The Supreme Court of South Carolina

Request for Written Comments and Notice of Public Hearing on Proposed Amendments to the South Carolina Rules of Civil Procedure

The South Carolina Bar has filed a petition to amend Rule 6 of the South Carolina Rules of Civil Procedure (SCRCP). A copy of this petition is attached. The Rules Advisory Committee has recommended approval of this rule change.

Additionally, Court staff has prepared possible alternative amendments to Rules 6 and 7, SCRCP. These amendments would incorporate some of the language and practice from the Local Federal Rules for the District of South Carolina regarding supporting memoranda and other documents, and would define the process and timing of filing of returns and replies to motions, and holding hearings on motions. A draft of these amendments is attached.[1]

Persons or entities desiring to submit written comments regarding these proposed amendments may do so by filing an original and seven (7) copies of their written comments with the Supreme Court. The written comments must be sent to the following address:

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

The Supreme Court must receive any written comments by Tuesday, December 29, 2009. Additionally, the Court requests that an electronic version of the comments in Microsoft Word or WordPerfect be e-mailed to Rule6@sccourts.org by that same date.

The Court will hold a public hearing regarding this matter on Tuesday, January 5, 2010, at 3:00 p.m. in the Supreme Court Courtroom in Columbia,

[1] If ultimately adopted, these proposed amendments may also require changes to other rules such as Rules 56(c) and 59(c), SCRCP.

South Carolina. Those desiring to be heard shall notify the Clerk of the Supreme Court no later than Tuesday, December 29, 2009.

Columbia, South Carolina
December 9, 2009

South Carolina Bar Petition :

THE STATE OF SOUTH CAROLINA
In The Supreme Court

PETITION
South Carolina Bar
Ex Parte

IN RE: Amendment of Rule 6, SCRCP

Fred W. Suggs, Jr.
President, South Carolina Bar
P.O. Box 608
Columbia, SC 29202
(803) 799-6653

1. The South Carolina Bar is empowered under Rule 410, SCACR, with the specific purposes set forth in section b. The undersigned as President of the Bar has general charge of the affairs of the organization and is thus empowered to seek this relief in the Court.

2. On May 14, 2009, at a properly called and convened meeting of the House of Delegates, the House adopted a proposal from the Practice and Procedure Committee to amend Rule 6, SCRCP, as set forth in Attachment A.

3. The Committee had received comments from lawyers and members of the judiciary that motions practice needed to be improved. Concerns had been raised about having memoranda of law submitted and served on opposing counsel shortly before or during a motions hearing and the absence of a uniform rule.

4. The Committee received comments from the Chief Judges for Administrative Purposes in each of the sixteen Judicial Circuits. Some of the judges wished to adopt the local federal rule requiring submission of the memorandum with the motion; others wanted submission at least thirty days prior to a hearing; still others felt filing contemporaneous with the hearing was acceptable. The Committee reported that some judges have established their own filing preferences, which preferences vary from judge to judge and circuit to circuit.

5. The Committee proposed adoption of a new subsection in Rule 6. The proposal, as amended by the House, is set forth in Attachment A. The proposal seeks to establish time intervals which will permit a meaningful opportunity to receive and respond to legal arguments. The intervals would also permit the judge to review and consider the arguments upon which a ruling is sought. The court is given discretion to modify the intervals upon request of a party.

WHEREFORE, the South Carolina Bar prays that the Supreme Court of South Carolina amend Rule 6, SCRCP, as set forth in Attachment A.

_____

Fred W. Suggs, Jr.
President

June 22, 2009

ATTACHMENT A

The following subsection would be added as (e), with the present subsection (e) becoming (f).

Rule 6(e)

Except for written motions that may be heard ex parte, or written motions for which notice of the hearing is not received in writing at least 30 days in advance from either the court or another party, or as otherwise provided in Rules 56(c) and 59(c), a moving party, if intending to do so, shall file and serve a memorandum of law in support of the motion no later than 20 days before the hearing. The nonmoving party, if intending to do so, shall file and serve a memorandum of law in opposition to the motion no later than 10 days before the hearing. The moving party, if intending to do so, shall file and serve a memorandum of law in reply no later than 2 days before the hearing. The court in its discretion may modify these deadlines upon request of a party.

Alternate Amendments:

(1) Amend Rule 6(d) to read:

(d) For Motions, Returns, Replies and Supporting Documents. ~~**For Motions--Affidavits.** A written motion other than one which may be heard *ex parte*, and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time. The moving party may serve reply affidavits at any time before the hearing commences. In all cases where a motion shall be granted on payment of costs or on the performance of any condition, or where an~~

~~order shall require such payment or performance, the party whose duty it shall be to comply therewith shall have 20 days for that purpose, unless otherwise directed in the order.~~ Motions, returns to motions, replies to returns and other supporting documents shall be served and filed within the times specified by Rule 7(b).

(2) Amend Rule 7(b), SCRCP, to read:

(b) Motions and Other Papers.

(1) 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.~~

(2) A written motion shall be accompanied by a supporting memorandum which shall be served and filed with the motion. Unless otherwise directed by the court, a supporting memorandum is not required if a full explanation of the motion required by (5) below is contained within the motion and a memorandum would serve no useful purpose. Where appropriate, motions shall be accompanied by affidavits or other supporting documents. The memorandum and any supporting affidavits or other documents shall be served and filed with the motion.

(3) A return to the motion may be served and filed within ten (10) days of the service of the motion. The return may be accompanied by a supporting memorandum, affidavits or other supporting documents. If so, the memorandum and any supporting affidavits or documents shall be served and filed with the return . The court may require a return and a supporting memorandum or other documents to be served and filed. If a memorandum is filed, its content shall comply with the requirements of (5) below.

(4) If a return is made to the motion, the moving party may serve and file a reply no later than two (2) days prior to the hearing. Replies, however, are discouraged. The reply may be accompanied by a supporting memorandum, affidavits or other supporting documents. If so, the memorandum and any supporting affidavits or documents shall be served and filed with the reply. The court may require a supporting memorandum or other documents to be served and filed. A supporting memorandum for a reply need not contain all of the information required by (5) below.

(5) A supporting memorandum shall contain:

(A) A concise summary of the nature of the case:

(B) A concise statement of the facts that pertain to the matter before the court;

(C) The argument (brevity is expected) relating to the matter before the court for ruling with appropriate citations;

(D) Where the memorandum opposes a motion for summary judgment, a concise statement of the material facts in dispute shall be set forth;

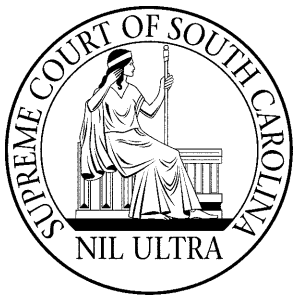
(E) Any special content required by that may be required by these rules or law based on the nature of the motion.

(6) The copy of a motion, return or reply filed with the court shall be accompanied by a proof of service showing that the document and any memorandum or supporting documents have been served on the opposing party.

(7) Hearing on Motion. Except for written motions that can be heard *ex parte* or where a different period is fixed by these rules or by an order of the court, no hearing shall be held on a motion until at least 20 days after the service of the motion on the opposing party. The clerk shall notify the parties of the hearing date. Unless a hearing is required by these rules or other law,

nothing in this rule shall be construed as preventing the court from ruling on a motion without a hearing.

~~(2)~~**(8)** The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 54
December 14, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Floree Hooper, as Personal Representative of the Estate of Albert L. Clinton, Deceased, Petitioner,

v.

Ebenezer Senior Services and Rehabilitation Center, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
S. Jackson Kimball, III, Circuit Court Judge

Opinion No. 26748
Heard September 17, 2009 – Filed December 14, 2009

REVERSED AND REMANDED

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, of Columbia, and Robert V. Phillips, of McGowan, Hood, Felder & Johnson, of Rock Hill, for Petitioner.

R. Gerald Chambers and R. Hawthorne Barrett, both of Turner, Padget, Graham & Laney, of Columbia, for Respondent.

JUSTICE BEATTY: Floree Hooper ("Hooper"), acting as Personal Representative of the Estate of Albert L. Clinton, brought this action alleging claims for wrongful death and survival against Ebenezer Senior Services and Rehabilitation Center ("Ebenezer"). The trial court granted summary judgment in favor of Ebenezer, finding the claims were untimely asserted. The South Carolina Court of Appeals affirmed. Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008). This Court granted Hooper's petition for a writ of certiorari. We now reverse and remand.

I. FACTS

The facts, in the light most favorable to Hooper, are as follows.[1] Ebenezer was a nursing home located in York County. In February 2003, Albert L. Clinton was placed at Ebenezer by his family. When he was admitted, Clinton had been diagnosed with short- and long-term memory deficits and impaired decision-making ability. Ebenezer was on notice that Clinton was at risk for the development of decubitus ulcers[2] and that he had to be given proper nutrition and be repositioned every two hours to avoid this condition.

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[1] On a motion for summary judgment, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Bovain v. Canal Ins., 383 S.C. 100, 678 S.E.2d 422 (2009).

[2] Commonly referred to as bed sores. Webster's Third New International Dictionary 588 (2002).

Within three weeks of his admission to Ebenezer, Clinton developed severe decubitus ulcers. In April 2003, Clinton was admitted to Piedmont Medical Center in Rock Hill, South Carolina, where he was diagnosed with dehydration, hypernatremia[3], and severe decubitus ulcers. As a result of the allegedly negligent treatment at Ebenezer, Clinton was transferred to another long-term care facility in May 2003. Clinton died on May 15, 2003.

On February 6, 2006, Hooper filed with the York County Court of Common Pleas a summons and complaint in which she alleged substandard care and treatment rendered by Ebenezer contributed to Clinton's death. She asserted claims for wrongful death and survival. It is undisputed by the parties that the statute of limitations on these claims began to run upon Clinton's death on May 15, 2003 and expired three years later on May 15, 2006. See, e.g., S.C. Code Ann. § 15-3-530 (2005) (providing a three-year statute of limitations period for the claims enumerated therein).

According to an affidavit prepared by Hooper's attorney and supporting documents, in order to effectuate service Hooper's attorney called the number for Ebenezer and was told that the business had been sold and it was now "Agape Rehabilitation." Hooper's attorney drove by the building where Ebenezer had been located and saw a sign identifying the premises as "Agape Rehabilitation of Rock Hill."

The attorney searched the website for the South Carolina Secretary of State and found Ebenezer was listed as a business in good standing with a registered agent (Jack G. Hendrix, Jr.) located at 1415 Richland Street, Columbia, South Carolina. On February 8, 2006, the attorney forwarded the pleadings to the Richland County Sheriff's Office for service upon the agent at the designated Columbia address. At the end of February or the beginning of March, the attorney received an Affidavit of Non-Service from the Richland County Sheriff's Office stating service was not successful because the agent had moved to an unknown address.

[3] An excessive amount of sodium in the blood. Dorland's Illustrated Medical Dictionary 741 (25th ed. 1974).

The attorney then hired a private investigator, who found a personal address for the agent. On March 21, 2006, the attorney mailed the pleadings to the Richland County Sheriff's Office for a second attempt at service upon the agent. On April 10, 2006, the Richland County Sheriff's Office returned the pleadings and advised the attorney that the address was in Lexington County and therefore was not within its jurisdiction.

Immediately thereafter on April 13, 2006, approximately one month before the three-year statute of limitations was due to expire, the attorney forwarded the pleadings to the Lexington County Sheriff's Office for service upon the registered agent. The attorney made numerous follow-up calls to the Lexington County Sheriff's Office to determine the status of service and each time was told that the agent was being served and that he would be notified when service was complete. On June 12, 2006, after the statute of limitations had run, the attorney received an Affidavit of Non-Service from the Lexington County Sheriff's Office informing him that they had, in fact, been unable to effect service on the agent because "per [a] neighbor [the] agt [agent] left his wife a year ago [and it is] unknown where he lives now."

According to the attorney, he then hired a private investigator to try to serve Agape Rehabilitation. An Affidavit of Service and supporting documents indicate service was accomplished on June 15, 2006 by a process server upon Janet Inkelaar, who indicated that she was the Administrator of Agape Rehabilitation and that she was authorized to accept service on behalf of Ebenezer. Inkelaar stated Ebenezer had been taken over by Agape Rehabilitation of Rock Hill in December 2004, but the two businesses were "affiliated."

Ebenezer moved to dismiss Hooper's action on the basis service was not completed before the running of the three-year statute of limitations of section 15-3-530, nor within the time limits of Rule 3(a)(2) of the South Carolina Rules of Civil Procedure (SCRCP), which requires that service be made within the statute of limitations or, if made thereafter, that it be made within 120 days of filing the summons and complaint. Ebenezer alleged Hooper's decedent died on May 15, 2003; therefore, the three-year statute of

limitations expired on May 15, 2006. In this case, the summons and complaint were filed on February 6, 2006[4] and service was not effected until June 15, 2006, which was after the running of the statute of limitations and more than 120 days after filing of the summons and complaint.

The parties submitted affidavits and other materials, so the trial court converted the motion into one for summary judgment.[5] The trial court granted summary judgment to Ebenezer, finding Hooper's action was not timely commenced because service did not occur within the statute of limitations or within 120 days of filing the summons and complaint as required by Rule 3(a)(2), SCRCP.

The trial court rejected Hooper's argument that the 120-day period should not begin running until the last day of the statute of limitations, finding this conflicts with the clear and unambiguous wording of Rule 3(a)(2). The trial court also rejected Hooper's arguments that the statute of limitations should be equitably tolled or that Ebenezer should be equitably estopped from asserting the statute of limitations based on its failure to accurately list its registered agent for service of process with the Secretary of State as required by state law.

The Court of Appeals affirmed. Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008). We granted Hooper's petition for a writ of certiorari to review the decision of the Court of Appeals.

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[4] Ebenezer states in its materials that filing of the summons and complaint occurred on February 8, 2006, but this appears to be a scrivener's error.

[5] See, e.g., Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) (allowing a motion to dismiss to be treated as a motion for summary judgment where the trial court considers materials outside the pleadings and the parties have a reasonable opportunity to respond to the materials).

II. LAW/ANALYSIS

A. Standard of Review

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a trial court may grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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.

"In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." Brockbank v. Best Capital Corp., 341 S.C. 372, 378-79, 534 S.E.2d 688, 692 (2000). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP. Id. at 379, 534 S.E.2d at 692.

B. Equitable Tolling

On appeal, we first consider Hooper's argument that the statute of limitations should be equitably tolled for the delay in service that occurred while Hooper was trying to serve Ebenezer's nonexistent agent. Hooper asserts she was entitled to rely upon the public records and Ebenezer's failure to name a viable registered agent with the South Carolina Secretary of State as required by state law thwarted her repeated attempts to effect service. Hooper asserts that, under all the circumstances, it would be inequitable for Ebenezer to be allowed to benefit from its conduct by obtaining a complete dismissal of her claims. We agree.

"'Tolling' refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting." 51 Am. Jur. 2d Limitation of Actions § 169 (2000). "Tolling may either temporarily

suspend the running of the limitations period or delay the start of the limitations period." Id.

South Carolina law provides for tolling of the applicable limitations period by statute in certain circumstances. See S.C. Code Ann. § 15-3-30 (2005) (stating exceptions to the running of the statute of limitations when the defendant is out of the state); id. § 15-3-40 (providing exceptions for persons under a disability, including being underage or insane).

In addition to these statutory tolling mechanisms, however, "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." 54 C.J.S. Limitations of Actions § 115 (2005). "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." Ocana v. Am. Furniture Co., 91 P.3d 58, 66 (N.M. 2004).

Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Rodriguez v. Superior Court, 98 Cal. Rptr. 3d 728 (Ct. App. 2009). "Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period 'to ensure fundamental practicality and fairness.'" Id. at 736 (citation omitted).

The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. Ocana, 91 P.3d at 65; see also 54 C.J.S. Limitations of Actions § 115 ("The party who seeks to invoke equitable tolling bears the devoir of persuasion and must, therefore, establish a compelling basis for awarding such relief.").

It has been observed that "[e]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." Ocana, 91 P.3d at 66. However, jurisdictions have considered tolling in a variety of contexts and have

developed differing parameters for its application.[6] See, e.g., Irby v. Fairbanks Gold Mining, Inc., 203 P.3d 1138, 1143 (Alaska 2009) ("Under the doctrine of equitable tolling, when a party has more than one legal remedy available, the statute of limitations is tolled while the party pursues one of the possible remedies."); Abbott v. State, 979 P.2d 994, 998 (Alaska 1999) ("Federal precedent equitably tolls the limitations period in three circumstances: (1) where the plaintiff has actively pursued his or her judicial remedies by filing a timely but defective pleading; (2) where extraordinary circumstances outside the plaintiff's control make it impossible for the plaintiff to timely assert his or her claim; or (3) where the plaintiff, by exercising reasonable diligence, could not have discovered essential information bearing on his or her claim." (footnotes omitted)); Kaplan v. Morgan Stanley & Co., ___ A.2d ___, ___ (Vt. 2009) (2009 WL 2401952) ("Equitable tolling applies either where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit, or where the plaintiff has timely raised the same claim in the wrong forum." (citing Beecher v. Stratton Corp., 743 A.2d 1093, 1098 (Vt. 1999)); cf. Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1988) (stating the doctrine of equitable tolling, unlike equitable estoppel, does not require deception or misrepresentation by the defendant; rather, it serves to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits).

In our view, the situations described above do not constitute an exclusive list of circumstances that justify the application of equitable tolling. "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." Hausman

[6] We note that in the jurisdictions referenced above that discuss tolling a limitations period when a plaintiff is prevented from filing a complaint, filing generally marks the time for commencement of an action. See, e.g., Alaska R. Civ. P. 3(a) (Alaska); Rule 1-003 NMRA (New Mexico); V.R.C.P. 3 (Vermont); see also Fed. R. Civ. P. 3 (federal rules).

v. Hausman, 199 S.W.3d 38, 42 (Tex. App. 2006). Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.

We have previously tolled a statute of limitations based on equitable considerations. In Hopkins v. Floyd's Wholesale, 299 S.C. 127, 382 S.E.2d 907 (1989), a workers' compensation case, we tolled the running of the statute of limitations for the time that the employee was induced by the employer to believe the claim would be taken care of without filing a claim (the "reliance period"). In reaching this result, we considered two methods of treating the claim: (1) requiring that the claim be filed a "reasonable time" after the reliance period, or (2) tolling the statute of limitations during the reliance period. Id. at 129, 382 S.E.2d at 908-09. We held the better rule was to toll the running of the statute of limitations during the reliance period, as this "rule estopping employers from asserting the statute of limitation[s]" provided greater certainty and gave the employee the greatest benefit of the equitable rule. Id. at 130, 382 S.E.2d at 909.

In Schriber v. Anonymous, 848 N.E.2d 1061 (Ind. 2006), a widow brought medical malpractice and wrongful death claims arising out of the death of her husband. The widow encountered difficulties in effecting timely service because the defendant, a healthcare facility, failed to file a certificate of assumed name for its business designation and to conspicuously post its facility license in public view as required by state law. Id. at 1063. The Indiana Supreme Court, while deciding the case on another basis, observed that the proper procedure should have been for the court to judicially toll the expiration of the applicable limitations period for the time that the defendant's actions hindered the plaintiff's discovery of the proper entity name and thus delayed her attempt to effect service. Id. at 1063-64.

In the current appeal, we find Ebenezer's failure to properly list its registered agent for service with the Secretary of State as required by state

law hindered Hooper's pursuit of service.[7] Although Ebenezer argues it is entitled to the dismissal of Hooper's action because she should have pursued alternative means of service, such as publication or service upon the Secretary of State, nowhere in Ebenezer's arguments does it acknowledge the obvious fact that the need for alternative means of service was caused by Ebenezer's own failure to supply the correct information regarding its agent to the Secretary of State as required by law. In fact, as Hooper noted in her brief, though several years had passed, Ebenezer still had not supplied the name of an appropriate agent for service of process to the Secretary of State at the time this case was initially brought before our Court. Hooper was entitled to rely on the public records and she diligently pursued service on what turned out to be a nonexistent agent. Thus, it is not equitable that Ebenezer be the beneficiary of the drastic consequence of a dismissal.

Moreover, it is important to note that a party utilizes these alternative methods of service only after first exercising reasonable or due diligence to effect service on an individual or agent. See e.g., S.C. Code Ann. §§ 15-9-710 & -730 (2005) (providing that when an individual or corporate agent, respectively, cannot be located in this State after the exercise of due diligence, service may be had by publication once this fact has been established by affidavit to the satisfaction of the court); id. § 33-44-111 (2006) (stating if an agent for a limited liability company cannot be found after the exercise of reasonable diligence, service may be had upon the Secretary of State).

In this case, Hooper first tried to effect service upon the agent named by Ebenezer at the address it supplied to the Secretary of State. When that was unsuccessful, Hooper hired a private investigator, who found a personal address for the agent. Hooper contacted the Lexington County Sheriff's Department on numerous occasions and was told that service was being made. She was not notified until one month after the running of the statute of

[7] Under South Carolina law, corporations and limited liability companies must designate and continuously maintain an agent for service of process. See S.C. Code Ann. § 33-5-101 (2006) (corporations); id. § 33-44-108 (limited liability companies).

the limitations that service had been unsuccessful because the whereabouts of the agent could not be determined.

Hooper finally was able to effect service after the statute of limitations had run, only after she exercised reasonable and due diligence to serve Ebenezer's agent. Under Rule 3(a)(2), SCRCP, even if the limitations period has run, service may still be effected if it is accomplished within 120 days of filing of the summons and complaint. Unfortunately, Hooper was approximately one week past the 120 days. Thus, under the unique circumstances of this case, we conclude it is appropriate to equitably toll the statute of limitations for the time Hooper spent in pursuit of Ebenezer's nonexistent agent.

Finally, we note that public policy and the interests of justice weigh heavily in favor of allowing Hooper's claim to proceed. The statute of limitations' purpose of protecting defendants from stale claims must give way to the public's interest in being able to rely on public records required by law.

CONCLUSION

As a matter of law and public policy, we reverse the trial court's grant of summary judgment in favor of Ebenezer and remand for further proceedings consistent with this opinion.[8]

REVERSED AND REMANDED.

TOAL, C.J., WALLER and PLEICONES, JJ., concur.
KITTREDGE, J., concurring in result only.

[8] Based on our holding, we need not reach Hooper's remaining arguments regarding the 120-day provision of Rule 3(a)(2), SCRCP and equitable estoppel. However, we note that, at oral argument, Hooper's counsel conceded the appropriateness of the ruling of the Court of Appeals regarding the application of Rule 3(a)(2), SCRCP.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carol Samuel Ervin, Appellant,

v.

Richland Memorial Hospital and Key Risk Management Services, Respondents.

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

Opinion No. 4636
Heard September 15, 2009 – Filed December 8, 2009

AFFIRMED

John Nichols, Stacey T. Meyer, Stephen B. Samuels, Joseph R. Dasta, and Aimee Zmroczek, all of Columbia, for Appellant.

Carmelo Sammataro and Michael Chase, both of Columbia, for Respondents.

SHORT, J.: Carol Ervin (Claimant) appeals from the trial court's order affirming the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel), arguing the court erred in failing to find: (1) her injury was a compensable injury by accident within the meaning of the Workers' Compensation Act; and (2) her injury arose out of her employment. We affirm.

FACTS

Claimant was employed as a unit secretary by Richland Memorial Hospital (Employer). Claimant's job duties involved answering the phone, greeting hospital visitors and new patients, and entering data. Claimant contended she suffered a compensable injury on October 16, 2003, as a result of an accident arising out of and in the course and scope of her employment, when she was exposed to perfume fragrances. Claimant argued this exposure aggravated and exacerbated a preexisting condition to such a degree that she became permanently and totally disabled.

Claimant contended she was entitled to: (1) a permanent and total disability award; (2) payment of all her past causally-related medical expenses; (3) lifetime medical care for her casually-related medical problems; and (4) future medical expenses, if permanent and total disability award was not granted.

Conversely, Employer argued Claimant's alleged injury was not compensable because Claimant had experienced asthma problems before October 16, 2003. Employer asserted a lack of a casual connection between Claimant's employment and her current health condition because Claimant's exposure in the workplace was no more than what she experienced in her general environment. Employer contended Claimant's preexisting condition had not changed due to her employment, therefore Claimant's prior condition was not exacerbated or aggravated on October 16, 2003.

After a hearing, the single commissioner concluded Claimant suffered a compensable injury by accident arising out of and in the course and scope of her employment because Claimant's preexisting condition was aggravated and exacerbated by her job. The single commissioner found Claimant was permanently and totally disabled, and ordered Employer to pay for all past causally-related medical treatment, as well as causally-related medical treatment for the rest of Claimant's life. The single commissioner also ordered Employer to pay Claimant a lump sum award for permanent and total disability.

Employer appealed this decision to the Appellate Panel, which reversed the single commissioner. The Appellate Panel found Claimant suffered an injury as a result of her exposure to perfume. However, the Appellate Panel determined the injury was not compensable under South Carolina law because the injury was not the result of an accident arising out of and in the course of Claimant's employment. Additionally, the Appellate Panel held "the causative danger that triggered the Claimant's injury, perfume, was not peculiar to the Claimant's place of work." Claimant appealed to the trial court, which affirmed the Appellate Panel. This appeal followed.

STANDARD OF REVIEW

In reviewing a Workers' Compensation decision, an appellate court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact unless the Appellate Panel's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Broughton v. South of the Border, 336 S.C. 488, 495-96, 520 S.E.2d 634, 637-38 (Ct. App. 1999). Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the Appellate Panel reached to justify its action. Id.

The findings of the Appellate Panel are presumed correct and will be set aside only if unsupported by substantial evidence. Id. As such, this court will affirm findings of facts made by the Appellate Panel if those findings are supported by substantial evidence. Id. An appellate court will not overturn a

decision by the Appellate Panel unless the determination is unsupported by substantial evidence or is affected by an error of law. Id.

LAW/ANALYSIS

Claimant argues the trial court erred in concluding her injury did not arise out of and in the course of employment. We disagree.

To be entitled to compensation for an injury, a claimant must show she suffered an injury by accident which arose out of and in the course of the claimant's employment. Id. at 496, 520 S.E.2d at 638. Thus, to be compensated there must be an injury by accident, and such an injury must occur out of and in the course of the employment.

The question of whether the compensability of a particular event qualifies as an injury by accident is a question of law. Grayson v. Gulf Oil Co., 292 S.C. 528, 532, 357 S.E.2d 479, 481 (Ct. App. 1987). However, the question of whether an accident arises out of and in the course and scope of employment is largely a question of fact for the Appellate Panel, subject to the substantial evidence standard of review. Broughton, 336 S.C. at 496, 520 S.E.2d at 638. As such, the claimant bears the burden of proving facts that will bring the incident within the purview of compensability. Id. The two parts of the phrase "arising out of and in the course of employment" are not synonymous. Id. Rather, both parts must exist simultaneously before recovery is allowed. Id.

Even if we assume Claimant suffered an injury by accident, to be compensable, such an injury must arise out of and in the course of Claimant's employment. The phrase "arising out of" refers to the injury's origin and cause. Id. at 497, 520 S.E.2d at 638. For an injury to "arise out of" employment, the injury must be proximately caused by the employment. Id. Therefore, before an injury is deemed to arise out of employment, a causal connection must exist between the conditions under which the work is required to be performed and the resulting injury. Id. As the South Carolina Supreme Court has explained:

> [The injury] arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. **The causative danger must be peculiar to the work and not common to the neighborhood.** It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Douglas v. Spartan Mills, Startex Div., 245 S.C. 265, 269, 140 S.E.2d 173, 175 (1965) (internal quotations omitted) (emphasis added).

In the present case, the causative danger, the perfume, was exceedingly common.[1] Common sense and day-to-day experience dictates many individuals wear perfume and cologne. Claimant suffered numerous

[1] Claimant also argues exposure to cleaning agents and helicopter fumes resulted in her disability. The trial court ruled only on whether Claimant's exposure to perfume resulted in her alleged disability; thus, this argument is not preserved. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding for an issue to be preserved for appeal it must have been raised to and ruled upon by the trial judge).

reactions outside of her employment. For example, Claimant testified she had or could have had reactions to perfume at church, the grocery store, a restaurant, and department stores. Based on this, we cannot conclude the Appellate Panel committed reversible error in determining Claimant's accident did not arise out of and in the course and scope of her employment. Broughton, 336 S.C. at 495-96, 520 S.E.2d at 637-38 (finding the question of whether an accident arises out of and in the course and scope of employment is largely a question of fact for the Appellate Panel, and as such, an appellate court will affirm if that finding is supported by substantial evidence).[2]

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

[2] Because we conclude Claimant's injury did not arise out of her employment, we do not address whether Claimant's injury was the result of an accident. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding this court need not address issues when disposition of a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shirley's Iron Works, Inc., and
Tindall Corporation, Appellants,

v.

City of Union, South Carolina,
Gilbert Group, LLC and
William E. Gilbert, Respondents.

Appeal From Union County
John C. Few, Circuit Court Judge

Opinion No. 4637
Submitted October 1, 2009 – Filed December 9, 2009

REVERSED IN PART AND AFFIRMED IN PART

Boyd Benjamin Nicholson, N. Ward Lambert and R. Patrick Smith, all of Greenville, for Appellants.

Andrew Lindemann and Gilbert Bagnell of both Columbia and William Whitney, Jr., of Union, for Respondents.

WILLIAMS, J.: In this case, we must determine whether the trial court erred in granting summary judgment in favor of the City of Union (the City) as to Shirley's Iron Works, Inc. and Tindall Corporation's (Appellants) claims. We reverse in part and affirm in part.

FACTS/PROCEDURAL HISTORY

In 2000, the South Carolina Legislature enacted the Subcontractors' and Suppliers' Payment Protection Act (SPPA). S.C. Code Ann. §§ 29-6-210 to -290 (Supp. 2008). The SPPA states, in pertinent part:

> (1) When a governmental body is a party to a contract to improve real property, and the contract is for a sum in excess of fifty thousand dollars, the owner of the property shall require the contractor to provide a labor and material payment bond in the full amount of the contract.
>
> . . .
>
> (3) For the purposes of any contract covered by the provisions of this section, it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form.
>
> (4) "governmental body" means . . . all local political subdivisions.

S.C. Code Ann. § 29-6-250 (Supp. 2008) (emphasis added).

On or about February 26, 2002, the City issued a request to general contractors for proposals for the design and construction of a building (the Project). The City chose the proposal of Gilbert Group, LLC (Gilbert). On June 4, 2002, the City and Gilbert entered into a general contract (the Contract) to build the Project. The total value of the Contract was approximately $875,000. Gilbert, in turn, entered into various subcontracts, including agreements with Shirley's Iron Works, Inc. and Tindall Corporation (collectively the Appellants). However, the City did not require Gilbert to furnish a payment bond for the Contract. The Appellants claim they performed their work under their subcontracts, but Gilbert has still not paid them in full.

On June 11, 2003, the Appellants filed a complaint against the City in which they alleged the City failed to obtain a payment bond from Gilbert as required by section 29-6-250. In response, the City filed an answer and third-party complaint on July 15, 2003. In their answer, the City denied the allegations in the complaint and presented a third-party complaint against Gilbert and William E. Gilbert[1] for breach of contract, breach of contract accompanied by a fraudulent act, negligence, and fraud.

In an order dated April 19, 2004, Judge Paul E. Short granted the City's motion to redesignate Gilbert and William E. Gilbert as defendants because they, along with the City, were "joint tortfeasors whose alleged acts combined and concurred to cause the harm for which the Plaintiffs seek to recover." In the order, the trial court held, "the Plaintiffs' cause of action against the City sounds in tort," and was, therefore, "necessarily brought pursuant to the South Carolina Tort Claims Act . . . ." (SCTCA). That same day, the trial court granted the City's motion to strike the Appellants' prayer for recovery of attorneys' fees. In that order, Judge Short again held the Appellants had alleged a cause of action that sounded in tort. The Appellants did not appeal either of these holdings.

On August 17, 2005, the Appellants filed an amended complaint against the City, Gilbert, and William E. Gilbert. In the amended complaint,

[1] William E. Gilbert is the sole proprietor of Gilbert Group, LLC.

the Appellants alleged Gilbert had failed to pay all the monies owed to them under their respective contracts. They also alleged the City failed to secure a payment bond from Gilbert, as required by section 29-6-250. The Appellants asserted causes of action for violation of section 29-6-250, violation of section 27-1-15 of the South Carolina Code, negligence, quantum meruit, and attorneys' fees. The Appellants also alleged for the first time in the amended complaint they were third-party beneficiaries of the Contract because the bonding requirements of section 29-6-250 are "legislatively mandated contractual obligations" that were incorporated into the Contract by operation of law.

Both parties moved for summary judgment, and the trial court heard the motions on January 23, 2006. After the hearing, but before the trial court ruled on the motions, this court issued its opinion in Sloan Constr. Co. v. Southco Grassing, Inc., 368 S.C. 523, 629 S.E.2d 372 (Ct. App. 2006) on April 24, 2006. In that case, this court held South Carolina Code sections 29-6-250 and 57-5-1660(a)(2) do not provide a subcontractor a private right of action against a governmental entity for failure to ensure a contractor is properly bonded. Id. In light of this court's holding in Sloan Construction, the trial court granted summary judgment in favor of the City as to the Appellants' tort, third-party beneficiary breach of contract,[2] and quantum meruit claims on September 24, 2007.

On March 24, 2008, however, our Supreme Court reversed this court's holding in Sloan Construction. See Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). While acknowledging "the SPPA does not expressly provide for a right of action between the subcontractor and the contracting government body," the Supreme Court nevertheless held an implied right of action for subcontractors exists under

[2] In granting summary judgment, the trial court did not specifically rule as to whether Appellants had properly raised a third-party beneficiary breach of contract claim in their amended complaint. The trial court held, "[T]o the extent the amended complaint may be construed as alleging a third-party beneficiary breach of contract claim, the Court finds that such claim must be dismissed . . . ."

the SPPA because the Legislature "must have intended for [suppliers and subcontractors] to be able to vindicate their rights under a statute enacted for their special benefit." Id. at 114-16, 659 S.E.2d at 162.

In a footnote, however, the Supreme Court held although it did not agree with this court's analysis of the SPPA, it nevertheless agreed:

> "[A] claim for failure to enforce the bonding requirements of the SPPA is not properly brought pursuant to the [(SCTCA)] because the [SCTCA] does not act as a waiver of sovereign immunity when a governmental entity fails to enforce a statute. [citations omitted]. Therefore, the [SCTCA] is not relevant to the government's liability for failure to comply with a duty under the SPPA."

Id. at 118 n.5, 659 S.E.2d at 164 n.5 (citing S.C. Code Ann. § 15-78-60(4) (2005)) (emphasis added).

The Supreme Court further held the government's failure to comply with the SPPA's bond requirements also gives rise to a third-party beneficiary breach of contract claim by the subcontractor against the government entity. Id. at 118, 659 S.E.2d at 164. In arriving at this conclusion, the Court adopted the reasoning of the Seventh Circuit in A.E.I. Music Network v. Bus. Computers, Inc., 290 F.3d 952 (7th Cir. 2002). At issue in that case was whether the bond requirement of the Illinois Bond Act gave rise to a third-party beneficiary breach of contract action against a public entity for failing to acquire bonds from contractors on public construction contracts. Id. at 953-54. The Illinois court held whereas the existence of a direct third-party beneficiary to a contract is normally determined by the intentions of the actual contracting parties, the relevant intentions in cases falling under the Illinois Bond Act were those of the Illinois Legislature alone. Id. at 955-56. Thus, because the Illinois Legislature intended the bond requirement term in the Illinois Bond Act to protect subcontractors, the bond requirement became a term in every construction contract involving a public entity. Id. at 955. In

view of A.E.I. Music, our Supreme Court concluded because our Legislature intended the SPPA to bestow a special benefit to subcontractors, the bond requirements of the SPPA are, therefore, incorporated into all construction contracts governed by the SPPA. Sloan Constr., 377 S.C. at 120, 659 S.E.2d at 165.

Finally, having found that section 29-6-250 gave rise to a private right of action against the government, the Court held the government's liability for failure to comply with the SPPA's bonding requirements was not open-ended. Id. at 121, 659 S.E.2d 165. Rather, the government's liability would be limited to the remaining balance on the contract with the general contractor when the subcontractor notifies the government of the general contractor's non-payment. Id. at 121, 659 S.E.2d at 165-66.

In light of our Supreme Court's decision in Sloan Construction, the Appellants argue the trial court erred in granting the City's motion for summary judgment as to its claims in tort, breach of contract, quantum meruit, and violation of section 27-1-15. This appeal followed.

LAW/ANALYSIS

I. Standard of Review

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." Bovain v. Canal Ins., 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c), SCRCP, provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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." Id. (quoting 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." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). "At the

summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). "[I]n 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." Hancock, 381 S.C. at 330, 673 S.E.2d at 803.

II. Motions for Summary Judgment

1. Tort Claim for Violation of section 29-6-250

The City argues summary judgment as to the Appellants' tort cause of action should be affirmed because although the Supreme Court recognized a private right of action for failure to enforce the bonding requirements of the SPPA in Sloan Construction, if such a claim were brought as a tort, it would be barred by the SCTCA. We disagree.

The SCTCA governs all tort claims against governmental entities and is the exclusive remedy available in an action against a governmental entity or its employees. Flateau v. Harrison, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003). The SCTCA waives sovereign immunity "while also providing specific, enumerated exceptions limiting the liability of the state and its political subdivisions in certain circumstances." Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998). One such exception to the waiver of immunity is found in section 15-78-60(4), which states the government is not liable for loss resulting from the government's failure to enforce a statute. S.C. Code Ann. § 15-78-60(4) (2005).

The City argues summary judgment should be affirmed because the Appellants' claims sound in tort and are, therefore, barred under the doctrine of sovereign immunity. In support of this position, the City cites footnote 5 in Sloan Construction, which states: "[A] claim for failure to enforce the

bonding requirements of the SPPA is not properly brought pursuant to the [SCTCA] because the [SCTCA] does not act as a waiver of sovereign immunity when a governmental entity fails to enforce a statute." 377 S.C. at 118 n.5, 659 S.E.2d at 164 n.5 (citing S.C. Code Ann. § 15-78-60(4) (2005)). The City interprets footnote 5 as saying if a claim for violation of section 29-6-250 is brought as a tort, it is barred by the SCTCA. Thus, because Appellants' claims were brought in tort, their claims are barred as a matter of law.

The Appellants, on the other hand, argue section 29-6-250 creates an affirmative duty on the government, and the SCTCA does not protect the government from liability for breach of that duty. In support of this, they cite to the latter portion of footnote 5, which states, "Therefore, the [SCTCA] is not relevant to the government's liability for failure to comply with a duty under the SPPA." Id.

We believe the Appellants' interpretation is correct. Footnote 5 was merely clarifying that while there exists a private right of action under the SPPA, it would be improper to assert that right by bringing a claim pursuant to the SCTCA for failure to enforce a statute because such claims are clearly barred under the SCTCA. Rather, the claim should be brought under the SPPA as a tort claim in negligence for breach of the duty created by section 29-6-250. Because the Appellants' tort claim alleges negligence arising out of the City's breach of its duty to require Gilbert to provide a bond, the Appellants may proceed under section 29-6-250.

A review of the Sloan Construction opinion supports the conclusion that a claim for violation of section 29-6-250 can be brought as a tort. As noted by the Supreme Court, the SPPA establishes both an affirmative duty on the governmental body to require payment bonding, as well as a standard of care for overseeing the issuance of a proper payment bond. Sloan Constr., 377 S.C. at 115-116, 659 S.E.2d at 162 (citing to S.C. Code Ann. § 29-6-250 and providing "it is the duty of the entity contracting for the improvement to take reasonable steps to assure that the appropriate payment bond is issued and is in proper form"). Such language clearly suggests a tort remedy for

breach of the duty created pursuant to section 29-6-250 of the SPPA. See Troutman v. Facetglas, Inc., 281 S.C. 598, 601, 316 S.E.2d 424, 426 (Ct. App. 1984) ("The elements of a tort are (1) duty; (2) breach of that duty; (3) proximate causation; and (4) injury.").

Furthermore, the Supreme Court stated in Sloan Construction, "[W]e hold that in a tort or contract action arising under the SPPA, the government's liability is limited to the unpaid balance on the contract." 377 S.C. at 121, 659 S.E.2d at 166-67 (emphasis added). The Court's holding clearly contemplates the possibility of claims being brought under the SPPA in tort or contract.

In sum, because the Appellants' claim was brought under section 29-6-250 as a tort, it was properly asserted according to the Supreme Court's holding in Sloan Construction. Accordingly, we reverse summary judgment in favor of the City as to the Appellants' tort cause of action.

2. Third-Party Beneficiary Breach of Contract

The Appellants argue the trial court's grant of summary judgment as to their third-party beneficiary breach of contract claim should be reversed in light of our Supreme Court's decision in Sloan Construction. Although the City concedes Sloan Construction establishes that the bonding requirements under the SPPA give rise to a private right of action for subcontractors for a third-party beneficiary breach of contract claim, the City presents two arguments as to why the trial court's grant of summary judgment should nevertheless be affirmed. We find the City's arguments to be without merit.

First, the City argues the Appellants never properly alleged a third-party beneficiary breach of contract claim in their amended complaint. We disagree.

"The purpose of a pleading is to put the adversary on notice as to what the issues are." Langston v. Niles, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975). To ensure substantial justice to the parties, pleadings must be

liberally construed. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000). In determining whether to grant summary judgment, pleadings and documents on file must be liberally construed in favor of the non-moving party. Bates v. City of Columbia, 301 S.C. 320, 321, 391 S.E.2d 733, 733 (Ct. App. 1990). In construing a complaint or responsive pleading, the court must review the entire pleading. Doe ex rel. Legal Guardian v. Barnwell School Dist. 45, 369 S.C. 659, 663, 633 S.E.2d 518, 520 (Ct. App. 2006); see Smith v. Nelson, 83 S.C. 294, 300, 65 S.E. 261, 263 (1909) (construing the "complaint upon the whole").

The Appellants alleged in the "Facts" section of their amended complaint: "[Appellants] are third-party beneficiaries of [the City]'s Agreement with Gilbert" because the terms of section 29-6-250 are intended to benefit subcontractors and are, therefore, incorporated into the Contract by operation of law. Appellants further discussed this theory under the section of the amended complaint discussing their cause of action for violation of section 29-6-250.

Looking at the amended complaint in its entirety, we believe the Appellants sufficiently pled a third-party beneficiary breach of contract claim. Although the complaint did not contain the heading "Third-Party Beneficiary Breach of Contract" in the section listing the causes of action, we believe the complaint as a whole sufficiently put the City on notice the Appellants wished to assert a third-party beneficiary theory. See e.g., Quality Towing 340 S.C. at 33, 530 S.E.2d at 371 (holding trial court erred in limiting the complaint to a single portion of an ordinance when, if read in its entirety, the complaint gave notice the plaintiff wished to attack the ordinance as a whole). This conclusion is supported by the fact that at the hearing on the cross-motions for summary judgment, the parties discussed extensively the question of whether the proposed private right of action under section 29-6-250 was a tort or a third-party beneficiary breach of contract. See id. (holding trial court erred in limiting operator's complaint to single portion of an ordinance when the plaintiff argued the invalidity of the ordinance as a whole at the summary judgment hearing).

Second, the City argues the law of the case doctrine precludes the Appellants from pursuing an action in contract because on April 19, 2004, the trial court held the Appellants' cause of action for violation of section 29-6-250 sounded in tort, and this holding was not appealed. We disagree.

Failure to challenge a ruling constitutes an abandonment of the issue, and the unchallenged ruling, right or wrong, is the law of the case. First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998). The law of the case doctrine derives from the principle of res judicata, which "bars a subsequent suit by the same parties on the same issues." Sub-Zero Freezer v. R.J. Clarkson Co., 308 S.C. 188, 190, 417 S.E.2d 569, 571 (1992); see Johnson v. Bd. of Comm'rs of Police Ins. & Annuity Fund of State, 221 S.C. 23, 25, 68 S.E.2d 629, 633 (1952) ("The rulings in a case even though admittedly wrong become the law of the case and [are] res judicata between the parties."); Prof'l Bankers Corp. v. Floyd, 285 S.C. 607, 613, 331 S.E.2d 362, 365 (Ct. App. 1985) ("An appealable order from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties on the same subject matter.").

We believe the law of the case doctrine does not apply here because the amended complaint involved additional parties and issues from those asserted in the original complaint. In 2004, when the trial court held the Appellants' cause of action against the City sounded in tort, it did so in the context of a motion to strike a portion of the original complaint. As stated above, the original complaint was against the City alone, and made no mention of a third-party beneficiary breach of contract theory. The first time the Appellants did allege a third-party beneficiary theory was in their amended complaint, filed August 17, 2005, which included Gilbert and William E. Gilbert as defendants. Thus, when Judge Short ruled on the City's motion to strike in 2004, Gilbert and William E. Gilbert were not parties, and the question of whether the Appellants could properly assert a breach of contract action was not before the court. As such, Judge Short's ruling that the original complaint sounded in tort cannot be res judicata as to the amended complaint.

Under the City's view of the law of the case doctrine, a trial court's ruling as to an original complaint would carry over to a subsequent amended complaint, regardless of the changes made in the amended complaint. Thus, as applied to this case, because Judge Short characterized the Appellants' original complaint as alleging a tort, the Appellants were thereafter precluded from alleging anything other than a tort in this case. This is inconsistent with our jurisprudence. See Adderton v. Aetna Casualty & Surety Co., 182 S.C. 465, 480, 189 S.E.2d 736, 742 (1937) (affirming trial court's determination that although its order sustaining defendants' demurrers as to the original complaint "was a final determination of all questions raised by the allegations of the original complaint, . . . the order [was] not res judicata as to any issue created by the allegations of new matter contained in the amended complaint").[3]

Accordingly, we reverse the trial court's grant of summary judgment in favor of the City as to the third-party beneficiary breach of contract claim.

3. Quantum Meruit

The Appellants argue the trial court erred in granting summary judgment in favor of the City on their quantum meruit claim. We disagree.

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[3] At oral argument, the City noted the trial court twice ruled that the Appellants' causes of action sounded in tort. The first was in Judge Short's order, filed in April 2004, before the amended complaint. The second was in Judge John's order, filed in December 2005, which was after the amended complaint. Thus, one could argue because Judge John's ruling came after the amended complaint was filed, his ruling that the claims sound in tort does have res judicata effect, and the law of the case precludes the Appellants' claims in the amended complaint. However, this line of reasoning was not presented in the City's brief; rather, the City argued Judge Short's ruling was the law of the case. Moreover, to the extent the City did argue this line of reasoning, we find Judge John's ruling was nevertheless erroneous under Adderton).

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). The elements of quantum meruit are the following: (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for the defendant to retain the benefit without paying its value. Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

The City argues there exists no genuine issue of material fact as to the third element of quantum meruit. At the trial court, the City maintained it had paid out the remaining balance on all subcontracts, and Appellants had failed to present sufficient evidence to the contrary to create a genuine issue of material fact. On this basis, the City now argues summary judgment as to quantum meruit should be affirmed because although the City has been "enriched" by the completion of the Project, such enrichment was not unjust because the City has paid out the full price of the Contract. See Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994) ("Courts addressing a claim of unjust enrichment by a subcontractor against a property owner have typically denied recovery where the owner in fact paid on its contract with the general contractor."); see also Sloan Constr., 377 S.C. at 121, 659 S.E.2d at 165-66 (holding government's liability for failure to comply with section 29-6-250 is limited to the remaining unpaid balance on the contract with the general contractor). After reviewing the record, we agree.

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2008). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Id. Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Id. at

558-59, 671 S.E.2d at 85. Rather, the nonmoving party must present specific facts showing a genuine issue for trial. Id. at 559, 671 S.E.2d at 85.

William E. Gilbert stated in his deposition that at the time the City learned some of the subcontractors had not been paid in full, a total of $111,270 remained to be paid to Gilbert on the Contract. Those funds were offered to the unpaid subcontractors, including the Appellants. Ultimately, all of the remaining unpaid subcontractors (except the Appellants) agreed to accept a share of the $111,270 in exchange for releasing the City from further liability. The Appellants refused to grant the City such a release. Thereafter, the portion of the $111,270 that was set aside to pay the Appellants was distributed among the other unpaid contractors. Thus, the record indicates although all of the subcontractors might not have been paid in full for their work, the City has not retained any of the unpaid balance on the Contract.[4] We believe this showing established an absence of evidence of the City's nonpayment such that the burden shifted to the Appellants to present evidence in support of its case.

The Appellants, however, do not point to any evidence, either in their Final Brief or in their Reply Brief, that would refute the trial court's finding that there was no evidence of the City's failure to pay. Rather, the Appellants merely allege in their Reply Brief, "It is very much disputed that the City has fully paid the value of the benefit by paying the entire contract price." The Appellants have shown no specific facts to support this contention; rather, they have rested on the allegations and denials in their pleadings. Under Gauld, this is not sufficient to survive summary judgment.

Accordingly, we affirm the trial court's grant of summary judgment as to the Appellants' quantum meruit claim.

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[4] We also note at oral argument on the cross motions for summary judgment, when counsel for the City stated it was "undisputed . . . that the full contract price was ultimately paid out by the City," counsel for the Appellants did not respond.

4. Violation of section 27-1-15 of the South Carolina Code

The City argues the Appellants' claim for attorneys' fees under South Carolina Code Section 27-1-15[5] is not preserved for review. We agree.

Error preservation requirements are intended to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. I'On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). It is axiomatic that for an issue to be preserved for appeal, it must have been raised to and ruled upon by the trial court. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). When an issue or argument has been raised to but not ruled upon by the trial court, a party must file a Rule 59(e), SCRCP, motion to preserve the issue for appeal. Id. at 24 n.4, 602 S.E.2d at 780 n.4.

The Appellants asserted claims pursuant to section 27-1-15 in their amended complaint. Thus, the issue of section 27-1-15 was properly raised to the trial court. However, the trial court's summary judgment order clearly does not address the question of the Appellants' entitlement to attorneys' fees and interest pursuant to section 27-1-15. Accordingly, it was incumbent upon the Appellants to file a Rule 59(e) motion to secure a ruling from the trial court and, consequently, preserve this issue for appeal. The Appellants did

[5] S.C. Code section 27-1-15 (Supp. 2008) states: "Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand."

not file such a motion. We, therefore, need not address this issue because it is not preserved for our review.

CONCLUSION

Accordingly, the decision of trial court is

REVERSED IN PART AND AFFIRMED IN PART

GEATHERS, J., and GOOLSBY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Emily B. Smith, Appellant/Respondent,

v.

Jeffrey O. Smith, Respondent/Appellant.

Appeal From Sumter County
George M. McFaddin, Jr., Family Court Judge

Opinion No. 4638
Heard September 1, 2009 – Filed December 9, 2009

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jan L. Warner and Matthew E. Steinmetz, both of Columbia, for Appellant/Respondent.

Thomas M. Neal III, Yulee E. Harrison, both of Columbia, and G. Murrell Smith, Jr., of Sumter, for Respondent/Appellant.

HEARN, C.J.: In this cross-appeal, Emily Smith (Mother) contends the family court erred by refusing to: (i) deviate from the child support guidelines and include the cost of the parties' daughter's private school tuition in calculating child support; (ii) require Jeffrey Smith (Father) to obtain life

insurance as security for his alimony and child support obligations; (iii) consider the cost of Mother's medical insurance in awarding alimony; (iv) find the tobacco bonds and Sumter residence titled in Father's name were subject to equitable division; and (v) award her attorney's fees and costs. In his appeal, Father asserts the family court erred in failing to impute income to Mother and in setting the visitation schedule. We affirm in part, reverse in part, and remand.

FACTS

Mother and Father met and began dating when Father was stationed at Shaw Air Force Base in Sumter and married in 1990. During the next year, they moved into a house in Sumter, and Father, after completing his service obligation to the Air Force, accepted employment as a pilot with Delta Airlines. Meanwhile, Mother continued working as a schoolteacher in the Sumter County School System.

In 2001, Mother and Father adopted a daughter, Kate, who was fourteen-months-old at the time. After bringing Kate home in March 2001, they completed an application for Kate to attend a local private school, Wilson Hall, once she reached the appropriate age. In addition, the parties decided Mother would no longer teach in the public school system following the current school year. Instead, they agreed Mother would apply for a teaching position at Wilson Hall so she could spend more time at home with Kate. Mother was hired as a teacher at Wilson Hall for the following year.

During this time, Father's mother, Janie Carraway (Grandmother), lived in Royal Palm Beach, Florida with her husband. After her husband's death, Grandmother sought to purchase a home closer to her part-time job and the residence of her oldest daughter in Palm Beach Gardens, Florida. As she looked to purchase a new home, Father solicited the services of Darrell Lowder, an accountant and financial planner, for advice on how to protect Grandmother's assets from relatives and future nursing home expenses. Lowder advised Father that any new assets purchased by Grandmother should be titled in Father's name. Father followed Lowder's advice, and when Grandmother purchased a home in Palm Beach Gardens (Florida residence), it was titled in Father's name. Although Grandmother paid the

down payment on the residence and $300 a month towards the mortgage payment, the remainder of the $721.40 monthly mortgage payment was paid from the parties' joint bank account. For the two years in which Grandmother lived in the Florida residence, Mother and Father paid a total of $9,635 in mortgage payments and an additional $5,500 for repairs on the Florida residence.

In October 2002, Grandmother's daughter suffered a stroke. With no family members able to watch over her in Florida, Grandmother and Father decided it was in her best interests to sell the Florida residence and purchase a home in Sumter. In November 2002, the Florida residence was sold for $138,500.[1] The proceeds from the sale were transferred to the parties' joint bank account. The following month, Grandmother purchased a home in Sumter for $110,000, titled in Father's name. Mother and Father paid $7,396 from their joint account for closing costs and other expenses associated with the Sumter residence. After these transactions were complete, Grandmother reimbursed Mother and Father for all expenses they had paid on her behalf: the mortgage payments on the Florida residence, repairs on the Florida residence, and closing costs and other expenses associated with the Sumter residence. Father accomplished this by deducting the unreimbursed expenses from the proceeds of the sale of the Florida residence, which remained in Mother and Father's joint account. Then, Father transferred the remaining proceeds from the sale of the Florida residence to a separate savings account for Grandmother. Thereafter, Father transferred $65,000 from Grandmother's savings account to the joint marital account so he could purchase tobacco bonds from Legg Mason for Grandmother. Ultimately, Father purchased $40,646 worth of tobacco bonds in his name for Grandmother and transferred the remaining $24,354 into Grandmother's savings account.

Although Mother and Father experienced some marital problems throughout the course of their marriage, they managed to resolve these issues, and their marriage remained intact. However, in September 2003, Father went to Hawaii on vacation without Mother and Kate to celebrate his brother-in-law's retirement from the fire department. Upon returning home to

[1] The Florida residence was purchased by Grandmother in October 2000 for $102,000.

Sumter, the parties' marital troubles escalated, and they began attending counseling sessions. Unable to resolve their differences, Father moved in with Grandmother later that month. Ultimately, Mother discovered Father was having an extramarital affair with a flight attendant, Victoria Eckles. In addition, Mother learned Father had taken Victoria with him to Hawaii, and on a previous occasion, he had taken Kate to see a movie with Victoria.

In October 2003, Mother commenced this divorce action against Father on the grounds of adultery. Additionally, Mother sought custody of Kate, child support, alimony, equitable division of the marital estate, and attorney's fees. In his answer, Father admitted the adultery and agreed Mother should have primary physical custody of Kate. In February 2004, the Honorable George M. McFaddin, Jr. issued a Pendente Lite Order, granting Mother physical custody of Kate and ordering Father pay $1,338 per month in child support, $2,500 per month in temporary maintenance, and $12,500 in attorney's fees. Thereafter, a three-day trial ensued with the focal point of the litigation dedicated to discerning whether the tobacco bonds and Sumter residence, titled in Father's name, were marital property subject to equitable division. On January 28, 2005, the family court issued a decree of divorce to Mother on the grounds of adultery and reserved all other issues. On May 31, 2005, the family court issued a supplemental final order, resolving all issues except for attorney's fees. In its supplemental order, the court awarded Mother custody of Kate and granted Father weekend visitation, including one non-overnight visitation from 6:00-7:30 p.m. when he did not have weekend visitation the following weekend. Additionally, the court ordered Father to pay Mother $821 per month in child support and $1,650 per month in alimony. The court also found the tobacco bonds and Sumter residence were not marital property and not subject to equitable division. Both parties filed motions to reconsider, which were denied. The family court ultimately issued an order denying both parties' requests for attorney's fees. Both parties appeal.

STANDARD OF REVIEW

In an appeal from the family court, this court may correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. Semken v. Semken, 379 S.C. 71, 75, 664 S.E.2d 493, 496 (Ct.

App. 2008). We are not, however, required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Marquez v. Caudill, 376 S.C. 229, 239, 656 S.E.2d 737, 742 (2008).

LAW/ANALYSIS

I. MOTHER'S APPEAL

A. Private School Tuition

Mother contends the family court erred in refusing to deviate from the child support guidelines and include the cost of Kate's private school tuition in calculating child support. In its order, the family court refused to deviate from the child support guidelines, finding such relief was not requested in Mother's pleadings or at trial. On appeal, Mother argues the family court erred in failing to liberally construe her pleadings. She asserts her request for "such other relief as the court may deem fit and proper" in her complaint and her testimony about the cost of Kate's private school tuition was sufficient to place the issue before the family court. We agree.

Rule 12 of the Rules of Practice for the Family Courts of South Carolina governed the construction of pleadings in family court until it was repealed with the enactment of the South Carolina Rules of Family Court on September 1, 1988. See Ward v. Marturano, 302 S.C. 112, 115, 394 S.E.2d 16, 18 (Ct. App. 1990) (stating former Rule 12 required pleadings to be liberally construed); Rule 2(d), SCRFC ("All Rules of Practice for the Courts of this State heretofore adopted are repealed as of the effective date of the South Carolina Rules of Family Court."). Currently, no family court rule governs the construction of pleadings. As a result, Rule 8(f), SCRCP applies. See Rule 81, SCRCP (stating The South Carolina Rules of Civil Procedure apply in family court when no family court rule provides otherwise). Rule 8(f) requires courts to construe pleadings so "as to do substantial justice to all parties." "To ensure substantial justice to the parties, the pleadings must be liberally construed." Gaskins v. S. Farm Bureau Cas. Ins. Co., 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000), aff'd as modified on other grounds, 354 S.C. 416, 581 S.E.2d 169 (2003).

In McMaster v. Strickland, although the plaintiff captioned his action as one for "Breach of Contract," he failed to request monetary damages in his complaint. Instead, the plaintiff asked only for specific performance and "such other or further relief as the Court deems just and proper." 322 S.C. 451, 454, 472 S.E.2d 623, 625 (1996). Nonetheless, the special referee awarded plaintiff monetary damages. Id. On appeal, the defendant argued the special referee erred in awarding plaintiff relief not requested in his pleadings. Id. Our supreme court upheld the special referee's award of monetary damages because the factual allegations of the complaint supported such an award and because the complaint contained a prayer for general relief. Id. In reaching its conclusion, the supreme court relied heavily on Mortgage Loan Co. v. Townsend, 156 S.C. 203, 152 S.E. 878 (1930). In Townsend, the supreme court held "[i]f the facts alleged are broad enough to warrant relief, it matters not how narrow the specific prayer may be if the bill contains a prayer for general relief." Id. at 225, 152 S.E. at 886 (emphasis added).

In Ward v. Marturano, father commenced an action seeking a reduction in child support after learning daughter was entitled to social security benefits. 302 S.C. 112, 113, 394 S.E.2d 16, 17 (Ct. App. 1990). In addition to granting father this relief, the family court also determined father was entitled to a credit for previous social security benefits received by daughter. Id. at 114, 394 S.E.2d at 17. On appeal, mother contended the family court erred in crediting father with all past social security payments received by daughter because father did not specifically request such relief in his pleadings. Id. at 115, 394 S.E.2d at 18. While this court found father did not specifically request credit for past payments, it affirmed the family court's decision because father's complaint contained a prayer for general relief and because the treatment of past paid benefits was at issue. Id.

Generally, the amount of child support which would result from the application of the child support guidelines is the amount of child support to be awarded. S.C. Code Ann. Regs. § 114-4710(A)(1) (Supp. 2008). However, the Guidelines do not take into account the economic impact of private school tuition and specifically list the expenses incurred on private school tuition as a possible reason for deviation from the Guidelines. S.C.

Code Ann. Regs. § 114-4710(B)(1) (Supp. 2008). While the family court maintains the discretion to decide whether to deviate from the child support guidelines in a given case, its decision must rest upon sound legal principles. See Smith v. Doe, 366 S.C. 469, 474, 623 S.E.2d 370, 372 (2005) ("Child support awards are within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion."); McKnight v. McKnight, 283 S.C. 540, 543, 324 S.E.2d 91, 93 (Ct. App. 1984) (stating an abuse of discretion occurs when the family court's findings are without evidentiary support or a ruling is based upon an error of law.).

In our view, the family court erred in refusing to consider whether deviation from the child support guidelines was appropriate in this case. Contrary to the decision of the family court, Mother's pleadings and the evidence presented at trial sufficiently placed this issue before the court. Similar to McMaster, Townsend, and Ward, Mother did not specifically ask the family court to deviate from the child support guidelines in her complaint. Rather, in her complaint, Mother asserted she was entitled to receive child support as set forth by the guidelines and, in addition, prayed for "such other relief as the Court may deem appropriate." By claiming entitlement to child support based upon the guidelines and including a prayer for general relief, Mother's pleadings were sufficient for the family court to decide whether deviation from the child support guidelines was appropriate, if such evidence was introduced at trial. See Townsend, 156 S.C. at 225, 152 S.E. at 886 ("If the facts alleged are broad enough to warrant relief, it matters not how narrow the specific prayer may be if the bill contains a prayer for general relief.").

At trial, Mother testified at length about the fact Kate attended private school, the cost of her tuition, and her desire for Kate to continue attending school there. Additionally, Mother testified she and Father mutually decided to enroll Kate in private school. On cross examination of Father, Mother's attorney specifically asked Father, "[w]hat is your position in regards to the payment of the Wilson Hall tuition?" Simply put, a central issue at trial was whether Father would have to contribute towards Kate's private school tuition. See Ward, 302 S.C. at 115, 394 S.E.2d at 18 (determining the family court did not err in awarding relief not specifically requested in father's pleadings where his complaint contained a prayer for general relief, and the

relief granted addressed a central issue at trial). Accordingly, the family court erred in refusing to consider this issue. As a result, we remand this issue to the family court to consider whether deviation from the Guidelines is appropriate in this case.

B. Life Insurance As Security For Alimony & Child Support

Mother argues the family court erred by not requiring Father to obtain life insurance as security for Father's alimony and child support obligations. Mother contends she demonstrated the need for such security in light of her age, health concerns, limited earning capacity, limited assets, and Father's dangerous occupation as a pilot. In addition, Mother asserts Father has the financial ability to acquire life insurance as evidenced by his earning capacity. We disagree.

The family court may order the payor spouse to obtain life insurance as security for an alimony or child support obligation if the supported spouse can demonstrate the existence of special circumstances with reference to her need for the security and the payor spouse's ability to provide it. Wooten v. Wooten, 364 S.C. 532, 553, 615 S.E.2d 98, 109 (2005); see S.C. Code Ann. § 20-3-130(D) (Supp. 2008). In considering whether the supported spouse has demonstrated a need for such security, the family court should consider "the supported spouse's age, health, income earning ability, and accumulated assets." Wooten, 364 S.C. at 553, 615 S.E.2d at 109. If a need for security is found, the family court should then consider the payor spouse's ability to secure the award with life insurance by considering "the payor spouse's age, health, income earning ability, accumulated assets, insurability, cost of premiums, and insurance plans carried by the parties during the marriage." Id.

Mother has not demonstrated the existence of special circumstances giving rise to a need for security in this case. The record reveals Mother was forty-three-years-old at the time of trial. Although she had two benign breast biopsies in the past, Mother testified repeatedly at trial that she was in good health. Additionally, while Mother currently earns less than $30,000 annually for teaching at private school, her "income earning ability" is substantially higher. If Mother chose, she could earn close to $50,000

annually as a public schoolteacher.[2] Finally, Mother owns substantial assets as a result of the equitable division of the marital estate. In its final order, the family court awarded Mother fifty percent of the marital assets, including the marital home, which the family court valued at $364,000. While Father is in good health and can afford the insurance premiums, Mother failed to demonstrate the existence of special circumstances giving rise to a need for security. Thus, the family court did not err in refusing to require Father to obtain life insurance as security for his child support and alimony obligations.

C. Mother's Medical Insurance & Expenses

Mother argues the family court erred by not requiring Father to continue to provide health insurance to her through his employer. Alternatively, she contends the family court was required to consider the cost associated with obtaining health insurance on her own in awarding alimony. In its order, the family court refused to address these issues, finding "Mother did not seek medical or health insurance coverage from Father in her pleadings or during her testimony, nor did Mother seek payment of her medical or health insurance expenses from Father." We disagree with the findings of the family court.

"Alimony is a substitute for the support which is normally incident to the marital relationship." Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988). "Generally, alimony should place the supported spouse, as nearly as practical, in the same position he or she enjoyed during the marriage." Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). The decision to grant or deny alimony rests within the sound discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. Jenkins v. Jenkins, 357 S.C. 354, 360, 592 S.E.2d 637, 640 (Ct. App. 2004). Section 20-3-130(C) of the South Carolina Code (Supp. 2008) sets forth twelve factors which must be weighed when determining

[2] According to Wooten, courts must consider "the earning ability" of the supported spouse in assessing her need for life insurance as security for alimony and child support. 364 S.C. at 553, 615 S.E.2d at 109. This is a separate inquiry from determining whether Mother is voluntarily underemployed and in no way shapes our analysis on that issue.

alimony. In deciding whether to award alimony, the family court must consider:

> (1) the duration of the marriage and the ages of the parties at the time of the marriage and at separation; (2) the physical and emotional condition of each spouse; (3) the educational background of each spouse and the need for additional education; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated income of each spouse; (7) the current and reasonably anticipated expenses of each spouse; (8) the marital and nonmarital properties of the parties; (9) the custody of any children; (10) marital misconduct or fault; (11) the tax consequences of the award; (12) the existence of support obligations to a former spouse; and (13) such other factors the court considers relevant.

Id. The family court may weigh these factors as it deems appropriate. Id.

As an initial matter, the family court is mistaken in concluding Mother did not ask for medical or health insurance coverage from Father in her pleadings or at trial. In her pleadings, Mother asked for "coverage for Plaintiff and the minor child on Defendant's health and dental insurance." At trial, Mother, who had been covered under Father's health insurance plan during the parties' marriage, testified she wanted to continue with "the same type of coverage [she] had in the past." Although the family court erred in refusing to address the merits of this issue, there is nothing in the record to indicate that Father's insurance carrier would allow him to carry Mother on his health insurance plan after the parties' divorce became final. See Germain v. Nichol, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983) (holding that the appealing party has the burden of providing a sufficient record). Accordingly, we cannot grant Mother any relief from this error.

The family court also erred by refusing to consider the cost associated with Mother obtaining health insurance on her own in awarding alimony. In her pleadings, Mother alleged she was entitled to alimony. Section 20-3-130(C) requires the family court to consider all of the twelve factors

enumerated in that section when determining alimony. Id.; see Epperly v. Epperly, 312 S.C. 411, 415, 440 S.E.2d 884, 886 (1994) (noting the statute "sets forth twelve factors which must be weighed when determining alimony.") (emphasis in original). Factor number seven requires the court to consider "the current and reasonably anticipated expenses and needs of both spouses." § 20-3-130(C). Thus, regardless of whether Mother asked the family court to consider the cost of obtaining health insurance in her pleadings, the family court was required to consider this expense in awarding alimony. At trial, Mother testified that health insurance through her employer would cost $189 a month. However, the family court refused to consider this expense because "[Mother] did not ask that such expenses be considered in the alimony calculation." This was error. As a result, we remand this issue to the family court to consider adjusting Mother's alimony award in light of this expense.

D. Equitable Division

Mother argues the tobacco bonds and Sumter residence were marital property subject to equitable division because they were purchased with marital funds. Alternatively, Mother asserts the tobacco bonds and Sumter residence, both titled in Father's name, were transmuted into marital property and subject to equitable division. We disagree.

Marital property is defined as all real and personal property acquired by the parties during marriage and owned as of the date of filing or commencement of marital litigation regardless of how title is held. S.C. Code Ann. § 20-3-630(A) (Supp. 2008). Section 20-3-630(A)(1)-(4) of the South Carolina Code (Supp. 2008) contains four exceptions to this general rule. Thus, even if property fits within the statutory definition of marital property, the property is considered nonmarital if either party acquires the property by inheritance, devise, bequest, or gift from a party other than the spouse. § 20-3-630(A)(1). In addition, property acquired by either party in exchange for property acquired by inheritance, devise, bequest, or gift is nonmarital. § 20-3-630(A)(3); see Jenkins v. Jenkins, 345 S.C. 88, 100, 545 S.E.2d 531, 538 (Ct. App. 2001) ("[P]roperty acquired during the marriage in exchange for nonmarital property is nonmarital.").

Property that is nonmarital at the time of its acquisition retains its separate identity unless it becomes transmuted into marital property. Miller v. Miller, 293 S.C. 69, 71, 358 S.E.2d 710, 711 (1987). Nonmarital property may be transmuted into marital property if: (1) it becomes so commingled with marital property to render it untraceable; (2) it is titled jointly; or (3) it is utilized by the parties in support of the marriage or in some manner evidencing an intent by the parties to make it marital property. Johnson, 296 S.C. at 295, 372 S.E.2d at 110. "Transmutation is a matter of intent to be gleaned from the facts of each case." Jenkins, 345 S.C. at 98, 545 S.E.2d at 537. "The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." Johnson, 296 S.C. at 295, 372 S.E.2d at 110-11.

At trial, Grandmother testified that she gave Father the funds to purchase the tobacco bonds and Sumter residence from her personal savings account.[3] See § 20-3-630(A)(1) (stating property is considered nonmarital if either party acquires the property as a gift from a party other than the spouse). Father and Darrell Lowder, Father's accountant and financial planner, corroborated Grandmother's testimony. In addition, Father produced financial records, showing the money used to acquire these assets came from Grandmother's savings account. Because the parties were married when Father acquired title to the tobacco bonds and Sumter residence, the character of the funds used to purchase these assets determines whether the assets themselves should be considered marital or nonmarital property. See § 20-3-630(A)(3) (stating property acquired by either party in exchange for property acquired by a gift is nonmarital); Jenkins, 357 S.C. at 100, 592 S.E.2d at 538 ("[P]roperty acquired during the marriage in exchange for nonmarital property is nonmarital."). Thus, if the money found in Grandmother's savings account qualified as nonmarital property, the tobacco bonds and Sumter residence should also be characterized as nonmarital property.

[3] While Grandmother failed to file a gift tax return evidencing her gift of these funds to Father, her failure to do so is not dispositive on the issue of whether a gift was actually given.

Father opened Grandmother's savings account after the sale of the Florida residence. While Grandmother lived in the Florida residence, Mother and Father paid $9,635 in mortgage payments and $5,500 for repairs on the house from their joint account. However, once the Florida residence was sold, the proceeds from the sale, $73,982.33, were transferred into Mother and Father's joint account. From these proceeds, Grandmother reimbursed Mother and Father for the mortgage payments and repairs. Additionally, Grandmother reimbursed Mother and Father for closing costs and other expenses they provided for the Sumter residence.[4] This was accomplished by Father deducting these unreimbursed expenses from the proceeds of the sale of the Florida residence, which remained in Mother and Father's joint account. Then, Father transferred the remaining proceeds from the sale of the Florida residence to Grandmother's newly opened savings account. Thus, all marital funds spent on the Florida residence were fully reimbursed to Mother and Father with the sale of the Florida residence. Additionally, all remaining proceeds from the sale of the Florida residence were used to create Grandmother's savings account. Because all marital funds spent on the Florida residence were reimbursed, Grandmother's savings account qualified as nonmarital property. From Grandmother's savings account, the tobacco bonds and Sumter residence were purchased. As a result, these assets were also nonmarital property and not subject to equitable division, unless they became transmuted into marital property. See § 20-3-630(A)(3) (stating property acquired by either party in exchange for property acquired by a gift is nonmarital); Miller, 293 S.C. at 71, 358 S.E.2d at 711 ("Property that is nonmarital at the time of its acquisition retains its separate identity unless it is transmuted into marital property.").

Because Mother claims the tobacco bonds and Sumter residence were transmuted into marital property, she bears the burden of "produc[ing] objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." Johnson, 296 S.C. at 295, 372 S.E.2d at 111. She has not carried this burden. At trial, no testimony was introduced evidencing an intent for these assets to become marital property. Instead, Father, Grandmother, and Darrell Lowder all

[4] Mother and Father paid $7,396 from their joint account for closing costs and other expenses associated with the recent purchase of the Sumter residence.

testified the tobacco bonds and Sumter residence were titled in Father's name for the purpose of protecting these assets from Grandmother's relatives and future nursing home expenses. While Mother and Father claimed they owned the tobacco bonds and Sumter residence on their tax returns, they only did so in accordance with the advice of Lowder.[5] Because the record does not reveal that the parties regarded the tobacco bonds or Sumter residence as marital property during their marriage, the family court did not err in concluding these assets retained their character as nonmarital property. Accordingly, we affirm the family court's ruling.

E. Attorney's Fees & Costs

Mother argues the family court erred by failing to award her attorney's fees and costs. We remand this issue to the family court for further consideration.

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

We have already concluded that the family court erred in refusing to address the cost of Kate's private school tuition and the cost of Mother's medical expenses. On remand, it is possible the family court may decide these issues in Mother's favor. If they are decided in Mother's favor, this

[5] At trial, Lowder testified the parties did not receive a tax advantage or detriment as a result of listing these assets on their return.

result could alter the court's analysis of the "beneficial results obtained at trial." Accordingly, any determination of whether to award attorney's fees must wait until these issues are revisited by the family court. Thus, this issue is remanded to the family court.

II. FATHER'S APPEAL

A. Voluntary Underemployment

Father argues the family court erred in failing to impute income to Mother because she could earn a higher salary teaching in public schools. We disagree.

"The failure to reach earning capacity, by itself, does not automatically equate to voluntary underemployment such that income must be imputed." Gartside v. Gartside, 383 S.C. 35, 44, 677 S.E.2d 621, 626 (Ct. App. 2009). "[T]he common thread in cases where actual income versus earning capacity is at issue is that courts are to closely examine the payor's good-faith and reasonable explanation for the decreased income." Kelley v. Kelley, 324 S.C. 481, 489, 477 S.E.2d 727, 731 (Ct. App. 1996). However, a parent seeking to impute income to the other parent need not establish a bad faith motivation to prove underemployment. Arnal v. Arnal, 371 S.C. 10, 13, 636 S.E.2d 864, 866 (2006).

The family court did not err in refusing to impute income to Mother. For most of the parties' marriage, Mother taught in public schools. In fact, Mother did not quit working in public schools until the parties adopted Kate in 2001. After adopting Kate, Mother and Father mutually agreed she would no longer teach in the public school system so she could spend more time at home with Kate. Thereafter, Mother began working at Wilson Hall. Because Mother's decision to quit working at public school was the product of a mutual decision made during the parties' marriage, the family court did not err in refusing to impute income to Mother.

B. Visitation

Father asserts the family court erred in the manner in which it awarded visitation. Specifically, Father claims the family court erred by not awarding him more flexible weekend visitation and overnight visitation on weekdays. Additionally, he argues the family court erred in: allowing Mother to deny visitation for "good cause"; requiring the parties to exchange Kate on Christmas Day; limiting telephone contact with the child to three days a week for no more than twenty minutes at a time; not stating whether Kate was barred from international travel; not requiring Kate to obtain a passport to facilitate international travel; and not allowing Kate to fly unaccompanied when she reaches the age permitted by the airlines. We disagree.

The welfare and best interests of the child are the primary considerations in determining visitation. Paparella v. Paparella, 340 S.C. 186, 191, 531 S.E.2d 297, 300 (Ct. App. 2000). The family court has the discretion to place limitations on visitation. Nash v. Byrd, 298 S.C. 530, 536, 381 S.E.2d 913, 916 (Ct. App. 1989). In the absence of a clear abuse of discretion, the family court's order limiting visitation rights will not be disturbed on appeal. Id.

The family court did not err in setting the visitation schedule. As an initial matter, the family court provided Father with a flexible visitation schedule. Father's work schedule varies from month-to-month, and he does not receive notice of his schedule for the upcoming month until the end of the current month. Because of this, the family court allowed Father to advise Mother of his schedule when he received it. After consulting his work schedule, Father could request visitation with Kate during the upcoming month. Obviously, this flexible visitation schedule requires the parties to work together to facilitate Father's visitation. Recognizing this, the family court admonished Mother that she should not "without good and just cause, deny Father's requests." Therefore, contrary to Father's assertion in his brief, the family court did not leave Father's regular visitation to the whim of Mother. Rather, the family court, in making this statement, was urging the parties to work together so as to accommodate Father's unpredictable

schedule. On appeal, Father has failed to point to any evidence in the record indicating that Mother has arbitrarily or "without good and just cause" denied Father's visitation requests. As for Father's remaining arguments, there is no evidence demonstrating that the family court abused its discretion in resolving these issues.[6]

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

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HUFF, J., and LOCKEMY, J., concur.

[6] The family court did not rule on the following issues at trial: whether Kate was barred from international travel and whether Kate must obtain a passport to facilitate international travel. While these issues were raised at trial, the family court did not rule on them, and Father did not ask the family court to consider these issues in his Rule 59 motion. Accordingly, these issues are not preserved for appeal. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (stating a party must file a Rule 59(e) motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review). Additionally, Father never put forth any evidence at trial as to the age at which airlines allow children to fly unaccompanied. This issue is likewise unpreserved for appeal.