The Supreme Court of South Carolina

In the Matter of Michelle Garon Day, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 16, 1994, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated December 17, 2008, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Michelle Garon Day shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

January 26, 2009

The Supreme Court of South Carolina

In the Matter of Eric D. Gazin, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 18, 1997, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the South Carolina Supreme Court, dated December 31, 2008, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Eric D. Gazin shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina

January 26, 2009

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E

IN THE MATTER OF KENNETH L. EDWARDS, PETITIONER

On December 11, 2006, Petitioner was definitely suspended from the practice of law for eighteen months. In the Matter of Edwards, 371 S.C. 266, 639 S.E.2d 47 (2006). He has now filed a petition to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the Petition for Reinstatement. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received no later than March 27, 2009.

Columbia, South Carolina
January 26, 2009

The Supreme Court of South Carolina

In the Matter of John F. Hardaway, Deceased.

ORDER

Pursuant to Rule 31, RLDE, of Rule 413, SCACR, Commission Counsel seeks an order appointing an attorney to take action as appropriate to protect the interests of Mr. Hardaway and the interests of Mr. Hardaway's clients.

IT IS ORDERED that J. Steedley Bogan, Esquire, is hereby appointed to assume responsibility for Mr. Hardaway's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts Mr. Hardaway may have maintained. Mr. Bogan shall take action as required by Rule 31, RLDE, to protect the interests of Mr. Hardaway's clients and may make disbursements from Mr. Hardaway's trust, escrow, and/or operating account(s) as are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of John F.

Hardaway, Esquire, shall serve as notice to the bank or other financial institution that J. Steedley Bogan, Esquire, has been duly appointed by this Court.

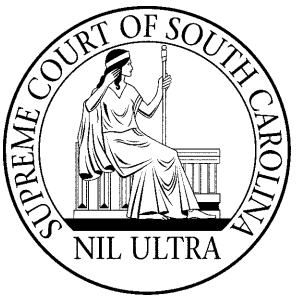
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that J. Steedley Bogan, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Hardaway's mail and the authority to direct that Mr. Hardaway's mail be delivered to Mr.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

Mr. Bogan's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

IT IS SO ORDERED.

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

Columbia, South Carolina
January 29, 2009



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 5
February 2, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Betty J. Hancock, Petitioner,

v.

Mid-South Management Co., Inc., Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Newberry County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 26587
Heard November 5, 2008 – January 26, 2009

REVERSED

Eugene C. Griffith, Jr., of Rushing & Griffith, and Samuel M. Price, Jr., both of Newberry, for Petitioner.

Elizabeth M. Dalzell and Kirby D. Shealy, III, both of Baker, Ravenel & Bender, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In *Hancock v. Mid-South Management Co., Inc.*, the court of appeals affirmed the trial court's order granting summary judgment in favor of Respondent Mid-South Management Company. 370 S.C. 131, 634 S.E.2d 12 (Ct. App. 2006). We granted a writ of certiorari to review that decision and now reverse.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner Betty J. Hancock filed a negligence action against Respondent after she tripped and fell in the parking lot of the office of *The Newberry Observer*, which is owned by Respondent. Petitioner alleged Respondent was negligent in failing to maintain a safe premises. Respondent moved for summary judgment, and at the hearing, the parties submitted deposition testimony from Petitioner and Petitioner's daughter-in-law (Daughter) and photographs of the parking lot. Although Petitioner could not identify the exact cause of her fall, she testified that she tripped on "a rock or something to that effect," "something raised up," and "broken asphalt." Daughter, who witnessed the fall, testified that Petitioner "tripped on that mess in front of the Observer." Additionally, Petitioner submitted an affidavit from a former employee who worked at the office of *The Newberry Observer* which provided that the employees were aware that the parking lot was in disrepair and that they had complained to management regarding the deteriorated state of the parking lot.

The trial court granted summary judgment in favor of Respondent finding that the change in the elevation in the parking lot caused Petitioner's fall, that the change in elevation was not a dangerous condition, and that even if it was a dangerous condition, Respondent had no duty to warn since the elevation change was an open and obvious condition. The court of appeals affirmed the trial court's ruling.

This Court granted certiorari to review the court of appeals' decision, and Petitioner presents the following issue for review:

Did the court of appeals err in affirming the circuit court's decision granting summary judgment?

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

LAW/ANALYSIS

We first address Respondent's argument that Petitioner must present more than a mere scintilla of evidence to withstand a motion for summary judgment. The rule followed in the federal court system provides that "a 'mere scintilla of evidence' is not sufficient to withstand the challenge." *Rogers v. Norfolk Southern Corp.*, 356 S.C. 85, 92, 588 S.E.2d 87, 90 (2003), quoting *Crinkley v. Holiday Inns*, 844 F.2d 156, 160 (4th Cir.1988). We recognize that the court of appeals has been somewhat inconsistent on whether a mere scintilla of evidence will overcome a motion for summary judgment.[1] This Court, however, has consistently held that where the federal

[1] In *Anders v. South Carolina Farm Bureau Mut. Ins. Co.*, the court of appeals stated that "[a]t the summary judgment stage of the proceedings, it [is] only necessary for the [nonmoving party] to submit a scintilla of evidence warranting determination by a jury." 307 S.C. 371, 375, 415 S.E.2d 406, 408 (Ct. App. 1992). However, the court of appeals has also declared that "[t]he existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment. *Shelton v. LS & K, Inc.*, 374 S.C. 294, 297, 648 S.E.2d 307, 308 (Ct. App. 2007); *see also Bravis v. Dunbar*, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App.1994).

standard applies or where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment.[2] Accordingly, we hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. However, in cases requiring a heightened burden of proof or in cases applying federal law, we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment.[3]

Turning to the merits of the case, although the operator of a parking lot is not an insurer of the safety of those who use the lot, reasonable care must be used by the operator to keep the premises used by invitees in a reasonably safe condition. *Henderson v. St. Francis Community Hosp.*, 303 S.C. 177, 180, 399 S.E.2d 767, 768 (1990). However, a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. *Callander v. Charleston Doughnut Corp.*, 305 S.C. 123, 126, 406 S.E.2d 361, 362 (1991), adopting Restatement (Second) of Torts § 343A, Known or Obvious Dangers (1965).

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[2] *See Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 578 S.E.2d 329 (2003) (applying the unmistakable and convincing evidence standard in an undue influence case); *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 609 S.E.2d 286 (2005) (applying the federal heightened standard in a Federal Employer's Liability Act suit); *and Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002) (applying the clear and convincing standard of proof in a libel action brought by a public figure).

[3] We note that this appeal does not depend on whether a mere scintilla of evidence is sufficient to defeat a motion for summary judgment because Petitioner has presented more than a scintilla of evidence.

In our view, the court of appeals erred in affirming the trial court's grant of summary judgment. Petitioner's testimony, Daughter's testimony, and the former employee's affidavit showed that the parking lot was in a state of disrepair. Thus, taken in a light most favorable to Petitioner, evidence shows that Respondent knew or should have known that a dangerous condition existed on its premises and that invitees would have to encounter this condition. *See Henderson*, 303 S.C. at 180, 399 S.E.2d at 769 (reversing the trial court's grant of a JNOV motion because the plaintiff presented evidence that a hospital failed to keep its parking lot reasonably safe).

Furthermore, the court of appeals erred in affirming the grant of summary judgment based on the finding that even if the parking lot contained a dangerous condition it was open and obvious. While a parking lot's state of disrepair may be considered open and obvious, a jury could determine that Respondent should have anticipated that such a condition may cause an invitee to fall and injure themselves. *See Creech v. South Carolina Wildlife and Marine Resources Dept.*, 328 S.C. 24, 491 S.E.2d 571 (1997) (holding that a dock without a guard rail on one side was an open and obvious condition, but that the defendant should have anticipated the harm); *Callander*, 305 S.C. at 126, 406 S.E.2d at 363 (holding that although a missing seat on a stool was an open and obvious condition, the owner should have anticipated the harm).

Accordingly, we hold the that the court of appeals erred in affirming the trial court's grant of summary judgment because a genuine issue of material facts exists regarding whether Petitioner's injuries resulted from a dangerous condition and, if so, whether Respondent should have anticipated this type of harm.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals.

WALLER, PLEICONES, BEATTY, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles R. Hipp, III, Respondent,

v.

South Carolina Department of Motor Vehicles, Appellant.

Appeal from Charleston County
Michael G. Nettles, Circuit Court Judge

Opinion No. 26588
Heard December 4, 2008 – Filed January 26, 2009

AFFIRMED

General Counsel Frank L. Valenta, Jr., Deputy General Counsel Philip S. Porter, and Assistant General Counsel Linda A. Grice, all of Blythewood, for Appellant.

Michael A. Timbes, of Thurmond, Kirchner & Timbes, of Charleston, for Respondent.

PER CURIAM: South Carolina Department of Motor Vehicles (SCDMV) appeals the order of the circuit court enjoining it from suspending

the driver's license of Respondent Charles R. Hipp, III (Respondent) as a consequence of Respondent's 1993 Georgia conviction for driving under the influence (DUI). We affirm.

FACTS

Respondent was arrested and pled guilty to DUI in the State of Georgia in 1993. At the time of the arrest, Respondent was a South Carolina resident attending college in South Carolina, and a driver licensed by the South Carolina Department of Motor Vehicles (SCDMV). As a result of his plea, Respondent paid a fine to the State of Georgia and fulfilled other conditions required by Georgia. In 2005, twelve years after his conviction, Respondent received notice from the SCDMV that his South Carolina driver's license was being suspended as a consequence of his 1993 Georgia DUI conviction. Respondent filed a declaratory judgment action asking the court to enjoin suspension of his license. The circuit court issued an order enjoining the SCDMV from suspending Respondent's driver's license.

ISSUE

Did the circuit court err in enjoining the suspension of Respondent's driver's license?

STANDARD OF REVIEW

"Actions for injunctive relief are equitable in nature." Shaw v. Coleman, 373 S.C. 485, 492, 645 S.E.2d 252, 256 (Ct. App. 2007). In actions in equity this Court may find facts in accordance with its own view of the preponderance of the evidence. Id.

ANALYSIS

The circuit court cited three grounds for enjoining suspension of Respondent's driver's license: (1) that the applicable statute is ambiguous; (2) the doctrine of laches; and (3) that suspension twelve years after conviction violates the "fundamental fairness" required by due process. We

find the circuit court's conclusion as to fundamental fairness to be persuasive and so, affirm.[1]

A person's interest in his driver's license is property that a state may not take away without satisfying the requirements of due process. Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed2d 90 (1971). Due process is violated when a party is denied fundamental fairness. City of Spartanburg v. Parris, 251 S.C. 187, 191, 161 S.E.2d 228, 230 (1968).

This Court addressed facts similar to those in the case at hand in State v. Chavis, 261 S.C. 408, 200 S.E.2d 390 (1973). While we found fundamental fairness was not violated by suspension after a one-year delay, we allowed that there might be circumstances under which it could be soundly held that the State had no right to suspend a driver's license after a lengthy delay. Id. at 411, 200 S.E.2d at 391. We find in the instant case the extreme circumstances contemplated by Chavis.

While we do not intend to set forth a bright line rule, we find that imposition of a suspension after more than twelve years delay, where Respondent bears no fault for the delay, is manifestly a denial of fundamental fairness.[2] Though neither dispositive nor directly applicable to the instant case, we note that Title 56 of the South Carolina Code, which addresses "Motor Vehicles," is replete with ten-year limitations for purposes of sentence enhancement and keeping record of convictions. See, e.g., S.C. Code Ann. §§ 56-1-746 (for purposes of determining a prior offense for sentence enhancement of alcohol-related offenses, only convictions within ten years of the date of the most recent violation are considered prior offenses); 56-1-1340 (violation convictions shall be entered in the records of

[1] Having found the circuit court's decision supported by its finding that Respondent was denied fundamental fairness, we do not address the remaining grounds. See Wilson v. Moseley, 327 S.C. 144, 147, 488 S.E.2d 862, 864 (1997).

[2] It should be noted that neither Respondent nor SCDMV is at fault for the delay. The unexplained delay in reporting the 1993 violation appears to be solely attributable to the inaction of the State of Georgia.

the SCDMV for a period of ten years); 56-5-2940 (for sentence enhancement of convictions for operating motor vehicle under influence of alcohol or drugs, only those violations which occurred within ten years preceding date of last violation constitute prior violations); 56-5-1990 (in determining time of suspension of driver's license, only violations which occurred within ten years of the last violation shall constitute prior violations).

CONCLUSION

We agree with the circuit court that under the unique circumstances of this case, the attempted suspension of Respondent's driver's license twelve years after conviction constitutes a denial of fundamental fairness. The order enjoining suspension is therefore

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Elizabeth M. McCullar and J.W. McCullar, Respondents,

v.

The Estate of Dr. William Cox Campbell and Palmetto Health Alliance d/b/a Palmetto Health Baptist, of whom the Estate of Dr. William Cox Campbell is the Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 26589
Heard December 2, 2008 – Filed January 26, 2009

REVERSED

Kay G. Crowe and J. Todd Kincannon, both of Barnes, Alford, Stork & Johnson, of Columbia, for Petitioners.

Kevin Hayne Sitnik, McGowan, Hood & Felder, of Columbia, for Respondents.

PER CURIAM: We granted certiorari to consider a Court of Appeals decision which reversed a circuit court order dismissing this medical malpractice suit brought against the estate of a deceased doctor (Estate) for lack of subject matter jurisdiction. McCullar v. Estate of Cox, Op. No. 2006-UP-332 (S.C. Ct. App. filed September 20, 2006). We reverse.

We agree with the Court of Appeals that there is no subject matter jurisdiction issue here, and thus both the Estate and the circuit court erred in relying on Rule 12(b)(1), SCRCP. In our opinion, however, the Court of Appeals erred in failing to exercise its discretion under Rule 220(c), SCACR, to affirm the circuit court's dismissal on another ground appearing in the record.

Subject matter jurisdiction is defined as "the power of a court to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994) (internal citation omitted). Tort suits are within the circuit court's jurisdiction. Sabb v. South Carolina State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002). Here, on its face, this complaint alleges a tort and therefore is not subject to dismissal for lack of subject matter jurisdiction.

The Court of Appeals cited cases holding the capacity of parties to sue or be sued is not a question of subject matter jurisdiction. It is true that whether a party is a "real party in interest" is not a matter of subject matter jurisdiction,[1] nor is the issue of a party's capacity to sue.[2] What is at issue here, however, is not capacity, standing, or party in interest, but something much more fundamental: whether, at the time the suit was purportedly

[1] Bardoon Props., NV v. Eidolon, 326 S.C. 166, 485 S.E.2d 371 (1997).
[2] Chet Adams Co. v. James F. Pedersen Co., 307 S.C. 33, 413 S.E.2d 827 (1992).

commenced, there existed a juridical entity known as "Estate of Dr. William Cox Campbell." Since it is undisputed that Dr. Campbell's Estate was closed months before this action was allegedly commenced by the then *pro se* respondents, the answer is "no."

The general rule, cited by this Court in a suit brought by a nonexistent plaintiff, is:

> [I]f there is a lack of legal entity, the whole action fails….If an action is brought in the name of that which under the *lex fori* has no legal entity, it is as if there was no plaintiff in the record and therefore no action before the Court…Although an action brought in the name of that which has no legal entity is a nullity, an action *in which a legally existing plaintiff has been misnamed* is still a true action, to which the court can give full effect, subject only to defendant's right to object at the threshold for misnomer….

Commercial & Savings Bank of Lake City v. Ward, 146 S.C. 77, 143 S.E. 546 (1928) (Ward) (internal citation omitted) (emphasis in original); see also Blackwood v. Spartanburg Commandery No. 3, Knights Templar, 185 S.C. 56, 193 S.E. 195 (1937) *overruled in part on other grounds* Scovill v. Johnson, 190 S.C. 457, 3 S.E.2d 543 (1939,) citing the Ward rule with approval in a defendant misnomer case.

We reverse the decision of the Court of Appeals because an action brought against a nonexistent defendant is a nullity. While the Estate sought unsuccessfully to characterize this fundamental defect as a Rule 12(b), SCRCP, issue, a fair reading of the record and the circuit court's ruling is that the dismissal rests on the lack of a defendant. The Estate raised this issue promptly,[3] the defect is fatal to Respondents' suit,[4] and the action was

[3] The lawsuit was filed on December 21, 2004, and the motion to dismiss was filed January 26, 2005.

[4] Ward, *infra*.

properly ended by the circuit court.[5] Accordingly, the decision of the Court of Appeals reinstating this lawsuit is

REVERSED.

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

[5] We hesitate to say "dismissed" as there was "no action before the Court. . ." to be dismissed. Ward, *supra.*

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth W. Sanders, Petitioner,

v.

MeadWestvaco Corporation,
Self Insured Employer, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Newberry County
Wyatt T. Saunders, Jr., Circuit Court Judge

Opinion No. 26590
Heard January 8, 2009 – Filed January 26, 2009

DISMISSED AS IMPROVIDENTLY GRANTED

Ben C. Harrison & Jeremy A. Dantin, of Harrison, White, Smith & Coggins, PC, of Spartanburg, for Petitioner.

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

PER CURIAM: We granted a writ of certiorari to review the Court of Appeals decision in *Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006). After a thorough review of the record and briefs, the writ of certiorari is

DISMISSED AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John R. Chastain and Katharine Chastain, Appellants,

v.

John H. Hiltabidle, Talle G. Hiltabidle and C. Dan Joyner Company, Inc., Defendants, Of Whom C. Dan Joyner Company, Inc. is the Respondent.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4487
Heard December 2, 2008 – Filed January 22, 2009

AFFIRMED

William H. Ehlies, II, of Greenville, for Appellants.

Samuel W. Outten and Sandi R. Wilson, both of Greenville, for Respondent.

WILLIAMS, J.: In this action for negligence, Appellants argue the trial court erred in granting summary judgment in favor of Respondent because Respondent's motion for summary judgment was procedurally defective, or, in the alternative, because the trial court erred in holding a realtor does not have a legal duty to investigate latent defects in property or to advise his or her clients on matters outside the scope of his or her expertise. We affirm.

FACTS/PROCEDURAL HISTORY

C. Dan Joyner Company, Inc. (Realtor) provides residential real estate services throughout the Greenville area. Joan Herlong (Agent) is an independent contractor for Realtor who provides services to individuals seeking to purchase or sell real estate. In January 2003, John H. Hiltabidle and Talle G. Hiltabidle (Sellers) engaged Agent in conjunction with the sale of Sellers' residence (the Property).

Agent listed the Property for sale in 2003. Appellants John R. Chastain and Katherine Chastain (Buyers) were interested in purchasing the property and hired Agent.[1] Buyers submitted an offer for the Property and Sellers accepted the offer that same day. Pursuant to S.C. Code. Ann. § 27-50-10 to -110 (Supp. 2008), the contract for sale was contingent on Sellers' completion of a form titled "State of South Carolina Residential Property Condition Disclosure Statement" (the Disclosure). According to the express terms of the Disclosure, it was "not a warranty," and it was "not a substitute for any inspections [Buyers] may wish to obtain."

On the Disclosure, Sellers responded affirmatively to two inquiries. First, they responded "yes" to a question that asked: "Water seepage, leakage, dampness or standing water or water intrusion from any sources in any area of the structure?" Sellers explained their affirmative response to this question in the Comments section of the Disclosure, describing two past flooding events:

[1] Sellers and Buyers each executed a "Consent to Dual Agency" agreement on January 30, 2003, thereby allowing Realtor to be the agent for both the buyer and the seller of the Property.

> Early 1990's: Hurricane Hugo. Some storm runoff in garage [and] laundry room due to blockage of culvert under Wembley Rd. Action [taken]: Re-landscape to allow water to flow toward creek.
>
> Fall 2002: Major tropical storm caused major flooding [and] road damage (throughout Greenville) – Very light water seepage into garage due to blockage of culvert under Wembley. Action taken: City improved swale along Wembley Rd. Project started to install a device to prevent blockage of culvert.
>
> The creek on [the Property] has never exceeded its banks.

Second, Sellers responded "yes" to a question that asked, "Flood hazards or that the property is in a federally designated flood plane [sic]?" In a handwritten note next to their "yes" answer, Sellers wrote, "Ground floor above 100 [year] flood level."

Following Buyers' purchase of the Property, two days of rain resulted in several inches of water intrusion onto the Property, causing damage to Buyers' furniture and to the Property itself.

Buyers filed an initial summons and complaint alleging causes of action for negligence and fraud[2] against Sellers arising out of the statements in the Disclosure. An amended complaint added Realtor as a defendant. A second amended complaint added Agent as a defendant. All defendants answered denying the allegations of the complaint. The parties agreed to dismiss Agent as an individual defendant on the stipulation that, at all times relevant to this action, she was acting within the course and scope of her employment with Realtor.

[2] Buyers' action for fraud was eventually dismissed on October 10, 2006. Only the action for negligence remains.

Realtor filed a motion for summary judgment on the negligence cause of action and included a written memorandum in support. In the memorandum in support, Realtor asserted two arguments. First, the Disclosure did not contain any substantively inaccurate or misleading information. Second, Realtor did not have actual or constructive knowledge of the alleged inaccuracies in the Disclosure. Buyers filed a motion in opposition to Realtor's motion for summary judgment and a hearing was held on Realtor's motion. Following oral arguments, the trial court granted summary judgment in favor of Realtor on the basis that Realtor did not have a legal duty to investigate latent defects in properties or to advise clients on matters outside the scope of its expertise.

A Form 4 reflecting the trial court's decision was entered on April 24, 2007. Thereafter, Buyers filed a Rule 59(e) motion in which they argued the trial court did not issue a detailed order reflecting its findings of fact and conclusions of law, did not rule on their Rule 7(a) Due Process argument, and did not comply with the rule that novel issues should be decided with a full and complete record. The trial court issued a seven-page order in which it set forth the factual and legal basis for finding in favor of Realtor. Buyers responded by filing a second Rule 59(e) motion, the substance of which was essentially identical to their previous Rule 59(e) motion. This motion was denied without a hearing. This appeal follows.

STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the trial court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The trial court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d

642, 648 (2006). A court considering summary judgment makes neither factual determinations nor considers the merits of competing testimony. David, 367 S.C. at 250, 626 S.E.2d at 5. However, summary judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. Id. To survive a motion for summary judgment, the non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. Steele v. Rogers, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct. App. 1992).

LAW & ANALYSIS

1. Due Process/Notice

Realtor first argues the trial court's grant of summary judgment should not be reversed on procedural grounds because Buyers failed to present their current argument, that Realtor's summary judgment motion did not comply with Rule 7(b)(1), SCRCP, and Rule 56, SCRCP, to the trial court at the motion hearing or in their motion for reconsideration. We disagree.

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. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-511, 598 S.E.2d 712, 715 (2004). When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court); Walsh v. Woods, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion).

Buyers argued in their motion in opposition that Realtor's motion for summary judgment "should be dismissed as violative of SCRCP 7(b) because it does not particularize the grounds upon which the relief is sought and therefore fails to provide notice to the adverse party in violation of due process guarantees." Thus, the issue of Rule 7(b) was timely raised to the

trial court.[3] However, at no time thereafter did the trial court specifically rule on this issue. When the issue was raised but not ruled upon, it became incumbent upon Buyers to raise the issue in a Rule 59(e) motion. Wilder Corp., 330 S.C. at 77, 497 S.E.2d at 734. Buyers filed not one but two Rule 59(e) motions. The substance of these motions, which are essentially identical, is limited to the following arguments:

> This motion is made pursuant to SCRCP, Rule 59(e). The grounds for the motion are that the court's [order] . . . is incomplete and ambiguous, sets forth neither findings of fact nor conclusions of law, fails to set forth the court's reasoning for its rulings, does not rule upon **the plaintiffs [sic] SCRCP 7(a) Due Process argument**, is impossible to review on appeal, violates the rule that novel issues should be decided with a full complete record, and it fails to fairly set forth facts in the record that contradict the assertions made in the order.

(emphasis added).

Buyers base their argument to this court on Rule 7(b)(1), SCRCP.[4] In their Rule 59(e) motions to the trial court, however, Buyers asserted a "Rule

[3] Buyers did not allege non-compliance with Rule 56, SCRCP, in their motion in opposition or in their Rule 59(e) motion. Accordingly, we do not address this argument on appeal. See Lucas, 359 S.C. at 510-511, 598 S.E.2d at 715 (holding an appellate court will not address issues raised for the first time on appeal).

[4] Rule 7(b)(1), SCRCP, states: "An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion."

7(a) Due Process argument," rather than a Rule 7(b)(1) argument.[5] In light of this apparent scrivener's error, Realtor argues Buyers failed to properly present their Rule 7(b)(1) argument to the trial court and, therefore, may not argue the issue now. We disagree.

Although Buyers' Rule 59(e) motion is technically insufficient to preserve the issue of Rule 7(b)(1), this Court will not apply the rules of error preservation so rigidly as to bar an otherwise properly presented issue. See State v. Guillebeaux, 362 S.C. 270, 274 n.1, 607 S.E.2d 99, 101 n.1 (Ct. App. 2004) (holding although Guillebeaux's issue on appeal referred to a motion for mistrial instead of a motion for a new trial, the court treated the references to mistrial in his appellate brief as a scrivener's error because the substance of the appellate argument focused on the failure of the trial judge to grant a new trial under the circumstances); State v. James, 362 S.C. 557, 562, 608 S.E.2d 455, 458 (Ct. App. 2004) (holding although James did not use the term "substantial circumstantial evidence" in his motion for a directed verdict, the argument was properly before the court because he argued in his directed verdict motion there was insufficient evidence to support the elements of the charge); State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (holding although Russell did not use the exact words "*corpus delicti*" in his request for a directed verdict, it was clear from the argument presented in the record that the motion was made on this ground).

In this case, Buyers' Rule 7(b)(1), SCRCP, due process argument was presented and is, therefore, preserved for two reasons. First, Buyers previously presented a Rule 7(b) due process argument to the trial court in their memorandum in opposition to summary judgment. Thus, when Buyers referred to "the plaintiff's Rule 7(a) Due Process argument" in their Rule

[5] Rule 7(a), SCRCP, states: "There shall be a complaint and an answer; and a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14, and there shall be a third-party answer, if a third-party complaint is served. No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer; and there may be a reply to affirmative defenses as provided in Rule 8(c)."

59(e) motions, it appears they were referring to their previous Rule 7(b)(1) due process argument that the trial court had not ruled on. Second, Buyers called their Rule 7(a) argument a "Due Process argument." Because Buyers have maintained only one due process argument in this case, namely the "particularity" requirement in Rule 7(b)(1), SCRCP, correcting the scrivener's error in this case is warranted. See Holroyd v. Requa, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) ("Our courts have corrected scriveners' errors when warranted."). We, therefore, find this issue was sufficiently raised in the Rule 59(e) motions and, thus, properly preserved for review.

2. Prejudice

Realtor next argues, even if the court finds Buyers properly preserved the question of whether Realtor complied with Rule 7(b)(1), SCRCP, summary judgment in favor of Realtor should be not be reversed on procedural grounds because Buyers can show no prejudice from the allegedly deficient notice. We agree.

As a general rule, a party must establish prejudice as the result of another's failure to comply with Rule 7(b)(1), SCRCP. See M&M Group, Inc. v. Holmes, 379 S.C. 468, 474, 666 S.E.2d 262, 265 (Ct. App. 2008) (subjecting Rule 7, SCRCP, to a prejudice analysis). To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish if he or she had received appropriate notice, he or she would have done something different, thereby affecting the decision of the trial court and advancing his or her case. Gardner, 353 S.C. at 14, 577 S.E.2d at 197.

As applied to this case, Buyers must demonstrate they were unable to marshal an effective defense in opposition to Realtor's motion for summary judgment due to Realtor's failure to provide sufficient notice of the particular grounds on which its motion was based. In other words, Buyers must show that had they received adequate notice, they would have done something different.

Buyers have made no such showing. A week before the hearing on Realtor's motion for summary judgment, Buyers filed a memorandum in opposition to Realtor's motion for summary judgment in which they set forth detailed legal arguments and factual bases for their opposition to Realtor's motion for summary judgment and supporting memorandum. Although Buyers claim they were not put on notice of the particular grounds upon which Realtor sought relief, their memorandum in opposition addresses the very same issues upon which the trial court ultimately granted summary judgment in favor of Realtor, namely, whether Realtor had a duty to investigate latent defects or representations by a seller, and whether there existed questions of fact as to whether Realtor had violated the statute. Thus, the alleged lack of notice did not prevent Buyers from marshaling a defense in opposition to Realtor's motion. Furthermore, Buyers have failed to articulate any new argument or factual issue that they were unable to present to the trial court due to a lack of notice. Their brief on appeal essentially mirrors their motion in opposition. As such, the Buyers' argument that but for the lack of notice, they would have done something different, is unconvincing in light of the fact that they put forth the same arguments now that they did at the motion hearing. We, therefore, hold Buyers' procedural Due Process argument is without merit.

3. Merits

Buyers argue the trial court erred in granting summary judgment because Realtor owed them a duty of reasonable care and disclosure and because questions of fact remain as to what Realtor knew or should have known about the flooding history of the Property. We disagree for two reasons. First, to the extent that Realtor, as a real estate licensee, owes Buyers a legal duty, this duty does not include investigating the veracity or adequacy of statements made on the Disclosure. Second, Buyers have presented no evidence that Realtor had actual or constructive knowledge that the statements on the Disclosure were inaccurate or incomplete.

i. Existence of a Duty

An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff, and absent such

a duty, no actionable negligence exists. Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The determination of whether a duty exists in regard to the wrong alleged is a question of law for the court. Huggins v. Citibank, N.A., 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003). If no duty exists, the defendant is entitled to judgment as a matter of law. Id.

A real estate licensee is "not obligated to discover latent defects in property or to advise the agent's clients on matters outside the scope of the agent's real estate expertise." S.C. Code Ann. § 40-57-137(F) (Supp. 2007); see also S.C. Code Ann § 27-50-80 (Supp. 2007) (stating a real estate licensee has no duty to inspect the onsite or offsite conditions of the property and any improvements). Additionally, a real estate licensee is not liable to a purchaser if: (1) the owner provides the purchaser with a disclosure form that contains false, incomplete, or misleading information, and (2) the real estate licensee did not know or have reasonable cause to suspect the information was false, incomplete, or misleading. S.C. Code Ann. § 27-50-70 (Supp. 2007); see also S.C. Code Ann. § 40-57-137(F) (stating a real estate company is "not liable to a buyer for providing the buyer with false or misleading information if that information was provided to the licensee by his client and the licensee did not know or have reasonable cause to suspect the information was false or incomplete"). Taken together, these sections provide that a real estate licensee does not have a duty to inspect or investigate the physical condition of a piece of property for the purpose of confirming or denying statements made by a seller in a disclosure statement. Rather, the Legislature places the duty of performing such an inspection or investigation squarely on the shoulders of the buyer. See S.C. Code Ann. § 27-50-80 ("This article does not limit the obligation of the purchaser to inspect the physical condition of the property and improvements that are the subject of a contract covered by this article.").

Here, Buyers were put on notice by Sellers' statements in the Disclosure that the Property had some history of flooding. To place on Realtor and other real estate licensees the burden of further investigating the accuracy of such statements would require them to have expertise in plumbing, electrical and construction codes. Because we do not believe this was the intent of the Legislature, we affirm the trial court.

ii. Evidence of Actual or Constructive Knowledge

In their brief, Buyers present evidence from which it could be inferred that Realtor knew there was a history of flooding in the neighborhood of the Property prior to 2003. For instance, Realtor represented Sellers in their purchase of the Property in 1985, at which time the Property had already experienced roughly $10,000 worth of flood damage due to a 1982 flood. Additionally, numerous individuals associated with Realtor live in the same neighborhood where the Property is located. As such, Buyers argue because this evidence is sufficient to raise a question of fact as to whether Realtor knew or should have known the Property was prone to flooding, summary judgment was improper.

However, even assuming the substantive information about flooding in the Disclosure was inaccurate or incomplete, and further assuming Realtor knew the Property had flooded in the past, it would not necessarily follow that Realtor knew Sellers' statements in the Disclosure about the Property's flooding history were inaccurate or incomplete. As stated above, if the owner of a property provides the purchaser with a disclosure form that contains false, incomplete, or misleading information, the real estate licensee is not liable unless he or she knew or had reasonable cause to suspect the information in the disclosure form was false, incomplete, or misleading. S.C Code Ann. § 27-50-70. The statute is concerned with whether a real estate licensee knows the statements in a disclosure form are false, not simply whether the licensee knows of a defect in the property. Therefore, to survive summary judgment, Buyers must present evidence that raises a question of fact as to whether Realtor knew or should have known that the statements in the Disclosure were inaccurate. See Steele, 306 S.C. at 552, 413 S.E.2d at 333 (holding to survive a motion for summary judgment, the non-moving party must offer some evidence that a genuine issue of material fact existed as to each element of the claim).

Buyers have not presented such evidence. First, Buyers have not provided any evidence that Realtor knew of any inaccuracies in the Disclosure. Second, Buyers stated under oath they were unaware of any

evidence that Agent had knowledge of any false, incomplete or misleading information in the Disclosure. John Chastain testified as follows:

> Q: Do you have any knowledge that [Agent] had any knowledge of any of these events described to you by your neighbors?
>
> A: I have no knowledge, no.
>
> Q: Do you have any knowledge that [Agent] had any knowledge of these alleged water problems which she did not disclose to you?
>
> A: I do not.
>
> Q: Do you have any knowledge that [Agent] withheld any knowledge she may have had regarding these water problems which she did not disclose to you?
>
> A: I do not.

Likewise, Katharine Chastain testified as follows:

> Q: Other than this conversation that you had with [Agent] regarding the Disclosure Statement and the trampoline that was apparently caught in a culvert, do you have any other evidence relating to [Agent's] alleged knowledge of flooding at the residence?
>
> A: No.
>
> Q: Sitting here today, do you have any reason to believe that [Agent] was aware at the time she had the conversation with you about the Disclosure Statement that anything other than the trampoline had caused potential flooding at the [Property]?

A: No.

Agent also testified under oath that she had no knowledge of flooding problems within the neighborhood, no knowledge of water intrusion within the home purchased by Buyers other than the information provided by Sellers to both her and Buyers, and no reason to suspect or believe the information in the Disclosure completed by Sellers was either false, misleading, or incomplete. Because Buyers presented no evidence Realtor or Agent knew or had reasonable cause to suspect Sellers' statements in the Disclosure about flooding were false, misleading or inaccurate, the trial court's grant of summary judgment was proper.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

PIEPER, J. and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lou Anne Pack, Respondent,

v.

South Carolina Department of Transportation, Employer and State Accident Fund, Carrier, Appellants.

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

Opinion No. 4488
Heard November 18, 2008 - Filed January 27, 2009

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED

Cynthia Burns Polk, of Columbia, T. McRoy Shelley, III, of Columbia, for Appellants.

Steven Eric Goldberg, of Charleston, for Respondent.

WILLIAMS, J.: In this worker's compensation action, Appellants contest (a) the circuit court's decision to reverse the Workers' Compensation Commission's holding that Pack suffered no brain injury, and (b) the circuit court's decision to affirm the Workers' Compensation Commission's holding that Respondent is entitled to

benefits for respiratory and psychological injury. We reverse in part, affirm in part, and remand.

FACTS/PROCEDURAL HISTORY

Lou Anne Pack (Pack) began working for the South Carolina Department of Transportation (the DOT) in 2000 as an assistant with the asphalt crew. Pack later began working with the roadside herbicide application crew. Her duties on the roadside crew included operating a truck equipped with a herbicide sprayer. During August 2002, the air conditioning in Pack's work vehicle was not working properly and, as a result, she began spraying herbicides from her truck with the windows open. On or about August 18, 2002, an amount of liquid herbicide "overflowed" from the tank on her truck and she was exposed to the fumes. Soon after this exposure, she collapsed next to her truck. Pack was admitted to Providence Hospital on August 30, 2002, with a diagnosis of "[p]ossible toxic reaction to weed spray, naphthalene." Her discharge summary noted her "renal and hepatic functions were normal, and her neurological symptoms and signs cleared within 24-48 hours" and "there was no slurring of speech."

Appellants commenced payment of weekly temporary total benefits but only paid twenty-seven dollars ($27.00) for medical treatment. Pack's counsel requested additional medical evaluation and treatment, but Appellants refused. Pack sought medical treatment from numerous physicians at her own expense and began seeing Dr. Allan Lieberman, an environmental specialist, and L. Randolph Waid, Ph.D., a neuropsychologist, in May 2003.

On January 26, 2005, Appellants filed a WCC Form No. 21 Stop Payment application. After a hearing was scheduled and the parties exchanged documents for admission, however, Appellants withdrew their Stop Payment application. Immediately after this withdrawal, Pack filed a WCC Form 50, seeking either an award of permanency for her brain, respiratory, and psychological injuries or, in the alternative, an award finding she had not reached maximum medical improvement and was entitled to reimbursement for and additional treatment by Dr.

Lieberman and Dr. Waid. Pack alleged injury to her "whole body, respiratory [system], brain[,] allergen, [and] chemical sensitivity" in connection with the August 18, 2002 incident. Appellants filed a WCC Form 51, in which they admitted Pack was exposed to herbicide and may have suffered transient effects but denied any permanent injury.

The Single Commissioner ruled Pack had not reached maximum medical improvement, that she had injury "to her respiratory system, brain with psychological overlay . . . when she was exposed multiple times to pesticides and herbicides," and that Appellants should pay for continued treatment. The Appellate Panel of the Workers' Compensation Commission (the Commission), in a 2-1 decision filed June 19, 2006, affirmed the Single Commissioner's decision with amendments. The majority held Pack's injuries were limited to "her respiratory system with psychological overlay" but did not include the brain.

The dissenting commissioner, Commissioner Bardner, held: there was no evidence of any respiratory injury, there was no objective evidence of any brain or "toxic exposure" injury, Pack had reached maximum medical improvement shortly after exposure to herbicide, and Pack had no residual permanency. In support of her position, Commissioner Bardner noted:

> (a) [Pack's] discharge summary from 2002 notes that her "renal and hepatic functions were normal," her "neurological symptoms cleared within 24-48 hours," and "there was no slurring of speech;" (b) [Pack's] claim appears to have as its basis her Internet research dealing with acephate; however [Pack's] plasma and blood levels showed no signs of insecticide exposure; further, certified toxicologists state that any symptoms from which [Pack] suffered were not related to acephate; (c) Dr. Waid is not a medical doctor, and based his findings on tests which show that [Pack] **acts** as if she has a

> toxic exposure injury; (d) Dr. Lieberman simply recites the purported exposure to organophosphates which no objective test has shown; (e) at most, [Pack] has had a psychosomatic experience from her Internet research; at worst, [Pack] is using the worker's compensation system for purposes of secondary gain; (f) all the **objective** medical evidence, . . . which describes [Pack] as very articulate and organized; that she has brought in a book with multiple tabs, and which summarizes medical opinions from various physicians; and that she speaks with fluency regarding the chemicals to which she was reportedly exposed.

(emphasis in original).

Both parties timely appealed to the circuit court. Pack argued the Commission erred in denying compensability for her physical brain injury, but the Commission did not err in affirming compensability for respiratory and psychological injuries. Appellants argued the denial as to Pack's brain injury was proper because it was supported by substantial evidence. Appellants further contended the dissenting opinion was correct and the majority opinion awarding compensability for respiratory and psychological injuries was not supported by substantial evidence.

As to the brain injury, the circuit court reversed the Commission, holding "the only evidence contained in the record supports the original finding that [Pack] sustained an injury to her brain" and "[t]he exclusion of the brain without explanation is inconsistent with the medical treatment and evaluation the Commission ordered." As to respiratory and psychological injury, the circuit court affirmed. This appeal follows.

STANDARD OF REVIEW

The Administrative Procedures Act applies to appeals from decisions of the Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). The Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. Etheredge v. Monsanto Co., 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002). The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial evidence. Lark, 276 S.C. at 135, 276 S.E.2d at 306. "Substantial evidence" is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Taylor v. S.C. Dep't of Motor Vehicles, 368 S.C. 33, 36, 627 S.E.2d 751, 752 (Ct. App. 2006).

LAW & ANALYSIS

1. Pack's Estoppel Argument

As an initial matter, Pack argues Appellants should be estopped from denying that she has suffered a brain injury because in their Form 51, Appellants "admit [Pack] was exposed to herbicide and may have suffered transient effects." However, Pack has cited no legal authority to support the argument that this amounts to a judicially binding admission of Pack's alleged injury. As such, this argument is conclusory, and such arguments are deemed abandoned on appeal. See Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding party abandoned an issue on appeal due to failure to cite any supporting authority and making only conclusory arguments).

2. Brain Injury

Appellants argue the circuit court erred in reversing the Commission's decision that Pack has not suffered a brain injury

because (a) the circuit court improperly made its own factual determination regarding the brain injury, and (b) substantial evidence supports the Commission's denial of the brain injury claim. Because we agree with Appellants on the first point, we reverse the circuit court's ruling as to the brain injury. However, we do not affirm the Commission's original ruling because the Commission's finding that Pack suffered injuries to the respiratory system with psychological overlay, standing alone, does not constitute a sufficient finding to warrant denial of the brain injury. Instead, we remand the issue to the Commission to make further findings of fact as to the brain injury.

In this case, the Commission disagreed with the Single Commissioner's finding that Pack had suffered a brain injury. Specifically, the Commission held Pack's only injuries were "to her respiratory system, with psychological overlay," whereas the Single Commissioner included the brain. The circuit court noted this difference of opinion between the Single Commissioner and the Commission and characterized it as a failure by the Commission to make an essential finding of fact, such that remand would normally be appropriate. The circuit court found:

> The Decision and Order of the [Commission] included neither a finding of fact nor conclusion of law explaining why the brain was removed as an affected body part. Remand is proper where the Commission has failed to make essential findings of fact, or the findings are so indefinite or general as to afford no reasonable basis upon which the appellate court can determine whether the findings are supported by the evidence and whether the law has been properly applied to the findings.

(internal citations omitted)**.**

The circuit court went on, however, to hold that remand was not appropriate in this case because the evidence in the record would **only**

support a finding in favor of Pack on the issue of brain injury. The circuit court stated:

> [H]owever, where the evidence is susceptible of but one reasonable inference, the question becomes a matter of law for the appellate court rather than the [Commission]. The **only medical evidence** contained in the record supports the [Single Commissioner's] original finding that [Pack] sustained an injury to the brain.

(emphasis added) (internal citations omitted).

This was error for two reasons. First, the latter holding was erroneous because questions of fact are decided solely by the Commission, and the court reviewing the Commission's decision lacks authority to determine factual issues, except in jurisdictional matters. Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 280, 461 S.E.2d 392, 394 (1995). Although the circuit court correctly stated that when the evidence is susceptible of but one reasonable inference, the question becomes a matter of law, Mullinax v. Winn Dixie Stores, Inc., 318 S.C. 431, 437, 458 S.E.2d 76, 80 (Ct. App. 1995), the circuit court erred in concluding there was no medical evidence in the record that would negate Pack's claim of a brain injury.

The record is replete with such evidence. Dr. Bill Simpson, a family medicine specialist at the Medical University of South Carolina, stated, "[Pack's] neurological examination is grossly intact." Dr. Waid stated Pack was "[q]uite talkative during the evaluation process," that her "[c]onversational speech was prosodic, fluent, of normal rate and tone" and she "did not demonstrate any word finding difficulties in conversational speech." Dr. Gordon Early, a specialist in occupational medicine, noted blood tests conducted soon after Pack's last alleged exposure revealed no evidence of any exposure to insecticide. Two board certified toxicologists offered their opinions that there was no evidence of any toxic exposure to insecticide and that, at most, Pack

had transient symptoms from herbicide exposure. Dr. Robert M. Bennett, a forensic toxicologist, reported that any biochemical changes that occur due to the toxicity of acephate are relatively short-lived, typically clearing in a matter of days. Dr. Bennet further stated, "No chronic, permanent or lasting organic biochemical somatic or neurological changes have been shown in the medical literature" and that "there are no reported cases of long term health effects in humans due to acephate or its formulations." Because the record contains conflicting evidence on the question of whether Pack suffered a brain injury, it was error for the circuit court to hold that the only medical evidence in the record supports the Single Commissioner's original finding that Pack sustained an injury to the brain. For this reason, the circuit court's holding is reversed.

Second, the circuit court erred to the extent that it held it was improper for the Commission to disagree with the findings of the Single Commissioner. The Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006). Pursuant to S.C. Code Ann. § 42-17-50 (Supp. 2007), the Commission shall weigh the evidence as presented at the initial hearing and, if good grounds are shown, make its own findings of fact and reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. Lowe v. Am-Can Transp. Servs. Inc., 283 S.C. 534, 537, 324 S.E.2d 87, 89 (Ct. App. 1984); see also Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 64, 156 S.E.2d 318, 321 (1967) (holding although it is logical for the Commission to give weight to the Single Commissioner's opinion, the Commission may disagree with his findings based on the credibility of witnesses).

In this case, the mere fact that the Commission disagreed with the Single Commissioner did not, by itself, constitute a failure to make an essential finding of fact. See Lowe, 283 S.C. at 537, 324 S.E.2d at 89 (holding the Commission had the power to make its own findings consistent with or inconsistent with those of the Single Commissioner whether or not the Single Commissioner's holdings were based on

competent substantial evidence and whether or not they were based on credibility of witnesses he had personally observed). Rather, the Commission's error was in its failure to explain its disagreement – i.e., its failure to explain exactly why it denied Pack's claim of brain injury. The absence of any findings to support the Commission's denial leaves this Court no way of evaluating the reasoning behind the Commission's decision. We, therefore, remand the issue to the Commission to make further findings to support its decision as to Pack's claim of brain injury. See Fox, 319 S.C. at 280, 461 S.E.2d at 394 (holding when an administrative agency acts without first making the proper factual findings required by law, the proper procedure is to remand the case and allow the agency the opportunity to make those findings).

3. Respiratory and Psychological Overlay

The Commission ruled, and the circuit court affirmed, that Pack suffered both respiratory and psychological injuries. Appellants argue the circuit court erred in affirming the Commission because (a) substantial evidence does not support the respiratory injury claim, and (b) the psychological injury claim does not meet the legal standard for compensability. We agree with the circuit court and the Commission that Pack's claim of injury to her respiratory system is supported by substantial evidence. Therefore, we affirm the circuit court's holding as to that issue. However, we remand the issue of psychological injury to the Commission for more definite factual findings of a causal connection between Pack's physical injuries, either brain or respiratory, and her psychological injuries.

a) Respiratory Injury

Appellants argue the circuit court erred in affirming the Commission's decision that Pack suffered an injury to her respiratory system because substantial evidence does not support a finding of a continuing respiratory injury. We disagree.

"Substantial evidence" is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence that,

considering the record as a whole, would allow reasonable minds to reach the same conclusion as the Commission. Taylor, 368 S.C. at 36, 627 S.E.2d at 752. Where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive. Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 380, 440 S.E.2d 401, 403 (Ct. App. 1994). The Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontradicted. 100A C.J.S. Workers' Compensation §1023 (2000). Thus, even sharply contradicted evidence of injury can constitute substantial evidence for purposes of review. See, e.g., Williams v. S.C. Dep't. of Mental Retardation, 308 S.C. 438, 439-40, 418 S.E.2d 555, 556 (Ct. App. 1992) (holding substantial evidence supported Commission's finding that claimant suffered a permanent ten percent impairment to her back, despite the fact that all of the experts, except claimant's family physician, agreed after close physical examinations that claimant had no permanent partial impairment).

While the evidence in the record tending to support Pack's alleged respiratory injury is far from overwhelming, the record does contain substantial evidence to support the Commission's conclusion Pack has suffered a respiratory injury. Dr. Lieberman listed among his diagnoses "excessive bronchial secretions[,] . . . wheezing[,] . . . [and] bronco spasms." Dr. Stewart, a rehabilitation counselor, concluded Pack "sustained significant work-related injuries to her brain (cognitive dysfunction) and lungs/breathing passages." Dr. Brian S. Dantzler, an allergist, diagnosed Pack with asthma "based upon a combination of clinical history of coughing, wheezing, or episodic difficulty breathing." Considering the record as a whole, this evidence could allow reasonable minds to conclude Pack suffered respiratory injury. See Taylor, 368 S.C. at 36, 627 S.E.2d at 752 (holding evidence is substantial if, considering the record as a whole, it "would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action[]"). Because the evidence is conflicting on this issue, the circuit court did not err in affirming the Commission's holding. See Rogers, 312 S.C. at 381, 440 S.E.2d at 403 (holding the circuit court's reversal of the Commission was error

because although the evidence conflicted, the Commission's findings were supported by substantial evidence).

b) Psychological Injury

Appellants argue the circuit court erred in affirming the Commission's decision that Pack suffered a psychological injury because Pack's claim for psychological injury does not meet the requirements of S.C. Code Ann. § 42-1-160 (Supp. 2007). Although we agree with Pack that substantial evidence supports the Commission's finding that she suffered an injury to her respiratory system, we do not believe the Commission made adequate findings of fact establishing a causal connection between Pack's physical injuries and her psychological injuries. We, therefore, remand the issue to the Commission for more specific findings of a causal connection.

Claims for psychological injury are compensable only if the claimant proves by a preponderance of evidence they are caused by physical injury or by extraordinary and unusual conditions of employment. Frame v. Resort Servs. Inc., 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct. App. 2004). In this case, there is no contention Pack suffered extraordinary and unusual conditions of employment. Therefore, for Pack's psychological injuries to be compensable, Pack must prove a physical injury caused her psychological injury. Estridge v. Joslyn Clark Controls, Inc., 325 S.C. 532, 538, 482 S.E.2d 577, 580 (Ct. App. 1997).

There are two alleged physical injuries in this case: brain and respiratory. From the record, Pack's position appears to be her alleged brain injury, not her respiratory injury, is what caused her psychological injuries. Indeed, the Single Commissioner grouped the psychological injuries with the brain injuries, describing Pack's injuries as "respiratory [and] brain with psychological overlay," and "brain accompanied with psychological overlay[]"). Thus, a finding that Pack has psychological injuries would seem to be contingent upon the Commission finding she had brain injuries. It was, therefore, puzzling that the Commission found psychological injuries while denying the

brain injury. In doing so, the circuit court implicitly held that Pack's respiratory injuries caused the psychological injuries. However, the circuit court made no findings of fact to support this.

The task of an appellate court is to inquire whether the Commission's findings are supported by substantial evidence. Lark, 276 S.C. at 136, 276 S.E.2d at 307. However, without clear findings of fact, this Court cannot evaluate the decision of the Commission under the substantial evidence standard. See Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 123, 127 S.E.2d 288, 292 (1962) (holding remand is proper where Commission's order affords no reasonable basis upon which the appellate court can determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings). Here, there are inadequate findings as to what caused Pack's psychological injuries. We, therefore, remand this issue to the Commission to make further findings as to the causal link between Pack's physical injuries, either brain or respiratory, and her psychological injuries.

CONCLUSION

As to the brain injury, the circuit court's reversal of the Commission is reversed, and the issue is remanded to the Commission for further findings on brain injury.

As to the respiratory injury, the circuit court's ruling is affirmed.

As to psychological injuries, the issue is remanded to the Commission for more specific fact-finding on the causal link between Pack's physical injuries and her psychological injuries.

PIEPER and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Windle E. Skipper, as personal representative of the estate of C.D. Nixon, Respondent,

v.

Gloria N. Perrone and Carol Repec Perrone, as personal representatives of the estate of Joel E. Perrone, Appellants,

v.

Ray Nixon, LLC, Windle Skipper, individually and as the personal representative of the estate of C.D. Nixon, N.F. Nixon, Jr., and John W. Ray, Third-Party Defendants

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Appeal From Horry County
L. Henry McKellar, Circuit Court Judge

Opinion No. 4489
Heard December 11, 2008 – Filed January 27, 2009

AFFIRMED

Paul Dominick, of Charleston, Rose Duggan Manos, of Columbia, Willard D. Hanna, Jr., of Surfside Beach, for Appellants.

J. Jackson Thomas, of Myrtle Beach, for Respondent.

HUFF, J.: Gloria N. Perrone and Carol Repec Perrone, as Personal Representative of the Estate of Joel E. Perrone appeal the order of the special referee setting aside a deed on the ground of undue influence. We affirm.

FACTS/PROCEDURAL HISTORY

On October 25, 1993, a deed from C. D. Nixon to his sister, Gloria Perrone, and nephew, Joel E. Perrone, was filed in the Horry County Register of Deeds Office. The deed was subsequently re-recorded on May 29, 1994. It was witnessed by Margaret S. Mullinax and Beverly A. Bell. The stated consideration was $10.00. The deed purported to convey:

> ALL AND SINGULAR, the properties located in the County of Horry, State of South Carolina, in the Little River Township now owned by the Grantor, and being the remaining property conveyed to the Grantor by deed of East Cherry Grove Realty Company, a corporation, dated June 9, 1997, and recorded in the records of Horry County in Deed Book 584, page 617. The description in said deeds being included as if fully set out herein.
>
> ALSO, All reservations, rights, interest in and rights of enforcing the same, which have not been sold,

> deeded, or transferred, including but not exclusive of those in any roads, avenues, attests, parks, lanes or beaches, together with all rights which have been reserved by the Grantor in prior conveyances as contained in the official Cherry Grove Beach Deed as restrictions and conditions.

Nixon passed away on December 13, 1995. Under the terms of his will, the bulk of his estate passed to a corporation to be formed and owned by John W. Ray, his long time accountant, and Dr. N.F. Nixon, Jr., his nephew and personal physician. Neither Gloria nor Joel Perrone was a beneficiary under the will.[1]

Windle E. Skipper, the personal representative of Nixon's estate, brought the present action on October 1, 2003 seeking to have the deed set aside on the grounds of lack of consideration, undue influence, lack of competency, that the deed was executed in blank, and lack of required witnesses. The circuit court dismissed the grounds of lack of consideration and lack of required witnesses. The remaining grounds were tried before the special referee.

The special referee found that during the latter part of 1993 Nixon was either incompetent or substantially impaired due to his advanced age and physical and mental condition. In addition, the referee held the consideration for the deed was grossly inadequate. Accordingly, the referee concluded the

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[1] Nixon left an unwitnessed memorandum to his will dated September 27, 1993 which provided:

> Recent events and statements made by several of my family members wherein they indicated that they might contest my Will or bring other actions against my Estate or Personal Representatives prompts me to issue this memorandum and ask that any court deny and reject such claims and that they receive no share of my Estate.

deed should be set aside on the grounds of undue influence. He rejected Appellants' defenses of laches, estoppel, and waiver. Appellants filed a motion to reconsider, alter, or amend, which the referee denied. This appeal followed.

STANDARD OF REVIEW

An action to set aside a deed on the basis of undue influence is an action in equity. Donnan v. Mariner, 339 S.C. 621, 626, 529 S.E.2d 754, 757 (Ct. App. 2000). When reviewing an action in equity, this court may review the evidence to determine facts in accordance with our own view of the preponderance of the evidence. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). "While this permits us a broad scope of review, we do not disregard the findings of the [referee], who saw and heard the witnesses and was in a better position to evaluate their credibility." Id.

LAW/ANALYSIS

1. Undue influence

Appellants argue the referee erred in finding the deed was the product of undue influence. We disagree.

Generally, the party attacking a deed has the burden of proof. Middleton v. Suber, 300 S.C. 402, 405, 388 S.E.2d 639, 641 (1990). However, the supreme court held an inference of undue influence will arise upon a showing of great mental weakness of the grantor and gross inadequacy of consideration. Brooks v. Kay, 339 S.C. 479, 490, 530 S.E.2d 120, 125-26 (2000). The court explained:

> It is not necessary, in order to secure the aid of equity, to prove that the deceased (grantor) was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid

> deed. It is sufficient to show that from her sickness and infirmities she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances imposition of undue influence will be inferred.

Id. at 490, 530 S.E.2d at 125-26. The court recognized this inference applies even absent a confidential relationship. Id. at 490, 530 S.E.2d at 126.

The referee held that Nixon was either incompetent or substantially impaired due to his advanced age and physical and mental condition at the time of the execution of the deed. Dr. N.F. Nixon, who was Nixon's nephew, treating physician, and one of the remainder beneficiaries of his estate, testified that in late 1990 or early 1991, Gloria Perrone's daughter, Melinda Floyd, spoke to him about her concerns that the people who were supposed to be looking after Nixon were in fact looking out for their own interests and were getting him to sign deeds. On July 10, 1991, Gloria Perrone, Floyd, and Dr. Nixon met with the probate judge. However, at that time they were not ready to have Nixon declared incompetent and no action was taken.

Dr. Nixon stated that by the early 1990's, Nixon had undergone senile dementia and was not capable of protecting himself from people who were taking advantage of him. He described Nixon's living conditions as squalid and stated Nixon was always on the couch reeking of urine and was unable to toilet himself. Dr. Nixon asserted Nixon would "sign just about anything that anyone would bring to him, just to get away from the stress of it." Dr. Nixon related that in 1992, he had Nixon grant him a deed to a tract adjoining property he already owned. Dr. Nixon acknowledged that although he believed C.D. Nixon knew him and agreed to the sign the deed, he did not have the ability to not sign and that Nixon would sign anything anyone brought him.

Margaret Mullinax, who lived with Nixon from August of 1993 until his death, testified that when she came to live with him, his entire house smelled of urine and he had not been well taken care of by his previous

caretaker. She and other family members decided to have the county nurses come to Nixon's house to check on him regularly. She stated the previous caretaker took advantage of Nixon and had him sign deeds giving her property. She recalled Nixon often signed deeds in blank and left them lying around.

Carlton Bell, Nixon's longtime attorney, stated that after Nixon broke his arm in 1991 or 1992, his dementia progressed. On December 16, 1993, when Nixon came to Bell's office to execute a deed, Bell had great concerns about Nixon's competency to execute the deed. Bell allowed Nixon to execute the deed because he believed that if Nixon had not executed the deed, he and Nixon's other attorney in fact could have executed it on his behalf.[2] He stated he did not want to have to tell Nixon he was incompetent when the transaction would have happened anyway. That was the last deed Bell helped Nixon execute.

Not long after Nixon executed the deed in the present case, he executed a deed on November 17, 1993 reserving a life estate to himself in all of his property in Horry County and conveying the remainder to Gloria Perrone's daughters Debbie Perrone Fowler and Melinda Perrone Fowler, a great niece Sue Nye Watson, and Margaret Mullinax. This deed was subsequently set aside on the basis of undue influence. Although Bell executed several deeds during this time period that have not been set aside, there is no evidence Skipper or Bell himself sought to set aside those deeds.

In May or June of 1994, Bell visited Nixon after receiving a call from his caretaker, Olea Ward. Bell found Nixon in an almost comatose state. Bell called Dr. Nixon and another friend of Nixon to help them. In September of 1994, Dr. Nixon, Gloria Perrone and other family members filed a petition for a conservator for Nixon. The probate court appointed temporary joint conservators in October of 1994.

[2] Unknown to Bell, the power of attorney naming Bell and Olea Ward as attorneys in fact was revoked on October 27, 1993.

We agree with the referee that Bell was in substantially weakened mental state at the time of the execution of the deed.

In addition, the referee held the compensation listed in the deed was grossly inadequate. There is no evidence in the record as to the exact value of the property. However, Bell testified the deed conveyed the marsh and whatever else the East Cherry Grove Realty Company may have owned at the time of its dissolution. This included a channel lot, which Bell stated was extremely valuable at the time of the execution of the deed.[3] In addition, the property conveyed by the deed included land between the front line of lots previously conveyed and the Atlantic Ocean. Bell explained that the mean high water mark had changed since the original deeds leaving up to 300 feet between the lots. Nixon had seen the property as having some value and had contacted lot owners inquiring if they wanted to expand their lots and most of them did at some price. Bell testified that according to the State of South Carolina, the marshland was worth approximately eight hundred to a million dollars per acre. It would also be worth something to an adjoining landowner who needed access to the channel across the property. However, to someone who does not own property there, it has no value.

After receiving the deed, the Perrones brought several actions against DHEC, the City of North Myrtle Beach, and private parties asserting their exclusive rights to the properties and seeking damages. In an order approving plans for pursuing real property claims by the estate of Joel Perrone, the probate court noted the Perrones' attorney informed the court that the claims "could amount to millions of dollars in recoveries." Thus the evidence in the record is that the property was extremely valuable and potentially worth millions. We find the evidence supports the referee's determination that the consideration for the deed of $10.00 was grossly inadequate. Accordingly, we hold the referee did not err in inferring the deed was the product of undue influence.

[3] Bell had handled transactions for similar lots and was familiar with their value.

2. Laches

The Perrones argue the referee erred in failing to apply the doctrine of laches to bar Skipper's claims. We disagree.

"Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Chambers of S. C., Inc. v. County Council for Lee County, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). "Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner." Id. at 421, 434 at 281. The party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice. Hallums v. Hallums, 296 S.C. 195, 199, 371 S.E.2d 525, 528 (1988).

The Perrones assert the doctrine of laches should apply because this action was not filed until almost ten years after the date of the deed. They assert they were prejudiced by the delay because by the date of the trial, Joel Perrone had passed away, and Gloria Perrone was in such poor health that she could not testify at trial. In addition, deed witness Beverly Bell was unable to testify at trial because of her health problems, Olea Ward passed away before the trial, and Margaret Mullinax could not be located to testify at trial.

From the time Nixon executed the deed until his death, he suffered from diminished mental capacity and may not have been able to bring an action to set aside the deed. Skipper testified that he was not familiar with the deed before Nixon died and after Nixon's death he concentrated on having another deed set aside. He stated he did not really concentrate on the present deed until he was about to close the estate and it was brought to his attention that he should look at the deed. By then, Joel Perrone had passed away and Gloria Perrone was bedridden. We find Skipper did not exercise unreasonable delay in bringing this action once he was aware of the circumstances of the deed. In addition, the prejudice to the Perrones was not

as great as they claim. Although Ward, Mullinax, and Beverly Bell were not able to testify at trial, they had previously testified in depositions, which were presented at trial.

The referee held, "I see nothing in the facts of the case at bar to indicate that here, where undue influence was used to obtain valuable property from an old, sick, mentally weak man, the Court should exercise its discretion in favor of [the Perrones'] laches defense." This court recognized, "Laches is a defense in equity, and one who comes to the court seeking equity must come with clean hands." Emery v. Smith, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004).

Accordingly, we find no error in the trial court's ruling on this issue.

3. Waiver

The Perrones argue the referee erred in failing to apply the doctrine of waiver to bar Skipper's claim. They assert that Nixon intentionally abandoned and waived a claim to set aside the deed by taking no action after telling Bell that he wanted to have the deed set aside. We disagree.

Waiver is a voluntary and intentional abandonment or relinquishment of a known right. Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007). It may be expressed or implied by a party's conduct. Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994).

At the time Nixon discussed setting aside the deed with Bell, he was greatly infirmed. Bell, who was his long-time attorney, advised him that he would have to seek another attorney to represent him as Bell would most likely have to appear as a witness in an action to set aside the deed. We find Nixon did not intentionally abandon the claim by not trying to find another attorney, given his mental condition.

CONCLUSION

For the foregoing reasons, the decision of the master is

AFFIRMED.

ANDERSON, HUFF, and THOMAS, JJ. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David J. Widener,	Appellant,
v.	
Fort Mill Ford, and WFS Financial,	Defendants,
of whom:	
Fort Mill Ford is	Respondent.

Appeal From York County
S. Jackson Kimball, III, Master In Equity

Opinion No. 4490
Heard December 3, 2008 – Filed January 27, 2009

REVERSED AND REMANDED

Mitchell K. Byrd, Sr., of Hilton Head Island, for Appellant.

Ronald J. Tryon and J. Drayton Hastie, III, both of Columbia, for Respondent.

GOOLSBY, A.J.: David J. Widener brought this action against Fort Mill Ford and WFS Financial (WFS) alleging violations of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, sections 56-15-10 to -600 of the South Carolina Code (Supp.

2007) (the Dealers Act), and the Unfair Trade Practices Act, sections 39-5-10 to -560 of the South Carolina Code (Supp. 2007). In response, Fort Mill Ford moved to dismiss or stay the proceedings and to compel arbitration. After a hearing, the trial court dismissed the action, holding "[t]he arbitration agreement is enforceable by [Fort Mill Ford and WFS] pursuant to the Federal Arbitration Act as to the claims asserted by [Widener] in this litigation." Widener appeals. We reverse and remand.

I. APPEALABILITY

Widener argues the trial court's order dismissing his action is immediately appealable. Fort Mill Ford contends the trial court's order is not appealable, citing section 15-48-200 of the South Carolina Code (Supp. 2007) and Carolina Care Plan, Inc. v. United HealthCare Services, Inc., 361 S.C. 544, 558, 606 S.E.2d 752, 759 (2004).

South Carolina courts have not specifically addressed the issue of whether an order dismissing an action without prejudice and allowing the parties to pursue arbitration is immediately appealable. The United States Supreme Court addressed a similar issue in Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79 (2000). The court held an order dismissing an action with prejudice and directing that the dispute be resolved by arbitration is final and immediately appealable. Id. at 86-87. The court added, "Had the District Court entered a stay instead of a dismissal in this case, that order would not be appealable." Id. at 87 n.2. Further, both the Second Circuit and the Ninth Circuit have held that orders dismissing actions without prejudice and compelling arbitration are immediately appealable. See Salim Oleochemicals v. M/V Shropshire, 278 F.3d 90, 93 (2d Cir. 2002); Interactive Flight Techs., Inc. v. Swissair Swiss Air Transport Co., Ltd., 249 F.3d 1177, 1179 (9th Cir. 2001).

We therefore hold the trial court's order is immediately appealable.

Fort Mill Ford's reliance on section 15-48-200 is misplaced. Although section 15-48-200 does not include an order dismissing an action among a list of orders from which an appeal may be taken in arbitration cases, this section does not preclude the order in this case from being immediately appealable. By dismissing Widener's action, the court finally determined the rights of the parties; therefore, we have jurisdiction pursuant to section 14-3-330 of the South Carolina Code (Supp. 2007).

Further, this case is distinguishable from Carolina Care Plan. In Carolina Care Plan, our supreme court held an order compelling arbitration and staying the remaining claims is not immediately appealable. 361 S.C. at 558, 606 S.E.2d at 759. Here, however, the trial court's order did not stay the action pending arbitration. Instead, trial court dismissed the action, stating, "It is further ordered that this action be dismissed without prejudice to the right of any party to seek such relief as may be available to enforce, modify, or vacate any arbitration decision as permitted by statute."

II. DISMISSAL

Widener argues the trial court erred in dismissing his action. He asserts the dismissal prejudices him because any future action will be barred by the statute of limitations. We agree.

Although South Carolina courts have not addressed this issue, the Alabama Supreme Court dealt with a similar situation in Johnson v. Jefferson County Racing Ass'n, 2008 WL 2554013, 7 (Ala. 2008). The Johnson court pointed to the following discussion, which appears in Porter v. Colonial Life & Accident Insurance Co., 828 So. 2d 907, 908 (Ala. 2002):

> "We note a potential for injustice. If a plaintiff's court action be dismissed to enforce an arbitration agreement, but, through no fault of the plaintiff's, the arbitration be not concluded or some of the plaintiff's claims be

> not arbitrated, a statute of limitations could bar a refiling of the unarbitrated claims in court. Sometimes, for instance, an arbitrator's first duty under an arbitration agreement is to determine the arbitrability of a plaintiff's claims. In such a case, the arbitrator could rule that some or all of the plaintiff's claims should be litigated and not arbitrated. Moreover, a stay, as distinguished from a dismissal, would likely better conserve the time and resources of the parties and the trial court even in the event of a successful arbitration, inasmuch as the winner commonly wants the arbitration award reduced to a judgment."

Here, as in Johnson, there is a potential the statute of limitations could bar refiling of any unarbitrated claims in court. See S.C. Code Ann. §§ 39-5-150 & 56-15-120 (Supp. 2007).

Accordingly, we reverse the decision of the trial court and remand this case for the trial court to vacate its dismissal of Widener's claims and to enter an order staying his action pending the outcome of the arbitration proceedings.

III. ARBITRATION

Widener argues the trial court erred in concluding his causes of action are subject to arbitration. We do not reach this issue because we are reversing and remanding this case for the trial court to stay this action pending arbitration.

REVERSED AND REMANDED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

William John Payne, Respondent,

v.

Sherry Payne, Appellant.

Appeal From York County
Jane D. Fender, Family Court Judge

Opinion No. 4491
Heard November 6, 2008 – Filed January 27, 2009

AFFIRMED

Douglas Kosta Kotti, of Columbia, for Appellant.

Pamela Michele Pearson, of Rock Hill, for Respondent.

HEARN, C.J.: Sherry Ann Payne (Mother) appeals from a family court order transferring custody of her minor son, Joshua Michael Payne, to William John Payne (Father). We affirm.

FACTS

Mother and Father separated in 1996 after four years of marriage; however, they did not divorce until 2001. The couple's son, Joshua,

was one year old at the time. During the separation and following the divorce proceedings, Mother was awarded primary custody of Joshua. Father was given supervised visitation until Joshua's sixth birthday, at which point Father began a two-year gradual introduction to "standard [unsupervised] visitation." This phased-in custody arrangement was the result of Father's status as a convicted sex offender, per a 1989 Criminal Sexual Conduct (CSC) conviction, and Mother's allegations of domestic violence by Father directed toward herself and Joshua during the separation and pendency of the divorce proceedings. Father remarried later in 2001, and ultimately began having unsupervised visitation.

In October of 2004, both parents were named as defendants in a South Carolina Department of Social Services action stemming from allegations made by Joshua's pediatrician, Dr. Deanna Threatt. Threatt expressed concern that Joshua's frequent hospitalization and illnesses may be a form of child abuse, and after consulting with other doctors in her practice group, diagnosed Mother with Munchausen Syndrome by Proxy. DSS was notified and the police were called. At the probable cause hearing, temporary custody was initially given to maternal grandmother. Following DSS in-home evaluations of both Mother's and Father's homes, temporary custody was awarded to Father for the pendency of the DSS case. Ultimately, the court found Joshua was not abused and returned custody to Mother.

In 2005, Father filed an action seeking modification of the family court's custody order in light of the DSS incident. In her answer and counterclaim, Mother requested that: (1) Father's visitation be reduced to supervised or restricted visits; (2) the action be dismissed; (3) the parties be permitted to engage in discovery; and (4) Father pay her attorney fees and costs.

Following a trial, the family court issued a final order that, in relevant part, transferred custody of Joshua to Father as well as set a visitation schedule for Mother. At the same time, Mother's counsel withdrew his representation.

Shortly thereafter, Mother's new attorney filed a "motion to reconsider with exceptions," which was denied. Because no one had notified the clerk of court's office that Mother's previous attorney no longer represented her, neither Mother, nor her new attorney, received the written order until January 29, 2007. Mother filed a pro se notice of appeal on February 26, 2007.

On March 14, 2007 Father's attorney moved to dismiss the appeal as untimely. Following Father's motion, both Mother's former attorney and Mother's attorney for the post-trial motion petitioned this court to be relieved as counsel of record for Mother. Mother consented to the motions, and on the same day, Mother's current attorney filed a notice of representation. Father's motion to dismiss the appeal was denied, but the parties were directed to address the issue of timeliness in their briefs.

STANDARD OF REVIEW

"In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence." Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 189, 612 S.E.2d 707, 711 (Ct. App. 2005) (citing Emery v. Smith, 361 S.C. 207, 213, 603 S.E.2d 598, 601 (Ct. App. 2004)). However, this broad scope of review does not require us to disregard the family court's findings. Bowers v. Bowers, 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct. App. 2002); Badeaux v. Davis, 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct. App. 1999). Neither is the appellate court required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Latimer v. Farmer, 360 S.C. 375, 380, 602 S.E.2d 32, 34 (2004); Holler v. Holler, 364 S.C. 256, 261, 612 S.E.2d 469, 472 (Ct. App. 2005). Because the family court is in a superior position to judge the witness demeanor and veracity, its findings should be given broad discretion. Durlach v. Durlach, 359 S.C. 64, 70, 596 S.E.2d 908, 912 (2004); Doe v. Doe, 370 S.C. 206, 211-12, 634 S.E.2d 51, 54 (Ct. App. 2006).

LAW/ANALYSIS

I. The Modification Order

"[W]hen a non-custodial parent seeks a change in custody, the non-custodial parent must establish the following: (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the overall best interests of the child." Latimer v. Farmer, 360 S.C. 375, 381, 602 S.E.2d 32, 35 (2004). At trial, Father successfully argued both prongs of Latimer and asks this court to affirm the family court's ruling.

On appeal, Mother argues the family court erred in granting Father's request for modification of the custody order for the following reasons: (1) failure to properly consider Father's status as a convicted sex offender; (2) failure to properly apply the doctrine of issue preclusion; (3) failure to comply with the child's preference regarding custody; and (4) failure to comply with the Private Guardian Ad Litem Reform Act barring the guardian from making a custody recommendation unless requested by the court for reasons specified in the record. She also asserts the family court erred in requiring her to pay one-half of the GAL fees. We disagree and affirm.

A. Father's Status as a Convicted Sex Offender

Mother argues the family court erred by failing to give adequate consideration to Father's sex offender status. Mother points to section 20-7-1530(A) of the South Carolina Code (Supp. 2007) as requiring the family court to consider Father's sex offender status with respect to custody. While Mother is correct insofar as § 20-7-1530(A) requires the court to give weight to "sexual abuse" in determining the best interest of the child, other relevant factors must also be considered. See Pountain v. Pountain, 332 S.C. 130, 136, 503 S.E.2d 757, 760 (Ct. App. 1998) (stating that when determining the best interests of the child, the family court should consider how the custody decision will impact all areas of the child's life, including physical, psychological, spiritual, educational, familial, emotional, and recreational aspects).

Here, the family court was well aware of Father's sex offender status but simply declined to give it the weight desired by Mother. On direct examination, Father was questioned by his counsel regarding the circumstances of his CSC conviction. Father testified concerning the counseling and other remedial measures required of him as a result of his CSC conviction. During Father's cross examination on this issue, the family court stated, "I want to know the relevance of this . . . they've been in court many, many times and I know that's a fact; I've got all this in evidence, and . . . I just don't think that's very relevant to this case." Thus, there is no question the family court judge was aware of Father's 1989 CSC conviction.

The family court based its custody decision primarily upon Mother's emotional and physical abuse of Joshua as testified to by Dr. Threatt, including, "numerous unnecessary [medical] procedures and hospitalizations." The court also relied on the testimony of Dr. Robert Noelker, who, in addition to expressing concerns over Mother's serious personality disorder and its effect on Mother's ability to parent, believed Father would provide Joshua a better home environment. Dr. Noelker also noted that due to the nature of Mother's personality disorder, extensive, long-term treatment, including the use of psychotropic medications, would be required to effectively treat her. Noelker additionally found Father was, "an excellent role model," and there were no current issues which would affect his ability to parent.

The Guardian ad Litem (GAL), Dr. Jane Rankin, echoed Noelker's statements regarding custody and testified Father was an involved parent who spent much time with Joshua. Rankin found Joshua to be "more relaxed" and "more independent" while in Father's custody during the DSS action. Additionally, Rankin reported Joshua was "tense" and "shy" upon returning to Mother's custody following termination of the DSS action.

The family court's custody decision was further supported by Joshua's principal, who testified Joshua missed approximately thirty days of school from the beginning of school until late October, while in

Mother's custody, and only one day of school after custody was transferred to Father during the DSS action. She further noted that Joshua seemed "more relaxed and outgoing" when Father had primary custody.

B. Issue Preclusion/ Collateral Estoppel

Mother also argues Father's custody modification action was precluded by the ruling in the prior DSS case, and therefore, maintains the family court erred in not dismissing the action. We disagree.

According to our supreme court, issue preclusion, also known as collateral estoppel, occurs when the party in a second action is precluded from re-litigating an issue which was decided in a previous action. Zurcher v. Bilton, 379 S.C. 132, 135-36, 666 S.E.2d 224, 226 (2008) (stating an issue litigated and determined by a valid and final judgment is conclusive in a subsequent action whether on the same or a different claim). In order to successfully assert issue preclusion, a party must show the issue was actually litigated and directly determined in the prior action, and that the matter or fact directly in issue was necessary to support the first judgment. Plott v. Justin Enters., 374 S.C. 504, 513, 649 S.E.2d 92, 96 (Ct. App. 2007) (citing Town of Sullivan's Island v. Felger, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (1995)).

Mother mischaracterizes the issue before the family court in the DSS action as a custody action. While it is true that custody was transferred to Father during the pendency of the DSS hearings, the issue in the DSS action was whether Mother abused or neglected Joshua. By comparison, the issue before the family court in the custody modification action was whether a substantial change affecting the welfare of the child had occurred and whether a change in custody would serve the best interests of the child. As the issue of custody between Mother and Father was neither litigated nor directly determined in the DSS action, we affirm as to this issue.

C. Consideration of Joshua's Preference Regarding Custody

Mother further argues Joshua's preference was not given sufficient weight by the family court. We disagree.

When determining issues of custody, "the court should consider all the circumstances of the particular case and all relevant factors must be taken into consideration." Pirayesh v. Pirayesh, 359 S.C. 284, 296, 596 S.E.2d 505, 512 (Ct. App. 2004). While the child's reasonable preference is a factor in considering the best interest of the child, it is not controlling. Brown v. Brown, 362 S.C. 85, 96, 606 S.E.2d 785, 791 (Ct. App. 2004). Additionally, the trial court is required to, "place weight upon the preference based upon the child's age, experience, maturity, judgment, and ability to express a preference." S.C. Code Ann. § 20-7-1515 (Supp. 2007).

While not expressing an outright preference, Joshua stated that "he wanted things to stay the way they were." The family court acknowledged Joshua's preference in the final order, but clearly took other factors, such as Mother's emotional condition and its impact upon Joshua, into consideration in its decision to modify the custody arrangement. Accordingly, we do not believe the family court erred in failing to give Joshua's preference controlling weight.

D. The Private Guardian Ad Litem Reform Act

Mother next asserts the family court erred by failing to set forth in the record the specific grounds for requesting the GAL's custody recommendation, as required by the Private Guardian Ad Litem Reform Act. S.C. Code Ann. § 20-7-1549(6) (Supp. 2007). Mother argues that, as a result of failing to give reasons for accepting the GAL custody recommendation, the GAL usurped the trial court's role as a decision maker. Here, Mother did not object when the GAL gave her recommendation; therefore, this issue is not preserved for appellate review. To be preserved for appellate review, an issue must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. 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).

II. The GAL Fees

Finally, Mother argues the family court erred in its division of the GAL fees. Additionally, Mother argues, "there is no recorded order appointing the [GAL] and no recorded order setting her fee rate or an initial authorization of her fees." We disagree.

South Carolina law provides that the family court should review the following factors when awarding GAL fees:

> (1) the complexity of the issues before the court; (2) the contentiousness of the litigation; (3) the time expended by the guardian; (4) the expenses reasonably incurred by the guardian; (5) the financial ability of each party to pay fees and costs; and (6) any other factors the court considers necessary.

S.C. Code Ann. § 20-7-1553(B) (Supp. 2007).

"An award of GAL fees lies within the sound discretion of the [family court] and will not be disturbed on appeal absent an abuse of discretion." Shirley v. Shirley, 342 S.C. 324, 341, 536 S.E.2d 427, 436 (Ct. App. 2000). The trial court abuses its discretion when a decision is based upon an error of law or upon factual findings that are without evidentiary support. State v. Morris, 376 S.C. 189, 206, 656 S.E.2d 359, 368 (2008).

After reviewing the GAL's time expenditure and her hourly rate, the family court found the GAL competently performed her services and was entitled to payment of her fees and expenses in the amount of $3,773. This was consistent with a July 29, 2005, order that appointed Dr. Rankin, set her hourly rate, and determined that each party would share equal responsibility for the balance of the fees owed to the

guardian. Consequently, the family court did not abuse its discretion by splitting the guardian fees between the parties.

The ruling of the family court is accordingly

AFFIRMED.

SHORT, J., and KONDUROS, J., concur.