Respondent.

FEW, C.J.: In this automobile accident case the jury returned a verdict in an amount significantly below the damages claimed by Plaintiff. The trial judge granted Plaintiff's motion for a new trial *nisi additur*, but failed to state compelling reasons for doing so. Our court addressed this specific situation

on indistinguishable facts in Green v. Fritz, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003). As we did in Green, we reverse and reinstate the jury verdict.[1]

Kathryn Luchok sued Rebecca Vena for damages resulting from a rear-end collision. Vena admitted that her negligence caused the accident but disputed whether all of the alleged damages were recoverable. Luchok claimed over $10,000.00 in medical bills, of which $9,100.00 were bills from a chiropractor.[2] The jury returned a verdict for Luchok in the amount of $3,023.90. The order granting the motion states:

> During trial, Plaintiff presented evidence that her medical bills alone totaled $10,071.00, consisting almost entirely of chiropractic treatment. Plaintiff testified at trial that the treatment for her injuries was reasonable and necessary and that she ceased to treat once she felt that she no longer required chiropractic treatment. . . .
>
> Based on the findings of fact as set forth above, the Court concludes and orders:
>
> The charges for chiropractic treatment of Plaintiff's injuries were reasonable and necessary. Despite the Defendant's admittance of liability and medical bills of $10,071.00, the jury limited the Plaintiff's award to $3,023.90. This award represents a grossly

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

[2] In addition to the chiropractic bills, the record contained evidence of $1,512.78 in other damages. Luchok testified to $87.80 for a rental car bill, $20.00 for prescriptions, $176.00 for a cervical collar and doctor's visit with her regular physician, $413.98 of lost wages, $775.00 for physical therapy to which she was referred by her physician, and $40.00 for a high-back chair at work.

> inadequate judgment rendered by the jury as liability was uncontested and the amount awarded does not approach the amount of medical costs reasonably and necessarily incurred by the Plaintiff.

In Green, we repeated the long-standing requirement that "a judge must offer compelling reasons for invading the jury's province by granting a motion for *additur*." 356 S.C. at 570, 590 S.E.2d at 41 (citing Bailey v. Peacock, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995)).[3] The requirement is imposed to balance the wide discretion given to a trial judge in ruling on a new trial motion with the substantial deference courts must give to a jury's determination of damages. Todd, 385 S.C. at 517, 685 S.E.2d at 618; Green, 356 S.C. at 570, 590 S.E.2d at 41. We find the judge's order does not comply with the requirement.

The amount of recoverable damages was hotly contested. The only two points made by defense counsel in her opening statement were to argue that Plaintiff did not prove causation as to the chiropractic treatments and to focus the jury on the question of whether those treatments were reasonable and necessary. Plaintiff was the only witness in her case in chief. She testified she did not need an ambulance, she did not go to the emergency room, and she drove herself home after the accident. She waited until the next day to go to her family doctor. The first time Plaintiff went to the chiropractor was more than three weeks after the accident and she continued going to the chiropractor for seventeen months. On cross-examination, Plaintiff conceded that the chiropractor's bills during those seventeen months included charges for massages she received from a massage therapist who worked for the chiropractor.

We interpret the judge's order to set forth two reasons for invading the jury's province. First, the verdict did not cover all the chiropractic bills. In

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[3] See also Todd v. Joyner, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008), aff'd, 385 S.C. 421, 685 S.E.2d 595 (2009); Jones v. Ingles Supermarkets, Inc., 293 S.C. 490, 493, 361 S.E.2d 775, 777 (Ct. App. 1987), overruled on other grounds by O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

the face of the sharply conflicting evidence, this is not a compelling reason to grant the motion. See Green, 356 S.C. at 571, 590 S.E.2d at 41 ("Where, as here, the evidence of damages is disputed, the mere listing of Green's claimed damages by the trial judge in his order does not constitute compelling reasons for invading the jury's province.").[4] Second, the "charges for chiropractic treatment of Plaintiff's injuries were reasonable and necessary." The judge is not entitled to make that determination as a matter of law when the evidence is conflicting. Therefore, there is no compelling reason and the trial judge's improper invasion of the province of the jury amounts to an abuse of discretion.

Appellant also contends the order should be reversed because it improperly grants *additur* without the option of a new trial. However, because we reverse on other grounds and reinstate the jury verdict, we need not reach this issue.

REVERSED.

HUFF and GEATHERS, JJ., concur.

[4] In many respects, this appeal presents an even more compelling case for reversal than Green. In Green, the plaintiff actually went to the emergency room in an ambulance and spent the night in the hospital. 356 S.C. at 568, 590 S.E.2d at 40. The chiropractor testified at trial to a specific diagnosis of the plaintiff's injuries, and to the causal connection between the accident and the chiropractic treatment. 356 S.C. at 568-69, 590 S.E.2d at 40-41. The chiropractic treatment in Green lasted only four weeks, and cost only $1,470.00. 356 S.C. at 569, 590 S.E.2d at 40. The $1,500.00 verdict in Green exceeded the combined ambulance and hospital bills of $1,318.90. 356 S.C. at 569, 590 S.E.2d at 41.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Consignment Sales, LLC, Respondent,

v.

Tucker Oil Company, Appellant.

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 4773
Heard September 14, 2010 – Filed December 22, 2010

AFFIRMED

Wesley D. Few, of Columbia, for Appellant.

George R. McElveen, III, of Columbia, for Respondent.

LOCKEMY, J.: In this breach of contract action, Tucker Oil Company (Tucker Oil) argues the trial court erred in finding the existence and breach of a contract with Consignment Sales, LLC. Tucker Oil also maintains the trial court erred in ordering an accounting and declaring it was obligated to continue paying Consignment Sales. We affirm.

FACTS

Tucker Oil owns several convenience stores and supplies gasoline to numerous gas stations throughout South Carolina. Consignment Sales owns several gas stations and also services gasoline supply contracts. Pursuant to a gasoline supply contract, a gas station operator agrees to purchase gasoline exclusively from a supplier at an agreed upon price for a fixed period of time. These contracts are also assignable from supplier to supplier.

By contract dated June 27, 2005, Consignment Sales assigned twelve gasoline supply contracts to Tucker Oil for $20,000 and 50% of the "net profits" generated by each contract. Net profits were to be calculated pursuant to a formula set forth in an exhibit to be attached to the contract. No exhibit was ever attached.

The contract also required Consignment Sales to market Tucker Oil's products and give Tucker Oil the right of first refusal to any new gasoline supply contracts procured by Consignment Sales. The contract included a termination clause that stated:

> This agreement is terminable by either party upon 60 days written notice to the other, after which [Consignment Sales'] duty to market [Tucker Oil's] products and secure accounts for [Tucker Oil's] approval shall expire. All contracts subject to this agreement, however, shall remain subject to this agreement in spite of such termination for the life of said contracts.

In March 2006, Tucker Oil informed Consignment Sales it intended to terminate the parties' agreement because it "decided this is not the type of business that [it] want[ed] to deal with." Tucker Oil informed Consignment Sales it would continue paying on the accounts sold by Consignment Sales "based on the terms of [the] agreement." However, in July, Tucker Oil informed Consignment Sales it would stop paying on the existing supply contracts in December. Subsequently, Tucker Oil stopped payment, and

Consignment Sales initiated an action for breach of contract, accounting, and a declaratory judgment.

After a bench trial, the trial court found a valid and enforceable contract existed between the parties, and Tucker Oil breached its obligation to continue paying Consignment Sales for the life of the supply contracts. The trial court ordered an accounting because Tucker Oil was in exclusive control of the "information necessary to determine the amounts due" Consignment Sales. The trial court also declared Tucker Oil was obligated to pay Consignment Sales 50% of the net profits on the supply contracts "previously assigned or procured" by Consignment Sales for the life of the contracts. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in finding a valid and enforceable contract existed without finding an agreed upon definition of net profits?

2. Did the trial court err in finding Consignment Sales sufficiently established damages to recover for breach of contract?

3. Did the trial court err in ordering Tucker Oil to render an equitable accounting to establish Consignment Sales' damages?

4. Did the trial court err in ordering a declaratory judgment where Consignment Sales failed to establish rights that could be declared going forward?

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." Corley v. Ott, 326 S.C. 89, 92 n.1, 485 S.E.2d 97, 99 n.1 (1997).

LAW/ANALYSIS

I. Issues 1 and 2: Existence and Breach of Contract

A. Standard of Review

"An action for breach of contract is an action at law." Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). "In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law." Id. "The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Id.

B. Existence of Contract

Tucker Oil argues the trial court erred in finding a valid and enforceable contract existed between the parties because there was no agreed upon definition of net profits. We disagree.

In general, a binding contract requires a manifestation of mutual assent to its terms. Edens v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978). Terms such as price, time, and place are indispensable to a binding contract and must be set out with reasonable certainty. Id. Where a contract fails to fix a price, there must be a definite method for ascertaining it. Id. Here, the parties agreed on a price term: $20,000 and 50% of the "net profits" generated by each supply contract. Although the exhibit outlining the formula used to calculate net profits was never attached to the contract, Tucker Oil calculated net profit and paid Consignment Sales for eighteen months without objection. In fact, even in terminating the contract, Tucker Oil never expressed any difficulty in determining net profits. Tucker Oil's assertion that its contract with Consignment Sales is invalid because it lacked an agreed upon price term is inconsistent with its actions. Accordingly, we find the parties set forth the price term with reasonable certainty, and the trial court properly determined the contract was valid and enforceable.

C. Breach of Contract

Tucker Oil argues the trial court erred in finding Consignment Sales sufficiently established damages for recovery under a breach of contract claim. We disagree.

In order to recover for breach of contract, a plaintiff must allege and prove (1) the existence of a contract, (2) breach of the contract, and (3) damages caused by the breach. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). Tucker Oil misconstrues the trial court's order. The trial court never found Consignment Sales sufficiently established damages as Tucker Oil suggests. Rather, the trial court found a valid and enforceable contract existed, and Tucker Oil breached the contract by ceasing payment of 50% of the net profits from the existing supply contracts. The trial court never ruled Consignment Sales established damages. Instead, the trial court ordered an accounting because Tucker Oil was in "exclusive control of the information necessary to determine the amounts due" Consignment Sales. See Rogers v. Salisbury Brick Corp., 299 S.C. 141, 144-45, 382 S.E.2d 915, 917-18 (1989) (finding appellant was entitled to an accounting where respondent was in control of information needed to calculate just compensation under the parties' lease agreement). In fact, the trial court's order specifically retained jurisdiction to render a final judgment in accordance with the accounting. Accordingly, Tucker Oil's argument that the trial court erred in finding Consignment Sales sufficiently established damages is without merit.

II. Equitable Accounting

Tucker Oil maintains that because Consignment Sales sought a remedy for breach of contract, it was error for the trial court to order an equitable accounting. We disagree.

An action for an accounting is an action in equity. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009). Accordingly, this court "may review the record and make findings in accordance with [our] own view of the preponderance of the evidence." Id.

We find Tucker Oil's argument that Consignment Sales' "sole remedy is at law under the alleged contract" because it relied upon the existence of a binding contract is without merit. An accounting implies the defendant is responsible to the plaintiff for money or property as the result of a contract or some other fiduciary relationship. 1A C.J.S. Accounting § 6 (2010). Additionally, Tucker Oil's reliance on Charleston County Sch. Dist. v. Laidlaw Transit, Inc., is misplaced. 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001). The issue in Laidlaw was whether Laidlaw could assert equitable counterclaims for quantum meruit, contract implied in law, and promissory estoppel for additional work it performed outside the parties' contract. Id. at 424, 559 S.E.2d at 364. This court affirmed the trial court's dismissal of the equitable counterclaims, noting the parties' agreement specifically covered the expansion of work. Id. at 425, 559 S.E.2d at 364. This court concluded Laidlaw's entitlement to payment was determined by its performance under the terms of the contract and held "[b]y admitting the contract and its terms . . . the parties have defined their relationship, and their rights and obligations are governed solely by the contract terms." Id. Here, there is no conflict between the equitable remedy of an accounting and any term of the parties' agreement. Accordingly, we conclude Laidlaw is distinguishable and lends Tucker Oil no support.

Furthermore, the trial court found Tucker Oil was in exclusive control of the information needed to determine the amount Consignment Sales is owed. Tucker Oil knows which of the supply contracts procured by Consignment Sales are still in existence. Tucker Oil knows the amount of gasoline it delivered pursuant to the contracts and gross proceeds of the contracts. Consignment Sales had no access to this information except through Tucker Oil and is reliant upon Tucker Oil to make the proper calculations and render payment. An accounting may be appropriate where, as here, there is a need for discovery. Rogers, 299 S.C. at 144, 382 S.E.2d at 917 ("Equitable jurisdiction for an accounting may also be invoked . . . when there is a need for discovery."). Thus, we find the trial court did not err in ordering an accounting.

III. Declaratory Judgment

Tucker Oil argues the trial court erred in ordering a declaratory judgment because Consignment Sales failed to establish rights that could be declared going forward. Specifically, Tucker Oil maintains Consignment Sales failed to establish a positive legal duty owed by Tucker Oil because it failed to prove a method of calculating net profits. The gravamen of Tucker Oil's argument is that Consignment Sales lacks standing to maintain a declaratory judgment action. We disagree.

In order to determine the appropriate standard of review to apply in an appeal from a declaratory judgment action, this court must look to the nature of the underlying action. Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). Here, Consignment Sales sought to have its right to payment under the existing supply contracts declared pursuant to its contract with Tucker Oil; accordingly, this is an action at law. See id. (applying the action at law standard of review to declaratory judgment action involving the interpretation of a contract). Because this is an action at law tried without a jury, our "standard of review extends only to the correction of errors of law." Electro Lab, 357 S.C. at 367, 593 S.E.2d at 172. "The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Id.

To state a cause of action under South Carolina's Declaratory Judgment Act,[1] a party must demonstrate a justiciable controversy. Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." Id. Thus, "[a]ny person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30 (2005).

[1] S.C. Code Ann. § 15-53-10 to -140 (2005).

Here, Consignment Sales is an interested party under its contract with Tucker Oil, and thus, has standing to maintain a declaratory judgment action. The trial court declared Tucker Oil had an obligation to pay Consignment Sales a portion of the net profits generated by the supply contracts assigned and procured by Consignment Sales for the term of the contracts. Any uncertainty in the method of calculating net profits does not affect Tucker Oil's continuing obligation to make such payment. Accordingly, the trial court properly declared the parties' rights pursuant to their agreement.

CONCLUSION

For the foregoing reasons, we hold the trial court properly found (1) a valid and enforceable contract existed between the parties, (2) Tucker Oil breached its obligations to continue paying on the existing supply contracts pursuant to the parties' contract, (3) Consignment Sales' action for breach of contract did not preclude an equitable accounting, and (4) Consignment Sales had standing to maintain the declaratory judgment action. Accordingly, the decision of the trial court is

AFFIRMED.

SHORT and THOMAS, JJ., concur.