OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11

March 19, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION TO FILE PETITION FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2007-UP-122 – Delores D. Leonard v. Kershaw County, State of South Carolina
(Kershaw, Judge James R. Barber, III)

2007-UP-123 – The State v. Roger Platt
(Florence, Judge J. Mark Hayes, II)

2007-UP-124 – The State v. Ishama M. Nelson
(Berkeley, Judge R. Markley Dennis, Jr.)

2007-UP-125 – The State v. Michael M. Walker
(Greenwood, Judge Wyatt T. Saunders, Jr.)

PETITIONS FOR REHEARING

4189 – State v. Theresa Claypoole	Pending
4196 – State v. Gary White	Pending
4198 – Vestry v. Orkin Exterminating	Pending
4200 – Brownlee v. SCDHEC	Pending
4202 – State v. Arthur Fanklin Smith	Pending
4205 – Altman v. Griffith (1)	Pending
4206 – Hardee v. McDowell	Pending
4209 – Moore v. Weinberg	Pending
4211 – State v. C. Govan	Pending
2006-UP-413 – S. Rhodes v. M. Eadon	Pending
2006-UP-430 – SCDSS v. E. Owens	Pending
2006-UP-431 – B. Lancaster v. L. Sanders	Denied 03/06/07
2007-UP-023 – Pinckney v. Salamon	Pending
2007-UP-042 – State v. Roger Dale Burke	Pending

2007-UP-048 – State v. Jody Lynn Ward Pending

2007-UP-056 – Tennant v. Beaufort County Pending

2007-UP-060 – State v. Johnny W. Stokes Pending

2007-UP-061 – J.H. Seale & Son v. Munn Pending

2007-UP-062 – Citifinancial v. Kennedy Pending

2007-UP-063 – Bewersdorf v. SCDPS Pending

2007-UP-064 – Amerson v. Ervin Pending

2007-UP-066 – Computer Products Inc. v. JEM Restaurant Pending

2007-UP-072 – Watt v. Charlie Galloway's Fur Pending

2007-UP-081 – Schneider v. Board of Directors Pending

2007-UP-087 – Featherston v. Staarman Pending

2007-UP-090 – Pappas v. Ollie's Seafood (1) (2) Pending

2007-UP-091 – Sundown Operating v. Intedge Pending

2007-UP-098 – Dickey, J. v. Clarke Nursing (Carolinas) Pending

2007-UP-110 – Holmes, C. v. Holmes, J. Pending

2007-UP-110 – Holmes, C. v. Holmes, J. (2) Pending

2007-UP-111 – Village West v. International Sales Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

3949 – Liberty Mutual v. S.C. Second Injury Fund Pending

3968 – Abu-Shawareb v. S.C. State University Pending

3983 – State v. D. Young Pending

4004 – Historic Charleston v. Mallon	Pending
4014 – State v. D. Wharton	Pending
4022 – Widdicombe v. Tucker-Cales	Pending
4033 – State v. C. Washington	Pending
4035 – State v. J. Mekler	Pending
4036 – State v. Pichardo & Reyes	Pending
4041 – Bessinger v. Bi-Lo	Pending
4042 – Honorage Nursing v. Florence Conval.	Pending
4043 – Simmons v. Simmons	Pending
4047 – Carolina Water v. Lexington County	Pending
4052 – Smith v. Hastie	Pending
4054 – Cooke v. Palmetto Health	Pending
4060 – State v. Compton	Pending
4061 – Doe v. Howe et al. (2)	Pending
4069 – State v. Patterson	Pending
4071 – State v. K. Covert	Pending
4074 – Schnellmann v. Roettger	Pending
4075 – State v. Douglas	Pending
4078 – Stokes v. Spartanburg Regional	Withdrawn 03/07/07
4080 – Lukich v. Lukich	Pending
4080 – State v. Elmore	Pending
4088 – SC Mun. Ins. & Risk Fund v. City of Myrtle Beach	Pending

4089 – S. Taylor v. SCDMV	Pending
4092 – Cedar Cove v. DiPietro	Pending
4093 – State v. J. Rogers	Pending
4095 – Garnett v. WRP Enterprises	Pending
4096 – Auto-Owners v. Hamin	Pending
4100 – Menne v. Keowee Key	Pending
4102 – Cody Discount Inc. v. Merritt	Pending
4104 – Hambrick v. GMAC	Pending
4107 – The State v. Russell W. Rice, Jr.	Pending
4109 – Thompson v. SC Steel Erector	Pending
4111 – LandBank Fund VII v. Dickerson	Pending
4112 – Douan v. Charleston County	Pending
4118 – Richardson v. Donald Hawkins Const.	Pending
4119 – Doe v. Roe	Pending
4120 – Hancock v. Mid-South Mgmt.	Pending
4121 – State v. D. Lockamy	Pending
4122 – Grant v. Mount Vernon Mills	Pending
4126 – Wright v. Dickey	Pending
4127 – State v. C. Santiago	Pending
4128 – Shealy v. Doe	Pending
4136 – Ardis v. Sessions	Pending

4139 – Temple v. Tec-Fab	Pending
4140 – Est. of J. Haley v. Brown	Pending
4143 – State v. K. Navy	Pending
4144 – Myatt v. RHBT Financial	Pending
4145 – Windham v. Riddle	Pending
4148 – Metts v. Mims	Pending
4157 – Sanders v. Meadwestvaco	Pending
4162 – Reed-Richards v. Clemson	Pending
4163 – F. Walsh v. J. Woods	Pending
4165 – Ex Parte: Johnson (Bank of America)	Pending
4172 – State v. Clinton Roberson	Pending
4175 – Brannon v. Palmetto Bank	Pending
4176 – SC Farm Bureau v. Dawsey	Pending
4178 – Query v. Burgess	Pending
4179 – Wilkinson v. Palmetto State Transp.	Pending
4180 – Holcombe v. Bank of America	Pending
4182 – James v. Blue Cross	Pending
4183 – State v. Craig Duval Davis	Pending
4184 – Annie Jones v. John or Jane Doe	Pending
4186 – Commissioners of Public Works v. SCDHEC	Pending
4187 – Kimmer v. Murata of America	Pending
2005-UP-345 – State v. B. Cantrell	Pending

2005-UP-490 – Widdicombe v. Dupree	Pending
2005-UP-557 – State v. A. Mickle	Pending
2005-UP-574 – State v. T. Phillips	Pending
2005-UP-580 – Garrett v. Garrett	Pending
2005-UP-584 – Responsible Eco. v. Florence Consolid.	Pending
2005-UP-585 – Newberry Elect. v. City of Newberry	Pending
2005-UP-590 – Willis v. Grand Strand Sandwich Shop	Pending
2005-UP-603 – Vaughn v. Salem Carriers	Pending
2005-UP-635 – State v. M. Cunningham	Pending
2006-UP-002 – Johnson v. Estate of Smith	Pending
2006-UP-013 – State v. H. Poplin	Pending
2006-UP-015 – Watts Const. v. Feltes	Pending
2006-UP-025 – State v. K. Blackwell	Pending
2006-UP-027 –Constenbader v. Costenbader	Pending
2006-UP-030-State v. S. Simmons	Pending
2006-UP-037-State v. Henderson	Pending
2006-UP-038-Baldwin v. Peoples	Pending
2006-UP-043-State v. Hagood	Pending
2006-UP-047-Rowe v. Advance America	Pending
2006-UP-049-Rhine v. Swem	Pending
2006-UP-066-Singleton v. Steven Shipping	Pending

2006-UP-071-Seibert v. Brooks	Pending
2006-UP-072-McCrea v. Gheraibeh	Pending
2006-UP-073-Oliver v. AT&T Nassau Metals	Pending
2006-UP-074-Casale v. Stivers Chrysler-Jeep	Pending
2006-UP-079-Ffrench v. Ffrench	Pending
2006-UP-084-McKee v. Brown	Pending
2006-UP-088-Meehan v. Meehan	Pending
2006-UP-096-Smith v. Bloome	Pending
2006-UP-115-Brunson v. Brunson	Pending
2006-UP-122-Young v. Greene	Pending
2006-UP-128-Heller v. Heller	Pending
2006-UP-130-Unger v. Leviton	Pending
2006-UP-151-Moyers v. SCDLLR	Pending
2006-UP-158-State v. R. Edmonds	Pending
2006-UP-172-State v. L. McKenzie	Pending
2006-UP-180-In the matter of Bennington	Pending
2006-UP-194-State v. E. Johnson	Pending
2006-UP-203-Sammy Garrison Const. v. Russo	Pending
2006-UP-211-Cunningham v. Mixon	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-230-Ex parte Van Osdell (Babb v. Graham)	Pending

2006-UP-237-SCDOT v. McDonald's Corp.	Pending
2006-UP-241-Marin v. Black & Decker	Pending
2006-UP-243-Sun Trust Mortgage v. Gobbi	Pending
2006-UP-245-Gobbi v. People's Federal	Pending
2006-UP-246-Gobbi v. Simerman	Pending
2006-UP-247-State v. Hastings	Pending
2006-UP-256-Fulmer v. Cain	Pending
2006-UP-262-Norton v. Wellman	Pending
2006-UP-279-Williamson v. Bermuda Run	Pending
2006-UP-281-Johnson v. Sonoco Products	Pending
2006-UP-287-Geiger v. Funderburk	Pending
2006-UP-299-Kelley v. Herman	Pending
2006-UP-303-State v. T. Dinkins	Pending
2006-UP-304-Bethards v. Parex	Pending
2006-UP-309-Southard v. Pye	Pending
2006-UP-313-Uzenda v. Pittman	Pending
2006-UP-314-Williams et. al v. Weaver et. al	Pending
2006-UP-315-Thomas Construction v. Rocketship Prop.	Pending
2006-UP-316-State v. Tyrelle Davis	Pending
2006-UP-317-Wells Fargo Home Mortgage v. Thomasena J. Holloway and Albert Holloway	Pending
2006-UP-320-McConnell v. John Burry	Pending

2006-UP-323-Roger Hucks v. County of Union	Pending
2006-UP-329-Washington Mutual v. Hiott	Pending
2006-UP-332-McCullar v. Est. of Campbell	Pending
2006-UP-333-Robinson v. Bon Secours	Pending
2006-UP-359-Pfeil et. al v. Walker et. al	Pending
2006-UP-360-SCDOT v. Buckles	Pending
2006-UP-367-Coon v. Renaissance	Pending
2006-UP-374-Tennant v. Georgetown et al.	Pending
2006-UP-377-Curry v. Manigault	Pending
2006-UP-393-M. Graves v. W. Graves	Pending
2006-UP-395-S. James v. E. James	Pending
2006-UP-426-J. Byrd v. D. Byrd	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Catawba Indian Tribe of South Carolina, Respondent,

v.

The State of South Carolina and Henry D. McMaster, in his official capacity as Attorney General of the State of South Carolina, Appellants.

Appeal From Richland County
Joseph M. Strickland, Circuit Court Judge

Opinion No. 26291
Heard January 17, 2007 – Filed March 19, 2007

AFFIRMED IN PART; REVERSED IN PART

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Robert D. Cook, and Senior Assistant Attorney General C. Havird Jones, Jr., all of Columbia, for Appellants.

Dwight F. Drake and B. Rush Smith, III, both of Nelson, Mullins, Riley & Scarborough, LLP, of Columbia; Jay Bender, of Baker, Ravenel & Bender, LLP, of Columbia; Robert M. Jones, of Rock

Hill; and Jim O. Stuckey, II, of Littler Mendelson, PC, of Columbia, for Respondent.

JUSTICE BURNETT: The State of South Carolina and Henry D. McMaster, in his official capacity as Attorney General of the State, (Appellants) appeal the circuit court's grant of summary judgment in favor of the Catawba Indian Tribe of South Carolina (Respondent). We certified the case for review from the Court of Appeals pursuant to Rule 204(b), SCACR, and we affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

In 1993, after many years of litigation and extensive negotiations, Respondent, the State, and the United States entered into a settlement that ended a dispute over the right to possession of 144,000 acres of land located in York, Lancaster, and Chester counties.[1] This settlement was memorialized in an Agreement in Principle ("Settlement Agreement"). Federal legislation[2] ("Federal Act") and state legislation[3] ("State Act") implemented the Settlement Agreement. The Federal Act requires the Settlement Agreement and the State Act to be complied with as if they had been implemented by federal law. 25 U.S.C.A. § 941b(a)(2) (2001).

As part of the settlement, Respondent waived its right to be governed by the Indian Gaming Regulatory Act.[4] 25 U.S.C.A. § 941*l*(a); Settlement

---

[1] See generally South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986) (describing the historical background of this land dispute); 25 U.S.C.A. § 941(a)(4) (2001) (describing the historical background which led to the Settlement Agreement); S.C. Code Ann. § 27-16-20 (2007) (same).

[2] 25 U.S.C.A. §§ 941-941n (2001 & Supp. 2006).

[3] S.C. Code Ann. §§ 27-16-10 through -140 (2007).

Agreement § 16.1. Respondent instead agreed to be governed by the terms of the Settlement Agreement and the State Act with regards to games of chance. 25 U.S.C.A. § 941*l*(b); S.C. Code Ann. § 27-16-110(A) (2007); Settlement Agreement § 16.2. The Settlement Agreement and the State Act give Respondent specific rights related to bingo and video poker or similar electronic play devices. S.C. Code Ann. § 27-16-110(B)-(H); Settlement Agreement § 16.3-.9.

Respondent brought this declaratory judgment action against Appellants seeking, *inter alia*, a declaration that pursuant to the terms of the Settlement Agreement and the State Act, Respondent has a present and continuing right to operate video poker or similar electronic play devices on its Reservation and a declaration that Respondent is not required to charge or pay an entrance fee imposed by S.C. Code Ann. § 12-21-4030(B)(1) (2000) against its bingo operation. On cross-motions for summary judgment, the circuit court ruled in favor of Respondent.

ISSUES

I. Did the circuit court err in granting summary judgment to Respondent on the ground Respondent has the present and continuing right to operate video poker or similar electronic play devices on its Reservation?

II. Did the circuit court err in granting summary judgment to Respondent on the ground the entrance fee imposed by S.C. Code Ann. § 12-21-4030(B)(1) (2000) was not applicable to Respondent's bingo operation?

STANDARD OF REVIEW

A circuit court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue

---

[4] 25 U.S.C.A. §§ 2701-2721 (2001 & Supp. 2006).

as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). In determining whether any triable issues of fact exist, the circuit court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Manning v. Quinn, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

The issue of interpretation of a statute is a question of law for the court. Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("The determination of legislative intent is a matter of law."). We are free to decide a question of law with no particular deference to the circuit court. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000).

LAW/ANALYSIS

I. Video Poker

Appellants argue the circuit court erred in granting summary judgment to Respondent on the ground the Settlement Agreement and the State Act give Respondent a present and continuing right to operate video poker or other similar electronic play devices on its Reservation. We agree.

The State Act provides:

> [Respondent] may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law. [Respondent] is subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law, except if the Reservation is located in a county or counties which prohibit the devices pursuant to state law,

> [Respondent] nonetheless must be permitted to operate the devices on the Reservation if the governing body of [Respondent] so authorizes, subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law.

S.C. Code Ann. 27-16-110(G); see also Settlement Agreement § 16.8 (same).

Appellants contend § 27-16-110(G) does not enable Respondent to operate video poker devices on its Reservation regardless of a statewide ban on the devices. Appellants argue the Settlement Agreement and the State Act provide Respondent with the right to permit or operate video poker devices on its Reservation only "to the same extent that the devices are authorized by state law." S.C. Code Ann. § 27-16-110(G).

Respondent argues the Settlement Agreement and the State Act differentiate between the terms "permit" and "operate," such that Respondent may "permit" video poker devices on its Reservation "to the same extent that the devices are authorized by state law." *Id.* (emphasis added). Respondent further argues it "nonetheless must be permitted to operate the devices on the Reservation if the governing body of [Respondent] so authorizes" and if the counties where the Reservation is located prohibit the video poker devices. *Id.* (emphasis added). Respondent contends because state law now prohibits video poker devices, Respondent may not give permission to third parties to place and maintain video poker machines on its Reservation. Respondent further contends, as a sovereign, it may now operate the devices on its Reservation if its governing body authorizes the operation because the counties where the Reservation is located prohibit them.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the

statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

The language of § 27-16-110(G) is unambiguous.[5] The first sentence of § 27-16-110(G) provides that Respondent may permit video poker or similar electronic play devices on its Reservation "to the same extent that the devices are authorized by state law." "[P]ermit" as used in the first sentence means "[t]o allow." Black's Law Dictionary 1160 (7th ed. 1999). Under the plain language of § 27-16-110(G), Respondent may allow video poker devices on its Reservation, either by its own operation or a third-party's operation, to the same extent state law authorizes the devices. The terms permit and operate must be interpreted as such to effectuate the intent of the legislature.[6] Furthermore, we reject Respondent's proposed construction of §

[5] The circuit court was persuaded by the affidavit of Crawford Clarkson, the State's lead negotiator of the Settlement Agreement, in making its ruling. The circuit court erroneously relied on Clarkson's affidavit and erroneously considered the affidavits submitted by Appellants in conjunction with their motions for summary judgment and for reconsideration because the statute is not ambiguous. See Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003) (finding there is no need to employ the rules of statutory construction when the language of a statute is plain and unambiguous). Moreover, even if the statute was ambiguous, affidavits of drafters of the statute and legislators are not admissible as evidence of legislative intent. Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 353-54, 549 S.E.2d 243, 250 (2001).

[6] In the same year it enacted the State Act, the legislature also enacted a local option law permitting counties to hold an individual referendum to determine whether cash payouts for video gaming should remain legal. Act No. 164, Part II, § 19G, 1993 S.C. Acts 1138-1139, formerly codified at S.C. Code Ann. §§ 12-21-2806 and -2808 (repealed effective July 1, 2000). In light of this historical fact, the phrase in the second sentence of the State Act that refers to Respondent's right to operate video poker devices if "the Reservation is located in a county or counties which prohibit the devices" does not refer to a statewide ban on video poker devices; rather, it refers to a

27-16-110(G) because such construction would create an absurd result, which the legislature clearly did not intend. See Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. . . . If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.") (citing Stackhouse v. Rowland, 86 S.C. 419, 422, 68 S.E. 561, 562 (1910)). The legislative intent was to circumscribe Respondent's right to allow video poker devices on its Reservation, either by its own operation or a third-party's operation, to the extent state law allowed the devices.[7]

Respondent contends unlike § 27-16-110(F), which requires its bingo license to be "revoked if the game of bingo is no longer licensed by the State," § 27-16-110(G) does not include language requiring the termination of Respondent's possession or operation of video poker devices if state law bans the devices. Respondent argues if its right to operate video poker devices was contingent upon state law allowing the devices, then language similar to that used in § 27-16-110(F) would have been included in § 27-16-110(G). Respondent's argument is without merit because the rules of

---

county's ban on the devices. S.C. Code Ann. § 27-16-110(G). This history further demonstrates the legislature's clear intention to limit Respondent's right to operate video poker devices on its Reservation to the same extent state law authorizes such devices. See Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 368, 20 S.E.2d 813, 815-16 (1942) ("A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. And the history of the period in which the [statute] was passed may be considered.").

[7] We note state law presently bans the possession and operation of video poker devices. See S.C. Code Ann. § 12-21-2710 (2000). Therefore, under the plain language of § 27-16-110(G), Respondent may not currently allow the devices on its Reservation.

statutory construction are not applicable. See Lester v. S.C. Workers' Comp. Comm'n, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999) (finding a court employs the rules of statutory construction only when a statute is ambiguous).

Respondent also contends it may operate video poker devices on its Reservation as a sovereign regardless of a statewide ban on the devices. "The [United States Supreme] Court has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,'. . . , and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States. . . .' It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207, 107 S.Ct. 1083, 1087, 94 L.Ed.2d 244, 253 (1987) (citing United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706, 716 (1975) and Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10, 29 (1980)). In this case, Congress expressly provided that "all laws, ordinances, and regulations of the State, and its political subdivisions, govern the regulation of gambling devices and the conduct of gambling or wagering by [Respondent] on and off the Reservation," unless the Settlement Agreement and the State Act specifically provide otherwise. 25 U.S.C.A. § 941*l*(b). Generally, Respondent agreed to be "subject to the civil, criminal, and regulatory jurisdiction of the State. . . and [to] the civil and criminal jurisdiction of the courts of the State to the same extent as any other person, citizen, or land in the State. . . ." S.C. Code Ann. § 27-16-40; see also Settlement Agreement § 4.3. Specifically, the Settlement Agreement and the State Act require state law to govern the conduct of gambling by Respondent, and the Federal Act requires the State Act to be complied with as if implemented by federal law. S.C. Code Ann. § 27-16-110(A); see also Settlement Agreement § 16.1; 25 U.S.C.A. § 941b(a)(2). By Congress's express approval of the State Act and by the terms of the Settlement Agreement and the State Act, Respondent relinquished any attributes of sovereignty relating to games of chance in this state.

Respondent also argues because the Federal Act requires the consent of both Respondent and the State to amend the terms of the Settlement Agreement and State Act, any subsequent state legislative enactments are not applicable to Respondent unless Respondent consents to the enactments. See 25 U.S.C.A. § 941m(f). The State Act is a contract between Respondent and the State, and "[i]t is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract." City of North Charleston v. North Charleston Dist., 289 S.C. 438, 442, 346 S.E.2d 712, 715 (1986). "However, statutes and ordinances enacted subsequent to the execution of a contract, which add burdens or impair the obligations of the contract, may not be deemed to be a part of the agreement unless the language of the agreement clearly indicates this to have been the intention of the parties." 17A Am.Jur.2d Contracts § 372 (2004). The first sentence of § 27-16-110(G) clearly binds Respondent to any subsequent state legislative enactments affecting video poker devices. The inclusion of the phrase "to the same extent that the devices are authorized by state law" is indicative of the parties' intent for Respondent to be subject to any future changes in state law regarding video poker devices.[8] See, *e.g.*, Lewis v. Quality Coal Corp., 270 F.2d 140, 142 (7th Cir. 1959) (finding the phrase "to the extent and in the manner permitted by law" required "conformity to existing or future law"); State ex rel. Ferguson v. City of Wichita, 360 P.2d 186, 191-92 (Kan. 1961) (finding contractual phrase "to the extent authorized by state law" included future legislation).

II. Entrance Fee

[8] Respondent also argues it is not bound by the current prohibition on video poker devices because the Settlement Agreement and the State Act were not "specifically modified or expressly repealed" as required by Act No. 125 of 1999, Pt. V, § 22(C). Act No. 125 of 1999 enacted the current legislation prohibiting the possession and operation of video poker devices. S.C. Code Ann. § 12-21-2710. Because the State Act requires future state law related to video poker devices to apply to Respondent, Respondent's argument is meritless.

Appellants argue the circuit court erred in concluding the general entrance fee imposed by S.C. Code Ann. § 12-21-4030(B)(1) is not applicable to Respondent's bingo operation. We disagree.

The State Act provides in relevant part:

> [Respondent] shall pay, in lieu of an admission, a head, a license, or any other bingo tax, a special bingo tax equal to ten percent for each dollar of face value for each bingo card sold. No other federal, state, or local taxes apply to revenues generated by the bingo games operated by [Respondent].

S.C. Code Ann. § 27-16-110(C)(3) (emphasis added); see also Settlement Agreement § 16.4.3 (same). Section 12-21-4030(B)(1) requires certain bingo license holders, including Respondent, to impose "an entrance fee of eighteen dollars."

Section 27-16-110(C)(3) states Respondent must pay a special bingo tax instead of an admission or, in other words, an entrance fee. The imposition of § 12-21-4030(B)(1) against Respondent's bingo operation violates the plain language of § 27-16-110(C)(3). Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994) ("When statutory terms are clear and unambiguous, there is no room for construction and courts are required to apply them according to their literal meaning."). In addition, the entrance fee cannot be imposed against Respondent because the Federal Act requires the consent of both the State and Respondent to amend the terms of the State Act, and Respondent did not consent to this amendment. 25 U.S.C.A. § 941m(f)(1) (requiring the consent of both Respondent and the State if the amendment relates to "the jurisdiction, enforcement, or application of civil, criminal, regulatory, or tax laws of [Respondent] and the State").

CONCLUSION

We conclude pursuant to the terms of the Settlement Agreement and the State Act, Respondent has the right to allow video poker and similar

electronic play devices on its Reservation, either by a third-party's operation or its own operation, to the same extent the devices are authorized by state law. We reverse the grant of summary judgment in favor of Respondent on this ground and remand to the circuit court for entry of judgment in favor of Appellants. We also affirm the grant of summary judgment in favor of Respondent on the issue related to the bingo entrance fee.

AFFIRMED IN PART; REVERSED IN PART.

MOORE, A.C.J., WALLER, PLEICONES, JJ., and Acting Justice Diane S. Goodstein, concur.

The Supreme Court of South Carolina

RE: Amendments to Rule 402, SCACR

ORDER

The South Carolina Board of Law Examiners is responsible for preparing and grading the essay portion of the South Carolina Bar Examination. Before determining that an applicant has failed an essay section of the examination, the Board conducts an extensive internal review process. This process includes the grading of the failing section on at least two separate occasions with the applicant being given the benefit of the highest score.

Under our current rule, applicants are allowed to review and seek re-grading of their papers. In this regard, South Carolina is one of only a very few states to allow for review and re-grading after the examination results have been released.

In our opinion, the internal review process conducted by the Board is more than sufficient to insure that any error in grading is determined before the examination results are released. Therefore, we have decided to delete the current

provisions allowing for review and re-grading after the results are released, bringing this jurisdiction in line with the overwhelming majority of other jurisdictions.

Accordingly, pursuant to Article V, §4 of the South Carolina Constitution, Rule 402(i), SCACR, is amended to read as follows:

> **(i) Bar Examination.**
>
> **(1) When Given.** The Bar Examination shall be conducted twice each year on the last consecutive Monday, Tuesday, and Wednesday in February and July.
>
> **(2) Content; Grading; Passing.** The Bar Examination shall consist of seven (7) sections. Six (6) of these sections shall be composed of essay questions prepared by the Board of Law Examiners. The Chair of the Board shall assign a member of the Board to prepare and grade or supervise the preparation and grading of each essay section. The Multistate Bar Examination shall be the seventh (7^{th}) section. To pass the Multistate portion of the Examination, an applicant must attain a scaled score of at least 125. To pass an essay section, the applicant must obtain a score of seventy (70). Once an applicant reaches seventy (70) points on an essay section, that section will receive a passing grade and will not be graded further. An applicant must pass six (6) of the seven (7) sections to pass the Bar Examination; provided, however, that an applicant who receives a scaled score of 110 or less on the Mulitstate Bar Examination shall fail the Bar Examination without any grading of the essay questions. The Board shall notify the Clerk of the Supreme Court of the results of the essay sections.
>
> **(3) Anonymous Grading; Prohibited Comments in Answer Sheets and Booklets.** Applicants taking the Bar Examination shall be assigned an identification number that shall be used for the purposes of taking and grading the Examination. Except for the identification number and any other information the applicant may be directed to provide by those administering the Examination,

answer sheets or booklets for the Examination shall contain no other information revealing the identity of the applicant. Any reference to the applicant's economic status, social standing, employment, personal hardship or other extraneous information in the answer sheets or booklets is prohibited.

(4) Notification of Results. The Clerk of the Supreme Court shall send a letter to each applicant advising the applicant whether the applicant passed or failed the Bar Examination. Additionally, the names of those passing the Examination and the identification numbers of those failing the Examination shall be posted on the South Carolina Judicial Department Website.

(**5) Access to Examination Answers; Re-grading or Other Review.** No applicant shall be given access to the answers the applicant submitted during the examination. The results reported by the Board of Law Examiners are final, and no applicant shall be allowed to seek re-grading or any other review of the results of the examination.

(6) Request for Verification of Multistate Bar Examination. While no review or inspection of the Multistate Bar Examination (MBE) will be permitted, an applicant may request a hand grading of the MBE. Any such request must be filed with the Clerk of the Supreme Court along with the applicable fee[1] within fifteen days of the date of the letter of notification in (4) above.

(7) Prohibited Contacts. An applicant shall not, either directly or through an agent, contact any member or associate member of the Board of Law Examiners or any member of the Supreme Court regarding the questions on any section of the Bar Examination, grading procedures, or an applicant's answers. This provision does not prohibit an applicant from seeking verification of the MBE score as permitted by (6) above.

(8) Cheating on the Bar Examination. An applicant who cheats, aids or assists another applicant in cheating on the Bar Examination, or attempts to cheat or aid or assist another in cheating,

[1] This fee is currently seven dollars and sixty cents ($7.60) and should be paid by check payable to “ACT.”

> shall be guilty of contempt of the Supreme Court of South Carolina and may be punished accordingly. In addition, if it is determined that an applicant has cheated or aided or assisted another in cheating, the applicant shall fail the examination and the Court may prohibit the applicant from reapplying for up to five years. Further, if the applicant has already been admitted, the Court may vacate the admission or discipline the lawyer under Rule 413, SCACR.

This amendment shall be effective June 1, 2007, and shall apply to all bar examinations conducted after that date.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

John H. Waller, J., not participating.

Columbia, South Carolina
March 12, 2007

The Supreme Court of South Carolina

In the Matter of W. Benjamin McClain, Jr., Respondent.

ORDER

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

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

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

any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Charles Stuart Mauney, Esquire, has been duly appointed by this Court.

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

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

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

Columbia, South Carolina
March 13, 2007

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patricia Fickling, Appellant,

v.

City of Charleston, Respondent.

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

Opinion No. 4217
Heard January 9, 2007 – Filed March 12, 2007

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

E.T. Moore, Jr. and Angela W. Abstance, both of Barnwell, for Appellant.

James A. Stuckey, Jr., of Charleston, for Respondent.

GOOLSBY, J.: Patricia Fickling brought this negligence action against the City of Charleston after she stepped into a hole in a sidewalk and

fell, sustaining injuries. The sidewalk was located within the municipal limits, but on a right-of-way owned by the State of South Carolina. The trial court, sitting without a jury, granted the City's motion for a "directed verdict,"[1] finding as a matter of law the City had no duty to inspect and repair

[1] We recognize that a motion for a directed verdict under Rule 50, SCRCP, is appropriate only in jury trials. See Hinton v. Designer Ensembles, Inc., 335 S.C. 305, 318 n.3, 516 S.E.2d 665, 671 n.3 (Ct. App. 1999), rev'd on other grounds, 343 S.C. 236, 540 S.E.2d 94 (2000). Rule 41(b), SCRCP, permits a defendant, when an action is tried, as here, by the court without a jury, to "move for a dismissal." If granted, the dismissal, except in three well-defined instances not applicable here, will operate as an adjudication upon the merits unless the court in its order "otherwise specifies." Id.

In this case, the trial court granted a directed verdict pursuant to a motion for a directed verdict made by the City. In doing so, the trial court specified it granted the City's motion pursuant Rule 50(a), SCRCP, the rule applicable to motions for directed verdict, and, citing prior opinions of the supreme court and of this court, employed the standard that a trial court must use in determining whether to grant a directed verdict. Moreover, the trial court in its subsequent order denying Fickling's motion for reconsideration again specified it had "direct[ed] a verdict in favor of the defendant."

Aside from all that, both parties treated the order appealed from as one granting a directed verdict to the City as a matter of law. Neither brief to this court contained an argument that we should treat the trial court's ruling as an adjudication on the merits. See Ducworth v. Neely, 319 S.C. 158, 159 n.1, 459 S.E.2d 896, 897 n.1 (Ct. App. 1995) (viewing an order of judgment in which the trial court stated it had directed a verdict for the plaintiff as amounting to a judgment on the merits). Indeed, the City in its brief referred to cases in which the directed verdict standard was applied. The City asserted the evidence yielded only one inference and maintained Fickling's "complaint fail[ed] as a matter of law." The City concluded its brief by stating "the court should affirm the trial court's order and directed verdict." [Emphasis added.] For her part, Fickling asserted the following: "The [trial] court erred in granting a directed verdict to the City where the evidence was capable of yielding more than one inference." [Emphasis added.]

the sidewalk under South Carolina statutory law, general common law, or the theory of a voluntary undertaking. The trial court further found the City had no notice, either actual or constructive, of the defect as a matter of law. Fickling appeals. We affirm in part, reverse in part, and remand.

FACTS

In October 1999, Fickling visited the City while attending a four-day landscape design class offered at the Charleston Museum. Sometime after 4:00 p.m. on October 13, 1999, Fickling decided to walk down Meeting Street towards the Market Street area to do some shopping after her class. After walking several blocks, Fickling stepped into a hole in the sidewalk on the 300 block of Meeting Street and fell. At the time, the hole was partially covered by leaves. A photograph taken of the area indicates the sidewalk

---

At any rate, an unappealed ruling becomes the law of the case and neither party here took any exception to the method by which the trial court concluded the case. See Auto Owners Ins. Co. v. Langford, 330 S.C. 578, 583 n.2, 500 S.E.2d 496, 498 n.2 (Ct. App. 1998) (noting a trial court's ruling on an issue becomes the law of the case where the appellant fails to take exception to it both before the trial court and on appeal). Certainly, the City should not be heard to complain of a result that its own conduct induced.

Moreover, for us to view the order as an adjudication on the merits would turn the evidence in this case on its head. Instead of viewing the evidence in the light most favorable to Fickling, the non-moving party, which we would be required to do for a directed verdict, we would be required, if this were treated as an adjudication on the merits, to uphold the ruling if there was any evidence to support it, which would be a more favorable standard for the City. We do not believe it would be fair here to sua sponte transform the order in view of the fact that the trial court and both parties have repeatedly treated the motion and ruling in this case as one for a directed verdict as a matter of law. We therefore decline to view the trial court's grant of a directed verdict in the City's favor as an adjudication on the merits, the circumstances being what they are in this instance, particularly since the trial court gave this defendant exactly what it asked for.

appears to have been crushed in. Large cracks radiated out from a dirt hole that had formed where a portion of the sidewalk had been. In the middle of the dirt hole, however, one piece of concrete remained. The affected area was about two feet long, two feet across, and approximately three and a half inches deep.

Fickling broke her right arm, badly injured her knees, and sustained bruises and abrasions in the fall. She incurred $53,376.66 in medical bills for surgeries on her broken arm and on both of her damaged knees, as well as other medical expenses. She underwent medical treatment from October 1999 to April 2002 as a result of the accident and continues to have pain from her injuries.

Fickling filed this negligence action against the City in October 2002, alleging the City's failure to maintain the sidewalk proximately caused her injuries.[2]

It is undisputed that the section of Meeting Street where the accident occurred is located on a right-of-way owned by the State.[3] The City presented the testimony of Laura Sullivan Cabiness, the Director of the City's Department of Public Service, who stated the City typically repairs sidewalks only after receiving notification of a defect and generally does not conduct inspections. Cabiness stated if someone, such as a member of the public or a City employee, calls in a report about a defect, the call is usually forwarded to either the City's Engineering Division or its Streets and Sidewalks Division, both of which are part of the Department of Public Service, to

---

[2] The City repaired the portion of the sidewalk at issue, as well as several adjoining panels, after Fickling's fall. In a memo dated June 12, 2001, an inspector from the City's Engineering Division noted many of the adjacent panels of the sidewalk were also broken and the sidewalk had collapsed. The inspector opined large vehicles had been parking on the sidewalk, forming a long rut in the concrete and causing the surrounding damage. The inspector noted the "Streets and Sidewalks Division was notified on June 8, 2001 with instructions to inspect and repair."

[3] Fickling did not bring an action against the State.

follow up and inspect the reported defect and determine whether repairs should be made and who is responsible for making the repairs.

When the City receives a complaint about a State-owned right-of-way, the City first notifies the State about the problem and generally will make repairs only if it receives a response from the State explaining the State lacks sufficient funds to make the repairs or if it receives no response from the State. The City receives complaints about streets and sidewalks at its Engineering Division or its Streets and Sidewalks Division and records all complaints. No complaints or work orders were found regarding the area of Meeting Street where Fickling fell.

Fickling presented evidence that the Charleston Police Department has foot patrols, horse patrols, and vehicle patrols on Meeting Street. Parking enforcement officers and sanitation workers also cover Meeting Street. A City fire department station is located about two and a half blocks from where Fickling fell. She contended the City had a duty to maintain the streets and sidewalks and it had notice, either actual or constructive, of the defect. Fickling noted the City fielded calls about defects in the sidewalks and undertook repair and maintenance of sidewalks located within the municipal limits.

The City moved for a directed verdict. The trial court granted the motion, ruling as a matter of law that the City had no duty to inspect and maintain the sidewalk and that, in any event, it had no actual or constructive notice of the defect. The trial court thereafter denied Fickling's motion to alter or amend the judgment. This appeal followed.

STANDARD OF REVIEW

When reviewing the trial court's ruling on a motion for a directed verdict, we must employ the same standard as the trial court – that is, we must consider the evidence in the light most favorable to the non-moving

party.[4] When ruling on a motion for a directed verdict, the trial court is required to deny the motion if either the evidence yields more than one inference or its inference is in doubt.[5] When considering a motion for a directed verdict, neither the appellate court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony and evidence.[6]

LAW/ANALYSIS

I. Statutory Duty

On appeal, Fickling first argues the trial court erred in granting a directed verdict as to whether section 5-27-120 of the South Carolina Code imposes a statutory duty on the City to keep all streets in good repair and thus to inspect and maintain the sidewalk in question.

Section 5-27-120 generally provides that a city having over one thousand inhabitants shall keep all streets within the city in good repair. This statutory section provides as follows:

> The city or town council of any city or town of over one thousand inhabitants shall keep in good repair all the streets, ways and bridges within the limits of the city or town and for such purpose it is invested with all the powers, rights and privileges within the limits of such city or town that are given to the governing bodies of the several counties of this State as to the public roads.[7]

---

[4] Sauers v. Poulin Bros. Homes, Inc., 328 S.C. 601, 605, 493 S.E.2d 503, 504-05 (Ct. App. 1997).

[5] Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003).

[6] Sauers, 328 S.C. at 605, 493 S.E.2d at 505.

The South Carolina Code defines a "sidewalk" as a portion of a street.[8]

In Vaughan v. Town of Lyman,[9] our supreme court recently considered this precise question and held that section 5-27-120 "does not create a 'special duty' upon which an individual may base a tort action against a municipality."[10] The court explained section 5-27-120 defines a municipality's duty to the general public to maintain its streets, but it does not establish an "identifiable class of persons" intended to be protected and thus the public duty rule[11] would preclude a private right of action based on the statute.[12] Because section 5-27-120 does not impose a duty upon the City in the circumstances present here, we affirm the trial court's grant of a directed verdict as to whether the City had a statutory duty to repair and maintain the sidewalks within the municipal limits.

---

[7] S.C. Code Ann. § 5-27-120 (2004).

[8] Id. § 56-5-480 (2006).

[9] 370 S.C. 436, 635 S.E.2d 631 (2006).

[10] Id. at 442, 635 S.E.2d at 635.

[11] Under the public duty rule, "public officials are generally not liable to individuals for their negligence in discharging public duties as the duty is owed to the public at large rather than anyone individually." Id. at 441, 635 S.E.2d at 634 (quoting Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 388, 520 S.E.2d 142, 149 (1999)). Although the court found section 5-27-120 does not create a private right of action, it noted: "This Court continues to acknowledge the duty of a municipality to maintain its streets; however, we no longer observe the statutory basis for a private right of action. Instead, liability is now imposed through the waiver provisions of the Tort Claims Act." Id. at 442, 635 S.E.2d at 635.

[12] Id. at 443, 635 S.E.2d at 635.

II. Common Law Duty or Voluntary Undertaking

Fickling next argues the trial court erred in granting a directed verdict in favor of the City as to whether the City owed her a duty either under the general common law or under a theory of voluntary undertaking to maintain the sidewalks within the City limits.

a. Common Law

In Vaughan, a pedestrian brought a negligence action against the Town of Lyman after she tripped and fell on the Lawrence Street sidewalk, injuring her hands, right knee, back, and spine.[13] Over time, the sidewalk had become broken by overgrown tree roots.[14]

The trial court granted summary judgment to the Town, finding as a matter of law the Town did not owe a duty to Vaughan because it did not own, maintain, or control the sidewalk where Vaughan fell.[15] The trial court based its decision on several items, including an affidavit that explained Lawrence Street is owned by Spartanburg County and maintained by the State Highway Department, deeds showing the transfer of Lawrence Street to Spartanburg County, and photographs of street signs that indicated Lawrence Street is part of the State Highway System.[16]

Our supreme court reversed, holding there was a genuine issue of material fact so as to preclude the entry of judgment as a matter of law regarding whether the Town owed a duty to Vaughan to maintain its

---

[13] Id. at 439-40, 635 S.E.2d at 633.

[14] Id.

[15] Id. at 444, 635 S.E.2d at 635.

[16] Id.

sidewalks under either the common law or under the theory of a voluntary undertaking.[17]

Regarding a common law duty, the court, citing section 57-5-140[18] of the South Carolina Code, noted ownership of the street (and sidewalk) is not dispositive because "ownership and maintenance of the sidewalk by another entity does not prevent [the Town] from also maintaining or controlling the same sidewalk."[19]

The court noted Vaughan had submitted deposition testimony "to show that [the Town] exercised at least some control over Lawrence Street."[20] Specifically, Vaughan had submitted depositions from several persons to show the Town had assumed responsibility for the general maintenance of the streets and sidewalks by removing trees and filling potholes and it fielded citizen complaints about the streets and sidewalks.[21] The Town minutes also contained several references to actions taken by the Town to correct problems related to the Town's sidewalks.[22]

The court observed more than one inference could be drawn from the evidence when it was viewed in the light most favorable to Vaughan, the

---

[17] Id. at 448-49, 635 S.E.2d at 638.

[18] S.C. Code Ann. § 57-5-140 (2006) (stating ownership of a highway by the State "shall [not] prevent a municipality from undertaking any improvements or performing any maintenance work on [S]tate highways in addition to what the department is able to undertake with the available funds").

[19] Vaughan, 370 S.C. at 444, 635 S.E.2d at 636.

[20] Id. at 444, 635 S.E.2d at 635 (emphasis added).

[21] Id. at 444, 635 S.E.2d at 635-36.

[22] Id. at 444, 635 S.E.2d at 636.

non-moving party.[23] Summary judgment was, therefore, inappropriate on the issue of the Town's common law duty to Vaughan because, the court held, "there is a genuine issue of fact regarding whether [the Town] exercised any control over the streets in the [T]own, specifically Lawrence Street."[24]

Similarly, in the current appeal, there is evidence that the City made repairs to sidewalks within the municipality and, thus, exercised some measure of control over both the municipal- and State-owned areas. The only limitation was, according to the City, that it would make repairs only as things were reported to it and would first check with the State to see if it would act before making any repairs. This limitation, however, does not alter the fact that the City exercised some measure of control over both municipal- and State-owned streets and sidewalks.

The trial court here focused on ownership, stating "although one falls on a city sidewalk, that in itself is not sufficient to establish that the City has ownership and, therefore, a duty to inspect and maintain all sidewalks." [Emphasis added.] We believe Vaughan has recently clarified however, that ownership is not the dispositive element in evaluating whether a duty exists; rather, control over the premises is the determinative factor.

It is unclear from the Vaughan case whether our supreme court would differentiate our current appeal based on the degree of control exerted by the City; i.e., the City here purported to exert a "limited" measure of control over property with the municipal limits. The Vaughan court did, however, base its determination that summary judgment was inappropriate on the ground there was conflicting evidence as to whether the Town "exercised any control" over the streets and sidewalks.[25]

---

[23] Id.

[24] Id. (emphasis added).

[25] Id. (emphasis added).

In the current case, as in Vaughan, the issue was decided by the trial court as a matter of law and, viewing the evidence in the light most favorable to Fickling, as we are required to do, we hold there is more than one inference that may be drawn as to whether the City exercised any control over the sidewalks in the municipal limits, including the sidewalk at issue here. We therefore hold the trial court erred in granting a directed verdict to the City regarding the City's common law duty to maintain the sidewalk on Meeting Street.

b. Voluntary Undertaking

In Vaughan, our supreme court additionally found the issue of whether the Town owed a duty to Vaughan based on a voluntary undertaking of the repair and maintenance of the Town's streets and sidewalks was inappropriately decided as a matter of law on summary judgment because the evidence was susceptible of more than one reasonable inference.[26] The court stated the trial court's decision granting summary judgment "was primarily based on evidence of ownership of Lawrence Street by Spartanburg County and the State's authority over the street as a result of including it in the State Highway System."[27] The court noted that ownership was not determinative, however, of whether the Town voluntarily undertook the duty to maintain the Town's streets and sidewalks, including Lawrence Street.[28]

Our supreme court stated Vaughan had presented some evidence regarding a voluntary undertaking, such as references to sidewalk maintenance in the Town minutes, Town ordinances regulating the sidewalks,

---

[26] Id. at 447-48, 635 S.E.2d at 637-38.

[27] Id. at 447, 635 S.E.2d at 637.

[28] Id. at 448, 635 S.E.2d at 637-38.

and deposition testimony showing the Town was aware of the condition of Lawrence Street without reporting the condition to any other authority.[29] Vaughan also submitted evidence indicating the Town had previously handled complaints about the sidewalks from Town residents and had removed hazardous tree roots disrupting the sidewalks.[30] Our supreme court concluded there was "a genuine issue of fact regarding whether [the Town] undertook the duty of maintaining city streets, even though all city streets were not owned by [the Town]."[31]

In the appeal now before us, Fickling presented evidence that the City had fielded complaints from residents about hazards to the sidewalks, had maintained a log of calls from residents, including repair calls, and had a policy in place, as well as employees, to handle repairs to sidewalks within the municipal limits, including those that were City-owned and those that were non-owned. The trial court expressly found the City admittedly engaged in a voluntary undertaking in this instance, but noted in its order: "Although the City in the instant case admits that it undertakes an obligation to maintain and repair public sidewalks, it only does so when it has notice of the dangerous condition or when the City creates the condition itself." In this case as in Vaughan, however, we believe there was a genuine issue of material fact as to whether the City had undertaken a duty of maintaining streets within the municipality, including Meeting Street.

Moreover, there was conflicting evidence presented as to whether the City had constructive notice[32] of the defect in the Meeting Street sidewalk. In the light most favorable to Fickling, there was at least some evidence that (1) there were numerous City personnel within the area of the defect who could

---

[29] Id. at 447, 635 S.E.2d at 637.

[30] Id.

[31] Id. at 447-48, 635 S.E.2d at 637.

[32] Fickling does not argue on appeal that the City had actual notice of the defect in the Meeting Street sidewalk.

have seen and reported the problem;[33] (2) the condition had existed for a while;[34] and (3) the City had an established policy in place to deal with

---

[33] The record reflects City employees, such as fire department personnel, police officers, and others regularly traversed the area where the sidewalk was damaged and the defect was in a high-traffic area of the City. Cf., e.g., Robison v. White City, 94 P. 141, 142 (Kan. 1908) (discussing, with approval, the trial court's instruction that if the defendant city or its officers and agents, by the exercise of ordinary care and diligence, could have known of or discovered the existence of a defect in the sidewalk and remedied the condition, the law implies notice to the defendant city of the existence of the condition); Keen v. Mayor of Havre de Grace, 48 A. 444, 444-45 (Md. 1901) (holding that, where the plaintiff stepped in a hole in the sidewalk and injured himself, there was a question of fact as to whether the city had constructive notice of the defect; the court noted that where there was evidence the hole was in the bed of the sidewalk, was not obscured by anything from the full view of anyone passing along that part of the sidewalk, and had been present for several weeks, the city's negligence was for the jury because a jury could find either that the city was negligent in not making the repair if its proper officers or agents knew of its existence or, if they did not have knowledge of its existence, that they did not exercise that active vigilance to see that the sidewalk was kept in a reasonably safe condition for public travel); see id. at 445 ("By 'constructive notice' is meant such notice as the law imputes from the circumstances of the case. It is the duty of the municipal authorities to exercise an active vigilance over the streets, to see they are kept in a reasonably safe condition for public travel. They cannot fold their arms and shut their eyes, and say they have no notice. After a street has been out of repair . . . and there has been full opportunity for the municipality, through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice, and charges it with negligence." (quoting Todd v. City of Troy, 61 N.Y. 506, 509 (N.Y. 1875) (emphasis added)); Todd v. City of Troy, 61 N.Y. 506, 509-10 (N.Y. 1875) (holding this negligence case was properly submitted to a jury where the plaintiff slipped and fell on ice extending across the city sidewalk that had accumulated for several days and was concealed by a slight covering of snow – the water came down a

defects in the sidewalks, and problems with the sidewalks were an expected and "recurrent"[35] or "continual"[36] condition of which it had notice.[37]

---

conductor from a nearby building and had accumulated on prior occasions; the court concluded a question of fact existed as to the city's negligence in failing to keep the sidewalk in a suitable condition for public travel).

[34] According to the City's Director of the Department of Public Service (Cabiness), the hole "had probably been that way for a while . . . ." See generally Jindra v. City of St. Anthony, 533 N.W.2d 641, 644 (Minn. Ct. App. 1995) ("Constructive notice arises when a condition has existed for such a period of time that a municipality in the use of reasonable care should have discovered the condition."). Cf., e.g., Wintersteen v. Food Lion, Inc., 344 S.C. 32, 36-37 n.1, 542 S.E.2d 728, 730 n.1 (2001) (noting generally that constructive notice can be established by evidence that a defect existed for a sufficient length of time for the defendant to have discovered the defect and remedied it).

[35] Wintersteen, 344 S.C. at 37 n.1, 542 S.E.2d at 730 n.1.

[36] Id.

[37] The City had a policy in place for handling recurring maintenance to streets and sidewalks within the municipal limits. Both the City's Engineering Division and its Streets and Sidewalks Division accepted complaints about sidewalk maintenance issues and responded to problems by having its employees make follow-up inspections to determine the nature of the defect and to make the necessary repairs. Cf. Pinckney v. Winn-Dixie Stores, Inc., 311 S.C. 1, 4, 426 S.E.2d 327, 329 (Ct. App. 1992) (holding Winn-Dixie was not entitled to a directed verdict in its favor in this slip-and-fall case because there was evidence from which a jury might have inferred the store manager had knowledge of the potential hazard created by the continuous presence of fallen leaves on the floor in the area near the store's poinsettia display); Henderson v. St. Francis Cmty. Hosp., 303 S.C. 177, 180-81, 399 S.E.2d 767, 769 (1990) (holding, in case where the plaintiff slipped and fell on sweet gum balls from nearby trees, a jury question existed as to the negligence of the

We therefore conclude the issue regarding whether the City owed Fickling a duty on the basis of a voluntary undertaking should not have been decided as a matter of law and the trial court erred in granting a directed verdict to the City on this basis.

CONCLUSION

Based on the foregoing, the grant of a directed verdict in favor of the City on the ground section 5-27-120 imposes no statutory duty on the City that would create a private right of action is affirmed. The grant of a directed verdict to the City on the issues of whether there was a common law duty or a voluntary undertaking by the City is reversed and remanded for further proceedings in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STILWELL and SHORT, JJ., concur.

---

hospital in failing to either remove the trees or employ safety measures when it had actual and constructive knowledge of the dangerous condition caused by the trees; the hospital had previously been advised to remove the trees because they produced debris that created a maintenance problem).

Our supreme court has observed that both Pinckney and Henderson involved "conditions [that] were of such a recurrent nature that the defendants were chargeable with constructive notice on the day of the accident" because they established certain patterns "wherein the recurrence is of such a nature as to amount to a continual condition" and this, coupled with other factors, "may be sufficient to create a jury issue" as to constructive notice. Wintersteen, 344 S.C. at 37 n.1, 542 S.E.2d at 730 n.1.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Andrea S. Shorb, Appellant,

v.

Patrick Shorb, Respondent.

Appeal From Laurens County
Stephen S. Bartlett, Family Court Judge

Opinion No. 4218
Submitted January 1, 2007 – Filed March 19, 2007

AFFIRMED IN PART and REVERSED IN PART

H. Michael Spivey, of Greenville, for Appellant.

Andrew G. Goodson, of Fountain Inn, for Respondent.

WILLIAMS, J.: The family court ordered Patrick Shorb (Husband) to transfer certain stock options, which were unmatured and

nonvested on the date of filing, to Andrea Shorb (Wife).[1] It further ordered Husband to pay Wife a portion of the proceeds from options Husband exercised and sold before the date of filing. Husband appeals the family court's decision, claiming Wife was not entitled to the full award because only some of the options were marital property. We affirm in part and reverse in part.

FACTS

Husband and Wife married on May 10, 1996. They had no children during their seven-year marriage. On the date of divorce, Husband was in a managerial position at Wal-Mart, and Wife worked as a private court reporter. Wife filed for divorce on October 27, 2003, citing Husband's adultery as the ground for divorce.

The court held a final hearing on November 30, 2004 and approved the parties' settlement agreement on December 15, 2004. Among other assets, the settlement agreement entitled Wife to fifty-five percent of Husband's Wal-Mart stock options. The parties agreed the family court would retain jurisdiction to determine what portion of the stock options was marital property. Both parties submitted briefs and affidavits supporting their positions.

---

[1] As a general rule, stock options are vested or nonvested, matured or unmatured, and restricted or unrestricted. See Fountain v. Fountain, 559 S.E.2d 25, 31 (N.C. Ct. App. 2002) (citing Equitable Distribution of Stock Options, 17 EQUITABLE DISTRIBUTION JOURNAL 85, 86 (Aug. 2000)). An option is vested if the right to exercise the option cannot be cancelled. Id. at 32 n.11. An option is matured, for equitable distribution purposes, if the right to exercise the option exists before the date of filing. Id. Finally, an option is restricted if it cannot be alienated to another party. Id. Because neither party presented any evidence regarding whether the options were restricted, we do not address this aspect of the options in our opinion.

On April 15, 2005, the family court entered a supplemental order relating to the stock options. It found that all stock options acquired during marriage, but prior to the filing of divorce, were compensation for Husband's employment at Wal-Mart and constituted marital property.

The court also correctly noted the stock options' vesting dates did not affect whether they were marital property; rather, the vesting dates affected the value of those options. In valuing the options Husband sold in July 2003, the family court held that pursuant to the agreement Wife was entitled to fifty-five percent of the net value of the stock options on the date of sale. The family court ordered Husband to transfer $24,099.17 to Wife within thirty days of the order.

The family court also determined Wife was entitled to fifty-five percent of all stock options held on the date of the final hearing, even though only a certain percentage of those options had fully vested.[2] The family court ordered Husband to transfer 1,096 of the total 2,001 stock options to Wife within thirty days of the order. This appeal follows.

---

[2] Husband maintains that the date of valuation should have been the date of filing rather than the date of the final hearing. In his brief, Husband asserts scant authority for this proposition, merely stating the date of valuation was both "wrong" and "unfair." Regardless, we find the date of valuation for the options at issue to be immaterial. The family court could not currently value the nonvested options on the date of filing or on the date of the final hearing because the fair market value of Wal-Mart's stock would undoubtedly change before the parties exercised these options. Further, the family court was only to "make a decision as to how [many of the stock options are] marital property" as the parties previously "agreed that [Wife] is entitled to 55% of the amount the Court determines to be marital property." Because the family court's only responsibility was to decide which options were marital and then to award Wife her allotted share, the valuation issue has no substantive bearing on the outcome.

STANDARD OF REVIEW

The apportionment of marital property is within the discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. Wooten v. Wooten, 364 S.C. 532, 542, 615 S.E.2d 98, 103 (2005). In appeals from the family court, this Court may find facts in accordance with its own view of the preponderance of the evidence. Hatfield v. Hatfield, 327 S.C. 360, 363, 489 S.E.2d 212, 215 (Ct. App. 1997). This broad scope of review does not require us to disregard the family court's findings. Bowers v. Bowers, 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct. App. 2002). Nor are we required to disregard the findings below or ignore the better vantage point the family court occupies in determining witness credibility. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981). The burden is upon the appellant to convince this Court that the family court erred in its findings of fact. Dubose v. Dubose, 259 S.C. 418, 423, 192 S.E.2d 329, 331 (1972).

LAW/ANALYSIS

Husband first contends the nonvested stock options are non-marital property, which are not subject to equitable distribution.[3]

[3] Husband lists several additional grounds in his brief for overruling the family court, including: (1) the stock options were never transmuted into marital property; (2) the family court should have reviewed the parties' settlement agreement, even though both parties consented to it, as equity and fairness require a different outcome; and (3) the valuation date for the stock options should have been the date of filing rather than the date of the hearing.

Husband fails to sufficiently support his contentions by either case law or the record. More importantly, Husband concedes from the outset in his brief that "the only issue left for appeal . . . at the time his present attorney took over the case was the stock [o]ption issue." Husband's only argument heading in his brief is "Did the Trial Court

Further, Husband avers that he exercised certain vested stock options prior to the date of filing, which the family court erroneously included as part of the marital estate. Based on these assertions, Husband argues Wife was entitled only to the portion of currently held options that vested and were in existence on the date of filing. While we reject the first argument, we accept the latter.

I. Nonvested Stock Options

Pursuant to Section 20-7-473 of the South Carolina Code (Supp. 2006), marital property is "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . ." Section 20-7-473 also includes several exceptions to marital property; however, none of these exceptions explicitly mention vested or nonvested stock options.

We have yet to address in South Carolina whether employee stock options are marital property, subject to equitable distribution. In resolving this issue, we first look to how this State has characterized pension benefits, which are similar to stock options. [4]

Err in Determining That Respondent Should Receive 1,096 Shares of Appellant's Stock Options From Wal-Mart?" Husband's additional arguments must fail as the only issue properly submitted and argued to this Court is the division of the stock options. See Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) (When "an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal."); see also Rule 208(b)(1)(D), SCACR (A "brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority.").

[4] According to the article, Equitable Distribution of Stock Options, *supra* note 1, at 87, "Most states treat stock options, vested and nonvested, 'in a manner analogous to the treatment' of retirement

Like stock options, the Code does not specifically define pension benefits as marital property, but this Court has consistently held that both vested and nonvested retirement benefits are marital property if the benefits are acquired during the marriage and before the date of filing. See generally Hickum v. Hickum, 320 S.C. 97, 99, 463 S.E.2d 321, 322 (Ct. App. 1995) ("'Since retirement plans were not excluded by the [Code], retirement plans are therefore includable as marital property subject to division.'" (quoting Ferguson v. Ferguson, 300 S.C. 1, 386 S.E.2d 267 (Ct. App. 1989))); Hardwick v. Hardwick, 303 S.C. 256, 259-60, 399 S.E.2d 791, 793 (Ct. App. 1990) (finding employer's contribution to vested retirement fund was a form of additional compensation and constituted marital property); Kneece v. Kneece, 296 S.C. 28, 33, 370 S.E.2d 288, 291 (Ct. App. 1988) (holding husband's civil service retirement fund was part of marital estate); see also Ball v. Ball, 312 S.C. 31, 34-35, 430 S.E.2d 533, 534-35 (Ct. App. 1993) (holding nonvested, unvalued pension benefits are a form of deferred compensation in which a party holds a vested, legally enforceable right so that the benefits are marital property subject to equitable distribution).

Moreover, vested pension benefits are a "joint investment of both parties" and "constitute an earned property right which, if accrued during the marriage, [are] subject to equitable distribution." Tiffault v. Tiffault, 303 S.C. 391, 392-93, 401 S.E.2d 157, 158 (1991); see also Hardwick, 303 S.C. at 260, 399 S.E.2d at 793 (If an employer "makes a contribution to a retirement fund as an employment benefit or as a form of additional compensation . . . the contribution is marital property . . . ."). Even if the vested benefits have yet to mature, they are properly includable in the marital estate. See Kneece, 296 S.C. at 33, 370 S.E.2d at 291.

We find stock options to be comparable to pension benefits in that they are also employment benefits. Like pension benefits, the

---

benefits." (*cited with approval in* Fountain, 559 S.E.2d at 32 n.12).

determinative factor for equitable distribution purposes is not when the options mature, but when the options are earned. See MacAleer v. MacAleer, 725 A.2d 829, 833 (Pa. Super. Ct. 2001) ("The determining factor is not when the right to exercise the option matures, but whether the stock option is earned prior to the date of separation."). Employers may grant options for a variety of reasons, which must be considered in deciding when the option is earned. Most jurisdictions determine the nature of stock options by whether the options are compensation for past services or are an incentive for future services. See, e.g., Hopfer v. Hopfer, 758 A.2d 673, 677 (Conn. App. Ct. 2001) (holding that stock options rendered entirely as incentive for future services are not marital property subject to equitable distribution); MacAleer, 725 A.2d at 835 (finding that employer's award of stock options to compensate employee for past services is earned when awarded, and if granted during marriage, it is marital property, even if the right to exercise the options matures after the date of filing); In re Balanson, 25 P.3d 28, 32 (Colo. 2001) (holding that stock options granted in consideration for future services do not constitute marital property).

In considering other jurisdictions' approaches, we believe the approach most consistent with this State's equitable apportionment scheme and with the purpose of stock options is to classify both vested and nonvested stock options as being earned when granted, and if granted during the parties' marriage, the options are marital property. See Bowman v. Bowman, 357 S.C. 146, 158, 591 S.E.2d 654, 660 (Ct. App. 2004) ("[C]lassification of property as marital or nonmarital must be determined in light of the true nature and purpose of the benefit."). One can argue that stock options serve a hybrid purpose in that they compensate an employee for past labor but also serve as an incentive to remain with the employer. Despite these competing functions, we believe the overriding purpose is to create a form of deferred compensation, which is exercisable at a determinate date in the future.

In our view, this approach parallels our position on pension benefits and is in accord with several other jurisdictions that have considered this same issue. These jurisdictions treat stock options as

marital property regardless of when the right to exercise the options matures as long as the options are granted as compensation for services rendered during the parties' marriage. See Fountain, 559 S.E.2d at 32 (stating nonvested stock options are a salary substitute or a deferred compensation benefit, and if received during marriage and before filing, the options are marital property, even if they cannot be exercised until after the parties divorce); Jensen v. Jensen, 824 So.2d 315, 319 (Fla. Dist. Ct. App. 2002) (holding nonvested stock options gained prior to filing represent assets accumulated during marriage and are subject to equitable distribution); Fisher v. Fisher, 769 A.2d 1165, 1168 (2001) (finding nonvested stock options are a form of deferred compensation, akin to pension benefits, and if earned by the employee prior to filing, they are marital property).

Accordingly, we hold the family court correctly classified all of the stock options in issue as marital property. Based on the facts, the family court determined the options were compensation for Husband's employment. This finding is supported by a memo from Wal-Mart executives, which states that these stock options are an "important part of [an employee's] compensation package" and serve to encourage employees to create "improved Company results and enhanced Shareholder value." As a part of Husband's compensation, Wife was entitled to a share of the stock options that Wal-Mart granted to Husband during the parties' marriage.

We recognize contingencies exist, such as Husband's continued employment, for both parties to receive their share of stock options. This disposition does not force Husband to cash in all the stock options and preemptively pay Wife before the options vest. In clarifying the family court's order, we note that Husband is only responsible for delivering the stock options to Wife that have vested by the date of this opinion.

To date, only seventy-two options have not fully vested. Wife's share of these stock options should be transferred to Wife by appropriate order. It is then Wife's responsibility to exercise her

options before the options' expiration date. If some occurrence prevents Husband from exercising his options, it will likewise affect Wife in the same manner. See Ball, 312 S.C. at 35, 430 S.E.2d at 535 (holding that if the husband's benefits never vest, the wife is not entitled to receive any of his pension benefits as neither party would suffer disproportionately in relation to the entire marital estate).

II. Vested and Sold Stock Options

Husband next contends the stock options sold in July 2003 were not in existence on the date of filing; therefore, the proceeds from that sale should not have been distributed as part of the marital estate. We agree.

For the family court to properly include property within the marital estate, two factors must coincide. Bowman, 357 S.C. at 155, 591 S.E.2d at 658; see also § 20-7-473. First, the property must be acquired during the marriage. Id. Second, the property must be owned on the date of filing or commencement of marital litigation. Id.

The ownership prong can potentially raise troublesome issues if the family court overlooks assets which should rightly be included in the marital estate, but which are non-existent on the date of filing due to a party's misconduct. See, e.g., Bowman, 357 S.C. at 155, 591 S.E.2d at 659; Panhorst v. Panhorst, 301 S.C. 100, 105, 390 S.E.2d 376, 379 (Ct. App. 1990). Consequently, if a party attempts to unfairly extinguish ownership of marital property before the date of filing or to improperly delay ownership of marital property until after litigation is commenced, the family court must include that property in the marital estate. To do otherwise would "promote fraud, reward misconduct, and contravene legislative intent." Bowman, 357 S.C. at 155, 591 S.E.2d at 659.

The family court's order confirms that while Husband acquired the stock options during the parties' marriage, he did not own the options on the date of filing. Furthermore, while the parties disagree

over whether the funds were spent for marital or non-marital purposes, they both agree that the proceeds from the sale of the stock options were disposed of before filing.

Proceeds from Husband's stock options will be considered marital only if the Wife introduces clear and convincing evidence to establish fraud in relation to Husband's sale of the options. See Devlin v. Devlin, 89 S.C. 268, 272, 71 S.E. 966, 968 (1911) ("[F]raud will not be presumed, but [one] who alleges it must prove it."); see also Armstrong v. Collins, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005) ("Fraud must be shown by clear and convincing evidence.").

Wife's only assertion of fraud is contained in her affidavit when Wife states: "When [Husband] sold his stock options on July 21, 2003, he did so without my knowledge or consent and [this] was done with the sole intent of depriving me of my rightful marital share." Husband, on the other hand, claims that Wife directly received money from the stock options' sale and that Husband paid other debts incurred by Wife with the proceeds from that sale. Both parties' arguments are tantamount to a swearing match. Because Wife presented no additional corroborating evidence, we cannot presume Husband acted in a fraudulent manner. See Young v. Goodyear Serv. Stores, 244 S.C. 493, 500, 137 S.E.2d 578, 582 (1964) ("It has been many times stated that fraud is not presumed, and that one who charges another with fraud and deceit as a basis of a cause of action must establish such by clear, cogent and convincing evidence.").

Husband's sale of the July 2003 stock options before the date of filing negates the ownership prong, which is necessary to classify the proceeds from the sale of the options as marital. Further, no clear proof exists that Husband committed fraud when he disposed of the options. As such, we reverse the portion of the family court's order that required Husband to pay Wife $24,099.17.

CONCLUSION

Based on the foregoing, we hold the family court correctly determined the nonvested stock options, granted during the parties' marriage and before the date of filing, were marital property. Wife was properly entitled to fifty-five percent of these marital stock options. Further, the family court erred in granting Wife fifty-five percent of the proceeds from the stock options sold prior to the date of filing. The family court's decision is accordingly

AFFIRMED IN PART and REVERSED IN PART.[5]

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

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and Treatment of Renauld L. Brown

Respondent,

v.

The State **Appellant.**

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No. 4219
Submitted March 1, 2007 – Filed March 19, 2007

REVERSED and REMANDED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Deborah R.J. Shupe, Assistant Attorney General Brandy A. Duncan, all of Columbia, for Appellant.

Renauld L. Brown, of Spartanburg, Pro Se Respondent.

ANDERSON, J.: The State appeals the circuit court's order finding the State had not shown probable cause to believe Renauld L. Brown is a sexually violent predator. We reverse and remand.[1]

FACTUAL/PROCEDURAL BACKGROUND

At approximately 6:00 a.m., on September 10, 2000, Renauld L. Brown was caught peeping in the windows of a thirty-six year old woman's home. In November of that year, Brown was indicted on one count of eavesdropping/peeping tom for the incident. Thereafter, Brown was seen looking into the same victim's windows on January 13, 2001 at approximately 3:00 a.m., and again on April 10, 2001 at 4:00 a.m. On October 10, 2001, Brown was convicted of one count of stalking and two counts of entering premises after notice in connection with the 2000 and two 2001 incidents. He was sentenced to thirty days with credit for time served.

On the evening of October 12, 2001, two days after being released from jail, Brown was seen peeping into the windows of the same woman's abode. While his victim was on the telephone calling police, Brown attempted to break down her back door. He was subsequently apprehended and charged with voyeurism, stalking, and attempted burglary. On December 19, 2002, Brown was convicted on all three charges and sentenced to three years suspended to 433 days (time served) for voyeurism, one year for stalking, and five years suspended to 433 days (time served) for attempted burglary.

On January 13, 2003, twenty-five days after being released from jail on the December 2002 convictions, Brown was seen shortly before midnight peeping into the windows of a house belonging to the sister of the victim of his earlier offenses. When police arrived, Brown attempted to flee but was captured after a brief foot chase. After he was arrested and placed in the patrol car, Brown kicked one of the officers and began kicking the vehicle's doors. He was charged with eavesdropping/peeping tom and resisting arrest.

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

On January 7, 2005, Brown pled guilty to voyeurism and was sentenced to three years suspended to thirty months and three years probation, with credit for time served. The sentencing judge made a specific finding that the offense should be considered a sexually violent act under the South Carolina Sexually Violent Predator Act (S.C. Code Ann. §§ 44-48-10 to 44-48-170 (Supp. 2006)).

Brown arrived at the South Carolina Department of Corrections on January 10, 2005, and was released on probation on January 11, 2005. On June 4, 2005, less than six months after being released on probation, Brown was seen looking into the windows of yet another home. The house belonged to a twenty-eight year old female, unrelated to his prior victims. Brown pled guilty to one count of eavesdropping/peeping tom on June 29, 2005, and was sentenced to eighteen months incarceration, with the special condition that he receive mental health counseling.

Pursuant to the Sexually Violent Predator Act, and particularly in light of the fact he had a previous qualifying offense, prior to Brown's release from the Department of Corrections, the multidisciplinary committee reviewed his case. On October 24, 2005, the committee found probable cause to believe Brown to be a sexually violent predator. On November 22, 2005, the prosecutor's review committee also found probable cause to believe Brown is a sexually violent predator and referred the case for further proceedings under the Act.

On December 2, 2005, the State commenced an action seeking to commit Brown for long term control, care, and treatment. The circuit judge found the State's petition set forth sufficient probable cause to believe Brown to be a sexually violent predator and ordered his detention pending a probable cause hearing.

The matter was called for a probable cause hearing in the circuit court on February 15, 2006. Brown was present with counsel. The state argued Brown's history indicated he has a mental abnormality that causes him serious difficulty in controlling his deviant behavior. The State further averred Brown's lack of sex offender treatment of any kind make him a significant risk to re-offend if not confined for long-term control, care and

treatment. In light of the evidence indicating Brown's inability to control his behavior and his significant risk to re-offend, the State asked the circuit court to find probable cause and order that Brown be evaluated by a qualified expert pursuant to the Code.

Brown argued that even though his conduct was against the law, he had not committed an act of violence, and therefore, the State could not show probable cause that he would commit future acts of sexual violence.

During the proceeding, the circuit court stated:

> [I]t's not like he's [Brown] just oblivious to the fact that [his offenses] ought to be considered some sort of deviant behavior.
>
> . . .
>
> He ought to have sense enough to know he needs counseling based upon his prior behavior. And if he had that treatment or that counseling at his request, it might be that the state wouldn't even be here with this petition today, you see.
>
> That's one concern they have, is that he's not received any treatment for his obvious misbehavior and it's likely that it's needed, and that's likely to be true. And therefore I say he ought to understand that just based on his prior behavior and his difficulties. That's got nothing to do with probable cause.

The circuit court dismissed the action, finding the State had not established probable cause to believe Brown is a sexually violent predator. The entire substantive body of the judge's order read:

> This matter came before this Court for hearing on the petition of the petitioner, pursuant to S.C. Code Ann. Section 44-48-80, for the Court to determine whether probable cause exists to believe

> that the respondent is a sexually violent predator as defined in S.C. Code Ann. Section 44-48-30. After a consideration of the showing made this Court finds that the Attorney General has failed to establish the existence of probable cause to believe that the respondent is a sexually violent predator and therefore the petition is dismissed with prejudice.

STANDARD OF REVIEW

"On review, the appellate court will not disturb the hearing count's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's finding." In re Care and Treatment of Tucker, 353 S.C. 466, 470, 578 S.E.2d 719, 721 (2003); see also In re Treatment and Care of Luckabaugh, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002) (citing Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976)) (on appeal of a non-jury law case, the findings of fact will not be disturbed unless found to be without evidentiary support). In an appeal regarding sufficiency of the evidence in a sexually violent predator case, we may only reverse the trial court if there is no evidence to support the trial judge's ruling. In re Care and Treatment of Harvey, 355 S.C. 53, 59, 584 S.E.2d 893, 896 (2003) (citing In re Matthews, 345 S.C. 638, 646, 550 S.E.2d 311, 315 (2001)). In other words, this court is concerned with the existence of evidence, not its weight. Id.

LAW/ANALYSIS

South Carolina's Sexually Violent Predator Act ("SVP Act" or "Act"), S.C. Code Ann. §§ 44-48-10 to 44-48-170 (Supp. 2006), provides for the involuntary civil commitment of sexually violent predators who are "mentally abnormal and extremely dangerous." S.C. Code Ann. § 44-48-20 (Supp. 2006). The Act is not intended to be punitive in nature. The quiddity of the act is to: (1) meet the special needs of sexually violent predators; (2) address the significant likelihood they will engage in repeated acts of sexual violence if not treated for their mental conditions; and (3) assess the risks requiring their involuntary civil commitment in a secure facility for long-term

control, care, and treatment. S.C. Code Ann. § 44-48-20 (Supp. 2006). Noting "the nature of the mental conditions from which sexually violent predators suffer and the dangers they present," our General Assembly found "it is necessary to house involuntary committed sexually violent predators in secure facilities separated from persons involuntarily committed under traditional civil commitment statutes." S.C. Code Ann. § 44-48-20 (Supp. 2006).

The SVP Act defines a "sexually violent predator" as a person who: "(a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30 (1) (Supp. 2006).

Commitment of someone under the SVP Act typically begins when a person convicted of a sexually violent offense is scheduled to be released from custody. See S.C. Code § 44-48-40(A) (Supp. 2006). When a person has been imprisoned for a sexually violent offense, law requires that the agency with jurisdiction over that person give notice to both the Attorney General and a multidisciplinary team specially designed to evaluate the particular offender. Id. Typically, such notice must be provided in writing at least one hundred eighty days prior to the person's release. See § 44-48-40(A)(1) (Supp. 2006).

The multidisciplinary team must consist of: "(1) a representative from the Department of Corrections; (2) a representative from the Department of Probation, Parole and Pardon Services; (3) a representative from the Department of Mental Health who is a trained, qualified mental health clinician with expertise in treating sexually violent offenders; (4) a retired judge appointed by the Chief Justice who is eligible for continued judicial service pursuant to Section 2-19-100; and (5) an attorney with substantial experience in the practice of criminal defense law to be appointed by the Chief Justice to serve a term of one year." S.C. Code Ann. § 44-48-50 (Supp. 2006). This team reviews the person's records to determine if he or she satisfies the definition of a sexually violent predator. Id. If the multidisciplinary team determines that the person meets the definition, the

body forwards its assessment and all relevant records to a prosecutor's review committee. Id.

The prosecutor's review committee then "determine[s] whether or not probable cause exists to believe the person is a sexually violent predator." S.C. Code Ann. § 44-48-60 (Supp. 2006). In additional to the records and reports provided by the multidisciplinary team, the committee must consider any information provided by the circuit solicitor who originally prosecuted the person. Id.

If the prosecutor's review committee finds probable cause exists to believe the person is sexually violent predator, the Attorney General must file a petition asking the court to make a probable cause determination.

> When the prosecutor's review committee has determined that probable cause exists to support the allegation that the person is a sexually violent predator, the Attorney General must file a petition with the court in the jurisdiction where the person committed the offense and must notify the victim that the committee found that probable cause exists. The Attorney General must also notify the victim of the time, date, and location of the probable cause hearing before the court. The petition, which must be filed within thirty days of the probable cause determination by the prosecutor's review committee, must request that the court make a probable cause determination as to whether the person is a sexually violent predator. The petition must allege that the person is a sexually violent predator and must state sufficient facts that would support a probable cause allegation.

S.C. Code Ann. § 44-48-70 (Supp. 2006).

"Upon filing of a petition, the court must determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator." S.C. Code Ann. § 44-48-80(A) (Supp. 2006). The probable cause hearing is required within seventy-two hours after the person is taken into custody. S.C. Code Ann. § 44-48-80(B) (Supp. 2006). At the hearing, the law instructs the court to: "(1) verify the detainee's identity; (2)

receive evidence and hear arguments from the person and the Attorney General; and (3) determine whether probable cause exists to believe that the person is a sexually violent predator." Id. The suspected predator is guaranteed: "(1) to be represented by counsel; (2) to present evidence on the person's behalf; (3) to cross-examine witnesses who testify against the person; and (4) to view and copy all petitions and reports in the court file." S.C. Code Ann. § 44-48-80(B) (Supp. 2006).

"If the court determines that probable cause exists to believe that the person is a sexually violent predator, the person must be taken into custody if he is not already confined in a secure facility," in order to await his or her commitment trial to be held. S.C. Code Ann. § 44-48-80(A) (Supp. 2006). This trial will be heard by a judge unless the detainee or Attorney General requests a jury trial. The State has the burden to prove the person is a sexually violent predator beyond a reasonable doubt. In the Matter of the Care and Harvey, 355 S.C. 53, 60, 584 S.E.2d 893, 896 (2003); see also S.C. Code Ann. § 44-48-100 (Supp. 2006).

The undisputed evidence presented to the circuit court at Brown's probable cause hearing established a clear pattern of sexually deviant behavior. Luculently, the existence of probable cause to believe he was a sexually violent person was validated.

"Probable cause is a flexible, common-sense standard." State v. Bowie, 360 S.C. 210, 220, 600 S.E.2d 112, 117 (Ct. App. 2004) (citing Texas v. Brown, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983)). The very term itself, "probable cause," does not import absolute certainty. State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971); State v. Arnold, 319 S.C. 256, 460 S.E.2d 403 (Ct. App. 1995).

In looking at probable cause determining whether a search warrant should be issued, this court has stated that magistrates are to concern themselves with probabilities and not certainties. State v. Fletcher, 363 S.C. 221, 251, 609 S.E.2d 572, 587 (Ct. App. 2005) (citing Bowie, 360 S.C. at 220, 600 S.E.2d at 117.) In regard to the lawfulness of an arrest, probable cause "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' " that an offense has been committed

and that the accused committed it. Brown, 460 U.S. at 742, 103 S. Ct. 1535 (quoting Carroll v. United States, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543 (1925)). Probable cause may be found somewhere between suspicion and sufficient evidence to convict. State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540-41 (Ct. App. 1999) (citing Thompson v. Smith, 289 S.C. 334, 336-37, 345 S.E.2d 500, 502 (Ct. App. 1986), overruled in part on other grounds by Jones v. City of Columbia, 301 S.C. 62, 389 S.E.2d 662 (1990)).

In the context of probable cause to believe someone to be a sexually violent predator, probable cause requires that the evidence presented would lead a reasonable person to believe and conscientiously entertain suspicion that the person meets the definition of a sexually violent predator. See People v. Hardacre, 109 Cal. Rptr. 2d 667, 673 (Cal. App. 2 Dist. 2001); see also Matter of Hay, 953 P.2d 666, 676 (Kan. 1998) (a probable cause determination in a sexual predator case requires evidence sufficient for a person of ordinary prudence and action to conscientiously entertain a reasonable belief that the person in question is a sexually violent predator). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." Brown, 460 U.S. at 742, 103 S. Ct. 1535.

In a seven-month span in 2000 and 2001, Brown was discovered peeping into the same victim's windows on three separate occasions, the latter two incidents occurring after he had already been indicted for the first. Only two days after completing his first sentence, Brown was apprehended for recommitting his previous offense, this time attempting to break down the woman's door. He was imprisoned and shortly after being released from confinement was caught peeping in windows at the home of the previous victim's sister. During this arrest, Brown behaved violently. He resisted capture and kicked a police officer in the process. After being incarcerated for approximately two years for this offense, Brown was yet again found looking into someone's home.

This chronology demonstrates a disturbing pattern, no sign of rehabilitation or remorse, and shows increasingly violent aspects of deviant behavior. A person's dangerous propensities to commit future acts of sexual violence are the focus of the SVP Act. See In re Care and Treatment of Corely, 353 S.C. 202, 207, 577 S.E.2d 451, 454 (2003). There is

Brobdingnagian evidence in the record indicating Brown suffers from voyeurism, a condition that involves recurrent, intense sexually arousing fantasies, sexual urges or behaviors involving the act of watching an unsuspecting person who is naked or in the process of disrobing, or engaging in sexual activity. Diagnostic and Statistical Manual of Mental Disorders, ("DSM-IV"), 532 (4th ed. 1994). There is plenitudinous evidence to support a reasonable belief and suspicion that Brown meets the definition of a sexually violent predator. Brown: (1) has been convicted of a sexually violent offense; and (2) most probably suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

That Brown was not violent, per se, toward any of his victims is of no consequence. The Code's definition of "sexually violent offense" lists fifteen specific criminal sexual offenses, as well as "any offense for which the judge makes a specific finding on the record that based on the circumstances of the case, the person's offense should be considered a sexually violent offense." S.C. Code Ann. § 44-48-30(2) (Supp 2006). Many of the listed offenses do not require an overt act of violence. Section 44-48-30(2) includes the crimes of incest, buggery, committing or attempting a lewd act upon a child under the age of sixteen, and accessory before the fact to commit any of the other offenses enumerated in the section. Such offenses can unequivocally be accomplished without aggression, the use of great force, or having serious physical harm or injury result. It is apodictic that in order to qualify as a sexually violent offense, one's actions do not have to be violent in the sense of being physically injurious or destructive.

The determination was made by the sentencing judge that, under these particular facts and circumstances, Brown's eavesdropping/peeping tom amounted to a sexually violent offense. The facts and circumstances necessary to qualify his offense as a sexually violent one are indubitably present. Brown's intrusion violated the sanctity of these victim's homes. His actions were unquestionably gravely injurious to the psyche and emotional well-being of these women. Furthermore, the repetitious nature of his behavior conforms to the definition of a predator. "Predatory" is defined as

"showing a disposition to injure or exploit others for one's own gain." Webster's New Collegiate Dictionary 898 (1979).

Additionally, Brown committed acts of violence. In connection with two of his voyeurism incidents, he attempted to break down one victim's door, resisted arrest, and kicked a law enforcement official. Such behavior indicates that Brown's urges transcend the act of passively watching women through their windows at night.

A cursory reading of the transcript reveals the circuit court believed there was sufficient evidence to suggest Brown suffers from sexually deviant urges and needs therapy and psychiatric care. The court stated that Brown should "know he needs counseling based upon his prior behavior," and that the State's contention that Brown needed sex offender treatment was "likely to be true." Yet incredibly, the circuit court stated Brown's need for treatment "based upon his prior behavior and his difficulties" had "nothing to do with probable cause." In contrariety, the need for treatment to prevent repeat offenses is the central focus of the SVP Act, and thus is directly relevant to such probable cause determinations. In the face of those statements on the record, however, the circuit court inexplicably found no probable cause and dismissed the case.

The circuit court's finding of no probable cause is not supported by the evidence. It is in contraposition to the record as well as the court's stated recognition that Brown has deviant urges and needs treatment. If the circuit court's order is given viability, Brown will not be evaluated to determine the extent of his obvious sexually deviant urges and what treatment he needs to control them. Rather, he will remain free to terrorize other unsuspecting females, and will not receive the treatment he requires.

CONCLUSION

We hold that the trial record irrefutably establishes probable cause within the mandate of the South Carolina Sexually Violent Predator Act. We come to the adamantine and inescapable conclusion that the evidentiary record dictates **REVERSAL**.

This case is remanded to the circuit court for further proceedings in accordance with the South Carolina Sexually Violent Predator Act, including a psychiatric evaluation and a trial on the merits.

ACCORDINGLY, THE ORDER OF THE CIRCUIT JUDGE IS REVERSED AND THE CASE IS REMANDED.

KITTREDGE and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Eugene Jamison and Delores Isaac, individually and as Personal Representative of the Estate of Virnell Isaac, **Appellants,**

v.

Ford Motor Company, **Respondent.**

Appeal from Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 4220
Submitted March 1, 2007 – Filed March 19, 2007

AFFIRMED

Stephanie P. McDonald and Samuel K. Allen, both of Charleston; and James E. Carter, of Savannah, for Appellants.

J. Kenneth Carter, Jr., of Columbia; David R.

Kelley and Wayne D. Struble, both of Minneapolis; and Jeffery T. Gorcyca, of Detroit, for Respondent.

ANDERSON, J.: Eugene Jamison and Delores Isaac, individually and as Personal Representatives of the Estate of Virnell Isaac (collectively Jamison), appeal the circuit court's: (1) exclusion of expert testimony and video evidence; and (2) denial of Jamison's motions for sanctions and relief from judgment. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

In July 1998, Virnell Isaac suffered major injuries to her liver when the 1993 Escort she was driving was involved in a frontal, angular collision with another car. Isaac died several days later as a result of the injuries sustained in the accident.

Jamison filed a wrongful death action against Ford Motor Company (Ford) alleging, in relevant part, that Isaac suffered fatal injuries because Ford negligently designed and implemented the driver's occupant protection system.[2] Ford equipped the 1993 Escort with a driver's side passive restraint system employing various components that worked collectively to protect the driver in frontal, angular collisions. The passive restraint system components included: (1) an automatic, motorized shoulder belt that positioned itself over the occupant without any action by the occupant; (2) a seat pan; (3) a knee bolster; and (4) an energy absorbing car body. The restraint system required no affirmative action by the driver, making it completely passive and in compliance with Federal Motor Vehicle Safety Standard 208. The 1993 Escort was additionally equipped with a manual lap belt that required affirmative action from the passenger or driver to engage it. Jamison specifically complained that Ford negligently designed and implemented the

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

[2] Jamison additionally averred that Ford failed to provide adequate warnings about proper use of the restraint system. However, this appeal does not involve claims regarding whether any warnings were inadequate.

various components of the restraint system, including the manual lap belt, the knee bolster, and the seat pan.

During discovery Jamison requested crash test reports and full videos of 1991 through 1993 Ford Escort crash tests. Ford responded by producing a summary of certification tests, but referred Jamison to Mazda, the company that conducted the requested crash tests, for the detailed reports and actual videos. Ford provided 1994 through 1996 Ford Escort crash test reports and videos. However, the 1994 through 1996 models, unlike the 1991 through 1993 models, were equipped with driver and passenger side airbag restraint systems.

In October 2003, Jamison filed a "Motion to Compel Production of Documents." Jamison asked the court to order Ford's production of the 1991 through 1993 test reports and videos. Additionally, Jamison urged that Ford be required to provide complete video tests, noting that the videos Ford had produced were "missing significant portions of the crash tests." Jamison sought sanctions against Ford for discovery abuses, claiming Ford had intentionally delayed discovery by submitting duplicative and non-responsive documents. The circuit court agreed Ford must supply the materials requested; however, the court refrained from imposing sanctions due to Ford's representation that the documents would be delivered. Ford subsequently surrendered a "small group of Mazda crash tests" and certified that all materials from Mazda regarding the crash tests had been yielded.

Ford filed motions in limine to exclude certain theories of liability Jamison asserted. Specifically, Ford contended (1) Jamison was preempted by Federal law from arguing Ford's choice of the passive restraint system installed in the Escort was defective, i.e. that another type of restraint system would have prevented Isaac's injuries; (2) Jamison was preempted from challenging the geometry of the manual lap belt design; and (3) Jamison's claim that the manual lap belt design was defective should be excluded because no reasonable evidence existed to indicate Isaac wore the manual lap belt and that its defective design proximately caused her injuries.

The circuit court ruled: (1) federal regulations preempted Jamison from challenging Ford's choice of restraint system; (2) testimony suggesting a manual lap belt should have been a component of the 1993 Escort's passive restraint system was excluded because such evidence challenged Ford's choice of restraint system; and (3) Jamison was allowed to present evidence that the design of the passive restraint system was defective; however, any testimony that the passive restraint system was defective without a manual lap belt was preempted.

In January 2004, Jamison filed a motion for sanctions against Ford for alleged ongoing discovery abuse. Jamison argued a default judgment should be entered against Ford for willful and intentional failure to produce certain crash test data that Jamison received on January 19, 2004 from another source.[3] The circuit court declined to enter a default judgment without having an opportunity to review the evidence and determine its prejudicial effect.

Immediately prior to trial, the circuit court again considered various pending motions, including Jamison's motion for default judgment. At that time, Jamison informed the circuit court that additional videotapes of crash tests showing more views of occupant kinematics in the 1993 Escort had been discovered. Jamison urged the court to sanction Ford by prohibiting references to the 1993 Escort's compliance with federal regulations. The circuit court held Jamison failed to demonstrate Ford's conduct warranted such sanctions, and the motion was denied.

During the pre-trial hearing, the circuit court revisited the issue of Jamison's defective lap belt claim. The circuit court held "[t]he lap belt . . . argument is preempted," and Jamison cannot "criticize the lap belt." However, the court held that "the effectiveness of [the passive restraint] system, what it was designed and intended to do is subject to challenge . . . ." The court confirmed that, in order to prove negligence based on any defective restraint system, Jamison must prove proximate cause.

---

[3] Jamison's attorney received the crash test documents from a plaintiff's attorney involved in other litigation with Ford.

The case was tried before a jury in February 2004. Jamison attempted to introduce a crash test video conducted on a 1995 vehicle that was identical to Isaac's 1993 Escort, except the 1995 vehicle was equipped with air bags. Jamison submitted that the tests demonstrated occupant kinematics. Ford objected to the tests based on the prejudicial effect of the air bag. The circuit court excluded the video under Rule 403, SCRE, concluding the probative value of the video was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and potential to mislead the jury. The jury returned a verdict in Ford's favor.

Subsequently, Jamison received a brochure advertising a 1993 European Escort. Jamison filed a Rule 60(b) motion for relief from judgment arguing the newly discovered evidence demonstrated the feasibility of an alternative design and further substantiated claims of Ford's discovery abuse. The circuit court found the brochure was cumulative and Jamison was not prejudiced by non-disclosure of the brochure. Jamison's motion for relief from judgment was denied

LAW/ANALYSIS

I. Expert Testimony

Jamison argues the circuit court erred in excluding expert testimony relating to the geometry and design of the manual lap belt Ford had installed in the 1993 Escort. Specifically, Jamison maintains the circuit court erred as a matter of law in relying on its interpretation of Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861 (2000), that any challenge to the passive restraint system based upon the alleged defective manual lap belt was preempted. We disagree.

Ford contends this issue is not preserved for our review. The failure to make a proffer of excluded evidence will preclude review on appeal. State v. Simmons, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004); TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998). Generally, a party must request the opportunity to present an expert witness in order for

the issue to be preserved for appellate review. State v. Beam, 336 S.C. 45, 51-52, 518 S.E.2d 297, 301 (Ct. App. 1999). It is well settled that a reviewing court may not consider error claimed in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been. State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979). However, this rule regarding proffers has been relaxed where the appellate court is able determine from the record what the testimony was intended to show and that prejudice clearly exists. State v. Jenkins, 322 S.C. 360, 367, 474 S.E.2d 812, 816 (Ct. App. 1996).

In this case, the record sufficiently identifies the testimony Jamison sought to introduce regarding the use of and alleged defects of the manual lap belt. Furthermore, as Jamison averred, the exclusion of expert testimony regarding the manual lap belt prevented Jamison from being able to "properly criticize the seatbelt design or to explain the full geometry of the defects in the belt system." Initially, Jamison's "primary criticism [was] aimed at lower torso restraint in this configuration, or lack thereof." The improper exclusion of the manual lap belt evidence would indubitably prejudice Jamison. Therefore, this issue is preserved for appellate review.

On the merits, the admissibility of an expert's testimony is a matter within the circuit court's sound discretion. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005); State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006) cert. pending; State v. Harris, 318 S.C. 178, 456 S.E.2d 433 (Ct. App. 1995). The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion. State v. Myers, 359 S.C. 40, 51, 596 S.E.2d 488, 494 (2004); Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003); State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Douglas, 367 S.C. at 507, 626 S.E.2d at 64.

To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480,

623 S.E.2d 373, 374 (2005); Fields, 363 S.C. at 26, 609 S.E.2d at 509; Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof. Fields, 363 S.C. at 26, 609 S.E.2d at 509.

A. Federal Preemption Under National Traffic and Motor Vehicle Safety Act of 1966, Federal Motor Vehicle Safety Standard 208, the "Saving Clause," and Geier v. American Honda Motor Company

A priori, the initial issue in the case sub judice is whether by express federal preemption this state common law tort action is barred. Briefly, we review the federal preemption principles explicated in King v. Ford Motor Co., 209 F.3d 886, 891 (2000).

> The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of and State to the Contrary notwithstanding." U.S. Const. art. VI. Thus, as has been clear since the Supreme Court's decision in M'Culloch v. Maryland, 17 U.S. (4 Wheat.), 316, 4 L. Ed. 579 (1819), any state law that conflicts with federal law is "without effect." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L.Ed.2d 407 (1992) (citing Maryland v. Louisiana, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L.Ed.2d 576 (1981)).
>
> In applying the Supremacy Clause, courts "start with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." Medtronic v. Lohr, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L.Ed.2d 700 (1996) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). Therefore, " '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." Id. (citing Cipollone, 505 U.S. at 516, 112 S. Ct. 2608). The Supreme Court has stated that Congress may make its intent to preempt

> clear either expressly or implicitly. See Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed.2d 385 (1995). Implied preemption, in turn, takes two forms. "We have found implied conflict pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. (internal citations and quotations omitted). In summary, then, there are three types of preemption-express preemption, implied conflict preemption, and implied field preemption.[4]

The cognoscenti of federal preemption jurisprudence bestow panoramic application so as to limit state common law tort actions. We decline to accept this broad-brush federal judicial barricade.

1. National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act) (80 Stat. 718, 15 U.S.C. § 1381 et seq. (1988 ed.)

The express preemption provision contained in section 1392(d) of the Safety Act reads:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item or motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d) (1988 ed.).

[4] Field preemption occurs when federal law so occupies a field that state courts are prevented from asserting jurisdiction. Black's Law Dictionary, 612 (6th ed. 1990). Field preemption is not implicated in the instant case.

2. Federal Motor Vehicle Safety Standard 208

Federal Motor Vehicle Safety Standard (FMVSS) 208, promulgated under the authority of the Safety Act, specifies performance requirements for the protection of vehicle occupants in crashes. 49 C.F.R. § 571.208 (2006). FMVSS 208 establishes the various restraint systems manufacturers must install to comply with federal regulations; the requirements differ depending on the year the car was manufactured. Id. The version of FMVSS 208 in effect when the 1993 Escort was produced required automobile makers to certify passenger cars with a completely passive restraint system:

> S4.1.2.1 First option—frontal/angular automatic protection system. The vehicle shall:
>
> > (a) At each front outboard designated seating position meet the frontal crash protection requirements of S5.1 buy means that requires no action by vehicle occupants.

49 C.F.R. § 571.208 (1992 ed.).

Manufacturers had the option of certifying passenger cars with either an automatic seat belt or an airbag. The Department of Transportation permitted manufacturers to meet the automatic seat belt option requirement using belts that provided only upper torso restraint:[5]

> S4.5.3 Automatic belts: Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4 and in place of any seat belt assembly otherwise required by that option.

[5] Components other than a belt provided lower torso restraint.

> S4.5.3.2 An automatic belt, furnished pursuant to S4.5.3, that provides both pelvic and upper torso restraint may have either a detachable or nondetachable upper torso portion, notwithstanding provisions of the option under which it is furnished.

Id.

> FMVSS 208 was viewed:
>
> not as a minimum standard, but as a way to provide a manufacturer with a range of choices among different passive restraint systems that would be gradually introduced, thereby lowering costs, overcoming technical safety problems, encouraging technological development, and winning widespread consumer acceptable—all of which would promote FMVSS 208's safety objectives.

Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 862 (2000).

3. The Saving Clause

Regulation FMVSS 208, together with the Safety Act's express preemption provision, precludes States from setting safety standards that are not identical to the federal standard set forth in FMVSS 208. However, Section 1397(k) of the Safety Act establishes that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." See Geier, 529 U.S. at 895. The presence of this saving clause "requires that the pre-emption provision be read narrowly to pre-empt only state statutes and regulations." Id. at 861. The majority in Geier observed that:

> [w]ithout a saving clause, a broad reading of the express pre-emption provision arguably might pre-empt those actions . . . as applying to standards imposed in common-law tort actions, as well as standards contained in state legislation or regulations. And if so, it would pre-empt all nonidentical state standards

> established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard. On that broad reading of the pre-emption clause little, if any, potential "liability at common law" would remain. . . . We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances.

Geier, 529 U.S.C. at 868.

Importantly, scholars on basic conflict preemption principles inculcate in regard to the fundamental elixir of the rule when juxtaposing federal/state constitutional analysis. If a state statute, administrative rule, or common law cause of action conflicts with a federal statute, it is incontestable that the state law has no efficacy. It is pellucid that the Supremacy Clause does not bless unelected federal judges with carte blanche to utilize federal law as a conduit to impose their own views of tort law on the States. Assumptively, we recognize that common law tort actions are historically within the scope of the States' police powers and are safe from preemption by a federal statute unless Congress reveals a clear and manifest purpose to preempt.

4. Geier v. American Honda Motor Company

The Geier court reasoned that the saving clause "at least" removed common law tort actions from the scope of the express preemption clause, but neither the saving clause nor the express preemption provision barred the ordinary working of conflict preemption principles. Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 869 (2000). The majority cautioned that "[n]othing in the language of the saving clause suggests an intent to save state-law tort actions that conflict with federal regulations." Id.

In Geier, a young man suffered injuries while driving a 1987 Honda Accord equipped with manual shoulder and lap belts but no driver's side airbag. 529 U.S. at 865. Under FMVSS 208, Honda had the choice of

whether or not to equip the 1987 Accord with an airbag. Id. Applying conflict preemption principles, the supreme court held plaintiffs' contention that the Accord should have been equipped with an airbag was preempted because the argument "stood as an obstacle to the accomplishment and execution of the important . . . federal objectives [to promote safety by allowing manufacturers to install alternative protection systems]." 529 U.S. at 881 (internal citations and quotations omitted). Thus, under Geier, a manufacturer's choice of restraint system cannot be challenged if it complies with the requirements under FMVSS 208.

Plaintiffs are not preempted from asserting a defect in the design or implementation of a chosen passive restraint system. See King v. Ford Motor Co., 209 F.3d 886, 892 (2000). The King court emphasized that "compliance with performance criteria does not immunize manufacturers from common law liability arising from any defects in the production or design of their passive restraint systems." Id. (internal citations omitted) ("[T]he very federal safety statute upon which GM relies makes it abundantly clear that compliance with the regulations promulgated thereunder does not immunize a manufacturer from common law liability." (citing 15 U.S.C. § 1397(c) (1976))).

In the instant case, Isaac sustained her injuries in a frontal, angular collision. Pursuant to FMVSS 208, the 1993 Escort had to "meet the frontal crash protection requirements [established by FMVSS 208] by means that require no action by vehicle occupants." 49 C.F.R. § 571.208 (1992 ed.) (emphasis added). Ford was required to provide a passive restraint system that secures passengers without the use of any manual elements. Ford chose to equip the 1993 Escort with a driver's side passive restraint system employing various components that worked collectively to protect the driver and complied with FMVSS 208. The components included: (1) an automatic, motorized shoulder belt; (2) a seat pan; (3) a knee bolster; and (4) an energy absorbing car body.

Based on the Safety Act, FMVSS 208, the saving clause, and Geier, Jamison was preempted from claiming the manual lap belt was defective in geometry or design. Notably a lap belt was not part of the passive restraint

system chosen by Ford or required by the FMVSS; Ford included the manual lap belt in compliance with other federal regulations to protect occupants against lateral crashes and rollovers. As Jamison's trial counsel acknowledged in a pre-trial hearing: "[I]t's not going to make any difference. . . whether you have a lap belt on or not because Ford depends on [other components] to restrain the lower torso" in collisions like the one in this case. Thus, allowing Jamison to challenge the geometry or design of the manual lap belt would be tantamount to allowing Jamison to argue Ford should have included a lap belt that effectively restrains the torso. Such an argument clearly challenges Ford's choice of occupant restraint systems and is preempted by Geier. The circuit court did not abuse its discretion in excluding Jamison's expert testimony regarding the manual lap belt. Moreover, the circuit court appropriately advised the jury about the irrelevance of the lap belt in the following instruction:

> [I]n this particular dispute . . . the use, design or performance of a lap belt is not in question. It is not an issue and it's not to be considered by you in this. You will see it and observe it [in various exhibits] but it has no significance in this dispute for your purposes or your consideration.

On appeal, Jamison suggests the jury was left to wonder about the role the lap belt played, or would have played, in protecting Isaac. Nevertheless, we determine the circuit court's instruction sufficiently informed the jury that the lap belt was not to be considered.

B. Proximate Cause

As an additional basis for exclusion of evidence regarding Jamison's defective lap belt claim, Ford contends Jamison failed to establish any reliable proof that a lap belt design defect proximately caused Isaac's fatal injuries. Proximate cause requires proof of causation in fact and legal cause. Bray v. Marathon Corp., 356 S.C. 111, 116-17, 588 S.E.2d 93, 95 (2003); Trivelas v. S.C. Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001). Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Small v. Pioneer Mach., Inc.,

329 S.C. 448, 463, 494 S.E.2d 835, 842 (Ct. App. 1997). Legal cause is proved by establishing foreseeability. Bray, 356 S.C. at 117, 588 S.E.2d at 95; Small, 329 S.C. at 463, 494 S.E.2d at 842. The touchstone of proximate cause in South Carolina is foreseeability. Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 443 S.E.2d 392 (1994); Small, 329 S.C. at 463, 494 S.E.2d at 842.

Ford advanced its contention that, because no reliable proof existed showing Isaac was wearing the lap belt in the 1993 Escort, any alleged defect in the lap belt design could not have proximately caused Isaac's injuries. Luculently, without evidence Isaac wore the lap belt, Jamison's defective lap belt claim even fails the 'but for' test for causation. However, the circuit court's exclusion of any evidence concerning a lap belt design defect was more clearly based on a preemption analysis under Geier, rather than on an analysis of proximate cause.

Notwithstanding the circuit court's rationale, this court is authorized to consider any sustaining ground pursuant to Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal.") and I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment."). Accordingly, we hereby encapsulate the entire reasoning and rationale in regard to proximate cause as an additional sustaining ground if per chance there is any issue as to the preservation of Ford's proximate cause argument.

II. Crash Tests

The circuit court excluded video crash tests of a 1995 Escort that Jamison purported were substantially similar to the collision in this case and should have been admitted. Jamison complains the exclusion was error; we disagree.[6]

[6] Because of our disposition of this issue, we decline to address Ford's contention that Jamison waived this issue by failing to properly challenge the legal grounds on appeal.

"The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." Id.

Generally, in order for an out of court experiment to be admissible, the experiment must "be made under conditions and circumstances similar to those prevailing at the time of the occurrence involved in the controversy." State v. Frazier, 357 S.C. 161, 166, 592 S.E.2d 621, 623 (2004) (quoting Weaks v. S.C. State Hwy. Dep't, 250 S.C. 535, 542, 159 S.E.2d 234, 237 (1968)). "It is not required that the conditions be identical with those existing at the time of the controversy; it is sufficient if there is a substantial similarity." Id. (quoting Weaks, 250 S.C. at 542, 159 S.E.2d at 237).

Relevant evidence is evidence that tends to prove or disprove the existence of a material fact and is generally admissible. Rule 401, SCRE; Rule 402, SCRE. However, "[t]he dictates of Rule 401 are subject to the balancing requirement of Rule 403, SCRE, which requires a court to exclude relevant evidence upon a showing that its admission would be more prejudicial than probative." Watson ex rel. Watson v. Chapman, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000). Under Rule 403, SCRE, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Moreover, "[a] trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) (citation omitted) (stating

that under the abuse of discretion standard the reviewing court is "obligated to give great deference to the trial court's judgment").

Jamison sought to introduce the 1995 video crash tests to demonstrate the effect of impact on occupant kinematics. Admittedly, the excluded video illustrated a vehicle and collision substantially similar to the 1993 Escort and accident in this case. However, unlike the 1993 Escort, the vehicle in the excluded video was equipped with airbags that deployed upon impact. Ford maintained "[i]t cannot be said that the air bag going off into the face and the chest of the dummy does not affect the dummy's occupant kinematics." The circuit court observed that the 1995 video crash tests presented:

> [o]ne of the rare occasions that I believe it covers just about every one that is mentioned in 403. Clearly the danger of an unfair prejudice is there. Confusion of the issue is clearly there. Misleading the jury is clearly there because it makes—there's no way for testimony to undo what's visual.

The jury's susceptibility to influences associated with viewing a crash test involving an airbag can reasonably be recognized as substantially outweighing the tests' probative value. We defer to the circuit court's judgment in this instance.

III. Discovery Abuses

Jamison challenges the circuit court's refusal to sanction Ford for alleged discovery abuses. We discern no error in the circuit court's ruling.

Pursuant to Rule 37(b)(2)(C), SCRCP, when a party fails to obey an order to provide or permit discovery, the court may "make such orders in regard to the failure as are just," including an order dismissing the action or proceeding, or any part thereof. Temple v. Tec-Fab, Inc., 370 S.C. 383, 390, 635 S.E.2d 541, 544 (Ct. App. 2006) (citing In re Anonymous Member of the S.C. Bar, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001) ("[j]udges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success

through abuse of the discovery rules rather than by the rule of law."). Generally, "the sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case." Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., Inc., 334 S.C. 193, 198, 511 S.E.2d 716, 719 (Ct. App. 1999).

The imposition of sanctions is generally entrusted to the sound discretion of the trial court. Halverson v. Yawn, 328 S.C. 618, 620-21, 493 S.E.2d 883, 884 (Ct. App. 1997); Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 318 (Ct. App. 1987). The circuit court's decision regarding the imposition of discovery sanctions will not be reversed absent an abuse of discretion. Samples v. Mitchell, 329 S.C. 105, 111, 495 S.E.2d 213, 216 (Ct. App. 1997).

"In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice." Samples, 329 S.C. at 112, 495 S.E.2d at 216. A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion. Id.

Here, the record indicates the circuit court considered the nature of the requests for production, the discovery posture of the case, Ford's lack of intent or willfulness, and the degree of prejudice Jamison suffered. During the pre-trial hearing, the circuit court noted Jamison demonstrated no prejudice, Ford adhered to the continuing rule to supplement responses to production requests, and nothing suggested Ford knew about the evidence at issue. Moreover, the record fails to substantiate that Ford either knew about or possessed the evidence in question when initially responding to Jamison's discovery requests. In fact, Ford complied with the rules of discovery by confirming that Mazda possessed the evidence and forwarding Jamison's request to Mazda. Indeed, Jamison admitted all documents in question were originally produced by Mazda. Additionally, Ford satisfied the rule requiring continued supplementation of responses to interrogatories.

Jamison implored the court to sanction Ford by prohibiting reference to the 1993 Escort's compliance with federal regulations. The circuit court found no evidence Ford acted in bad faith with the willful disobedience or gross indifference required for a sanction that would be tantamount to default judgment. See Griffin Grading & Clearing, Inc., 334 S.C. at 198-99, 511 S.E.2d at 719 ("Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction."). Conclusively, the circuit court exercised sound discretion in refraining from the imposition of discovery abuse sanctions.

IV. Rule 60(b), SCRCP, Motion

Jamison next argues the circuit erred in denying its Rule 60(b) motion for relief from judgment. Jamison contends the advertising brochure for the European Escort provided evidence of an existing alternative design and was material to its case. In addition, Jamison professes that the brochure provided a basis for sanctions against Ford for abuse of discovery. We disagree.

Generally, the decision to grant a new trial under Rule 60(b) lies within the sound discretion of the circuit court. Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2005). The appellate court will reverse a trial court's decision regarding the grant or denial of a Rule 60(b) motion only if it amounts to an abuse of discretion. Id. at 18, 594 S.E.2d at 482.

A. Newly Discovered Evidence

The circuit court may relieve a party from a final judgment where "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b)(2), SCRCP. "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003). To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the

trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. Lanier v. Lanier, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) (citation omitted). Courts have found evidence is not newly discovered evidence for the purposes of Rule 60(b)(2) where the evidence was (1) known to the party at the time of trial, and (2) in the party's possession. Id. at 218, 612 S.E.2d at 459. In addition, Rule 60(b)(2) allows the court to grant a new trial only if the newly discovered evidence could not have been discovered by due diligence prior to trial. Black's Law Dictionary defines "due diligence" as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." 468 (7th ed. 1999). Furthermore, exclusion of testimony that would be merely cumulative or impeaching does not constitute error. See Gamble v. International Paper Realty Corp. of South Carolina, 323 S.C. 367, 474 S.E.2d 438 (1996) (ruling that where excluded testimony was merely cumulative there was no error).

In the case at bar, the circuit court ruled the brochure advertising the European Escort that Jamison advanced as newly discovered evidence would not likely change the result in a new trial and was merely cumulative. As a threshold requirement, before the brochure or any test regarding the European Escort could be admissible, Jamison had to demonstrate the European Escort was substantially similar to the 1993 Escort at issue. See State v. Frazier, 357 S.C. 161, 166, 592 S.E.2d 621, 623 (2004) (holding an out of court experiment will only be admissible if proven to be substantially similar to the occurrence involved in the controversy). Jamison could not prove the European Escort was substantially similar to the 1993 Escort. Concomitantly, Ford provided an affidavit stating the vehicles differed significantly in structural design.

Jamison urged that the brochure constituted new evidence of a feasible alternative design—a critical and material element of its defective design claim. The circuit court noted, however, that Jamison had presented evidence of a feasible alternative design at trial. Jamison submitted a 1987 Volkswagen as an example of an effective passive restraint system with a seat pan that could successfully restrain the lower torso in an accident like the

one in this case. Thus, the brochure, as evidence of a feasible alternative design, albeit one Ford employed, is merely cumulative of evidence introduced at trial. Jamison's potential use of the brochure for impeachment of Ford's witness does not support granting the Rule 60(b) motion. See Lanier, 364 S.C. at 217, 612 S.E.2d at 459.

B. Fraud, Misrepresentation, or Other Misconduct

Rule 60(b)(3), SCRCP authorizes the circuit court to relieve a party from a final judgment where the party demonstrates "fraud, misrepresentation, or other misconduct of an adverse party." In South Carolina, in order for a party to be entitled to relief based on fraud, the moving party must demonstrate extrinsic fraud. Raby Constr., LLP v. Orr, 358 S.C. 10, 20-21, 594 S.E.2d 478, 484 (2005); Hagy v. Pruitt, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000) ("A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'"). Fraud is extrinsic when it is collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing or the opportunity to present its case. Id. (citing Hilton Head Ctr. of S.C., Inc. v. Pub. Serv, Comm'n of S. C., 294 S.C. 9, 362 S.E.2d 176 (1987); Mr. G. v. Mrs. G., 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Chewning v. Ford Motor Co., 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003) (citing Hilton Head, 294 S.C. at 11, 362 S.E.2d at 177). On the other hand, intrinsic fraud is fraud presented and considered at the trial. Hagy, 339 S.C. at 431, 529 S.E.2d at 484 (citing Evans v. Gunter, 366 S.E.2d 44, 294 S.C. 525 (Ct. App. 1988)). Intrinsic fraud misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. Chewning, 354 S.C. at 81, 579 S.C.2d at 610 (citing Hilton Head, 294 S.C. at 11, 362 S.E.2d at 177).

Jamison maintains Ford engaged in fraudulent conduct by withholding the brochure; consequently, the circuit court should grant relief from judgment. The record fails to substantiate Jamison's allegations that Ford

intentionally withheld documents. Moreover, the assertion that a party failed to disclose documents generally amounts to intrinsic rather than extrinsic fraud. Raby Constr., 358 S.C. at 19, 594 S.E.2d at 483.

Accordingly, Jamison was not entitled to a Rule 60(b) relief from judgment on either newly discovered evidence or fraud.

CONCLUSION

We hold that the Safety Act, FMVSS 208, and Geier prohibit a state common law tort action based on the choice of design of a passive vehicle passenger restraint system. We rule that a state common tort action is permitted if bottomed and premised on defects in design and/or implementation of the chosen restraint system.

Finally, we place our imprimatur and approbation upon the arbitraments of the circuit court in regard to: (1) the exclusion of Jamison's expert testimony in reference to the manual lap belt; (2) the disallowance of video crash tests of the 1995 Escort with a driver side airbag; (3) the denial of Jamison's motion for sanctions; and (4) the rejection of Jamison's motion for relief from judgment.

Accordingly, the rulings and orders of the circuit court are

AFFIRMED.

KITTREDGE and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edward P. Bowers **Respondent,**

v.

Jerry D. Thomas **Appellant.**

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

Opinion No. 4221
Heard March 6, 2007 – Filed March 19, 2007

AFFIRMED

Deborah Harrison Sheffield, of Columbia, for Appellant.

Philip J. Corson, of Lake Wylie, for Respondent.

ANDERSON, J.: Jerry Thomas appeals the circuit court's order terminating his lease agreement with Edward Bowers. Thomas contends: (1) there was insufficient notice to terminate the lease agreement; (2) the lease

could not be terminated based on the tardy payment of the June rent; and (3) the circuit court erred in denying his request for a jury trial. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

On March 1, 2005, Bowers and Thomas entered into a written rental agreement governed by the South Carolina Residential Landlord and Tenant Act ("the RLTA"). Rent was due and payable in advance on the first day of each month. The rental agreement gave Thomas the option to purchase the property, provided Thomas was not in default at the time. The agreement provided:

> LANDLORD'S REMEDIES. If Tenant defaults in the payment of rent, or any other item to be paid by Tenant under this Lease, and that default is not cured within ten (10) days, except for the payment of rent, after written notice of default by Landlord to Tenant, it being agreed that rent shall be due and payable without notice, Landlord may re-enter and take possession of the Premises and remove all persons and property from the Premises, and at its option terminate this Lease, and shall have such rights as are available under South Carolina law. Tenant and Landlord agree that if rent is not paid within ten (10) days of its due date, this Lease and the attached Option Agreement shall both terminate immediately without further notice.

(Emphasis in original).

In June 2005, Thomas failed to pay the June rent at the time it was due. After receiving written notice of his June default and Bowers' intent to terminate the lease, Thomas delivered a check for the rent to Bowers' attorney. The check, dated June 23, 2005, was returned to Thomas' lawyer. Thomas' lawyer then mailed the check back to Bowers' counsel; however, it was never received, and the June rent remained unpaid.

Rent payments continued to be late. The July 2005 rent was not paid until the fourteenth of the month. On July 15, 2005, Bowers gave Thomas written notice of nonpayment of rent when due and his intention to terminate the lease agreement if rent was not paid within ten days from the due date. Specifically, the notice stated:

> If you do not pay your rent on time this is your notice. If you do not pay your rent within 10 days of the due date, the landlord can start to have you evicted. You will get no other notice as long as you live in this rental unit.

The August 2005 rent was not paid within ten days of its due date. On August 11, 2005, the magistrate issued an order and rule to show cause, ordering Thomas to either vacate the premises, or appear and show cause why he should not be evicted. On August 12, 2005, Thomas delivered a check to Bowers' attorney with the mutual agreement that such acceptance would not constitute a waiver of any default.

A bench trial was scheduled for August 23, 2005. Four working days before the trial, Thomas requested a jury trial. The magistrate denied the request as untimely, but rescheduled the bench trial. After the bench trial on September 1, 2005, the magistrate ordered Thomas's eviction and payment of all accrued rent. Thomas appealed to the circuit court, which affirmed the magistrate's order.

STANDARD OF REVIEW

Section 18-7-170 of the South Carolina Code (1985) articulates the standard of review to be applied by the circuit court in an appeal of a magistrate's judgment:

> Upon hearing the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which

> do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.

See also Hadfield v. Gilchrist, 343 S.C. 88, 92-93, 538 S.E.2d 268, 270 (Ct. App. 2000).

While the Circuit Court maintains a broad scope of review, our standard is more limited:

> [T]he Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate's judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the magistrate and there are no facts that show the affirmance was influenced by an error of law.

Burns v. Wannamaker, 281 S.C. 352, 357, 315 S.E.2d 179, 182 (Ct. App. 1984). Specifically, "[i]n ejectment proceedings first heard in magistrate's court, the Court of Appeals is without jurisdiction to reverse the findings of fact of the circuit court if there is any supporting evidence." Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp., 280 S.C. 232, 233, 312 S.E.2d 20, 21 (Ct. App. 1984). "Unless we find an error of law, we will affirm the judge's holding if there are any facts supporting his decision." Hadfield, 343 S.C. at 94, 538 S.E.2d at 271.

However, as recognized in Hadfield, the Court of Appeals still retains de novo review of whether the facts show the circuit court's affirmance was controlled or affected by errors of law. Hadfield at 92-93, 53 S.E.2d at 270. Our Supreme Court, in Stanford v. Cudd, 93 S.C. 367, 370, 76 S.E. 986, 987 (1913), held that where the testimony is sufficient to sustain a judgment of the magistrate's court, and it is affirmed on appeal to the circuit court, this court will assume the circuit court affirmed the judgment on the merits, in the absence of facts showing the affirmance was controlled or affected by errors of law.

LAW/ANALYSIS

A. Default

Thomas contends the circuit court erred in finding there was legally sufficient notice to justify termination of his lease. We disagree.

Section 27-40-710 of the South Carolina Code (2007) governs a landlord's remedies in situations where a tenant fails to pay rent when due. In pertinent part, section 27-40-710(B) states:

> If rent is unpaid when due and the tenant fails to pay rent within five days from the date due or the tenant is in violation of section 27-40-540, the landlord may terminate the rental agreement provided the landlord has given the tenant written notice of nonpayment and his intention to terminate the rental agreement if the rent is not paid within that period. The landlord's obligation to provide notice under this section is satisfied for any lease term after the landlord has given one such notice to the tenant or if the notice is contained in conspicuous language in a written rental agreement. The written notice requirement upon the landlord under this subsection shall be considered to have been complied with if the rental agreement contains the following or a substantially equivalent provision:
>
> > "IF YOU DO NOT PAY YOUR RENT ON TIME
> >
> > This is your notice. If you do not pay your rent within five days of the due date, the landlord can start to have you evicted.

> You will get no other notice as long as you live in this rental unit."
>
> The presence of this provision in the rental agreement fully satisfies the "written notice" requirement under this subsection and applies to a month-to-month tenancy following the specified lease term in the original rental agreement.

(Emphasis in original).

Thomas contends the circuit court erred in finding that Bowers gave proper notice of non-compliance with the lease agreement, under section 27-40-710(B). In this instance, notice was provided not by "conspicuous language" in the parties' lease agreement, but by the July 15, 2005 letter mailed notifying Thomas that any subsequent nonpayment would result in eviction. This letter indubitably satisfies the language contained in section 27-40-710(B). Despite receiving this notice in July, Thomas failed to pay his August rent in a timely manner. In fact, the August rent was not paid until after the magistrate issued the rule to show cause.

Because a landlord's obligation to provide notice is satisfied for any lease term after the landlord has given one such notice to the tenant, the landlord was not required to furnish any separate or additional written notice to Thomas in order to commence proceedings in August for nonpayment of rent when due. See S.C. Code Ann. § 27-40-710(B) (2007). Accordingly, the circuit court did not err in finding there was sufficient notice to terminate the lease after the late payment of the August rent.

Thomas devotes a great deal of his brief to the position that the language in the lease agreement was not "bold and conspicuous" as required by the statute. However, we need not reach this issue because Thomas had sufficient notice under section 27-40-710(B) from the July 2005 letter of the consequences if he failed to pay his rent in a timely manner.

Additionally, Thomas argues the lease agreement should not have been terminated based on the June rent because his rent check was returned to him after he delivered it to Bowers' attorney. However, this argument is flawed as the lease was not terminated based on Thomas's failure to pay the June rent, but rather was terminated based on his failure to pay the August rent after the notice was sent in July. The June check was dated June 23, 2005, twenty-two days after its due date. This check was lost, and as of the date of the circuit court's order, payment for June rent has not been made and Thomas is still liable for the June 2005 rent.

B. Jury Trial

Thomas contends the circuit court erred in denying his request for a jury trial. We disagree.

Initially, this issue has not been preserved for our review. Bowers never objected to the magistrate's ruling concerning a jury trial. An issue not raised to and ruled upon by the court is not preserved for appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Furthermore, Thomas has waived this issue. If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable and failure to do so forever bars appellate review. Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000); Foggie v. CSX Transp., Inc., 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993). Because Thomas failed to immediately appeal his denial of a jury trial, he is barred from raising this issue on appeal.

Moreover, this issue fails on the merits. Rule 11(b), SCMCR states that "If either party wants a jury trial it must be requested in writing at least five working days prior to the date set for trial." The Notice of Hearing shows the trial was set for August 23, 2005. Thomas's written request for a jury trial was not submitted to the magistrate until August 17, 2005, only four working days prior to trial. Accordingly, the circuit court did not err in finding Thomas's request untimely and affirming the denial of a jury trial.

CONCLUSION

Based on the above analysis, the circuit court's decision is

AFFIRMED.

KITTREDGE and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brandi Rhodes, Respondent,

v.

Benson Chrysler-Plymouth, Inc. d/b/a Benson Chrysler-Plymouth Dodge, Inc., Appellant.

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

Opinion No. 4222
Submitted March 1, 2007 – Filed March 19, 2007

AFFIRMED

Bradford N. Martin, Laura W.H. Teer, Lora E. Collins, and Robin Foster, of Greenville, for Appellant.

Lane W. Davis, of Greenville, for Respondent.

KITTREDGE, J.: Benson Chrysler-Plymouth, Inc. appeals the denial of its motion to compel arbitration. We affirm.[1] We hold a party waives its right to enforce an arbitration provision when it delays in demanding arbitration and engages in extensive discovery resulting in prejudice to the party opposing arbitration.

I.

In April 2005, Brandi Rhodes sued Benson Chrysler-Plymouth, Inc. (Benson) for breach of contract in connection with the purchase of a vehicle.[2] Benson answered, pleading the contract contained an arbitration provision that encompassed Rhodes' allegations. Benson, however, did not pursue arbitration, opting instead to engage in extensive discovery. Benson and Rhodes exchanged written interrogatories and requests for production. Benson also noticed and took five depositions. Benson sought the circuit court's assistance in executing out-of-state subpoenas, which the circuit court granted. The circuit court heard two motions for protective orders. By the last hearing, the case had been set for trial.

In February 2006, ten months after Rhodes initiated this action, Benson filed a motion to compel arbitration. Rhodes opposed Benson's attempt to resurrect its right to arbitrate under the contract. Rhodes argued Benson waived its right to compel arbitration by participating in significant discovery and waiting until the case was scheduled for trial. The circuit court agreed with Rhodes, and denied Benson's motion to compel arbitration. Benson appeals.

---

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

[2] According to the complaint, Rhodes agreed to purchase a properly-titled, undamaged 2001 Dodge Durango from Benson, and not the stolen, damaged 1999 Dodge Durango Rhodes received from Benson.

II.

"[D]etermining whether a party waived its right to arbitrate is a legal conclusion subject to de novo review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them." Liberty Builders, Inc. v. Horton, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999).

III.

South Carolina favors arbitration. Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc., 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). The right to enforce an arbitration clause, however, may be waived. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." Id. "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." Id.

Generally, the factors our courts consider to determine if a party waived its right to compel arbitration are: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others.

Thus, a party may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration. What is "a substantial length of time" varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration. Compare Deloitte & Touche, LLP v.

Unisys Corp., 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (finding a five-and-a-half year period where the parties "conducted a significant amount of discovery, resulting in the production of thousands of documents" demonstrated waiver); and Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 548, 575 S.E.2d 74, 75-76 (Ct. App. 2003) (finding a nineteen month period where the parties exchanged written interrogatories, requests to produce, and the party requesting arbitration took two depositions demonstrated waiver); and Liberty Builders, 336 S.C. at 666, 521 S.E.2d at 753-54 (finding a two-and-a-half year period where the parties sought assistance from the court on approximately forty occasions demonstrated waiver); with Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen month period where discovery was "very limited in nature and the parties had not availed themselves of the court's assistance," and "Respondent had not held any depositions," did not demonstrate waiver); and Rich v. Walsh, 357 S.C. 64, 67, 590 S.E.2d 506, 507 (Ct. App. 2003) (finding a thirteen month period where "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting fifteen minutes did not demonstrate waiver); and Gen. Equip., 344 S.C. at 557, 544 S.E.2d at 645 (finding a period of less than eight months where the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories" did not establish waiver).

To establish prejudice, the non-moving party must show something more than "mere inconvenience." Evans, 352 S.C. at 550, 575 S.E.2d at 76-77. To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took "advantage of the judicial system by engaging in discovery." Id. at 548, 575 S.E.2d at 76. This inquiry, however, is just part of a broader, common sense approach our courts take to determine whether a motion to compel arbitration should be granted or denied: (1) if the parties conduct little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," prejudice will likely not exist, and the law would favor arbitration; (2) if the parties conduct significant discovery, then the party seeking arbitration has taken "advantage of the judicial system," prejudice will likely exist, and the

law would disfavor arbitration. Of course, cases do not always fit neatly into clearly defined categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts.

This case, we believe, falls between the General Equipment line of cases (Toler's Cove and Rich) and the Liberty Builders line of cases (Evans and Deloitte). Because Benson sought arbitration less than a year after Rhodes brought suit, General Equipment suggests that a substantial length of time may not have transpired to warrant waiver. Indeed, as cited above, there is precedent where arbitration was compelled with an even greater length of time between the commencement of the action and the commencement of the motion to compel arbitration. See Toler's Cove, 355 S.C. at 612, 586 S.E.2d at 585 (finding a thirteen month period did not demonstrate waiver); Rich, 357 S.C. at 72, 590 S.E.2d at 507 (finding a thirteen month period did not demonstrate waiver). What distinguishes this case from the General Equipment line of cases, however, is the extensive discovery engaged in by Rhodes and especially Benson, as well as the fact that the trial was imminent.

Benson and Rhodes exchanged written interrogatories and requests to produce. Benson also noticed and took five depositions.[3] Furthermore, the chief administrative judge set the case on the trial docket for an upcoming term of court. The parties completed virtually *all* discovery and the trial date had been set *before* Benson moved to compel arbitration. The extent of discovery, in conjunction with the status of the case on the trial docket, provides a direct nexus to the presence and degree of prejudice sustained by Rhodes, the party opposing arbitration. We are persuaded that under the facts presented here Benson waived its right to compel arbitration.

---

[3] Depositions entail more than "routine administrative matters," Gen. Equip., 344 S.C. at 557, 544 S.E.2d at 645, and could not be considered "limited discovery" in any sense of the phrase. Certainly, taking five depositions was more than a "mere inconvenience" to Rhodes. Depositions involve substantial time, effort, and money, all of which could have been avoided if Benson had pursued arbitration earlier.

IV.

The record amply supports the findings of the learned special circuit court judge. As the court held, Rhodes incurred "costs resulting from discovery processes that likely could have been avoided in arbitration." The record contains evidence to support this finding, and we certainly cannot say there is "no evidence" to support it. Benson, with full knowledge of its right to arbitrate this dispute, cannot invoke and enjoy the full benefits of discovery and then assert a right to arbitrate at the eleventh hour with the case scheduled for trial. The order of the circuit court denying the motion to compel arbitration is

AFFIRMED.

ANDERSON and SHORT, JJ., concur.