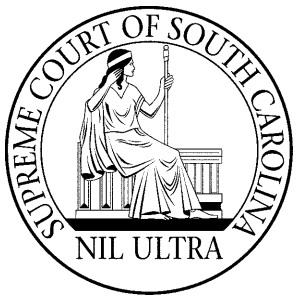

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3

January 22, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mary Lou Moseley, Petitioner,

v.

Jim Oswald, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lexington County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 26420
Heard December 6, 2007 – Filed January 22, 2008

REVERSED

William E. Booth III, of West Columbia, for Petitioner.

Blaney A. Coskrey III, of Columbia, and Ralph Shealy Kennedy, Jr., of Batesburg-Leesville, for Respondent.

CHIEF JUSTICE TOAL: In this case, Petitioner Mary Lou Moseley filed a conversion action against Respondent Jim Oswald. The trial court granted Respondent's motion for summary judgment, and the court of appeals affirmed on the basis that Petitioner failed to present any evidence that Respondent owned the land on which Petitioner's chattels were stored. *Moseley v. Oswald*, Op. No. 2005-UP-530 (S.C. Ct. App. filed September 16, 2005). This Court granted certiorari to review the court of appeals' decision. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

In April 1998, Oswald Wholesale Lumber, Inc. ("Oswald Lumber"), of which Respondent is the president, purchased a large tract of land from Petitioner's son. In October 1998, Petitioner filed a conversion action against Respondent alleging that Respondent refused to allow her to take possession of seven automobiles and various pieces of furniture stored on the property. Respondent filed a motion for summary judgment, arguing that Oswald Lumber, and not Respondent individually, owned the property. The trial court held that because Petitioner could not show that Respondent owned the property, there was no evidence that Respondent converted Petitioner's personal property, and Respondent was therefore entitled to summary judgment. The court of appeals affirmed, holding that there was no evidence to support Petitioner's allegation that Respondent owned the property and that Petitioner presented no admissible evidence that Respondent exercised control over her personal property.

This Court granted certiorari, and Petitioner presents the following issue for review:

> Did the court of appeals err in affirming the trial court's grant of summary judgment based on Petitioner's failure to produce evidence that Respondent owned the land on which her personal property was stored?

STANDARD OF REVIEW

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

LAW/ANALYSIS

Petitioner argues that the court of appeals erred in affirming the trial court's grant of summary judgment based on ownership of the real property on which Petitioner's personal property is stored. We agree.

Conversion is defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990). To establish the tort of conversion, the plaintiff must establish either title to or right to the possession of the personal property. *Crane v. Citicorp Nat'l Servs., Inc.*, 313 S.C. 70, 72, 437 S.E.2d 50, 52 (1993) (superseded by statute on other grounds).

In our view, the courts below erred in hinging their decisions on the fact that Oswald Lumber, and not Respondent individually, owns the property on which Petitioner's chattels are stored. While ownership of the real property may be relevant, a conversion action does not depend on who owns the real property on which the automobiles and other items are stored. Rather, the issue in a conversion action is whether Respondent exercised unauthorized control over Petitioner's personal property. *See SSI Med. Servs., Inc.* (holding that an action for conversion may arise by some illegal use or misuse, or by illegal detention of another's chattel).

Moreover, the record reveals that there are several genuine issues of material fact regarding Petitioner's conversion claim. Specifically, Petitioner produced evidence showing that she holds title to the automobiles and owns the furniture, and Respondent testified in his deposition that he attempted to sell one of the automobiles. Furthermore, there is evidence that Respondent refused to allow Petitioner to retrieve the automobiles and furniture from the property. Respondent argues that summary judgment is appropriate because a careful review of the record shows that Petitioner's son demanded return of the automobiles on behalf of Petitioner's husband and not on behalf of Petitioner and that Petitioner has never specifically demanded the return of the items to which she currently is referring. We reject Respondent's argument. Clearly, Respondent is on notice of the items that Petitioner alleges belong to her. Therefore, we hold that the trial court erred in granting Respondent's motion for summary judgment.

CONCLUSION

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

MOORE, WALLER, PLEICONES, JJ., and Acting Justice Alison Renee Lee, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Myriam Therese Marquez,	Appellant/Respondent,
v.	
David L. Caudill, John Doe, David Storm, and the South Carolina Department of Social Services,	Defendants,
of whom David L. Caudill is	Respondent/Appellant,
and John Doe and David Storm are	Respondents.

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

Opinion No. 26421
Heard November 14, 2007 – Filed January 22, 2008

AFFIRMED

Anita Ruth Floyd, of Conway, for appellant-respondent.

Randall K. Mullins, of North Myrtle Beach, for respondent-appellant.

Charles Richard Rhodes, Jr., of Conway, and Melissa Meyers Frazier, of North Myrtle Beach, for Guardians Ad Litem.

JUSTICE MOORE: This is a case involving custody and visitation issues. Amy Caudill gave birth to Jason in October 1992. Jason's biological father is David Storm; however, he has never been involved in Jason's life. When Jason was a toddler, Amy married respondent/appellant (hereinafter referred to as Stepfather)[1] in February 1994. Amy gave birth to Kathryn (Katie) Caudill in December 1999. Katie's father is Stepfather.

Amy committed suicide in September 2003. A few months later, appellant/respondent (hereinafter referred to as Grandmother), who is Jason and Katie's biological maternal grandmother, filed actions seeking custody of Jason and visitation of Katie. Jason's biological father elected not to participate in the proceedings and he presented the court an affidavit of relinquishment of his parental rights and consent for adoption. The family court ruled that Stepfather would retain custody of Jason and that he could adopt Jason. Jason's biological father's parental rights were terminated. The family court also ruled that, pursuant to S.C. Code Ann. § 20-7-420(33) (Supp. 2006), Grandmother would be allowed visitation with both Jason and Katie. The court further ruled that Grandmother must pay $25,000 in attorney's fees to Stepfather's attorney. Finally, the court ruled that both Grandmother and Stepfather would equally divide the fees of the guardians *ad litem*. We certified these appeals from the Court of Appeals. We now affirm.

FACTS

Stepfather met Amy while she was pregnant with Jason. He moved in with Amy a few months after Jason's birth and they subsequently married. They had a rocky relationship and separated three times. Amy filed for

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[1]Although respondent/appellant is the biological father of Katie, we will call him Stepfather for purposes of these appeals.

divorce shortly after Katie's birth. At that time, there was an agreement for custody wherein Katie lived with Stepfather and Jason lived with Amy. They reconciled and then separated again in 2003. Stepfather left on Amy's request and filed for divorce and custody of the children. At that time, there was an agreement for joint custody. While that order was in effect, Amy committed suicide.

Grandmother

Grandmother has a history of depression. She married her first husband at age 18 and had Amy and another daughter, Jessica, within two years. She had a miscarriage during this first marriage. She divorced her first husband and married her second husband who adopted Amy and Jessica. She then gave birth to Gina and, later, another daughter. Therefore, in six years, she had five pregnancies, four of which resulted in live births. After her youngest child was born in 1971, she became depressed and attempted suicide. She has periodically taken antidepressants. She claims she has not been depressed since 1989 until the death of her daughter in 2003.

During her second marriage, Grandmother left her children in Florida in the custody of her husband while she attended college and law school in Maryland. For three of those years, her children were also in Maryland. She saw and talked to her children often while she was in school. After school, all of her children moved back in with her.

Grandmother worked as a lobbyist in Washington, D.C., and later entered into private practice. She married twice more, with her last divorce occurring in 1996. In 1999, she moved to the state of Washington. While in private practice, she started an internet company that failed. She had to file for bankruptcy in 2001 and discharged $150,000 in liabilities.

Immediately before the family court hearing in 2005, Grandmother bought a single-family home in anticipation of gaining custody of Jason. She wanted to be near her family for support and chose the home because it was in an excellent school district. Grandmother has a net yearly income of $45,600 and testified she could financially take care of Jason.

Stepfather

Stepfather was in the Air Force for over eleven years and was honorably discharged due to anxiety. He had one suicide attempt; however, he maintains that it was only an attempt to attract attention during a divorce. At the time of the hearing, Stepfather was taking medication for anxiety. He has previously taken other medications and, at times, would carry medicine to assist him in the event he had a panic attack.

Stepfather testified that the only time he did not take his anxiety medicine was when it was lost in the mail and he suffered withdrawal. He then remained off the medicine for two years because he felt fine. He alleged his doctor was aware of his failure to take the medicine.

Several years prior to meeting Amy, Stepfather had a child of whom he relinquished custody. He has maintained contact with this child, who is now an adult.

Prior to his separation from Amy in 2003, Stepfather met another woman, Kim Darling, on an adult website. Within three or four months after Amy's suicide, Stepfather moved Jason and Katie into his girlfriend's house. The girlfriend has twin boys that also live with them in the five bedroom home. Jason and Katie call the girlfriend Kim, although there were allegations Stepfather was attempting to have the children call her Mom. Stepfather and Kim have since married. This is his fourth marriage. Stepfather testified that he felt it was appropriate to move in with Kim because Kim helped Jason by giving him stability. He admitted the move could have been a mistake but that it has worked out.

At the time of the hearing, Stepfather was working as a driver for Coca-Cola. His financial statement indicates that his net monthly income is $2,952.

Jason

Jason has consistently had behavioral problems. He was first taken to counseling at the age of four as a result of being expelled from four daycares in one year. His issues included kicking, biting, and hitting. His behavior was allegedly the result of his mother and Stepfather arguing in front of him.

Jason was admitted to counseling again around age six for extreme behavior problems at school. He underwent school-based counseling and Jason indicated he had to get between Amy and Stepfather when they fought.

Jason's third admission to counseling occurred at seven years of age and continued until 2002 when he was about ten years of age. This service was again initiated by Amy. Jason was in trouble at school for choking one child and pushing other children. Jason was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and placed on medication. He was discharged from counseling.

Jason's fourth admission to counseling was initiated by Stepfather after Amy's death. This counseling occurred between October 2003 and March 2005. Jason was accused of destroying property and acting in a threatening manner toward others. He also had suicidal thoughts. From the questionnaire, it appeared Stepfather did not know a lot about Jason's school life. During the fourth counseling session, the Department of Social Services was called by Jason's school in March 2004 because Jason had been wearing the same clothes to school for a week.[2]

In October 2004, a therapist met with Stepfather. The therapist stated Jason had made great progress, had less anger, and was taking Strattera for ADHD. At this time, Jason was living with Stepfather, Katie, and Kim and

[2]However, all other testimony indicates Jason was always well-groomed, well-dressed, and healthy. Further, Stepfather testified that the allegations were deemed unfounded by DSS.

her two children. In March 2005, counseling for Jason ended because he was doing well but also mainly because he was resistant to participating in counseling sessions.

At one point, Jason was off his ADHD medication after Christmas 2004. He had twelve incidents at school while he was off the medication.

Throughout the fourth counseling session, Jason vacillated between wanting to live with Grandmother and wanting to live with Stepfather. Jason indicated that he loved both of them and wanted to be with both of them and that it was a hard decision for him. He indicated that he enjoyed living with Kim and her children. Jason refers to Stepfather as "Dad" and Stepfather is the only father figure Jason has ever known. Grandmother admits Stepfather is a fit parent to both Jason and Katie and that Jason and Stepfather have emotionally bonded as father and son. Amy's sister and other witnesses testified that the relationship of Stepfather and Jason is as father and son and that Stepfather loves both Jason and Katie. The Guardians *ad litem* both testified that Stepfather is a fit parent.

Stepfather testified that he did not earlier seek to adopt Jason because, initially, Amy was receiving child support from the biological father and she did not want that support to stop. When the support did stop, he testified they simply did not discuss it anymore.

A couple of months before the hearing, Jason was in trouble at school for choking another child. He had also indicated he was having suicidal thoughts again. Jason's school records for 2005 indicated he was making C's, D's, and F's, and had 11 disturbing school infractions and one physical altercation (the choking incident). Stepfather testified he would seek more counseling for Jason.[3] He testified, however, that he was told by the counselor that Jason would have to be ready to receive counseling or it would not help him.

[3]Unfortunately, at oral argument, counsel indicated that Jason has not received the counseling that he needs.

There was evidence that Stepfather favored Katie over Jason. One witness testified Stepfather and Jason's relationship was very reserved and cold on Stepfather's part. This witness felt Jason attempted to get Stepfather's attention. A former co-worker of Amy testified that Amy would often bring Jason to the convenience store where she worked. Amy indicated she had to bring Jason because she did not have anyone to babysit him. This co-worker testified that Katie stayed with her paternal grandparents but Jason was not allowed to do so.

Amy's sister, Gina, testified that when she went to retrieve Amy's remains for the funeral in Maryland, Jason and Katie were living with their paternal grandparents at the time. None of Jason's belongings were inside the house because he was living outside in a camper. Katie, on the other hand, had a bedroom filled with toys and clothes inside her grandparents' house. Gina further testified that Stepfather focuses all of his attention on Katie and does not engage in any physical contact, such as hugging, with Jason. She mentioned that Stepfather told Jason he could not cry at his mother's memorial service that was held in South Carolina.

On the other hand, Stepfather presented two witnesses who stated Stepfather plays video games with Jason, that Stepfather appropriately disciplines Jason, and that Stepfather mostly took care of the children while Amy was alive. Stepfather did most of the cooking and feeding of the children. One of Stepfather's witnesses stated he treats Katie "a little bit better" than Jason.

Grandmother was present at Jason's birth and she saw Jason monthly until he was over 2 years old. She did not see him in 1995. From 1996 to 1999, Grandmother saw Jason about eleven times. She did not see him in 2000. From 2001 to 2003, Grandmother allegedly saw Jason three times.[4] After Amy's death, she did not see Jason again until September 2004. As of the hearing, she had seen Jason for five visits.

[4]Although Grandmother indicated she saw Jason three times between 1999 and 2004, the family court found she did not see Jason from 1999 until after Amy's death in 2003.

Katie

Katie was born in 1999 and she and Jason are seven years apart; however, they have a good relationship. Both Guardians testified that Jason and Katie should not be divided.

Grandmother was not present at Katie's birth and saw Katie twice between 2001 and 2003. She did not see Katie again until after Amy's death. Grandmother testified that she could not visit Katie due to financial restraints. Amy's sister, Gina, testified that she never visited Katie from her birth to Amy's death.

STANDARD OF REVIEW

In appeals from the family court, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. Strickland v. Strickland, 375 S.C. 76, 650 S.E.2d 465 (2007). This broad scope of review does not require the reviewing court to disregard the findings of the family court; appellate courts should be mindful that the family court, who saw and heard the witnesses, sits in a better position to evaluate credibility and assign comparative weight to the testimony. *Id.* Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved. Dodge v. Dodge, 332 S.C. 401, 505 S.E.2d 344 (Ct. App. 1998).

GRANDMOTHER'S APPEAL

ISSUES

I. Did the family court err by failing to award custody of Jason to Grandmother?

II. Did the family court err by awarding attorney's fees to Stepfather?

DISCUSSION

I. Custody

The family court found that both Grandmother and Stepfather would be fit parents. The court found that Stepfather has played an important role in rearing Jason and that, although he has not been the perfect father, he has been the only father figure that Jason has ever known. The court noted that the evidence establishes a degree of attachment and psychological bonding as father and son.

The family court found that, while Stepfather has shown poor judgment by living with his fiancée and her two children prior to marriage, visiting pornographic websites, and not always taking his medication, there was no evidence that this behavior has had any detrimental effect on Jason. The family court found that Stepfather has an appropriate home for Jason.

As to Grandmother, the family court found that she is fit to be a parent although she has had problems, including depression. The family court noted that Grandmother was forced to declare bankruptcy at one point. The court stated it "was struck by her cavalier attitude to this financial experience."

The family court found that Grandmother did not have a great deal of contact with Jason prior to Amy's death. However, he noted that she and Jason love each other and that Jason views her as his grandmother and not as a mother figure.

The family court found that it is in Jason's best interest to be in the custody of Stepfather due to their relationship. He also noted that he did not believe Jason should be separated from Katie given both guardians recommend that the children remain together. The family court stated that Jason needs as much stability as possible and that Jason would find this by remaining with the only father he has ever known and his biological sister.

The family court further found that, because Stepfather has custody of Jason, Stepfather's adoption of Jason should be approved. The family court ordered the adoption although Jason's guardian did not advocate the adoption because the guardian did not believe Stepfather would foster the relationship between Grandmother and Jason.

The best interest of the child is the primary and controlling consideration of the Court in all child custody controversies. Moore v. Moore, 300 S.C. 75, 386 S.E.2d 456 (1989). There is a rebuttable presumption that it is in the best interest of any child to be in the custody of its biological parent. *Id.* However, in this case we do not have a biological parent seeking custody of Jason. We have a biological maternal grandmother versus a stepfather who has essentially raised Jason since birth.

We recognized the notion of a psychological parent in Moore v. Moore, *supra*. In Moore, a biological father attempted to regain custody of his child after a temporary relinquishment due to hardships from third parties. We stated that even though there may exist a psychological parent-child relationship, the mere existence of such a bond is an inadequate ground to justify awarding permanent custody to the psychological parent. We ruled that the child should be returned to the biological father.

The Court of Appeals mentioned the psychological parent doctrine in Dodge v. Dodge, 332 S.C. 401, 505 S.E.2d 344 (Ct. App. 1998). The Dodge court found that although the subject children had a close and loving relationship with their stepfather and grandparents, the level of attachment did not rise to the level of a psychological parent-child relationship. The Dodge court found the family court should have awarded the biological father full custody.

In Middleton v. Johnson, 369 S.C. 585, 633 S.E.2d 162 (Ct. App. 2006), the Court of Appeals noted that, while both Moore and Dodge recognized the existence of the psychological parent doctrine, neither case explored how a party establishes that he or she is the psychological parent to a child of a fit, legal parent. The Court of Appeals fleshed out the meaning of a psychological parent. The court reviewed the law in other states and found

that some states define a psychological parent by breaking down parenthood to its fundamental elements. The court noted that in California, for example, a *de facto* parent is defined as a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period. Middleton, 369 S.C. at 595, 633 S.E.2d at 168 (citations omitted). The court noted that some states have expanded the definition of psychological parent, and that Wisconsin has developed a four-prong test for determining whether a person has become a psychological parent. *Id.* at 596-597, 633 S.E.2d at 168 (citations omitted).

The Court of Appeals chose to adopt the four-prong test, stating that this test provides a good framework for determining whether a psychological parent-child relationship exists and that the test would ensure that a nonparent's eligibility for psychological parent status will be strictly limited.

The four-prong test states that, in order to demonstrate the existence of a psychological parent-child relationship, the petitioner must show:

> (1) that the biological or adoptive parent[s] consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
>
> (2) that the petitioner and the child lived together in the same household;
>
> (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; [and]
>
> (4) that the petitioner has been in a parental role for a length of time sufficient to have

> established with the child a bonded, dependent relationship parental in nature.

Middleton, *supra* (quoting *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435-36 (Wis. 1995)[5]). The Court of Appeals discussed each prong of the test.

Regarding the first prong, the court noted the first factor is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child. This factor recognizes that when a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced. *Id.* at 597, 633 S.E.2d at 168-169.

Regarding the second prong, the court stated the requirement that the psychological parent and the child have lived together further protects the legal parent by restricting the class of third parties seeking parental rights. *Id.* at 598, 633 S.E.2d at 169.

The court stated that the last two prongs are the most important because they ensure both that the psychological parent assumed the responsibilities of parenthood and that there exists a parent-child bond between the psychological parent and child. The psychological parent must undertake the obligations of parenthood by being affirmatively involved in the child's life. The psychological parent must assume caretaking duties and provide emotional support for the child. The Court of Appeals stated that these duties, however, must be done for reasons other than financial gain, which guarantees that a paid babysitter or nanny cannot qualify for psychological parent status. The court further noted that when both biological parents are involved in the child's life, a third party's relationship with the child could never rise to the level of a psychological parent, as there is no parental void in the child's life. *Id.* at 598, 633 S.E.2d at 169 (citation omitted).

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[5] *Cert. denied*, Knott v. Holtzman, 516 U.S. 975 (1995).

We find the Court of Appeals' adoption of the four-prong psychological parent test is appropriate. It is a reasoned way to analyze situations such as the one present in the Middleton case[6] and in the instant case.[7] It is an appropriate extension of the Moore case.[8] As the Court of Appeals noted, the test will limit the persons who may seek to be considered a psychological parent, but it will assist those who are worthy to be called such.

Utilizing the four-prong test, we find Stepfather has met the requirements of a psychological parent. The first prong is whether Amy, as the biological parent, consented to, and fostered, Stepfather's formation and establishment of a parent-like relationship with Jason. Shortly after Jason's birth, Amy and Stepfather moved in together and a few months later they married. Amy did not want Stepfather to adopt Jason because she would lose the child support she was receiving from the biological father. After that support ceased, the issue either never arose again as Stepfather testified, or as

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[6]In Middleton, an ex-boyfriend brought an action seeking visitation of his ex-girlfriend's biological son based on the fact he had played a prominent role in the child's life. The Court of Appeals utilized the four-prong test to find that Middleton was the child's psychological parent and that allowing him visitation was in the child's best interest.

[7]The Middleton court cautioned that its decision does not automatically give a psychological parent the right to demand custody in a dispute between the legal parent and psychological parent. While Middleton was concerned with visitation by a psychological parent, in the instant case, a legal parent no longer exists. In this situation, the Middleton analysis applies to a custody determination between an alleged psychological parent and a third party.

[8]The Moore line of cases do not apply in the instant case because Jason has never lived outside of his stepfather's and parent's home for a substantial period of time. The Moore case involves a natural parent versus a third party who has had possession of and cared for the child. In the instant case, a natural parent is no longer involved and the third party, Grandmother, has never possessed Jason and has only had visits with him.

the maternal family suggested, Amy did not wish to have Stepfather adopt Jason. In any event, at the time of the final separation, Stepfather and Amy had agreed to joint custody of Jason. The evidence supports a finding that Stepfather has met this element.

Stepfather has met the second prong to determine whether he is a psychological parent. He and Jason have always lived together in the same household; that is, except for times of separation between he and Amy.

The third prong is whether Stepfather has assumed obligations of parenthood by taking significant responsibility for Jason's care, education and development, including contributing towards Jason's support, without expectation of financial compensation. Since Amy's death, Stepfather has clearly met this prong. However, the evidence was not as clear as to whether he met this prong prior to her death. Some testimony indicated Stepfather preferred Katie to Jason and spent his time with Katie instead of Jason. The evidence also indicated that before her death, Amy was the person who ensured Jason received counseling and talked to his counselors. However, other testimony indicated Stepfather was the one in charge of both children; that he cooked for and fed the children, and that he disciplined the children. There is no indication in the evidence regarding financial support; however, given both Stepfather and Amy were employed, married, and all living in the same household, one can assume that he has provided financial support for Jason throughout his life. After reviewing all the evidence, we find Stepfather has also met this prong.

The fourth prong is whether Stepfather has been in a parental role for a length of time sufficient to have established with Jason a bonded, dependent, parental relationship. The evidence that Stepfather meets this prong is clear. Jason has always referred to Stepfather as "Dad," and Stepfather is the only father figure Jason has ever known. Grandmother admitted that Stepfather and Jason have bonded as father and son. Therefore, Stepfather has met the requirements to be considered a psychological parent to Jason.

Grandmother cannot meet the test of whether she is a psychological parent because she does not meet the prongs stated above. It must be

remembered that this is a custody action between a stepfather and a grandmother. A biological parent is not involved; and therefore, there is no reason to recognize the superior rights of a natural parent in this case. Grandmother cannot step into her daughter's place. Although her daughter has died, Grandmother remains a third party seeking custody.

While there was evidence indicating Stepfather is not perfect and sometimes shows bad judgment, there is no requirement that a person be perfect in order for custody to be granted. Because Stepfather is Jason's psychological parent and is, in fact, the only father he has ever known, we find the family court appropriately determined that it was in Jason's best interest for Stepfather to have custody of him.[9]

II. Attorney's Fees

The family court found that Stepfather prevailed on a majority of the issues in this case, *i.e.* custody and adoption, and that he does not have the ability to pay all of the attorney's fees he has incurred. On the other hand, he found Grandmother, as a practicing attorney, has the ability to earn substantial income and has sufficient assets which she can apply towards the satisfaction of Stepfather's attorney's fees.

The court found that Stepfather's attorney has been practicing law for approximately nineteen years and devotes a substantial portion of his practice to domestic litigation and that the fees he has charged are reasonable and within the norms of hourly rates in Horry County. After a review of the factors in Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991), the court ordered Grandmother to pay Stepfather $25,000 in attorney's fees.

The decision to award attorney's fees is a matter within the sound discretion of the trial judge and the award will not be reversed on appeal

[9]Regarding the family court's decision to grant Stepfather's request to adopt Jason, the family court did not err by allowing the adoption given the analysis above. *See* S.C. Code Ann. § 20-7-1820 (Supp. 2006) (any person may adopt his spouse's child and the requirements for doing so are lessened).

absent an abuse of discretion. Buckley v. Shealy, 370 S.C. 317, 635 S.E.2d 76 (2006). The factors used to determine a reasonable attorney's fee are: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services. Glasscock v. Glasscock, *supra*. While "contingency of compensation" is an appropriate factor considered in awarding attorney's fees, the contingency to be considered is whether the party on whose behalf the services were rendered will be able to pay the attorney's fee if an award is not made. Further, the factor "beneficial results obtained" merely aids in determining whether an award is appropriate when considering whether the services of a lawyer facilitated a favorable result. *Id.*

We find the family court did not abuse its discretion in requiring Grandmother to pay Stepfather's attorney's fees. The family court's findings are consistent with an application of the Glasscock factors. The family court properly noted that Stepfather has prevailed on a majority of the issues and that he does not have the ability to pay all of the attorney's fees he has incurred. Stepfather's financial statement showed that almost all of his paycheck is used to pay bills. He also testified that without his father's financial help he would have been unable to afford the litigation.

The family court properly found that Grandmother, as a practicing attorney, has the ability to earn substantial income and has sufficient assets she can apply towards the satisfaction of Stepfather's attorney's fees. The family court stated it had reviewed the Glasscock factors and found an award should be made to Stepfather. The family court did not abuse its discretion in awarding attorney's fees to Stepfather.[10] *See* Patel v. Patel, 359 S.C. 515, 599 S.E.2d 114 (2004) (an abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support).

[10]Stepfather argues the award was reasonable due to Grandmother's dilatory tactics regarding discovery. Twice during the hearing, the family court stated that he should impose sanctions given how untimely Grandmother's responses were.

STEPFATHER'S APPEAL

ISSUES

I. Did the family court err by requiring a fit parent to proceed with specific grandparent visitation when the statute utilized is unconstitutional or is unconstitutional as applied to Stepfather?

II. Did the family court err by requiring Stepfather to be responsible for the payment of guardian *ad litem* fees?

DISCUSSION

I. Grandparent Visitation

The family court found that, because the adoption of Jason was approved, it would analyze the visitation issue as if Stepfather is the biological father of both children. The family court found that, as we ruled in Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565 (2003), the grandparent visitation statute could be applied constitutionally. The family court found that, due to the particular facts of this case, maintaining the ties between the mother's family and the children present compelling and exceptional circumstances to justify ordering visitation with Jason and Katie. After reviewing what amount of visitation is rationally related to achieve its stated goal of maintaining the mother's memory and what is in the children's best interest, the court specified the amount of visitation. Grandmother was allowed two weeks of visitation during the summer months and one week during the Christmas holidays. Grandmother was to be responsible for arranging all transportation and its related costs.

Stepfather argues that the grandparent visitation statute, S.C. Ann. § 20-7-420(A)(33), is either unconstitutional on its face, pursuant to Troxel v. Granville, 530 U.S. 57 (2000), or as applied to the instant situation. Section 20-7-420(A)(33) provides that the family court has exclusive jurisdiction to:

> order periods of visitation for the grandparents of a minor child where either or both parents of the minor child is or are deceased, or are divorced, or are living separate and apart in different habitats regardless of the existence of a court order or agreement, and upon a written finding that the visitation rights would be in the best interests of the child and would not interfere with the parent/child relationship. In determining whether to order visitation for the grandparents, the court shall consider the nature of the relationship between the child and his grandparents prior to the filing of the petition or complaint.

We addressed the constitutionality of the grandparent visitation statute in Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565 (2003). In Camburn, we stated that it is well-settled that parents have a protected liberty interest in the care, custody, and control of their children and that this is a fundamental right protected by the Due Process Clause. *Id.* at 579, 586 S.E.2d at 567 (citing Troxel, *supra*). We noted that, under Troxel, the court must give "special weight" to a fit parent's decision regarding visitation. *Id.* A court considering grandparents' visitation over a parent's objection must allow a presumption that a fit parent's decision is in the child's best interest:

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Id. at 579, 586 S.E.2d at 567-568 (quoting Troxel, *supra*). Parental unfitness must be shown by clear and convincing evidence. *Id.* (citations omitted).

The presumption that a fit parent's decision is in the best interest of the child may be overcome only by showing compelling circumstances, such as significant harm to the child, if visitation is not granted. *Id.* The fact that a

child may benefit from contact with the grandparent, or that the parent's refusal is simply not reasonable in the court's view, does not justify government interference in the parental decision. *Id.* In Camburn, we stated that, in sum, parents and grandparents are not on an equal footing in a contest over visitation. Before visitation may be awarded over a parent's objection, one of two evidentiary hurdles must be met: the parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child's best interest. *Id.* at 579-580, 586 S.E.2d at 568. Accordingly, we have already ruled that the grandparent visitation statute is not facially invalid because it can be constitutionally applied in the appropriate circumstances.

Applying the statute and Camburn to the facts here, there has been no finding that Stepfather is unfit; in fact, Grandmother's attorneys conceded and the family court found that Stepfather is a fit parent.[11] We hold that a biological parent's death and an attempt to maintain ties with that deceased parent's family may be compelling circumstances justifying ordering visitation over a fit parent's objection. We find visitation here is in the children's best interest to further the relationship between the children and the mother's family. We further find the visitation ordered by the family court would not excessively interfere in Stepfather's relationship with the children. Therefore, the family court did not err by awarding Grandmother visitation.

II. Guardian *ad litem* Fees

The family court found that both of the guardians *ad litem* had properly performed their services and were entitled to payment of their fees and expenses. The court ruled that each party would be equally responsible for the balance of the fees owed to the guardians. We find the family court did not abuse its discretion by splitting the guardian fees between the parties. *See* Shirley v. Shirley, 342 S.C. 324, 536 S.E.2d 427 (Ct. App. 2000) (an award of

[11]Because the family court properly allowed Stepfather to adopt Jason, we likewise address this issue as if Stepfather is the parent of Jason.

guardian *ad litem* fees lies within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion).

CONCLUSION

In conclusion, we find Stepfather has met the requirements of being a psychological parent and, as such, he was properly awarded custody of Jason. We find the family court did not err by ordering Grandmother to pay a portion of Stepfather's attorney's fees and by ordering the parties to share equally the costs of the guardian fees. Finally, we find the family court appropriately awarded Grandmother visitation of the children. Given our disposition of the appeals, we find it is unnecessary to address Stepfather's Issues V and VI. *Cf.* *Whiteside v. Cherokee County Sch. Dist. No. One*, 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issue when resolution of prior issue is dispositive). Accordingly, the decision of the family court is

AFFIRMED.

WALLER and BEATTY, JJ., concur. TOAL, C.J., concurring in part and dissenting in part in a separate opinion in which PLEICONES, J., concurs.

CHIEF JUSTICE TOAL: I agree with the majority by and large; however, I would reverse the portion of the family court's order awarding Stepfather $25,000 in attorneys' fees.

This was an extremely close case, and although Stepfather ultimately prevailed on the merits of the custody issue, the family court awarded Grandmother significant visitation rights. Grandmother has incurred substantial expenses as a result of this litigation and, pursuant to the family court's order, is now responsible for visitation costs. *See E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992) (holding that in deciding whether to award attorney's fees, the family court should consider the beneficial results obtained by counsel, the parties' ability to pay their own fee, the respective financial conditions of the parties, and the effect of the fee on each party's standard of living). In my opinion, it is instructive that the family court ordered Stepfather and Grandmother to be equally responsible for the guardian *ad litem* fees, and I would hold that the family court should have applied this reasoning to the issue of attorneys' fees.

Accordingly, I would reverse this portion of the family court's order and hold each party responsible for his and her own attorney's fees.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of W. James Hoffmeyer, Respondent.

Opinion No. 26422
Heard October 18, 2007 – Filed January 22, 2008

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., both of Columbia, for Office of Disciplinary Counsel.

Kevin M. Barth, of Florence, for Respondent.

PER CURIAM: This is an attorney discipline case involving an inappropriate sexual relationship between James Hoffmeyer (respondent) and a client (Client). The Commission on Lawyer Conduct Full Panel (Panel) adopted the report of the sub-panel, which recommended a public reprimand.

The Office of Disciplinary Counsel (ODC) appeals and asks for a harsher sanction, contending the Panel erred in failing to find other instances of misconduct. We agree and impose a nine month suspension. In addition, respondent is to be charged the costs of this disciplinary proceeding.

FACTS

Respondent is a solo practitioner who mainly practices in the areas of criminal defense and insurance defense, along with a small amount of family court work. In September 2003, Client retained respondent to represent her in a legal separation and child custody action. Client and her husband had

been negotiating terms without legal representation, and they were close to reaching an agreement when Client retained respondent as her counsel. Client, who was struggling with an eating disorder and depression, desired a prompt resolution of her case because she was concerned her husband would use her health against her on the issue of custody.

After respondent sent Client's husband a letter enclosing proposed terms of an agreement, Client's husband retained counsel to represent him on October 2, 2003. Respondent and Client's husband's attorney began exchanging proposals in an attempt to finalize the separation agreement.

Around this point in time in early October 2003, respondent and Client started having frequent telephone conversations and office visits, which were personal in nature and unrelated to Client's domestic case. The increasing attraction between respondent and Client resulted in a physical encounter on or about October 10, 2003. Although he admitted he should not have continued to represent Client, respondent failed to withdraw as Client's attorney after the incident and continued to negotiate on her behalf because he believed a speedy resolution was in Client's best interest.

On October 14, 2003, respondent and Client engaged in sexual intercourse at respondent's house. Respondent discussed with Client that he should withdraw as her counsel, but she asked him to continue representing her, again citing her desire to obtain quickly an agreement in her favor.

Respondent continued to negotiate with Client's husband's counsel. One of the proposed provisions of Client's settlement agreement was that Client be required to pay her husband $3,500 for his share of the equity in the marital home. Respondent gave Client $3,500 from his personal funds to enable Client to reach a quick resolution with her spouse. Respondent admitted that in addition to concerns over Client's medical condition, he desired to reach a prompt settlement for Client so there would be less of a problem spending time with Client.

In addition, during the early part of October 2003, Client's eating disorder worsened, and her physicians recommended she be admitted to an in-patient facility in New Orleans, Louisiana. Client was making plans to

travel to New Orleans, and respondent instructed his secretary to use respondent's office credit card to purchase a plane ticket for Client to travel to the treatment center in New Orleans. However, no plane ticket was purchased because the credit card had not been activated. In addition, respondent gave Client $100.00 in cash for her personal use when she arrived in New Orleans.

On October 15, 2003, one day before Client was to travel to New Orleans, respondent allowed Client to spend the night with him at his home. Late that evening, Client's husband arrived at respondent's home and confronted Client and respondent regarding their relationship. Client's husband took with him a tape recorder and recorded the exchange.

After the confrontation with Client's husband on October 15, 2003, respondent told Client the next morning that he could not continue as her lawyer. He provided her with names of several lawyers who could handle her case and assured Client that he would take care of her attorney's fees. Later that day, respondent delivered Client's file to another attorney, discussed Client's case with him, and also assured the attorney that respondent would be financially responsible for Client's legal fees. Eventually, another local attorney agreed to represent Client and respondent paid the retainer fee.

On October 17, 2003, respondent made a Self-Report to ODC.

Client's attorney negotiated a settlement agreement on behalf of Client, which was approved by the family court in January 2004. The agreement reached is very similar to the one previously negotiated by respondent, and Client received primary custody of the parties' minor children. Accordingly, the Panel concluded that respondent's personal relationship with Client did not adversely affect her domestic case.

The Panel did find that respondent violated Rule 1.7(b) and Rule 1.16 by failing to withdraw from representing Client as soon as it became clear that he and Client had developed strong personal feelings for each other. The Panel concluded that ODC failed to prove by clear and convincing evidence

the remaining allegations of misconduct in the formal charges.[1] The only sanction recommended by the Panel was a public reprimand.

LAW/ANALYSIS

I. Rule 1.14

ODC objects to the Panel's failure to find that Client was under a disability as defined in Rule 1.14, SCRPC, and that respondent's conduct constituted a violation of Rule 1.14. We agree.

Rule 1.14(a) states, "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

When Client first came to respondent's office, she was depressed, taking prescription medication for anxiety, and showed signs of anorexia. During respondent's representation of Client, Client was hospitalized several times for treatment of dehydration and malnutrition due to anorexia. These physical problems, coupled with the stress of going through a divorce, enhanced Client's vulnerability. Respondent's failure to maintain a normal relationship with his vulnerable client constitutes a violation of Rule 1.14.

[1] We agree with the Panel that ODC did not prove by clear and convincing evidence the allegations of misconduct regarding: (1) respondent's allegedly false statements given to ODC; (2) respondent's alleged settlement negotiations with Client's husband during their confrontation; (3) the manner in which respondent retained counsel for Client after he withdrew; and (4) respondent's alleged attempt to obstruct justice by "coaching" Client before her statements to ODC.

II. Rule 1.8

ODC argues that the Panel erred by not finding a violation of Rule 1.8 because it deemed the financial assistance given to Client by respondent was merely a gift. We agree.

Rule 1.8(e) prohibits a lawyer from providing "financial assistance to a client in connection with pending or contemplated litigation." The Panel determined that the $3,500 payment to aid Client in her divorce negotiations and the $100 cash, given by respondent before he withdrew as her attorney, were not prohibited by Rule 1.8(e) because there was no expectation of repayment.

These payments, whether deemed to be loans or gifts, are prohibited by Rule 1.8(e). Rule 1.8(e) forbids an attorney from providing financial assistance in connection with pending litigation. The rule does not distinguish between loans and gifts, and the term "financial assistance" is unambiguous and encompasses both loans and gifts of money. *See* In re Strait, 343 S.C. 312, 540 S.E.2d 460 (2000) (advancing money to client for his electric bill); In re Larkin, 336 S.C. 366, 520 S.E.2d 804 (1999) (providing money for mobile home payments for client and providing loans to numerous clients); and In re Mozingo, 330 S.C. 67, 497 S.E.2d 729 (1998) (furnishing money for a rental car to a client). Accordingly, respondent violated Rule 1.8(e) when he provided financial assistance to Client while he represented her.

III. Continued legal representation

ODC argues that respondent continued his legal representation of Client after he formally withdrew and continued a sexual relationship with Client, thereby committing a separate violation of Rule 1.7(b) and Rule 1.16. We agree.

The record reflects that after formally withdrawing from the domestic action and while he and Client were still involved in a romantic relationship, respondent: a) prepared several affidavits in Client's domestic case in August

2004; and b) prepared and filed a power of attorney for Client in January 2005. Although respondent did not continue to officially represent Client in her continuous custody disputes with her ex-husband, we find that respondent continued to act as Client's attorney while they were still physically involved with each other. Respondent's preparation of affidavits and a power of attorney on Client's behalf constitutes separate violations.

IV. Unfitness to practice law/legal profession in disrepute

ODC contends that respondent acted with an utter lack of judgment and demonstrated an unfitness to practice law, which is a ground for sanctions under Rule 7(a)(5), Rule 413, RLDE. We agree.

The record is replete with instances where respondent showed questionable judgment which demonstrates an unfitness to practice law.

First, respondent's behavior during the confrontation with Client's husband on the night of October 15, 2003, causes us great concern. Respondent belittled Client's husband's actions in regards to the separation and divorce proceedings, using information he obtained through his representation of Client.

Another incident that brings the legal profession into disrepute occurred when respondent and Client, in anticipation of the issue arising in Client's domestic litigation, drafted a synopsis of events involving their relationship up until November 2003. The timeline trivializes certain events and makes vulgar references to Client's private affairs. Respondent testified that the document was a result of two people being "silly," but we believe the situation involving respondent and Client is far from humorous and shows questionable judgment.

Another incident involves an encounter between Client, respondent, and an acquaintance of respondent named Gigi. In December 2003, respondent came home to find Client had intentionally cut her wrist with a knife, leaving a large gash. Gigi was also present at the home. Although there are conflicting details of the events of that night, a struggle ensued

amongst all three, resulting in Gigi leaving respondent's home with a broken nose.

After Gigi left the home, respondent expressed concerned over Client's wrist wound and acknowledged the need for medical attention. However, Client did not want this incident to be used against her in future custody disputes, so she and respondent avoided professional medical attention. Instead of going to a doctor, respondent sewed up Client's wound with seven to eight stitches while Client, a nurse, directed him.

Later, Gigi contacted respondent and informed him that she was holding him responsible for her injuries. Respondent drafted a document, styled as a "Complete and Full Release", which was typed by Client and provided a payment of $19,000 by respondent to Gigi. The document provided that Gigi would hold respondent harmless from any liability, but it did not provide that protection to Client, even though Client may have been responsible for the injuries. Respondent also failed to inform Client that she should seek independent legal advice in this regard.

Finally, respondent's judgment is called into question for not only failing to inform the family court of Client's problems with substance abuse, eating disorders, and other self-destructive behavior, but also for affirmatively supporting Client in her custody dispute in August 2004 when he knew of her problems. By filing an affidavit in support of Client, respondent let his personal feelings for Client get in the way of his responsibilities as an attorney and officer of the court. His decision to get involved in a legal matter to support Client's bid for custody of two small children despite her numerous problems demonstrates that respondent's professional judgment was seriously hampered by his personal feelings for Client.

Aggravating and mitigating circumstances

The Panel did not make any findings of aggravating circumstances, but we believe the vulnerability of Client should be considered. Despite their mutual attraction, respondent still should have recognized the vulnerability of

Client. She was under the stress of pending divorce, had just ended a recent affair, and was struggling with anxiety, depression, and anorexia.

The Panel found numerous mitigating circumstances. These included the fact that respondent had no prior disciplinary action and self-reported, as well as the following evidence that respondent: participated in local mock trials at schools, spoke at career day, accepted numerous court appointments, participated in numerous legal seminars, prepared wills for soldiers leaving for Iraq, was involved in the Big Brother program, and donated and participated in over 16 charities and local fundraisers. Also, respondent offered evidence from 21 character witnesses, who spoke in high regard of respondent's skills, diligence, community service, and professionalism. We also note that all of respondent's disciplinary problems have arisen out of his relationship with Client, and although the violations are quite serious, we do not feel that respondent's behavior constitutes a continuing danger to the public.

CONCLUSION

The purpose of disciplinary proceedings is to protect the public and the integrity of the legal system. In re Chastain, 340 S.C. 356, 532 S.E.2d 264 (2000). In light of our findings of additional instances of misconduct, we suspend respondent from the practice of law for nine months. In addition, within ninety (90) days of the filing of this opinion, respondent shall pay costs associated with this proceeding. Within fifteen (15) days of the filing of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Legaree Leavy Evans, Appellant.

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

Opinion No. 4332
Submitted January 2, 2008 – Filed January 16, 2008

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of the South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

HUFF, J.: Appellant, Legaree Leavy Evans, was indicted for and convicted of burglary in the first degree and possession of burglary tools. He appeals, asserting the trial judge erred in denying his motion for directed verdict on the first-degree burglary charge because the building in question did not qualify as a dwelling. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

Around 4:30 a.m. on December 21, 2004, a neighbor getting ready for work noticed the lights on at the Shaw home on Gully Falls road in Pickens County. Because the neighbor knew the Shaws were rarely at the home and it was unusual to see activity there, she called 9-1-1. Deputies Porter and Sailors arrived at the home to discover the lights on and the door open. Deputy Sailors observed someone near the back of a truck in the driveway, who turned and ran back toward the house. After Deputy Sailors radioed that a white male wearing an orange shirt was running from the truck into the woods, Deputy Porter heard someone behind the house and went after him. There, he found appellant face down on the ground with arms spread out. Appellant had a flashlight and some gloves with him. A subsequent search of the truck revealed tools commonly used in burglaries.

Charles Shaw testified that he owned the home on Gully Falls Road for the past ten years and this was a secondary residence. He described the property as heavily wooded, mountainous, and secluded. His family had been "living in it off and on, going up there as a secondary house . . . until about three years ago." Because of his wife's medical condition and the treatments she received, they were unable to live there or spend significant amounts of time there anymore. However, Mr. Shaw testified he went to the home once every two weeks or once a month, the utilities were all on, and the house was "ready to be lived in." The last time he and his wife had been to the property prior to December 21st was December 5th of that year. They remained at the house for about two and a half to three hours on that day, retrieving some Christmas decorations they had stored there, storing some other seasonal items, and sitting in the home talking for about an hour and a half before they left. On cross examination, Mr. Shaw agreed they had been

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

using the house as a storage building "as circumstances prevented [them] from living there" for the past three years.

Mr. Shaw and his wife met Detective Lovell and Lieutenant Robinson at the home the following day. When Mr. Shaw first entered the house, he found that plastic storage containers he had used to store things had been emptied of their contents and someone was using the containers to pack other items from the home, such as teapots, music boxes, and plates. Linens and towels from the home were used to pad the items in the containers. Missing from the home were numerous teapots, a child's wagon, and a VCR.

Following the close of the State's case, appellant moved for a directed verdict on the first degree burglary charge, arguing there was no evidence the house was a dwelling at the time of the alleged offense. The trial court denied the motion, finding it was a factual question for the jury. The jury returned verdicts of guilty on both the burglary in the first degree and possession of burglary tools charges.

LAW/ANALYSIS

The only issue raised on appeal is whether the trial court erred in denying appellant's motion for directed verdict on the first-degree burglary charge because the building did not meet the statutory definition of a dwelling. Appellant contends the undisputed evidence shows the property in question was only a storage building, and though it had once been used as a part-time residence, nobody had occupied or resided in it for at least three years. Accordingly, he maintains it was no longer a dwelling house. We disagree.

In reviewing a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight. State v. Parris, 363 S.C. 477, 481, 611 S.E.2d 501, 502-03 (2005). A defendant is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged. State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004). On

appeal from the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State. Id.

"A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the entering or remaining occurs in the nighttime." S.C. Code Ann. § 16-11-311(A)(3) (2003). "Dwelling house" as used in the arson and burglary statutes is defined as "any house, outhouse, apartment, building, erection, shed or box in which there sleeps a . . . person who lodges there with a view to the protection of property." S.C. Code Ann. § 16-11-10 (2003).

In the 1979 case of State v. Ferebee, 273 S.C. 403, 257 S.E.2d 154 (1979) our Supreme Court held that a vacant apartment unit, abandoned a week prior by former tenants, was not a dwelling house for purposes of the burglary statute. Id. at 405, 257 S.E.2d at 155. The court found section 16-11-10 required the apartment have an identifiable occupant sleeping or residing therein to so qualify, and while the temporary absence of occupants will not prevent a residence from becoming the subject of a burglary, it required that the occupant leave with the purpose of returning in order for the apartment to be considered a dwelling. Id. In applying Ferebee to an arson case, our Supreme Court in State v. Glenn, 297 S.C. 29, 374 S.E.2d 671 (1988) determined, where the occupant had left over $10,000 worth of personal possessions in a mobile home and had returned to the mobile home on numerous occasions to gather some possessions, there was sufficient evidence she did not vacate the home but left with the intention of returning. Id. at 32, 374 S.E.2d at 672. Accordingly, the court found the trial court did not err in failing to direct a verdict on the second degree arson charge based on Glenn's argument that the home did not constitute a dwelling house under section 16-11-110. Id. Thus, "the test of whether a building is a dwelling house turns on whether the occupant has left with the intention to return." Id. (analyzing Ferebee). Temporary absence from a "dwelling" is irrelevant. State v. White, 349 S.C. 33, 36, 562 S.E.2d 305, 306 (2002).

Here, there is sufficient evidence of the Shaws' intent to return to the mountain property. As noted by Mr. Shaw, they visited the home about once every two weeks or month, the utilities were all on in the home, and it was

"ready to be lived in." They had previously been "living in [the home] off and on," and the only reason the Shaws had not been staying overnight in the home the last three years was his wife's current medical condition prevented them from doing so. See William Shepard McAninch & W. Gaston Fairey, The Criminal Law of South Carolina 445 (4th ed. 2002) ("[A] person could have more than a single dwelling house, any of which might be the object of a burglary despite the occupant's absence for extended periods of time, so long as he had an intention to return. Consequently, a vacation cottage would qualify as a dwelling house even though the owner had not been there in months."). Accordingly, we find no error in the trial court's denial of appellant's motion for directed verdict on the first degree burglary charge.

Based on the foregoing, Evans' conviction is

AFFIRMED

PIEPER, J., and GOOLSBY, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

State of South Carolina, Respondent,

v.

Stanley Dantonio, Jr., Appellant.

Appeal from Horry County
Steven H. John, Circuit Court Judge

Opinion No. 4333
Heard January 9, 2008 – Filed January 16, 2008

AFFIRMED

Wesley Locklair of Murrells Inlet, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Special Assistant Attorney Salley W. Elliott, Special Assistant Attorney General Amie L. Clifford, of Columbia; and Solicitor J. Gregory Hembree, of Conway, for Respondent.

ANDERSON, J.: Stanley Dantonio appeals his conviction on two counts of felony driving under the influence. He argues the trial court erred

in failing to direct a verdict in his favor and in instructing the jury on proximate cause. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Dantonio was involved in a three-car collision on December 30, 2004 resulting in two fatalities. The accident occurred between 9:30 and 9:45 p.m. on Highway 17 by-pass near Murrells Inlet. The Jeep Dantonio was driving struck a Honda driven by Katinka Mandoza as she turned into the right lane of Highway 17 by-pass. After hitting Mandoza, Dantonio's Jeep crossed the median and collided with an oncoming vehicle. The driver of the oncoming car, Elise Anne Anderson, and her passenger, Derrick Michael Labar, were killed.

Dantonio had been drinking with friends at the Dead Dog Saloon since about 4:00 p.m. on the afternoon of the accident. At approximately 9:35 p.m., Dantonio paid the bar tab for his party of four. Thirty-seven beers were charged to Dantonio's bill. Bartender Diane Tracy testified she was concerned about Dantonio's ability to drive, but felt reassured when she learned his wife had the keys to the Jeep in her possession. Nevertheless, Dantonio was driving at the time of the accident. A blood sample drawn from Dantonio at 12:35 a.m., on December 31, 2004, revealed a blood alcohol concentration of .114. Authorities arrested Dantonio at the hospital for felony driving under the influence.

Corporals Dangerfield, Breland, and Jarrett of the South Carolina Highway Patrol Multi-Disciplinary Accident Investigation Team (M.A.I.T.) were qualified as experts in the field of collision reconstruction. The team concluded neither roadway nor weather conditions caused the collision. Dantonio appeared to be driving at a minimum of eighty-five (85) miles per hour in a fifty-five (55) mile per hour zone. His speed and the fact that Dantonio was driving under the influence contributed to the accident. The driver of the Honda was not responsible for the collision because she stopped at the stop sign and saw Dantonio's Jeep at least 343 feet down the roadway before she pulled out into the intersection. An animation expert reported the data collected showed the collision would not have occurred if Dantonio had been driving fifty-five (55) miles per hour.

At the close of the State's case, Dantonio moved for a directed verdict of not guilty, arguing the jury could not find beyond a reasonable doubt speed was the proximate cause of the collision. Dantonio averred the trial court should remove the question from the jury by directing the verdict because the evidence did not support a conclusion Dantonio's speed was the only cause of the accident.

The trial court denied Dantonio's directed verdict motion, clarifying the ruling:

> [A]s I understand the law on a motion for directed verdict, the defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged, and the trial court is charged with the duty that, in reviewing a motion for a directed verdict the trial judge is concerned with the existence of the evidence, not its weight. In other words, if there is direct evidence, or substantial circumstantial evidence, reasonably tending to prove the guilt of the accused, the case should go forward, and that is the standard that I'm using, and I want to make that clear, because I understand that to be the directed verdict standard.
>
> Now, with that I have made some excerpts from the testimony, as I have heard it in this particular case. Ms. Diane Tracy indicated she had questions about the Defendant's condition, and was told the wife had the keys. Ms. Mandoza indicated the accident had happened at night, but that night did not cause a problem to her; she was on the phone with a girlfriend, with an ear piece; that did not cause a problem with her; she was driving a stick-shift; that was not a problem to her; the Defendant was in the other lane, the fast lane; that wasn't a problem; her windows were fogged up, but she rolled one [down], that's not a problem for her; she looks left, right, left, sees the headlights by the cinema sign, and her testimony, as I heard it was, I figured it was safe enough to pull out in front of the Defendant. She says she stopped at the stop

sign. She indicates that she was, in no way, responsible for the accident.

Now, whether or not this testimony is believable or not, whether the Court believes it or not, whether it's human nature to deny responsibility for a horrendous accident, or any cause to it, that's not my job. That's the jury's job. I'm concerned with the existence of evidence in this matter.

Further evidence in this case. There is a stipulation of facts. Two young people died as a result of this accident. Mr. Summers stated the Defendant had an odor of alcohol. He stated that—to Mr. Summers that he had a couple of beers. Corporal Dangerfield stated—though there were different accounts of what occurred, it's very difficult to calculate speed, the—and he indicated the collision occurred in the right lane. Corporal Breland, qualified to give his opinion, stated that the weather was no problem; the road conditions were good; the site and distance were good. He concluded the Defendant was driving eighty-five miles an hour. He said speed contributed to the accident. Corroborated—he said the evidence corroborated drinking; speed at the impact was fifty-five miles an hour. He stated he assumed Ms. Mandoza had stopped at the stop sign. He stated if the Defendant was going fifty-five miles an hour there would have been no wreck. Corporal Jarrett says that a computer animation is a visual representation of what we believe happened; the wreck would not have happened if the Defendant was going fifty-five miles an hour; the Defendant was in the right lane and made an effort to steer away from Ms. Mandoza. Trooper Hughes: The Defendant, at the hospital, had a strong smell of alcohol about him. Ms Barber: The blood alcohol level was zero point one one four at 12:35 A.M., significantly after the accident; the permissive level is zero point zero eight. That being a brief summation of the testimony in this case, there is no question, in this Court's mind that, looking at the existence of evidence that, if that evidence was believed by the jury, there is enough evidence to prove the Defendant guilty of the crimes charged,

> and at this point in time the Court respectfully declines to grant your motion for a directed verdict.

At the close of all evidence, Dantonio renewed his motion for a directed verdict, professing Mandoza's act of entering the highway played a role in the collision and would preclude a jury finding beyond a reasonable doubt Dantonio's speed was the proximate cause of the collision. The trial court denied Dantonio's motion:

> Once again, the Court believes its responsibility, in response to a directed verdict motion, is on this basis, that the defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged, and the trial judge is concerned with the existence of evidence, not with its weight. If there is direct evidence or substantial circumstantial evidence reasonably tending to prove the [guilt] of the defendant, the case must be submitted to the jury.
>
> I'm not going to go back and review all of that testimony. I did at the end of the State's case. I just reaffirm that rendition of the facts I previously gave.
>
> Further, in addition to that, I find that the evidence presented thereafter only supports the finding by this Court that there is more than sufficient evidence, if believed by the jury—that being their job, to judge the credibility and believability of the witnesses—but there has been testimony and evidence presented, if believed by the jury, that would prove the Defendant guilty of the crimes charged by the State, and therefore I would respectfully decline to grant your motion for a directed verdict.

On the definition of proximate cause, the trial court instructed the jury:

> Proximate cause is the direct cause, the immediate cause, the efficient cause, the cause without which the death would not have resulted. Now, there may be more than one proximate cause. The acts of two or more persons may combine together to be a

> proximate cause of the death of a person. The Defendant's act may be regarded as the proximate cause if it is the direct cause to the death of the victim. The fact that other causes also contribute to the death of the victim does not relieve the Defendant from responsibility. The Defendant's act need not be the sole cause of death, but it has to be the direct cause, without which the death of the victim would not have resulted, and this has to be proved to you by the State of South Carolina beyond a reasonable doubt.
>
> Dantonio objected to the proximate cause charge:
>
> I believe that the law, the actual law here should be that, unless Mr. D'Antonio is at least fifty-one percent—and I would argue much more—but at least fifty-one percent the proximate cause, that it would be improper for there to be a finding of guilt.
>
> . . .
>
> I would prefer, and feel like it would be more appropriate and more accurately reflect the law if, added to the word direct, the word main or primary were added, then we would insure that all of us were operating with the understanding that Mr. D'Antonio would have to be at least fifty-one percent proximately causing it in order for him to be found guilty.

The trial court declined to incorporate Dantonio's request, expounding the issued charge properly instructed the jury on the law of proximate cause in South Carolina. Shortly after beginning deliberation, the jury asked to rehear portions of testimony and the jury instructions on proximate cause. The part of the testimony was replayed for the jury, and the trial court reiterated instructions on proximate cause, intervening act, and unavoidable accident. The jury returned a verdict of guilty on the two felony driving under the influence charges. Dantonio was sentenced to two concurrent seventeen-year terms of imprisonment.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Douglas, 367 S.C. 498, 506, 626 S.E.2d 59, 63 (Ct. App. 2006) cert. granted, June 2007; State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). An appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 450, 527 S.E.2d 105, 109 (2000); State v. Patterson, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App. 2004).

LAW/ANALYSIS

I. Directed Verdict

Dantonio claims the trial court should have directed a verdict of not guilty because the State's evidence did not support a conclusion that the jury could find him guilty beyond a reasonable doubt. We disagree with the standard Dantonio applies and his assignment of error regarding the denial of his directed verdict motion.

The criterion for denying a directed verdict motion in South Carolina is well established. A case should be submitted to the jury if there is any direct evidence or any substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006); State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002); State v. Zeigler, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct. App. 2005); State v. Al-Amin, 353 S.C. 405, 411, 578 S.E.2d 32, 35 (Ct. App. 2003). However, the defendant is entitled to a directed verdict if the state fails to produce evidence of the offense charged. Weston, 367 S.C. at 292, 625 S.E.2d at 648; State v. Moore, 374 S.C. 468, 474, 649 S.E.2d 84, 86 (Ct. App. 2007); State v. Crawford, 362 S.C. 627, 633, 608 S.E.2d 886, 889 (Ct. App. 2005). In ruling on a motion for directed verdict, the trial court is concerned only with the existence or nonexistence of evidence, not its weight. Weston, 367 S.C. at 292, 625 S.E.2d at 648; Sellers v. State, 362 S.C. 182, 188, 607 S.E.2d 82,

85 (2005); State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004); State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757, 758-59 (2003). A directed verdict motion should be granted when the evidence merely raises a suspicion of the accused's guilt. State v. Arnold, 361 S.C. 386, 390, 605 S.E.2d 529, 531 (2004); State v. Stanley, 365 S.C. 24, 42, 615 S.E.2d 455, 464 (Ct. App. 2005).

When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Weston, 367 S.C. at 292, 625 S.E.2d at 648; State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004); State v. Buckmon, 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001); Moore, 374 S.C. at 474, 649 S.E.2d at 86. The court may reverse the trial court's denial of a motion for a directed verdict if there is no evidence to support the court's ruling. Weston, 367 S.C. at 292, 625 S.E.2d at 648 (citing State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002)); Moore, 374 S.C. at 474, 649 S.E.2d at 86; Crawford, 362 S.C. at 633, 608 S.E.2d at 889. Concomitantly, the court may reverse the trial court's denial of a motion for a directed verdict if the ruling is based on an error of law. State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 793-94 (Ct. App. 2003).

Section 56-5-2945(A) of the South Carolina Code of Laws (Supp. 2006) establishes the elements of felony driving under the influence:

> A person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs, drives a vehicle and when driving does any act forbidden by law or neglects any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes great bodily injury or death to a person other than himself, is guilty of a felony . . . .

State v. Grampus is the leading case in South Carolina setting forth the elements of felony driving under the influence. 288 S.C. 395, 343 S.E.2d 26 (1986) abrogated on other grounds by State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). A felony driving under the influence charge requires proof of three elements: (1) the actor drives a vehicle while under the influence of alcohol or drugs; (2) the actor does an act forbidden by law or

neglects a duty imposed by law; and (3) the act or neglect proximately causes great bodily harm or death to another person. Id. at 397, 343 S.E.2d at 27; accord State v. White 311 S.C. 289, 428 S.E.2d 740 (Ct. App. 1993); State v. Nathari, 303 S.C. 188, 399 S.E.2d 597 (Ct. App. 1990).

In addition, section 56-5-2950(b)(3) of the South Carolina Code of Laws (Supp. 2006) provides in the criminal prosecution of a violation under section 56-5-2945, an alcohol concentration of eight one-hundredths of one percent or more, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the inference the person was under the influence of alcohol.

The State presented evidence satisfying the elements in section 56-5-2945(A) and from which Dantonio's guilt may reasonably and logically be deduced. The jeep Dantonio was driving struck Mandoza's Honda. Testimony indicated Dantonio had been drinking during the hours prior to the accident, and his blood alcohol concentration suggested he was under the influence of alcohol. Collision reconstruction experts opined Dantonio drove in excess of eighty (80) miles per hour in a fifty-five (55) mile per hour speed zone—an act forbidden by law. Moreover, the State introduced evidence that but for Dantonio's speeding, the collision with Mandoza's vehicle would not have occurred. Considering the existence of this evidence in a light most favorable to the State, we conclude the trial court properly denied Dantonio's motion for a directed verdict.

Dantonio contends, as a matter of law, because a jury could not reasonably find his speeding was the "sole," "main," or "primary" cause of the collision and resulting fatalities, the trial court should remove the case from the jury and direct a verdict. South Carolina precedent concerning proximate cause does not support this assertion.

A defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased. State v. Burton, 302 S.C. 494, 496-97, 397 S.E.2d 90, 91 (1990) (setting out the law of South Carolina on proximate cause in a jury charge). The defendant's act need not be the sole cause of the death, provided it is a proximate cause actually contributing to the death of the deceased. Id.

"One who inflicts an injury on another is deemed by law to be guilty of homicide where the injury contributes mediately or immediately to the death of the other. The fact that other causes also contribute to the death does not relieve the actor from responsibility." State v. Riley, 219 S.C. 112, 112, 64 S.E.2d 127, 130 (1951) (citing State v. Doe, 218 S.C. 520, 520, 63 S.E.2d 303, 303 (1951)); accord State v. Jenkins, 276 S.C. 209, 211, 277 S.E.2d 147, 148 (1981) (finding one who inflicts an injury on another is deemed by law to be guilty of homicide where the injury contributes mediately or immediately to the death of the other).

Dantonio claims speed, as a contributing factor, is without legal significance because but for Mandoza's entrance onto the highway in front of him, the accident would not have occurred. In support of this position, Dantonio cites Horton v. Greyhound Corp., 241 S.C. 430, 128 S.E.2d 776 (1962). Horton involved a claim alleging negligence in the death of a passenger who was killed when the truck he was riding in collided with defendant Greyhound's bus. Id. at 430, 128 S.E.2d at 778. The trial court directed a verdict in Greyhound's favor. The sole issue on appeal was whether Horton sustained the burden of producing evidence to support a reasonable inference of causal connection between the speed of the bus and the fatal collision. Id.

The driver of the truck in which Horton's decedent was a passenger executed an unlawful turn from behind another vehicle into the southbound lane of oncoming traffic. Id. The Greyhound bus, traveling south at an allegedly high rate of speed, collided with the truck. Id. In reviewing the trial court's ruling, the South Carolina Supreme Court acknowledged the evidence was sufficient to raise a jury issue as to whether the bus was being operated at an excessive rate of speed. Id. However, the overarching issue was whether a reasonable inference of causal connection between the bus's speed and the collision could be drawn. Id. at 430, 128 S.E.2d at 781.

In affirming the directed verdict, our Supreme Court stated:

> It is abundantly clear that the primary efficient cause of the collision was the unlawful act of the truck driver in turning his

> north bound vehicle into the southbound lane of travel, which was occupied by the approaching bus. It is equally clear that the only evidence of a negligent or unlawful act by the bus driver relates to excessive speed, which could not have resulted in harm to [decedent] if the truck had remained in its proper lane of travel. The concurrence of excessive speed with this primary, efficient cause of the collision does not impose liability on the defendants unless, without it, the collision would not have occurred.

Id.

The Court emphasized speed, as a contributing factor in placing the bus in a particular location on the highway, was without legal significance. Id. Greyhound was rightfully in the proper lane of traffic on that portion of the highway. The accident would not have occurred but for the truck driver's unlawful turn into the path of the oncoming bus. Horton failed to establish evidence sufficient to raise a reasonable inference that the collision would not have occurred but for the negligence of the bus driver. Id. at 430, 128 S.E.2d at 781-82.

In Clark v. Cantrell, we observed that the application of Horton is limited to cases with specific factual scenarios. 332 S.C. 433, 444, 504 S.E.2d 605, 611 (Ct. App. 1998) aff'd as modified by 339 S.C. 369, 529 S.E.2d 528 (2000). "Each of those cases involved entry of a vehicle from a servient roadway onto the main highway, in such an abrupt fashion that an accident could not have been avoided, notwithstanding the excessive speed of the oncoming vehicle." Id. (quoting Tubbs v. Bowie, 308 S.C. 155, 158, 417 S.E.2d 550, 552 (1992)).

Horton is factually distinguishable from the case sub judice and does not support Dantonio's assertion of error. Horton's evidence failed to raise a reasonable inference that but for the speed of the bus, the fatal collision would not have occurred. Here, the State presented evidence clearly supporting the inference that but for excessive speed, Dantonio's Jeep would not have collided with Mandoza's Honda and been propelled across the median into oncoming traffic. Unlike the truck driver in Horton, Mandoza

turned onto the highway lawfully, into the appropriate lane of traffic. She believed Dantonio's vehicle was far enough away for her to safely turn into the right lane. There is no evidence she entered the roadway so abruptly that the accident could not have been avoided.

Collision reconstruction testimony indicated Dantonio was traveling significantly in excess of the lawful speed limit. Additionally, medical test results showed Dantonio was likely under the influence of alcohol. Experts opined if Dantonio had driven at fifty-five (55) miles per hour, the lawful speed limit, he would not have collided with Mandoza. The impact with Mandoza's Honda thrust his Jeep across the median and into another vehicle, killing the two occupants. This evidence, if believed by the jury, could lead to the fair and logical deduction that Dantonio's unlawful conduct was the proximate cause of the fatalities. The trial court did not err as a matter of law in submitting the case to the jury.

II. Jury Instruction

Dantonio alleges the trial court erred in charging the law on proximate cause. Specifically, Dantonio argues the words "main" or "primary" should supplement the word "direct" in defining proximate cause. We discern no error in the trial court's instruction.

Generally, a trial court is required to charge only the current and correct law of South Carolina. State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472-73 (2004); State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005); State v. Brown, 362 S.C. 258, 261-62, 607 S.E.2d 93, 95 (Ct. App. 2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006) cert. denied May 3, 2007; State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003).

The law to be charged to the jury is determined by the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001); State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000); State v.

Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002); State v. Harrison, 343 S.C. 165, 172, 539 S.E.2d 71, 74 (Ct. App. 2000) (citing State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues. State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996); see also State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989) (acknowledging a defendant is generally entitled to a requested jury instruction if it is a correct statement of the law on an issue raised by the indictment); State v. West, 138 S.C. 421, 421, 136 S.E. 736, 737 (1927) (finding the court has a duty to charge jury as to law applicable to facts brought out in testimony).

A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004); State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999); Harrison, 343 S.C. at 172, 539 S.E.2d at 74. On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000).

In State v. Burton, our Supreme Court acknowledged language in the following jury instruction as the correct law to be charged on proximate cause:

> The law recognizes there may be more than one proximate cause. The acts of two or more persons may combine and concur together as an efficient or proximate cause of the death of a person.
>
> The defendant's act may be regarded as the proximate cause if it is a contributing cause of the death of the deceased. The defendant's act need not be the sole cause of the death provided that it be a proximate cause actually and contributing to the death of the deceased.
>
> One who inflicts an injury on another is deemed by law to be guilty of the homicide if the injury contributes mediately or

> immediately to the death of the deceased. The fact that other causes also contribute to the death of the deceased does not relieve the defendant from responsibility.
>
> You have to be convinced beyond a reasonable doubt that the defendant was the cause of death. A person who inflicts a fatal injury upon a person and that person dies at a later time, you have to be convinced beyond a reasonable doubt that the infliction of the first injury was the cause of death, that it was the proximate cause, that there was a chain of causation from the time it happened until the time of the death. The fact that other things contributed to it or speeded it up, things of that sort, that is not a defense . . . .

302 S.C. 494, 496-97, 397 S.E.2d 90, 91 (1990); see also State v. Jenkins, 276 S.C. 209, 277 S.C. 147 (1981); State v. Riley, 219 S.C. 112, 112, 64 S.E.2d 127, 130 (1951).

On examination of the trial court's charge, we conclude the jury was properly instructed on the current and correct law of South Carolina regarding proximate cause. The trial court's language substantially follows the jury charge on proximate cause articulated in Burton. Moreover, we are unaware of any precedent, and Dantonio does not cite any authority, for incorporating the words "main" or "primary" as part of the jury instruction on proximate cause.

CONCLUSION

We hold the trial court applied the proper standard in denying Dantonio's motion for directed verdict. The State presented evidence from which Dantonio's guilt could be fairly and logically deduced. The case was properly submitted to the jury. We rule the trial court's charge on proximate cause accurately reflected the current and correct law of South Carolina.

Accordingly, Dantonio's convictions and sentences are

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Randy P. Silver, Respondent,

v.

Aabstract Pools & Spas, Inc., Appellant.

Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 4334
Heard November 6, 2007 – Filed January 16, 2008

REVERSED and REMANDED

Michael Stephen Chambers, of Greenville, for Appellant.

David G. Ingalls, of Spartanburg, for Respondent.

HEARN, C.J.: Randy Silver (Homeowner) brought an action against Aabstract Pools and Spas, Inc. (Contractor) for breach of contract and conversion. Contractor asserted affirmative defenses and counterclaimed for breach of contract and attorneys' fees. With the consent of the parties, the circuit court referred the matter to the Master-in-Equity who concluded the payment provisions of the contract were ambiguous. The master ruled in favor of Homeowner on the breach of contract claim and awarded him compensatory damages of $30,000. Contractor appeals. We reverse and remand.

FACTS

On April 11, 2002, Contractor and Homeowner[1] executed a five-page contract requiring Contractor to construct and install a swimming pool, spa, and water feature at Homeowner's residence for a price of $69,742. The parties' contract contained five labeled sections: (1) **General Specifications:** duties Contractor was required to perform; (2) **Miscellaneous:** duties Homeowner was required to perform, including excavating rock, hauling dirt, masonry work, landscaping, etc; (3) **Payment:** Homeowner was required to make five separate payments to Contractor upon completion of five corresponding tasks; (4) **Agreed Conditions:** twenty-five (25) specific conditions mutually agreed to by the parties; and (5) **Witnesseth:** a reiteration of Contractor's promise to construct the pool and Homeowner's promise to pay $69,742 "at the five intervals in accordance with the schedule of values." The parties initialed and dated each page of the contract.

[1] Homeowner is a college-educated, residential contractor who has built approximately 2,000 homes in the Spartanburg area that range in price from $130,000 to $650,000. He has over thirty years of experience working as a contractor.

The relevant contract language provides:

> Payment:
> Time is of the essence, the work progress payments specified shall be the essence of this agreement.
>
> Schedule of values Total contract price $69,742.00
>
> | | | |
> |---|---|---|
> | Deposit | due upon signing contract | $ 6,974.20 |
> | Phase 1 | due upon completion of dig | $27,896.80 |
> | Phase 2 | due upon completion of shoot | $17,435.50 |
> | Phase 4 | due upon completion of deck pour | $13,948.40 |
> | Final | due at completion | $ 3,487.10 |
>
> . . . The cost plus work is due at completion of the item.
>
> Agreed Conditions: . . . (14) . . . If work progress payments are not made in full by the [Home]owner in the amount and in the manner specified in this agreement, all work by Contractor[] and his agents will immediately cease and all equipment . . . will be removed from the pool site by Contractor. . . . [Home]owner shall pay to Contractor all reasonable attorney fees & all costs & expenses incurred to collect any sums past due from [H]omeowner including but not limited to all court costs.

Homeowner paid Contractor the deposit on April 11, 2002, as specified. Contractor completed the Phase 1 digging work and, on April 24, 2002, Homeowner paid Contractor the specified payment. Next, Contractor completed the Phase 2 shoot[2] and, on May 16, 2002, Homeowner paid Contractor the specified payment. Contractor then completed the Phase 4

[2] A "shoot" is a term for the installation of a pool's inner shell.

deck pour; however, Homeowner refused to pay Contractor the specified payment of $13,948.

After Homeowner refused to pay Contractor for his Phase 4 work, their contractual relationship reached an impasse with Homeowner owing Contractor $19,345.[3] Pursuant to paragraph 14 of the Agreed Conditions, Contractor suspended work on the job and removed his equipment from the site.[4] Homeowner made no further payments to Contractor and did not contact him for nine months.

By a letter dated March 13, 2003, Homeowner's attorney proposed that his client put $18,000 into the attorney's trust fund for payment to Contractor upon completion of the pool project. Contractor did not accept Homeowner's offer. Homeowner commenced this action for breach of contract and conversion. Contractor answered, pleading affirmative defenses[5] and asserting a counterclaim for breach of contract and attorneys' fees.

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[3] Contractor alleged Homeowner also did not pay invoices of $5,397 for additional work performed under the contract, including: $3,688 for specialized excavation necessitated by uncovered conditions, authorized by paragraph 7 of the Agreed Conditions; $420 for an extra load of concrete; and $1,289 for enlarging the pool deck.

[4] Contractor claims Homeowner owed him $22,833. Contractor testified he considered pursuing Homeowner to recover the outstanding balance under the original contract ($17,436) and the amount past due for additional work performed ($5,397). However, after comparing the payments Contractor had received to date ($52,306) with his direct costs and overhead, he found he was "basically at a break-even point at that time, and it wasn't worth pursuing" an action against Homeowner.

[5] Contractor alleged, pursuant to the conditions of their contract, that Homeowner's failure to pay for the completed Phase 4 work justified his suspension of work.

Following a bench trial, the master concluded the contract language stating Homeowner's payment obligations under the contract was "at best, ambiguous," and that any ambiguity must be construed against Contractor, as drafter of the contract. The master entered judgment in favor of Homeowner on the breach of contract claim and awarded compensatory damages of $30,000. The master denied Homeowner's conversion claim and Contractor's counterclaim. Subsequently, the master denied Contractor's motion to reconsider, alter or amend the order. This appeal followed.

STANDARD OF REVIEW

An action to construe a contract is an action at law. Pruitt v. S.C. Med. Malpractice Liability Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). Likewise, "[a]n action for breach of contract seeking money damages is an action at law." R & G Constr., Inc., v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 430, 540 S.E.2d 113, 117 (Ct. App. 2000). When reviewing a judgment made in a law case tried by a master without a jury, the appellate court will not disturb the master's findings of fact unless the findings are found to be without evidence reasonably supporting them. See Karl Sitte Plumbing Co., Inc. v. Darby Dev. Co. of Columbia, Inc., 295 S.C. 70, 77, 367 S.E.2d 162, 166 (Ct. App. 1988). However, "[a] reviewing court is free to decide questions of law with no particular deference to the trial court." Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004).

LAW/ANALYSIS

I. Ambiguity of Contract Language

Contractor first argues it was an error of law for the master to find that the payment terms of the contract were ambiguous. We agree.

"It is a question of law for the court whether the language of a contract is ambiguous." S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). In determining as a matter of law whether a contract is ambiguous, the court must consider the contract as

a whole, rather than deciding whether phrases in isolation could be interpreted in various ways: "[O]ne may not, by pointing out a single sentence or clause, create an ambiguity." Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975).

Homeowner argues he was justified in refusing to pay Contractor for the deck pour because the payment terms of the contract were ambiguous. However, Homeowner cannot create ambiguity when it does not exist within the four corners:

> In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.

McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945).

Homeowner attempts to create ambiguity by arguing the contract language implies that actual "work progress" could be the parties' intended basis for calculating both the amount and scheduling of payments to Contractor. Additionally, he argues the contract language reasonably could

be interpreted to imply that payments to Contractor could be proportionate to Homeowner's subjective perception of the "value" he had received.[6]

Homeowner acknowledges he complied with the payment schedule until Contractor demanded payment for the Phase 4 deck pour, stating he refused to make the Phase 4 payment because "he surmised the pool was only twenty percent (20%) complete . . . [and he] refused to send additional monies until the percentage of completion more closely equaled the money paid." In contrast, Contractor points to the four corners of the contract and argues Homeowner breached the contract by failing to pay for Phase 4 after the deck pour was completed. Contractor strengthens this position by referring to paragraph 14 of the Agreed Conditions that expressly authorized Contractor to cease work if Homeowner failed to pay for completed work according to the specified schedule.

Here, we find the language of the contract is clear and unambiguous. See Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business."). Read as a whole, the contract states that Homeowner is required to make five specific payments, each corresponding to Contractor's performance of a specific task. This payment schedule is explicitly explained in the section labeled "Payment" and is later reinforced, both in paragraph 14 of "Agreed Conditions" and in the final section of the contract. Homeowner's actions in making the first three payments according to the schedule set forth in parties' written contract indicates that Homeowner and Contractor shared a common understanding of the payment terms.

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[6] Homeowner cites Webster's Ninth New Collegiate Dictionary (1985) as an authority for his interpretation of the word "value" in the contract's Schedule of Values, stating that definition two defines "value" as "a fair return or equivalent in goods."

Because we find this contract is clear, explicit, unambiguous, and capable of only one reasonable interpretation, the court does not look beyond the four corners to discern the parties' intentions. See Keith v. River Consulting, Inc., 365 S.C. 500, 506, 618 S.E.2d 302, 305 (Ct. App. 2005) (explaining parol evidence is admissible to discover the parties' intentions when a contract is silent regarding a particular issue). Therefore, we reverse the master's finding that the contract's payment terms were ambiguous.

II. Breach of Contract

Next, Contractor argues there was no evidentiary support for the master's finding that Contractor breached the parties' contract. We agree.

"[E]vidence that a party complied with the terms of the alleged contract or acted in conformity therewith is relevant and admissible on the issues of the contract's existence, the meaning of its terms, and whether the contract was breached." Conner v. City of Forest Acres, 363 S.C. 460, 473, 611 S.E.2d 905, 912 (2005). "The failure to pay an instal[l]ment of the contract price as provided in a building or construction contract is a substantial breach of the contract, and gives the contractor the right to consider the contract at an end, to cease work, and to recover the value of work already performed." Zemp Constr. Co. v. Harmon Bros. Constr. Co., 225 S.C. 361, 366, 82 S.E.2d 531, 533 (1954).

Here, Homeowner paid the first three installments as scheduled under the contract terms, yet he refused to make the Phase 4 installment after the deck was poured. Homeowner explains he refused to make the Phase 4 payment because the project was, in his opinion, only twenty percent complete. However, Homeowner is not permitted to reinterpret written contract terms midstream because he is unhappy with the contract he executed. See Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007) ("Parties [to a contract] are governed by their outward expressions and the court is not at liberty to consider their secret intentions."); Bannon v. Knauss, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984) ("Interpretation of the contract is governed by the objective manifestation of the parties' assent at the time the contract

was made. It does not depend on the subjective, after the fact meaning one party assigns to it."). We find Homeowner's failure to make the Phase 4 installment payment constitutes his substantial breach of the parties' contract.

III. Damages for Breach of Contract

Because Homeowner was the first party to breach the contract, we find he must bear the liability for his nonperformance. "Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests." Willms Trucking Co., Inc. v. JW Constr. Co., Inc., 314 S.C. 170, 178, 442 S.E.2d 197, 201 (Ct. App. 1994); see also Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) ("When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully."). Accordingly, pursuant to paragraph 14 of the Agreed Conditions of the parties' contract, we find Contractor is entitled to attorneys' fees and court costs, and remand this issue for a determination of reasonable fees and costs.

REVERSED and REMANDED.

KITTREDGE, J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lawrence Marcus Tucker, Appellant.

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

Opinion No. 4335
Heard November 7, 2007 – Filed January 16, 2008

AFFIRMED

Appellate Defender Katherine H. Hudgins, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia; and Solicitor David Michael Pascoe, Jr., of Summerville, for Respondent.

THOMAS, J.: Lawrence Marcus Tucker appeals the entry of his guilty plea in which he waived his rights to appellate review and post-conviction

relief. He argues his appearance in a South Carolina court violated the Interstate Agreement on Detainers Act and his conviction should be vacated. We disagree. Tucker also argues the trial court erred in accepting his guilty plea in which he waived the right to file an action for post-conviction relief. We find this issue is not ripe for our review.

FACTS AND PROCEDURAL HISTORY

Tucker was charged with two counts of assault with intent to kill and one count of assault and battery with intent to kill after an incident in Calhoun County on October 20, 2002. Following his May 13, 2003 Calhoun County Grand Jury indictments, Tucker was convicted in a federal court of the unauthorized use of a device while on bond and began serving his federal sentence.

In February 2006, Tucker was transferred from the Edgefield Federal Correctional Institution to Calhoun County to dispose of the three indictments against him. Although the State was prepared to proceed to trial, Tucker had never met with his attorney and thus moved for a continuance. The trial court granted his motion and Tucker was returned to federal custody.

On March 20, 2006, Tucker was again transferred into state custody to dispose of the three indictments. Before returning to Calhoun County, Tucker filed a motion to dismiss the indictments based on a violation of the Interstate Agreement on Detainers Act (IAD). Tucker argued solely under IAD Article IV(e), the "anti-shuttling" provision, that his three indictments should be dismissed. After hearing arguments from both sides, the trial court ruled that the purpose of the IAD, the timely disposition of charges, was not accomplished upon Tucker's February visit and as such the anti-shuttling provision of the IAD did not apply to Tucker.

After the trial court denied his motion to dismiss, Tucker entered into negotiations with the solicitor. Tucker subsequently pled guilty in return for a recommended sentence of seven years. Included in the plea agreement were a waiver of Tucker's right to file an appeal on his IAD motion and a waiver

of his right to file for post conviction relief (PCR). Tucker waived both of these rights several times during the trial court's plea colloquy. Tucker now appeals his conviction and seeks to vacate his plea on the two rights he waived in the plea agreement, namely, an appeal regarding the IAD motion and an appeal of his waiver of the right to file a PCR.

LAW/ANALYSIS

I. Interstate Agreement on Detainers

Tucker asserts Article IV(e) of the IAD was violated and the trial court erred by not dismissing the charges against him in light of the IAD violation. We find Tucker waived any such IAD violation by entering a guilty plea and expressly waived the right to appeal any such violation under the terms of his guilty plea.

The IAD is an interstate compact by which the states, the District of Columbia, and the Federal Government have established uniform procedures for the transfer of prisoners serving sentences in one state to another state[1] for the disposition of pending charges. South Carolina enacted the IAD into law in 1962. S.C. Code Ann. § 17-11-10 (2006).

In State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003), this court found that a violation of the IAD does not deprive a court of subject matter jurisdiction. Numerous courts have held the rights created by the IAD are statutory in nature and do not rise to the level of constitutionally guaranteed rights. Pethel v. McBride, 219 W.Va. 578, 638 S.E.2d 727 (2006); U.S. v. Black, 609 F.2d 1330 (9th Cir. 1979), certiorari denied 101 S.Ct. 132, 449 U.S. 847, 66 L.Ed.2d 56 ("the protections of the IAD are not founded on constitutional rights, or the preservation of a fair trial, but are designed to facilitate a defendant's rehabilitation in prison and to avoid disruptions caused when charges are outstanding against the prisoner in

[1] Article II(a) of the IAD explains, "'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico."

another jurisdiction"); Camp v. U.S., 587, F.2d 397, 400 (8th Cir. 1978) (holding the IAD is a statutory set of rules and does not amount to constitutionally guaranteed rights); Diggs v. Owens, 833 F.2d 439, 442 (3rd Cir. 1987) (holding the IAD is a set of procedural rules, the violation of which does not infringe a constitutional right); Reed v. Clark, 984 F.2d 209, 210 (7th Cir. 1993) (holding IAD procedures are not constitutional rights). The United States Court of Appeals for the Third Circuit has held the IAD "constitutes nothing more than a set of procedural rules." U.S. v. Palmer, 574 F.2d 164, 167 (3rd Cir. 1978). The statutory right to dismissal due to an administrative violation of these rules is therefore not "fundamental," even though its impact on a defendant may be great." Id. (citing Blackledge v. Perry, 417 U.S. 21, 30 (1974)).

Tucker contends Article IV(e)[2] of the IAD was violated when he was transferred to South Carolina custody in March 2006 for disposition of the same charges he faced during a February 2006 appearance in a South Carolina court. In the interim, Tucker was returned to Edgefield Federal Correctional Institution, his "original place of imprisonment" under the terms of the IAD. S.C. Code Ann. § 17-11-10, Art. IV(e) (2006). Tucker argues under Alabama v. Bozeman, 533 U.S. 146 (2001), the United States Supreme Court held "*every* prisoner arrival in the receiving State, whether followed by a very brief stay or a very long stay in the receiving State, triggers IV(e)'s 'no return' requirement," and thus Tucker's return to South Carolina custody was in violation of the IAD. 533 U.S. at 154 (emphasis in original).

The case *sub judice* is distinguished from Bozeman by the fact that Tucker proceeded to enter a guilty plea following the denial of his motion to

[2] If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. S.C. Code Ann. § 17-11-10, Art. IV(e) (2006).

dismiss. Guilty pleas "generally act as a waiver[3] of all non-jurisdictional defects and defenses." State v. Thomason, 341 S.C. 524, 526, 534 S.E.2d 708, 710 (Ct. App. 2000) (citing State v. Munsch, 287 S.C. 313, 338 S.E.2d 329 (1985)). In United States v. Broce, the Supreme Court discussed guilty pleas and their implications as follows:

> A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack. There are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence.[4]

488 U.S. 563, 565 (1989).

In United States v. Palmer, the Court of Appeals for the Third Circuit addressed the question we do now, namely, whether a defendant may complain about violations of Article IV(e) of the IAD after pleading guilty without reservation. 574 F.2d 164 (3rd Cir. 1978). That court noted that "although [defendant] moved to dismiss the indictment before sentencing, he was not willing to surrender [the] benefits [of pleading guilty] by seeking to

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[3] Waiver is "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Tucker knew of his right to appeal since moments before he proposed his guilty plea Tucker asked, "[w]hat's the process as far as appealing the [IAD] motion?"

[4] Besides the precedent of Adams wherein this court found a violation of the IAD does not deprive a court of subject matter jurisdiction, Tucker's appeal did not present an argument regarding the trial court's power to accept his plea or impose a sentence. "Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal." Rule 208(b)(1)(B), SCACR.

withdraw his plea and 'take his chances' on the outcome of his IAD motion." Palmer, 574 F.2d at 166.

We hold that by proceeding with his guilty plea, Tucker waived any and all defects regarding his return to state custody under the IAD. In addition to implicitly waiving any violation of the IAD by entering a guilty plea, we also find that Tucker expressly waived his right to appeal the trial court's ruling on his IAD motion under the terms of his guilty plea.

When the trial court asked Tucker if he would like to enter a guilty plea or proceed to trial, Tucker hesitated, conferred with counsel, and then proposed a guilty plea in which he would "waive his right to appeal that motion, and would plea in exchange for a seven year sentence."[5] After the State agreed to Tucker's plea offer, the trial court reviewed the plea agreement during the plea colloquy:

> In that agreement the state has agreed to recommend a sentence in this case of seven years in exchange for you waiving your right to file any appeal on the motion, and you are also waiving your right to file any post conviction relief. In other words, you would not be allowed to appeal, or you would accept the decision made… by the court earlier today in regards to the Interstate Detainers Act.

"It is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999) (quoting State v. Armstrong, 263 S.C. 594, 597, 211 S.E.2d 889, 890 (1975)). The United States Court of Appeals for the Fourth Circuit has held that a defendant may waive the right to appeal if that waiver is knowing and intelligent. U.S. v. Blick, 408 F.3d 162, 169 (4th Cir. 2005).

[5] The state originally offered a plea agreement of fifteen years.

A guilty plea must also be knowingly and intelligently entered into in order to be valid. State v. Boykin, 395 U.S. 238 (1969). To knowingly and voluntarily enter a guilty plea a defendant must have a full understanding of the charges against them and the consequences of the plea. State v. Rikard, 371 S.C. 295, 300, 638 S.E.2d 72, 75 (Ct. App. 2006). An appellate court will review the totality of the circumstances to discern if a plea was entered into knowingly and intelligently. Hughey v. State, 255 S.C. 155, 157-58, 177 S.E.2d 553, 555 (1970).

At the time of the guilty plea Tucker told the trial court he was thirty-four years old, not under the influence of alcohol or drugs, and not coerced or promised anything in return for his plea. Tucker also showed a high level of savvy regarding the criminal justice system by presenting and arguing his motion to dismiss on the IAD although his attorneys were present. The trial court questioned Tucker's understanding of the seven year sentence under his plea agreement instead of the fifteen year sentence in the state's original plea offer or the twenty year sentence he faced if convicted at trial. Tucker answered that he agreed to accept the seven years proposed in his plea agreement. We find further proof that Tucker knowingly and intelligently entered into this guilty plea expressly waiving his right to appeal his IAD motion since Tucker is the one who conceived of and proposed this plea agreement.

II. Post-Conviction Relief

Tucker asserts the trial court erred by accepting a plea agreement made unreasonable by a waiver of future post-conviction claims in addition to a waiver of the right to appeal. This issue is not ripe for our review.

Tucker's assertion presents the novel issue of whether a criminal defendant can waive his ability to file for post-conviction relief (PCR) in a guilty plea where the right to file an appeal is also waived. The South Carolina Supreme Court has held PCRs can be waived but the court has only addressed such a waiver in capital cases after a prisoner has filed a PCR application. Hughes v. State, 367 S.C. 389, 395, 626 S.E.2d 805, 808 (2006) ("The Court will issue an execution notice after that person either has

exhausted all appeals and other avenues of post-conviction relief in state and federal courts, or after that person, who is determined by this Court to be mentally competent, knowingly and voluntarily waives such appeals."); State v. Downs, 369 S.C. 55, 631 S.E.2d 79 (2006) (holding appellant is competent to waive his appeals and be executed as his decision to waive those appeals is knowing and voluntary). In Downs the supreme court allowed a prisoner to waive his PCR upon the finding he was competent to do so. This issue was presented to the supreme court after Downs had been convicted, sentenced, and filed a PCR application.

While we are mindful of the supreme court's rulings in capital cases such as Downs, those matters are distinguishable from the present case by the fact that specific PCR applications, not the prospective ability to file a PCR, were waived. In the matter *sub judice* we find the issue of Tucker's waiver of his right to file a prospective PCR application is beyond the purview of this court as an error correcting authority. See State v. Elmore, 368 S.C. 230, 238, 628 S.E.2d 271, 275 (Ct. App. 2006) (recognizing the supreme court as the arbiter of legal policy).

The Uniform Post Conviction Procedure Act provides a procedural framework for collaterally attacking convictions and sentences. Al-Shabazz v. State, 338 S.C. 354, 366, 527 S.E.2d 742, 748 (1999); S.C. Code Ann. § 17-27-20 (2006). Tucker has not sought post-conviction relief yet. The state has conceded that if and when Tucker should attempt to file a PCR application, Tucker could raise the issue of whether his plea agreement was made unreasonable by a waiver of post-conviction claims. Since Tucker has yet to file for post-conviction relief, we find the current issue is not ripe for our review and we therefore decline to address it.

CONCLUSION

Based on the foregoing, the order of the trial court is hereby

AFFIRMED.

HEARN, C.J., and KITTREDGE, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lowcountry Open Land Trust, Respondent,

v.

Charleston Southern University, Appellant.

Appeal from Dorchester County
Patrick R. Watts, Master-in-Equity

Opinion No. 4336
Heard November 7, 2007 – Filed January 16, 2007

AFFIRMED IN PART, REVERSED IN PART

Stephen L. Brown and Edward Buckley, Jr., both of Charleston, for Appellant.

G. Dana Sinkler, of Charleston, for Respondent.

KITTREDGE, J.: Charleston Southern University (the University) and Lowcountry Open Land Trust (Buyer) entered into a contract for the sale

and purchase, respectively, of real property in Dorchester County, South Carolina. The University is the principal, but not sole, owner of the real property. The University attempted to terminate the contract, resulting in an action by Buyer for specific performance. The master-in-equity rescinded the University's purported termination of the contract and ordered the parties to renegotiate their contract and enter into a "written extension agreement." The purpose of the extension agreement was to provide additional time within which to ascertain the varying ownership interests of the multiple property owners. The University appeals. We affirm the master only insofar as the University's interest in the property is concerned. We reverse that portion of the order requiring the parties to renegotiate their contract. The result of our holding is to grant specific performance as to the University's undivided interest in the property.

I.

The University and Buyer entered into the contract on October 27, 2004, for approximately 63.38 acres of land located near Summerville in Dorchester County, South Carolina. The University represented that it owned 61.70% of the property, and provided the Buyer a list of twenty-seven other institutions and individual owners that it believed held the remaining interest.[1] The contract called for a total purchase price of $325,000, payable to each individual owner agreeing to the sale, including the University, in an amount to be determined in accordance with each owner's interest in the property.

Both the University and Buyer were aware of the unusual title and ownership issues. Therefore, the contract provided various options in the event Buyer was unable to obtain the complete ownership interest in the property. For example, in the event there were any deficiencies in title, Buyer could give notice to the University to cure such deficiencies. If the University was unable or unwilling to cure the claimed defects in title, or "in the failure of any Buyer's contingency described," Buyer could elect to

[1] There is some variation on this point as the record also contains a reference to twenty-eight other owners.

cancel the contract or to "[a]ccept such title and/or condition of Property as [the University] can convey as performance in full." Thus, in the event Buyer was unable to obtain deeds conveying the full ownership interest from the remaining owners, Buyer could cancel the contract or take a deed from the University for its undivided interest in the property. Moreover, Buyer could purchase the interest of other property owners who would be willing to convey their ownership interest to Buyer. In this regard, to help determine title, the University agreed to contact the other owners and attempt to obtain their agreement to sell their interest in the property.[2]

The contract also included two timeline provisions: (1) an "Inspection Period," which was to last for sixty days from the October 29, 2004 delivery date of the contract; and (2) a "Title Examination Period," which was to begin on the expiration of the Inspection Period and continue until the thirtieth day thereafter. The contract further provided that the closing date should take place "on or before the expiration date of the Title Examination Period (or the first business day thereafter if such date shall be a Saturday, Sunday or legal holiday) at the office of Buyer's attorney, or at such other date or place as the parties may agree in writing." The parties agreed the Title Examination Period expired no later than January 31, 2005. Thus, the projected closing date was January 31, 2005. The contract did not include a "time is of the essence" provision.

Once the parties signed the contract, both the University and Buyer undertook efforts to verify the other owners of the property. On October 28, 2004, Buyer contacted Sidney Jones, a title abstractor, to perform the title search. Shortly after Jones received the order, Jones told Buyer that he could not complete the work in the time required due to his busy schedule and the number of owners he would have to research. Meanwhile, the University mailed a letter to all known owners asking for information as to how they acquired title to the property and seeking their consent to the sale of their

[2] The contract expressly provided, however, that the University made no representation or warranty that it would, in fact, be able to deliver such agreements from the other owners.

property interest under the contract. On or about January 17, 2005, the parties discussed the status of consents the University had received from the other owners.[3] The projected closing date of January 31, 2005 passed without the parties closing on the contract.

On March 11, 2005, Sue Mitchell, Vice President for Business Affairs at the University, directed William Bates, the University's attorney, to check on the status of the contract so she could make a report to the University's Board of Trustees at the next scheduled board meeting. Bates contacted John Warren, III, Buyer's attorney, who advised Bates that Buyer was waiting for the completed title work. Later that same day, Warren e-mailed Bates requesting an extension of the contract. Bates forwarded the request to Mitchell, who in return directed Bates to issue a letter terminating the contract.

Bates sent a termination letter to Buyer on March 23, 2005. Buyer responded by filing this declaratory judgment action seeking specific performance on April 11, 2005. Notwithstanding the filing of this declaratory judgment action, on April 13, 2005, Bates delivered to Warren a copy of a Trust Agreement with respect to the property. The next day, Warren wrote to acknowledge receipt, stating he would forward the document to Buyer's title examiner and he hoped this would be "just what we have been looking for to help establish the current ownership."

On May 5, 2005, Buyer tendered a check to the University for $190,525 to purchase the interest owned by the University. The tendered check of $190,525 plus $10,000 in earnest money Buyer had previously paid equaled $200,525, which is 61.70% of the total purchase price of $325,000. The University did not accept the money and refused to quitclaim its interest in the property to Buyer.

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[3] According to a chart prepared by the University, as of January 17, 2005, ten people had sent completed information and signed consents to the sale of the property; one person had met with a University official; six people had no information about how they acquired their interest; three people referred the University to other sources; and seven people had not yet responded.

The case proceeded to trial. In his final order, the master found (1) the contract did not include a "time was of the essence" provision, and (2) the University had waived its right to enforce the closing date based on its actions after January 31, 2005. As a result, the master rescinded the University's termination of the contract and ordered the parties to renegotiate an extension of the contract. The University appeals.

II.

Buyer filed a declaratory judgment action. "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). To make this determination, the appellate court must look to the essential character of the cause of action. Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). The character of the action is generally ascertained from the body of the complaint, but when necessary, "resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978); In re Estate of Holden, 343 S.C. 267, 278, 539 S.E.2d 703, 709 (2000) (citing Bell v. Mackey, 191 S.C. 105, 119, 3 S.E.2d 816, 824 (1939) ("The nature of the issues as raised by the pleadings or the pleadings and proof, and character of relief sought under them, determines the character of an action as legal or equitable.")).

In this case, Buyer primarily asserted a claim for specific performance.[4] An action for specific performance lies in equity. Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 290 (2000). In an appeal from an action in equity, tried by a judge alone, this court may find facts in accordance with its

[4] On appeal, the Buyer asserts the master was interpreting the contract, so the action is one at law and this court's scope of review should extend only to the correction of errors of law. As previously discussed, although Buyer alleged a claim of breach of contract, the relief sought is specific performance. This is an action in equity.

own view of the preponderance of the evidence. Barnacle Broadcasting, Inc., 343 S.C. at 146, 538 S.E.2d at 675.

III.

A. Specific Performance

The University claims the master erred in rescinding its termination of the contract because Buyer was not ready, willing, and able to perform its obligations under the contract on the closing date. We disagree insofar as the University's undivided interest in the property is concerned. We agree with the master that Buyer's failure to close on the projected closing date did not entitle the University to terminate the contract because time was not of the essence under the contract. It is well settled that time is not of the essence in a contract to convey land unless made so by its terms expressly or by implication. Faulkner v. Millar, 319 S.C. 216, 219, 460 S.E.2d 378, 380 (1995). "When the contract does not include a provision that 'time is of the essence,' the law implies that it is to be done within a reasonable time." Id. Under the circumstances presented here, Buyer had a reasonable time to complete performance of the contract.

The master's decision to rescind the University's termination of the contract is buttressed by other provisions in the contract and the conduct of the parties after January 31, 2005. For example, the contract included a provision allowing the parties to agree to an alternative closing date. Further, the conduct of the University after the projected closing date shows that the University did not believe time was of the essence. More than a month after the projected closing date, University Vice President Mitchell contacted Bates about the contract. Significantly, Mitchell contacted Bates to determine the status of the contract, not to declare a termination of the contract. It was only after Buyer requested a formal extension of the contract that the University advised Buyer that its delay under the contract entitled the University to terminate the contract. Additionally, even after this lawsuit was filed, the University's attorney provided documentation to Buyer's attorney, which indicates there was a continuing effort to complete the transaction.

"[A] seller will not be permitted to declare a forfeiture of the rights of the buyer for nonperformance of any of the vital terms or conditions of the contract where such nonperformance has been with the express or clearly evinced tacit or implied consent of the seller." Faulkner, 319 S.C. at 221, 460 S.E.2d at 381. Accordingly, we find the University's communications and actions after January 31, 2005, demonstrate the tacit or implied consent of the University to Buyer's nonperformance.

By rescinding the University's termination of the contract, the master, in effect, granted Buyer specific performance. "In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract." Campbell v. Carr, 361 S.C. 258, 262, 603 S.E.2d 625, 628 (Ct. App. 2004). The party seeking to compel specific performance "must be able to perform at the exact time he requested specific performance, not some 'reasonable time' in the future." Ingram, 340 S.C. at 106 n.1, 531 S.E.2d at 291 n.1.

The master found specific performance was appropriate as to the University's interest because Buyer attempted to close on the contract by waiving the title search and exercising its option under the contract to purchase only the University's interest. Paragraph 5 of the contract, entitled "Title Examination," provides in relevant part as follows:

> Buyer shall examine title to the Property during the "Title Examination Period" . . . . In the event there are any deficiencies in the title . . . Buyer shall give written notice to [the University] . . . . In the event that the [University] is unable or unwilling to cure any claimed defect in title to the Property, or in the failure of any Buyer's contingency described, the Buyer may elect either of the following as Buyer's sole and exclusive remedy . . . i) Cancel the within

> Agreement . . . ; or ii) **Accept such title and/or condition of Property as [the University] can convey as performance in full.**

(Emphasis added.)

Buyer unquestionably was willing and able to purchase the University's undivided interest in the property as evidenced by the tender of $190,525. Therefore, under the terms of the contract, Buyer could at its option forgo a title search, pay the University, and accept a quitclaim deed from the University. We concur in the master's grant of specific performance to the extent he required the University to convey its undivided interest in the property to Buyer.

The University's final argument to defeat specific performance arises from its claim that the title examination was a condition precedent to its obligation to convey its undivided interest in the property. A condition precedent to a contract is "any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises." Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." Id. (internal quotation omitted).

We hold, as did the master, that the provisions concerning the title examination do not rise to the level of a condition precedent. As noted above, the contract extended Buyer certain options in the event of title deficiencies, including the right to "[a]ccept such title and/or condition of Property as [the University] can convey as performance in full." Buyer proceeded at its own peril in electing this bargained-for option under the contract and tendering to the University 61.70% of the purchase price in exchange for a quitclaim deed from the University.

Before moving to the next issue, we do recognize that much of the University's argument here centers on the varying interests of the other property owners. Clearly, the interests of the other property owners cannot be determined without a proper title examination. Buyer does not contend otherwise in the claim for specific performance against the University. As far as its rights under Paragraph 5 of the contract, Buyer simply seeks to enforce its contractual right to "accept such title . . . as [the University] can convey." As discussed below, we affirm the master's order only to the extent it grants specific performance to the University's undivided interest in the property.

B. The Extension Agreement

The University contends the master had no authority to order the parties to enter into an undefined and indefinite extension agreement. We agree.

The master's order instructed the University to rescind its termination of the contract and for "both parties to execute an appropriate written extension agreement." What is "appropriate" is unknown. The purpose of the extension agreement concerned an undefined extension of time in which to determine the ownership interests of the remaining owners. It is one thing for a court to impose a reasonable time period in a contract (based on the particular facts presented) where time is not of the essence; it is quite another for a court to order the parties to enter into a new agreement. We are unaware of any legal authority, and none has been cited to us, permitting a court to order parties to renegotiate contract terms and enter into a new agreement.[5]

Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties. Amick v. Hagler, 286 S.C.

[5] Moreover, it appears as of the time of trial Buyer had not determined the varying ownership interests of the multiple remaining owners. Thus, Buyer was in no position to perform under the contract even as late as the trial. Under these circumstances, we would decline to grant Buyer equitable relief with respect to the remaining property owners.

481, 485, 334 S.E.2d 525, 527 (Ct. App. 1985) (holding the trial judge properly granted specific performance, but did not have the authority to give one party the option of requiring the other party to provide owner financing because this was not part of the parties' contract).

Parties have the right to make their own contracts. Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975); MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 369, 588 S.E.2d 635, 638-39 (Ct. App. 2003) (stating, as a matter of first impression, that the appellate court would decline to adopt a procedure used in other jurisdictions that extended the non-compete period following a party's breach to ensure the nonbreaching party received the benefit of the bargain, the court stating there is no support for such an extension under South Carolina law because it would, in effect, rewrite the contract).

Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction. Therefore, we reverse the portion of the master's order requiring the parties to renegotiate and enter into a new written extension agreement. See, e.g., Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties."); E. Bus. Forms, Inc. v. Kistler, 258 S.C. 429, 189 S.E.2d 22 (1972) (finding the court may not make a new agreement for the parties into which they did not voluntarily enter).

C. Failure to Include Legal Authority

The University asserts the master's failure to support his conclusions of law with any legal authority is an error of law warranting reversal. We agree that the master failed to cite to any legal authority in his order. We do not find, however, that the lack of citation to legal authorities rises to the level of reversible error. This case was factually intensive, and the master's order discusses in detail the facts considered in making a decision to grant specific performance to Buyer of the University's undivided interest. While it may be unusual for a trial court not to cite legal authority to support its conclusions,

the master generally discussed applicable legal concepts, such as whether time was of the essence in the contract, whether Buyer and the University acted in good faith, and whether the parties performed their obligations under the contract before concluding specific performance should be granted. We find no reversible error.

IV.

We affirm the master's grant of specific performance as to the University's undivided interest in the property. We reverse the part of the order requiring the parties to execute a new written extension agreement. We therefore affirm the order requiring the University to convey its ownership interest to Buyer.

AFFIRMED IN PART, REVERSED IN PART.

HEARN, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jesse Cook and Toni Smith, as natural parent and Guardian ad Litem for Tracie Smith, a minor under the age of fifteen, Appellants,

v.

State Farm Automobile Insurance Company, Respondent.

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 4337
Submitted December 1, 2007 – Filed January 17, 2008

AFFIRMED

Ian D. Maguire and Vivien Sookram, both of Myrtle Beach, for Appellants.

Linda Weeks Gangi, of Conway, for Respondent.

WILLIAMS, J.: Toni Smith (Mother), as guardian ad litem and natural parent for Tracie Smith (Daughter), and Jesse Cook (Grandfather) appeal the Master-in-Equity's (the Master) order finding Daughter was not entitled to recover uninsured motorist (UIM) benefits under Grandfather's insurance policies with State Farm Automobile Insurance Company (State Farm). We affirm.

FACTS

On November 3, 2001, Daughter was a passenger in a 1999 Isuzu automobile, which collided with a tree. Daughter, a minor at the time, suffered personal injuries in the collision. Grandfather and Mother filed an action against the driver. The driver tendered her insurance policy limits of $15,000, and Grandfather and Mother subsequently made a claim on Daughter's behalf for the UIM coverage under Grandfather's automobile insurance policies.

At the time of the collision, Grandfather owned three automobiles, each insured by State Farm. All three policies contained UIM coverage in the amount of $25,000. State Farm refused the claim for the UIM coverage. State Farm asserted Daughter was not a resident relative of Grandfather's household, and consequently, Daughter was not insured under the policies.

Grandfather and Mother filed a declaratory judgment action against State Farm to determine Daughter's ability to recover under the policies. At trial, Grandfather and Mother presented evidence regarding Daughter's residence. Ultimately, the Master concluded Daughter did not primarily reside with Grandfather, and therefore, she was not entitled to recover the UIM benefits under the policies. This appeal follows.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "An issue essentially one at law, will not be transformed into one in equity simply because declaratory relief is sought." Id. In South Carolina, an insurance policy is a contract

between the insured and the insurance company, and the terms of the policy are to be construed according to contract law. Estate of Revis by Revis v. Revis, 326 S.C. 470, 476, 484 S.E.2d 112, 115 (Ct. App. 1997). "Contract actions are actions at law." Hofer v. St. Clair, 298 S.C. 503, 508, 381 S.E.2d 736, 739 (1989).

Our scope of review for a case heard by a master-in-equity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury. Wigfall v. Fobbs, 295 S.C. 59, 60-61, 367 S.E.2d 156, 157 (1988). Therefore, we may not disturb the master's findings of fact unless those findings are "wholly unsupported by the evidence or controlled by an erroneous conception or application of the law." Auto Owners Ins. Co. v. Langford, 330 S.C. 578, 581, 500 S.E.2d 496, 498 (Ct. App. 1998) (internal quotations and citations omitted).

The determination of resident relative status is a factual finding for the trial court. Langford, 330 S.C. at 581, 500 S.E.2d at 497. This finding must be affirmed unless no evidence reasonably supports it or the trial court made an error of law. Id. at 581, 500 S.E.2d at 498.

LAW/ANALYSIS

Grandfather and Mother argue the Master erred in finding Daughter did not primarily reside with Grandfather and, therefore, in finding Daughter was not entitled to UIM coverage under Grandfather's State Farm policies. Specifically, Grandfather and Mother contend the Master failed to broadly construe the applicable clauses of the policies. They maintain under a broader construction, the evidence would support a finding that Daughter primarily resided with Grandfather. We disagree.

In South Carolina, clauses of inclusion should be broadly construed in favor of coverage, and when there are doubts about the existence or extent of coverage, the language of the policy is to be "understood in its most inclusive sense." Buddin v. Nationwide Mut. Ins. Co., 250 S.C. 332, 337-38, 157 S.E.2d 633, 635 (1967). Courts should not, however, "torture the meaning of policy language in order to extend" or defeat coverage that was "never

intended by the parties." Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975). "Insurance policies are subject to general rules of contract construction." State Farm Mut. Auto. Ins. Co. v. Calcutt, 340 S.C. 231, 234, 530 S.E.2d 896, 897 (Ct. App. 2000). Accordingly, courts "should give policy language its plain, ordinary and popular meaning." Id.

In the present case, Grandfather's three automobile insurance policies issued by State Farm are at issue. All three policies contain language that extends UIM coverage to Grandfather, his spouse, and his relatives.[1] The policies define a relative as "a person related to you or your spouse by blood, marriage or adoption who resides primarily with you."[2] Giving the policy language its plain, ordinary and popular meaning, it is clear to recover under the policy, a person must be a relative of the policy holder by "blood, marriage or adoption," as well as "reside[] primarily with" that policy holder. Daughter is related to Grandfather by blood; thus, the determinative issue is whether Daughter resided "primarily with" Grandfather at the time of the accident.

The standard for determining whether an individual is a resident of the same household was discussed in Buddin, where our Supreme Court stated, "[A] resident of the same household is one, other than a temporary or transient visitor, who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently." 250 S.C. at 339, 157 S.E.2d at 636 (citing Hardware Mut. Cas. Co. v. Home Indem. Co., 50 Cal. Rptr. 508, 514 (Cal. Dist. Ct. App. 1966)). Since

[1] The coverage also extends to permissive occupants and users of the covered automobiles; however, this policy language is not applicable in the instant case.

[2] The policy's definition of relative also includes "unmarried and unemancipated" children who are "away at school." This policy language, however, is not applicable in the instant case.

Buddin, this standard has been applied to varying factual situations,[3] making it clear the resident relative analysis depends heavily on the facts of each situation and has no bright line test. Auto-Owners Ins. Co. v. Horne, 356 S.C. 52, 61, 586 S.E.2d 865, 870 (Ct. App. 2003).

Grandfather and Mother argue the evidence does not support the Master's findings under the Buddin standard. Specifically, they argue Daughter and Grandfather's "unique" living arrangement comprised a singular residence. Ample evidence in the record supports the conclusion that the mobile home and the house were separate residences. The parties stipulated Grandfather lived with his wife in a two bedroom house located in Galivants Ferry, South Carolina. Grandfather owned the surrounding real estate. A mobile home owned by Mother and her husband, Billy Ray Smith (Father), was also located on the same property. The two structures had separate property tax assessments, electrical services, phone services, septic tanks, and insurance policies. Mother and Father owned the mobile home, while Grandfather owned the house. Further, testimony indicated the two structures were physically separate with a fence between them. Father testified he and Mother paid $100 a month in rent to Grandfather. The record also reveals the bills and expenses for the two homes were paid separately. While Grandfather testified he helped pay the bills for the mobile home for a period of time, he confessed he only did so to help Mother and Father

[3] See Auto-Owners Ins. Co. v. Horne, 356 S.C. 52, 68-69, 586 S.E.2d 865, 874 (Ct. App. 2003) (holding that a daughter was not a resident-relative of her father, the non-custodial parent, for purposes of stacking UIM coverage where she lived with her mother in Conway and only occasionally visited her father in Saluda); Richardson v. S.C. Farm Bureau Mut. Ins. Co., 336 S.C. 233, 236-37, 519 S.E.2d 120, 122 (Ct. App. 1999) (holding that a daughter was not a resident relative of her parents' household when she had moved away as a graduate student several years before, maintained her own residence in another town, and only kept a few items at her parents' home); Langford, 330 S.C. at 583-84, 500 S.E.2d at 499 (holding that a granddaughter was not a resident relative with her grandmother when she usually lived with her mother and only stayed with her grandmother when she and her mother fought).

because they could not afford to pay the bills. Lastly, there was testimony Father stayed in the mobile home exclusively and did not consider the two homes to be a single residence. Accordingly, we find that evidence supports the conclusion the mobile home and house were in fact two separate residences.

In addition, evidence supports the Master's conclusion that Daughter resided primarily in the mobile home and not in the house with Grandfather. Several witnesses testified Daughter, along with her parents and siblings, lived in the mobile home, and Grandfather and his wife lived in the house. The record also shows the majority of the family possessions of Mother and Father were stored in the mobile home, and Daughter and her siblings only kept a few toys and a change of clothes in Grandfather's house. Grandfather's wife testified that she would care for the children while Mother was away, and the children would leave Grandfather's house and return to the mobile home as soon as Mother returned home. Therefore, we find the Master did not err in concluding Daughter did not primarily reside with Grandfather. Accordingly, we find the Master properly found Daughter was not entitled to UIM benefits under Grandfather's insurance policies.

CONCLUSION

For the foregoing reasons, the judgment of the Master is

AFFIRMED.[4]

ANDERSON and SHORT, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Friends of McLeod, Inc., Appellants,

v.

City of Charleston, City of Charleston Board of Zoning Appeals and American College of the Building Arts, Respondents.

Appeal From Charleston County
Deadra L. Jefferson, Circuit Court Judge

Opinion No. 4338
Heard November 7, 2007 – Filed January 17, 2008

AFFIRMED AS MODIFIED

Patrick F. Stringer, of Charleston, for Appellants.
Timothy A. Domin, William L. Howard, Sr., Stephen L. Brown, and Russell G. Hines, all of Charleston, for Respondents.

CURETON, J: Friends of McLeod, Inc. (Friends) appeals the circuit court's determination that its appeal was untimely and that it lacked standing to appeal the decision of the City of Charleston Board of Zoning Appeals (Board) granting the American College of the Building Arts (College) a special exception. Friends also argues the circuit court erred in failing to find the Board acted arbitrarily and abused its discretion in granting the special exception. We affirm as modified.

FACTS

Originally, this matter began with a request by the College to Charleston City Council to rezone McLeod Plantation to a School (S) Overlay Zone district. At the time the area was zoned residential. The request arose from the College's desire to purchase the McLeod Plantation from the Historic Charleston Foundation (Foundation) and establish a small college devoted exclusively to teaching construction and preservation techniques on old and/or historic structures. Charleston City Council approved the rezoning. The College then applied to the Board for a special exception to operate the College within the School (S) Overlay Zone district. Both proponents and opponents heavily attended the Board's hearing on the exception. After hearing the College's proposal, the Board initially denied the special exception. Immediately thereafter, a Board member made a motion to allow the special exception upon the condition the College operate with no more than one hundred persons, including students, faculty, and staff. The Board then voted to grant the exception. Subsequently, Friends, a collective group of individuals, requested the Board reconsider its approval. The Board denied Friends' motion to reconsider, and Friends appealed to the circuit court.

Friends filed its initial appeal within the thirty-day time limit prescribed by statute, but the summons and complaint named only the City of Charleston (City) and the Board as parties. Several months later, Friends filed a motion to amend the complaint and, pursuant to a consent order, joined the College as a party. The circuit court found Friends did not timely perfect its appeal because Friends failed to name College, a necessary party in the action, as a

party within the thirty-day time period for appeals allowed in decisions from a zoning board. Additionally, the court found Friends neither had standing nor suffered any individualized harm based on the record presented to the Board. In the interests of judicial economy, the circuit court affirmed the Board's decision on the merits. This appeal followed.

STANDARD OF REVIEW

"[T]he findings of fact by the Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence." S.C. Code Ann. § 6-29-840(A) (Supp. 2006). See also Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 405, 552 S.E.2d 42, 44 (Ct. App. 2001). In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law. Id. Furthermore, "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." Rest. Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." Id. The timeliness of an appeal from a zoning board's decision is a jurisdictional requirement and, as such, may be raised at any time by either party or sua sponte by this court. Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 489, 536 S.E. 2d 892, 896 (Ct. App. 2000).

LAW/ANALYSIS

As a threshold issue Friends asserts the circuit court erred in holding the appeal was untimely because Friends failed to include College as a proper party. We disagree.

Under South Carolina law:

> A person who may have a substantial interest in any decision of the board of appeals . . . may appeal from a decision of the board to the circuit court . . . by filing with the clerk of the court a petition in writing . . . [and said] appeal must be filed within thirty days after the decision of the board is mailed.

Friends maintains the statute's only requirement is that the appeal be filed within the thirty-day time period. Having timely filed its appeal, Friends argues, a party should be able to amend its pleadings to add a necessary party to the lawsuit.

Our supreme court has announced that development permittees are necessary parties to appeals of their respective permits. Spanish Wells Property Owners Ass'n v. Bd. of Adjustment of the Town of Hilton Head Island, 295 S.C. 67, 69, 367 S.E.2d 160, 161 (1988). Spanish Wells confronted the court with a situation similar to the one here. The circuit court had dismissed an appeal from a decision of the Hilton Head Island Planning Commission for failure to name the development permittee but had allowed the appellant fifteen days leave to add the permittee as a party. Id. at 67, 367 S.E.2d at 161. Instead, the appellant appealed the court's ruling that a development permittee is a necessary party. Our supreme court, addressing only that issue, adopted the majority view that a development permittee is a necessary party to an appeal of its permit. Id. at 69, 367 S.E.2d at 161.

College, City, and Board (collectively Respondents) maintain the appeal is not timely and must be dismissed because College, as a necessary party, was not named in the initial appeal or added within the thirty-day appeal period provided by section 6-29-820. Respondents argue that the Rules of Civil Procedure do not govern an appeal from a decision of a zoning board. Austin v. Board of Appeals, 362 S.C. 29, 38, 606 S.E. 2d 208, 214 (Ct. App. 2004). Indeed, Austin states that the procedures governing appeals from zoning boards are prescribed by statute, and the statute makes no

provision for "amendment of the grounds set forth in the petition." Id. at 37, 606 S.E.2d at 213. But see Botany Bay Marina, Inc. v. Townsend, 296 S.C. 330, 333, 372 S.E.2d 584, 585 (1988) (wherein our supreme court stated that former section 4-27-280 governed appeals of a board of adjustment decision to the circuit court, but the statute did not "address the appealability of interlocutory decisions" of the board. The court then applied former Rule 72 of the Rules of Civil Procedure and concluded that the interlocutory order of the board was appealable). Moreover, in Spanish Wells, the Board of Adjustment moved pursuant to Rule 12(b)(7), SCRCP, arguing the development permittee was a necessary party to the appeal under Rule 19, SCRCP. 295 S.C. at 68, 367 S.E.2d at 161. Additionally, Rule 74, SCRCP, recognizes that statute governs the procedure on appeal to the circuit court from the decision of inferior tribunals and states further that "[n]otice of appeal to the circuit court must be served on all parties within thirty (30) days after receipt of written notice" of the decision from which appeal is made. Rule 74, SCRCP (emphasis added). Clearly, the College was a party to the proceeding before the zoning board because it was the applicant for the special exception. However, Friends does not contend College was served with the appeal documents within thirty days of the mailing of the board decision. The timeliness of an appeal from the decision of a zoning board is jurisdictional. Vulcan Materials, 342 S.C. at 489, 536 S.E.2d at 896. We therefore affirm the decision of the circuit court dismissing the appeal for Friends' failure to file and serve the notice of appeal on College within thirty days of receipt of notice thereof.[1]

Having concluded Friends' appeal is untimely, we vacate the remainder of the circuit court's order discussing standing and the merits.[2] The decision of the circuit court is accordingly

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[1] We recognize section 6-29-280 provides that the time for appeal runs from date of mailing (apparently to the parties). We do not know how or when Friends received notice of the decision of the Board, but the date Friends received notice of the Board's decision is not an issue on appeal.

[2] While we agree with the trial court that Friends' appeal was untimely and thus the trial court did not have jurisdiction to decide the appeal on the

AFFIRMED AS MODIFIED.

KITTREDGE AND THOMAS, JJ., concur.

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merits, we nevertheless note that were we to decide the appeal on the merits we would affirm the trial court.

The Supreme Court of South Carolina
P. O. Box 11330
Columbia, South Carolina 29211