The Supreme Court of South Carolina

In the Matter of
Louis Gray Sullivan, II, Respondent.

ORDER

Pursuant to Rule 31, RLDE, Rule 413, SCACR, the Commission on Lawyer Conduct has filed a Petition to Appoint Attorney to Protect Clients' Interests in this matter. This request is based on the current medical condition of the respondent. The petition is granted.

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

operating account(s), and any other law office account(s) Mr. Sullivan maintained 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 Mr. Sullivan, shall serve as notice to the bank or other financial institution that Kurt D. Gibson, 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 Kurt D. Gibson, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Sullivan's mail and the authority to direct that Mr. Sullivan's mail be delivered to Mr. Gibson'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.

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

Columbia, South Carolina

April 27, 2011

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15
May 2, 2011
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UNPUBLISHED OPINIONS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 PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2011-UP-188-Joe Davis v. SCDC
(Administrative Law Court, Judge Carolyn C. Matthews)

2011-UP-189-Edwin K. Hartzler v. Bob Sheheen et al.
(Richland, Judge L. Casey Manning)

2011-UP-190-Charleston Cty. Department of Social Services v. I. H.
(Charleston, Judge Paul W. Garfinkel)

2011-UP-191-State v. Corey Jawan Robinson
(Georgetown, Judge Steven H. John)

2011-UP-192-SCDSS v. T.L.F., a.k.a. T.R.-F. and John Doe
(Sumter, Judge George M. McFaddin, Jr.)

2011-UP-193-In the interest of Quavious R., a minor under the age of seventeen
(Darlington, Judge Jamie Lee Murdock Jr. and Judge Peter Fuge)

2011-UP-194-State v. Antoine Miller
(Richland, Judge J. Michelle Childs)

2011-UP-195-SCDSS v. Rayshana H., Randall S., and John Doe
(Sumter, Judge George M. McFaddin, Jr.)

2011-UP-196-Edwin K. Hartzler v. S.C. Department of Mental Health
(Richland, Judge John M. Milling)

PETITIONS FOR REHEARING

4764-Walterboro Community Hosp. v. Meacher	Pending
4773-Consignment Sales v. Tucker Oil	Pending
4792-Curtis v. Blake	Pending
4794-Beaufort Cty. Schl. v. United	Pending
4799-Trask v. Beaufort County	Pending
4802-Bean v. SC Central	Pending
4805-Limehouse v. Hulsey	Pending

4810-Menezes v. WL Ross & Co.	Pending
4811-Prince v. Beaufort Memorial Hospital	Pending
4815-Sun Trust v. Bryant	Pending
4818-State v. Randolph Frazier	Pending
2011-UP-007-Barrett v. Flowers	Pending
2011-UP-061-Mountain View Baptist Church	Denied 04/25/11
2011-UP-108-Dippel v. Horry County	Denied 04/22/11
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-117-State v. E. Morrow	Pending
2011-UP-121-In the matter of T. Simmons	Pending
2011-UP-125-Groce v. Horry County	Pending
2011-UP-127-State v. B. Butler	Pending
2011-UP-129-NBSC v. Ship Ahoy	Pending
2011-UP-130-SCDMV v. P. Brown	Pending
2011-UP-131-Burton v. Hardaway	Pending
2011-UP-136-SC Farm Bureau v. Jenkins	Pending
2011-UP-138-State v. R. Rivera	Pending
2011-UP-140-State v. P. Avery	Pending
2011-UP-143-Booker v. SCDC	Pending
2011-UP-145-State v. S. Grier	Pending
2011-UP-147-State v. B. Evans	Pending
2011-UP-148-Mullen v. Beaufort C. School	Pending

2011-UP-156-Hendricks v. SCDPPPS	Pending
2011-UP-157-Sullivan v. SCDPPPS	Pending
2011-UP-162-Bolds v. UTI Integrated	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4367-State v. J. Page	Pending
4474-Stringer v. State Farm	Pending
4510-State v. Hoss Hicks	Pending
4526-State v. B. Cope	Pending
4529-State v. J. Tapp	Pending
4548-Jones v. Enterprise	Pending
4588-Springs and Davenport v. AAG Inc.	Pending
4592-Weston v. Kim's Dollar Store	Pending
4597-Lexington County Health v. SCDOR	Pending
4599-Fredrick v. Wellman	Pending
4605-Auto-Owners v. Rhodes	Pending
4609-State v. Holland	Pending
4610-Milliken & Company v. Morin	Pending
4614-US Bank v. Bell	Pending
4616-Too Tacky v. SCDHEC	Pending
4617-Poch v. Bayshore	Pending
4619-State v. Blackwill-Selim	Pending
4631-Stringer v. State Farm	Pending

4633-State v. G. Cooper	Pending
4635-State v. C. Liverman	Pending
4637-Shirley's Iron Works v. City of Union	Pending
4641-State v. F. Evans	Pending
4654-Sierra Club v. SCDHEC	Pending
4659-Nationwide Mut. V. Rhoden	Pending
4661-SCDOR v. Blue Moon	Pending
4670-SCDC v. B. Cartrette	Pending
4673-Bailey, James v. SCDPPPS	Pending
4675-Middleton v. Eubank	Pending
4680-State v. L. Garner	Pending
4682-Farmer v. Farmer	Pending
4687-State v. D. Syllester	Pending
4688-State v. Carmack	Pending
4691-State v. C. Brown	Pending
4692-In the matter of Manigo	Pending
4697-State v. D. Cortez	Pending
4698-State v. M. Baker	Pending
4699-Manios v. Nelson Mullins	Pending
4700-Wallace v. Day	Pending
4702-Peterson v. Porter	Pending

4706-Pitts v. Fink	Pending
4708-State v. Webb	Pending
4711-Jennings v. Jennings	Pending
4714-State v. P. Strickland	Denied 04/07/11
4716-Johnson v. Horry County	Pending
4721-Rutland (Est. of Rutland) v. SCDOT	Pending
4725-Ashenfelder v. City of Georgetown	Pending
4728-State v. Lattimore	Pending
4732-Fletcher v. MUSC	Pending
4737-Hutson v. SC Ports Authority	Pending
4738-SC Farm Bureau v. Kennedy	Pending
4742-State v. Theodore Wills	Pending
4746-Crisp v. SouthCo	Pending
4747-State v. A. Gibson	Pending
4752-Farmer v. Florence Cty.	Pending
4753-Ware v. Ware	Pending
4755-Williams v. Smalls	Pending
4756-Neeltec Enterprises v. Long	Pending
4761-Coake v. Burt	Pending
4763-Jenkins v. Few	Pending
4770-Pridgen v. Ward	Pending
4779-AJG Holdings v. Dunn	Pending

4781-Banks v. St. Matthews Baptist Church	Pending
2009-UP-266-State v. McKenzie	Pending
2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-403-SCDOT v. Pratt	Pending
2009-UP-564-Hall v. Rodriquez	Pending
2010-UP-080-State v. R. Sims	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-138-State v. B. Johnson	Pending
2010-UP-140-Chisholm v. Chisholm	Pending
2010-UP-141-State v. M. Hudson	Pending
2010-UP-182-SCDHEC v. Przyborowski	Pending
2010-UP-196-Black v. Black	Pending
2010-UP-228-State v. J. Campbell	Pending
2010-UP-232-Alltel Communications v. SCDOR	Pending
2010-UP-251-SCDC v. I. James	Pending
2010-UP-253-State v. M. Green	Pending
2010-UP-256-State v. G. Senior	Pending
2010-UP-273-Epps v. Epps	Pending
2010-UP-281-State v. J. Moore	Pending
2010-UP-287-Kelly, Kathleen v. Rachels, James	Pending

2010-UP-289-DiMarco v. DiMarco	Pending
2010-UP-302-McGauvran v. Dorchester County	Pending
2010-UP-303-State v. N. Patrick	Pending
2010-UP-308-State v. W. Jenkins	Pending
2010-UP-317-State v. C. Lawrimore	Pending
2010-UP-330-Blackwell v. Birket	Pending
2010-UP-331-State v. Rocquemore	Pending
2010-UP-339-Goins v. State	Pending
2010-UP-340-Blackwell v. Birket (2)	Pending
2010-UP-352-State v. D. McKown	Pending
2010-UP-355-Nash v. Tara Plantation	Pending
2010-UP-356-State v. Robinson	Pending
2010-UP-362-State v. Sanders	Pending
2010-UP-369-Island Preservation v. The State & DNR	Pending
2010-UP-370-State v. J. Black	Pending
2010-UP-372-State v. Z. Fowler	Pending
2010-UP-378-State v. Parker	Pending
2010-UP-406-State v. Larry Brent	Pending
2010-UP-425-Cartee v. Countryman	Pending
2010-UP-440-Bon Secours v. Barton Marlow	Pending
2010-UP-437-State v. T. Johnson	Pending

2010-UP-448-State v. Pearlie Mae Sherald	Pending
2010-UP-449-Sherald v. City of Myrtle Beach	Pending
2010-UP-450-Riley v. Osmose Holding	Pending
2010-UP-461-In the interest of Kaleem S.	Pending
2010-UP-464-State v. J. Evans	Pending
2010-UP-494-State v. Nathaniel Noel Bradley	Pending
2010-UP-504-Paul v. SCDOT	Pending
2010-UP-507-Cue-McNeil v. Watt	Pending
2010-UP-525-Sparks v. Palmetto Hardwood	Pending
2010-UP-533-Cantrell v. Aiken County	Pending
2011-UP-005-George v. Wendell	Pending
2011-UP-017-Dority v. Westvaco	Pending
2011-UP-024-Michael Coffey v. Lisa Webb	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-071-Walter Mtg. Co. v. Green	Pending
2011-UP-109-Dippel v. Fowler	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Estate of Patricia S. Tenney, Respondent,

v.

The South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management and the State of South Carolina, Appellants.

Appeal from Beaufort County
Marvin H. Dukes, III, Master in Equity

Opinion No. 26965
Heard February 2, 2011 – Filed April 25, 2011

AFFIRMED

Attorney General Alan Wilson and Assistant Deputy Attorney General J. Emory Smith, Jr., both of Columbia, for Appellant State of South Carolina, and Carlisle Roberts, Jr., of Columbia, and Davis Arjuna Whitfield-Cargile, of Charleston, for Appellant SCDHEC.

Mary D. Shahid and R. Cody Lenhardt, Jr., both of Charleston, of McNair Law Firm, for Respondent.

CHIEF JUSTICE TOAL: In this action to quiet title, the South Carolina Department of Health and Environmental Control (DHEC), the Office of Ocean and Coastal Resource Management (OCRM), and the State of South Carolina (the State) (collectively, Appellants) challenge the Order of the Master-in-Equity (master) holding that Patricia S. Tenney (Respondent)[1] is the fee simple owner of Little Jack Rowe Island (Little Jack Rowe), a 15.45 acre undeveloped island located in Beaufort County. We affirm.

FACTS/ PROCEDURAL BACKGROUND

This action was precipitated by OCRM's refusal to process Respondent's dock permit application without proof of a sovereign's grant to the property. In 2003, then Attorney General Henry D. McMaster (AG) issued an opinion in response to DHEC's question of whether it is legal to grant permits for bridges to islands that are presumed to be owned by the State, without a showing of a sovereign's grant. That opinion stated in accordance with *Coburg, Inc. v. Lesser*, 309 S.C. 252, 422 S.E.2d 96 (1992) (*Coburg I*) and *Coburg Dairy, Inc. v. Lesser*, 318 S.C. 510, 458 S.E.2d 547 (1995) (*Coburg II*) (collectively, *Coburg*), the State is the presumptive owner of all "marsh islands," and therefore, permit applicants must produce "an original grant from the State or predecessor sovereign" to demonstrate ownership. 2003 S.C. AG LEXIS 231 (Dec. 5, 2003). Based on this opinion, on February 19, 2004, DHEC published a public notice advertising that all applicants seeking permits to build structures on undeveloped islands must provide a sovereign's grant as proof of ownership. This requirement was not statutory, as the South Carolina Code required only "[a] copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from

[1] On January 18, 2011, Respondent's counsel informed this Court of Respondent's death. This Court granted counsel's Motion to Substitute, as indicated in the caption.

the owner of the property to carry out the proposal." S.C. Code Ann. § 48-39-140 (1987 & Supp. 1993).

On September 20, 2005, DHEC submitted draft regulations to the Board of Health and Environmental Control (Board) that would amend 23A S.C. Reg. 30-2 and 30-12(N). This draft proposed that the State was the presumptive owner of marshes and coastal islands, and therefore, in order that an applicant be granted a permit to build a structure in these areas, the applicant must supply the following as proof of ownership: (1) a copy of a document that shows an original grant of the island from a sovereign, (2) an attorney's title opinion, (3) a title abstract, and (4) a deed to the applicant.

On June 23, 2006, the General Assembly adopted coastal island regulations promulgated by DHEC. The draft regulation described above was not included in these adopted regulations. Under section 48-39-140 of the South Carolina Code and in volume 23A of the South Carolina Code of Regulations, regulation 30-2-(B)(4), it remained that proof of ownership required only a copy of the deed or other document under which the applicant claimed ownership or authority to build. Nevertheless, on November 10, 2006, DHEC submitted a second public notice informing all interested parties that proof of ownership of undeveloped islands for which an applicant seeks to obtain a dock permit requires the applicant submit proof of a sovereign's grant, an attorney's title opinion, and an accompanying abstract of title.

On September 27, 2005, Respondent purchased Little Jack Rowe for $875,000 from Bradbury Dyer, III (Dyer) by way of general warranty deed. The chain of title to Little Jack Rowe dates back to 1865 when the United States government issued a Federal Tax Certificate as a measure to collect delinquent taxes from "insurrectionary districts within the United States." Little Jack Rowe is a 15.452 acre island located in Bluffton Township, Beaufort County, South Carolina. Before Respondent purchased Little Jack Rowe from Dyer, the island was historically sold as part of Jack Rowe Island. Jack Rowe Island is roughly 53 acres in size and is connected to Little Jack Rowe by a causeway approximately 100 yards in length that can be

walked across at high tide. Jack Rowe Island currently has five docks connected to it. Similar to Jack Rowe Island, Little Jack Rowe is bordered on one side by the Cooper River,[2] a deep saltwater tidal river which is part of the Intracoastal Waterway. The remaining majority of the island is bordered by tidal marshland.

Dyer, the previous owner of the island, held a dock permit approved by OCRM, which expired on May 12, 2005, four months prior to Respondent's purchase of the island. Respondent planned to build a house on the island, and the only convenient way to access the island is by mooring a boat to a dock. On November 7, 2005, Respondent submitted a critical area permit application to OCRM, seeking to construct a dock from Little Jack Rowe to the Cooper River. On November 29, 2005, OCRM forwarded the application to the AG's office.

On July 19, 2006, Respondent's attorney contacted the AG's office by letter, seeking to discern the AG's position regarding the dock permit and requesting the AG either approve or deny the application. The AG's office responded by letter stating that Respondent must produce a sovereign grant covering Little Jack Rowe in order that the office may review the application.

By Complaint dated February 27, 2007, Respondent brought this action to quiet title to Little Jack Rowe, in addition to several other causes of action. Each party submitted Motions for Summary Judgment, and the master denied each of these motions following a hearing, with the exception that the master ordered OCRM to either grant or deny Respondent's permit application. On March 26, 2008, DHEC issued Respondent a letter denying her permit application.

After trial and oral argument, the master issued an Order granting judgment for the Respondent on the ground that Little Jack Rowe is not

[2] South Carolina has two Cooper Rivers; the more well-known Cooper River lies in Charleston, and the less-known Cooper River lies west of Hilton Head Island.

a marsh island under *Coburg*, that Respondent was entitled to quieted title under the forty year statute, S.C. Code Ann. § 15-3-380 (2005), that the Federal Tax Certificate of 1865 represented a sovereign's grant, and that Respondent qualified for a dock permit under section 48-39-140 of the South Carolina Code and accompanying regulations. This case is before the Court pursuant to Rule 204(b), SCACR.

ISSUE

I. Whether Respondent holds fee simple title to Little Jack Rowe Island.

STANDARD OF REVIEW

This action was commenced as both a quiet title action and a request for declaratory judgment. Typically, an action to remove a cloud on and quiet title to land is one in equity. *Cathcart v. Jennings*, 137 S.C. 450, 135 S.E. 558, 562 (1926). However, "when the defendant's answer raises an issue of paramount title to land, such as would, if established, defeat the plaintiff's action, the issue of title is legal." *Dargan v. Tankersley*, 380 S.C. 480, 483, 671 S.E.2d 73, 74 (2008).

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 136, 141 (2009). In this case, the Court must determine the reach of its prior case law. Thus, this is an action at law. In an action at law tried before a master, the appellate court "will affirm the master's factual findings if there is any evidence in the record which reasonably supports them." *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006). However, "[a]n appellate court may determine questions of law with no particular deference to the trial court." *Verenes v. Alvanos*, 387 S.C. 11, 14, 690 S.E.2d 771, 772–73 (2010).

ANALYSIS

I. Title to Little Jack Rowe Island

Appellants argue the master erred in finding Little Jack Rowe was not subject to a presumption of State ownership, as set forth in *Coburg*. After much consideration, we take this opportunity to overturn the specific holding of *Coburg* that "[t]itle to islands situate within marshland follows title to the marshland." *Coburg II*, 318 S.C. at 513, 458 S.E.2d at 548.

In *Coburg I*, Lesser received a permit from the South Carolina Coastal Council to construct a walkway and floating dock on marshland that contained two small islands, Glass Island and Small Island. *Coburg I*, 309 S.C. at 253, 422 S.E.2d at 97. These islands were bordered on one side by the Wappoo Creek, a navigable tidal stream on the Intracoastal Waterway, and on the remaining sides by marshland. Coburg brought an action to quiet title to the marshland and islands, claiming ownership pursuant to a 1967 deed which traced back to a 1703 grant from the Lords Proprietors to Robert Gibbes. *Coburg II*, 318 S.C. at 512, 458 S.E.2d at 548. After reciting the established principle that "[p]resumption of title to marshland rests in the State of South Carolina, to be held in trust for the benefit of the public," *Coburg I*, 309 S.C. at 253, 422 S.E.2d at 97, this Court followed, stating "ownership of islands situate within marshland follows ownership of the marshland." *Id.* (*comparing with McCullough v. Wall*, 4 Rich. 68, 53 Am. Dec. 715 (1850)). This Court remanded the case so the State could be added as a party. *Id.* at 255, 422 S.E.2d at 98.

In *Coburg II*, this Court found the Lord Proprietors grant upon which Coburg relied did not contain specific language showing the intent to convey land below the high water mark of Wappoo Creek. *Coburg II*, 318 S.C. at 513, 458 S.E.2d at 548. This Court then repeated its statement from *Coburg I* that "[t]itle to islands situate within marshland follows title to the marshland;" ultimately concluding the marshland and the islands in question belonged to the State. *Id.*

Under the public trust doctrine, the State holds presumptive title to tidal land below the high water mark to be held in trust for the benefit of all people of South Carolina. *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003); *State v. Pacific Guano Co.*, 22 S.C. 50, 84 (1884). In areas subject to the public trust doctrine, presumption of State ownership "may be overcome only by showing a specific grant from the sovereign which is strictly construed against the grantee." *McQueen*, 354 S.C. at n.6, 580 S.E.2d at n.6.

The proposition that the public trust doctrine extends to lands above the high water mark first appeared in *Coburg I*, 309 S.C. at 253, 422 S.E.2d at 97. The proposition was supported by a comparison citation to *McCullough v. Wall*, 4 Rich. At 68, 53 Am.Dec. at 715, which involved a dispute over the ownership of a fishing rock located in the Catawba River. *Id.* The defendant in that case argued if the area of the river surrounding the rock was navigable by boat, the fishing rock was for the enjoyment of the public. *Id.* However, if this area was non-navigable, the plaintiff, who allegedly owned the land to the west of the river, possessed title to the rock under the principle of *medium filum aquoe*, which imposes an imaginary property line at the center of the river. *Id.* This Court found the plaintiff owned the rock pursuant to his deed to the bordering riparian land. In dicta this Court stated, "[i]slands in rivers fall under the same rule as to the ownership of the soil and its incidents as the soil under water does." *Id*.

We decide today that neither the facts, nor the holding of *McCullough v. Wall* offer a substantial enough foundation for the principle propounded in *Coburg*. Importantly, *McCullough* involved riparian rights. *McCullough*, 4 Rich. At 68, 53 Am.Dec. at 715. This Court has long recognized that riparian property rights differ from the rights of landowners subject to the ebb and flow of tides. *See State v. Pacific Guano Co.*, 22 S.C. at 79 ("It is a settled principle of the English law that the right of owners of land bounded by the sea or on navigable rivers where the tide ebbs and flows, extends to high water mark . . . . But grants of land bounded on rivers . . . carry the exclusive

right and title of the grantee to the centre of the stream"). The brief statement in *Coburg* that title to marsh islands follows title to the surrounding marsh has not been subsequently applied by this States' courts to quiet title in the State. Instead, our jurisprudence has continued to reflect the longstanding principle that the public trust doctrine extends only up to the land below the high water mark. *See State v. Fain*, 273 S.C. 748, 752, 259 S.E.2d 606, 608 (1979) (to prove its case that it owned certain lands, the State provided photographic evidence that the disputed land was covered by normal high tide); *see also State v. Hardee*, 259 S.C. 535, 543, 193 S.E.2d 497, 501 (1972) ("In the absence of specific language, either in the deed or on the plat, showing that it was intended to go below high water mark, the portion of the land between high and low water mark remains in the State in trust for the benefit of the public").

The principle that the State is unqualifiedly the presumptive owner of all marsh islands situated in state-owned marsh appears to be unique to South Carolina. In limited instances, some states have found islands to be state-owned based on a lack of permanence. *See Giles v. Basore*, 154 Tex. 366, 374, 278 S.W.2d 830, 835 (1955) (islands formed in river by deposits of silt, soil, and logs that were not in existence at time land was granted is property of the owner of that area at the time it was granted, in that case the state); *see also Mulry v. Norton*, 55 Sickels 424, 432, 3 N.E. 581, __ (N.Y. 1885) ("if marine increase be by small and almost imperceptible degrees, it goes to the owner of the land; but if it be sudden and considerable it belongs to the sovereign"). In *Coburg*, the islands in question were described in Coburg's predecessor's deeds since 1843 and appeared on plats since at least 1853. *Coburg, Inc. v. Lesser*, No. 90-CP-10-2034R (S.C. Ct. Com. Pl. Mar. 13, 1991). Thus, the *Coburg* principle was not premised on permanence. We decline to diminish the bright line of the public trust doctrine with a test that requires case by case determination. Coastal lands are notoriously subject to the volatility of changing tides, erosion, and accretion. Landowners and potential landowners are well aware of the long-standing principle that the State is presumptive owner of lands below the high water mark. Accordingly, a person who possesses title to land especially vulnerable to this volatility takes title

with the knowledge their land is at risk of loss to the State by natural forces.

Other grounds by which this Court might narrow the reach of *Coburg* are similarly flawed. The master in this case found the *Coburg* principle did not apply to Little Jack Rowe for two reasons: (1) the physical characteristics of the islands differed; and (2) Respondent in this case held a specific title to Little Jack Rowe, whereas in *Coburg*, there was no evidence of a specific deed or history of record title for the small islands. Although we recognize the master's effort to reach an equitable solution, in our view, an attempt to limit *Coburg*, either by physical characteristic or title history, will sacrifice clarity and uniformity for the sake of stare decisis.

The master found Little Jack Rowe was not "situate within marshland" because it is located on the Cooper River. In our view this is a distinction without a difference because both the *Coburg* islands and Little Jack Rowe are bordered by navigable waterways on the Intracoastal Waterway. Therefore, when this Court established the principle that the State is the presumed owner of marsh islands, it did not intend to limit that presumption only to islands completely surrounded by marshland.

The master additionally distinguished the islands by size, stating the *Coburg* islands were insubstantial "marsh hummocks,"[3] while Little Jack Rowe is a substantial island of more than fifteen acres.[4] Based on the definition given hammocks by the South Carolina Department of Natural Resources (DNR),[5] both the *Coburg* islands and Little Jack

---

[3] Also known as hammocks.

[4] From a scaled plat provided in the record, Appellants estimate that Glass Island is approximately 150 feet x 225 feet, and Small Island is approximately 160 feet x 150 feet.

[5] Hammocks are back barrier islands "typically located behind the oceanfront barrier islands and adjacent to the larger Sea Islands." An

Rowe are considered hammock islands. For clarity, we believe marsh hammocks to be the technical term for "islands situate within marshland," *Coburg II*, 318 S.C. at 513, 458 S.E.2d at 548. Because marsh hammocks can vastly vary in size,[6] the State and its courts cannot practically and uniformly apply the presumption of State ownership theory based on an island's size. In our view, an attempt to confine *Coburg* to include only "smaller" hammocks would arbitrarily extend the public trust doctrine and would likely cloud titles of thousands of coastal islands.[7]

Lastly, the master distinguished the *Coburg* islands by noting those islands lacked a specific deed or history of record title. In *Coburg*, Coburg's deed description included the two islands; however, the sovereign grant upon which Coburg relied, did not include a specific description of those islands. *Coburg II*, 318 S.C. at 512, 458 S.E.2d at 548. This case presents a similar factual scenario, as Respondent's deed described Little Jack Rowe, but the Federal Tax Certificate upon which Respondent relied did not specifically describe the island. Therefore, this is another distinction without a difference. It is common for ancient coastal deeds to convey groups of islands, without mention of specific island names. It is equally common for these islands' names to have changed over time. In our view, narrowing *Coburg* on the ground the State is the presumptive owner of marsh islands whose sovereign grant lacks a specific description of the

---

Ecological Characterization of Coastal Hammock Islands in South Carolina, Final Report to OCRM SCDMV (Dec. 1, 2004) (DNR Report). "Almost all [marsh hammocks] are surrounded by expanses of Salt Marsh, occasionally being bordered by tidal creeks or rivers." *Id.*

[6] These islands range "in size from less than an acre to several hundred acres." *Id.* The DNR Report reveals the majority of marsh hammocks are very small—53.7% are less than one acre and 81.5% are less than five acres. *Id.*

[7] South Carolina has "approximately 3,467 coastal islands, not including the larger 'Sea Islands' such as Hilton Head." *Id.*

island claimed would cloud title to a vast number of marsh islands in this State, many containing homes, businesses, and infrastructure.[8]

In sum, the jurisprudence of this State is consistent that "[p]resumption of title to marshland rests in the State of South Carolina, to be held in trust for the benefit of the public." *Coburg I*, 309 S.C. at 253, 422 S.E.2d at 97. However, the proposition that the State is the presumed owner of land that remains above the high water mark is at odds with coastal property jurisprudence that predated *Coburg*, and expands the public trust doctrine beyond its historic bounds. Of the 3,467 coastal islands in South Carolina, the DNR estimates that 72% of these are privately owned. We do not see a practical and uniform way to narrow the scope of *Coburg* without clouding the title of potentially thousands of marsh islands.[9] We do not underestimate the importance of these islands as the vestiges of our State's most fragile ecosystems, and we recognize the State's interest in protecting and preserving these lands for the enjoyment of all citizens. DHEC and other agencies of this State have the regulatory authority to prevent or limit the development of our State's pristine coastal areas, and our opinion today leaves them at liberty to continue those efforts. Current and potential marsh island owners should be keenly aware of this regulatory risk. However, we do not believe the protection and preservation of these islands should be effected through the unprecedented expansion of the public trust doctrine. Therefore, we overrule the specific principle found in the *Coburg* cases that "ownership of islands situate within marshland follows ownership of the marshland." *Coburg I*, 309 S.C. at 253, 422 S.E.2d at 97.

---

[8] Developed marsh islands include many of the marsh islands in the Folly and Kiawah regions, for example. *Id.*

[9] Currently, DHEC requires a sovereign's grant for only undeveloped marsh islands. Although DHEC has chosen to apply the *Coburg* principle sparingly, without modification, there is little to preclude DHEC, or any other state entity, from extending the presumption of state ownership to all 3,467 marsh islands.

CONCLUSION

Appellants raised the additional issues of whether the master erred in declaring Respondent's forty years of record title defeated the state's presumption of title, finding the 1865 Federal Tax Certificate represented a sovereign grant, and addressing permitting issues that were not before the court. In light of our disposition of this case, we do not find it necessary to address these remaining issues. *Futch v. McCallister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). Today we overturn the specific holding of the *Coburg* cases that "[t]itle to islands situate within marshland follows title to the marshland." *Coburg II*, 318 S.C. at 513, 458 S.E.2d at 548. Therefore, we quiet title to Little Jack Rowe island in favor of Respondent.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nancy S. Ahrens, Ann Mercer, and Gary M. McCombs, on behalf of themselves and all others similarly situated, Respondents/Appellants,

v.

The State of South Carolina and the South Carolina Retirement System, Appellants/Respondents,

and

James B. Arnold, Jr., Cynthia A. Thompkins-Hart, Nelson E. Brown, William M. Tisdale, Jr., Bobby Pack, Mitch Anderson, Lorenza Cobb, Ivan Holden, Phillip White, Jamie Harrelson, Dan Furr, Ann U. Mercer, Sharon C. Fulton, Johnnie R. Deas, Katie Daniels and Barbara Durfey, Panda J. Duncan, Janet Klee, John Locklair, Carol Ann Williamson and Leon Bellamy, Individually and as Class Representatives, Respondents/Appellants,

v.

The South Carolina Police Officers Retirement System, The South Carolina Retirement System, and the State of South Carolina, Appellants/Respondents.

Appeal from Richland County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26966
Heard November 3, 2010 – Filed May 2, 2011

AFFIRMED IN PART; REVERSED IN PART

Robert E. Stepp, Roland M. Franklin, Jr., Amy L.B. Hill, and Tina Cundari, all of Sowell, Gray, Stepp & Laffitte, of Columbia, David K. Avant and Justin R. Werner, both of Columbia; for Appellants-Respondents.

A. Camden Lewis, Keith M. Babcock and Ariail E. King, all of Lewis & Babcock, of Columbia; Brana J. Williams, of Conway; Gene McCain Connell, Jr., of Kelaher, Connell & Connor, of Surfside Beach and Richard A. Harpootlian, of Columbia, for Respondents-Appellants.

CHIEF JUSTICE TOAL: In 2006, this Court decided *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006), remanding to the circuit court the issue of whether a contract existed between the South Carolina Retirement System (SCRS) and certain retirees.[1] This case is an appeal from the circuit court's decision on remand. In this case, the South Carolina Police Officers Retirement System (PORS), the SCRS, and the State of South Carolina (collectively, the State) appeal the circuit court's order that the State is estopped from collecting retirement contributions from the certified class of "old working retirees" (Retirees), and that the State must return the contributions withheld from those Retirees since July 1, 2005. The State additionally appeals the circuit judge's certification of the class of Retirees. Finally, the State argues that Retirees failed to exhaust administrative remedies. The Retirees appeal the circuit court's holding that no contract existed between the State and the Retirees to prevent the State from changing the terms of sections 9-1-1790(A) and 9-1-90(4)(a) of the South Carolina Code (the Working Retirees statutes) after the employees' retirement. Retirees additionally appeal the circuit court's grant of summary judgment on the constitutional issues raised. This Court consolidated for review the cases brought against the PORS[2] and the SCRS[3] (together, the Retirement Systems), and is reviewing the circuit court order pursuant to Rule 204(b), SCACR.

---

[1] Nancy Ahrens, Ann Mercer, and Gary McCombs, on behalf of themselves and all others similarly situated.

[2] *Arnold v. S.C. Police Officers Ret. Sys.*, No. 05-CP-22-756 (Ct. Comm. Pl., filed June 25, 2009).

[3] *Ahrens v. State of S.C. & S.C. Retirement Sys.*, No. 05-CP-40-2785 (Ct. Comm. Pl., filed June 25, 2009).

FACTS/PROCEDURAL BACKGROUND

This case involves the State's working retiree program, and the propriety of its withholding retirement contributions from eligible Retirement Systems members who returned to covered employment with the State prior to July 1, 2005. Prior to this date, the old working retiree program allowed employees to retire and then, after a 60 day break for SCRS members, and a 15 day break for PORS members, those employees could be re-hired at an employer's discretion and receive both retirement benefits and a salary up to $50,000 per year, without being required to contribute to the Retirement Systems. S.C. Code Ann. §§ 9-1-1790(A) (Supp. 2001) & 9-11-90(4)(a) (Supp. 2002). In 2005, the State Retirement System Preservation and Investment Reform Act (Act 153) amended these statutes to require that retired members pay the employee contribution as if they were active members, but without accruing additional service credit. 2005 S.C. Acts 153. In filing these actions, the Retirees' chief contention is that it is unlawful for the State to change the terms of the old working retiree program after the Retirees irreversibly retired, and with the understanding that contributions to the Retirement Systems would not be required.

This Court first considered the issue in *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006). In that case, participants in the Teacher and Employee Retention Incentive Program (TERI), along with the *Ahrens* plaintiffs,[4] brought an action contesting the contribution requirement created by Act 153. As to the TERI program, this Court ruled in favor of the plaintiffs, finding that "the language in the old TERI statute demonstrates, in unambiguous terms, the intent of the legislature to bind itself to the terms in the statute," and therefore, "[w]hen the State, through Act 153, sought to collect retirement contributions from the old TERI participants, it was in clear breach of the contract it created by the relevant statutes." *Id.* at 639–40,

[4] The *Arnold* plaintiffs initiated a separate lawsuit challenging the contribution requirement.

630 S.E.2d at 269. As to the old working retirees statute, this Court found the statute

> does not use the same contractually significant language as utilized in the old TERI statute. As a result, we hold that the old working retiree statute does not create a binding contract between the State and the old working retirees prohibiting the State from altering the statute exempting old working retirees from further contributions to the retirement system.

Id. at 643, 630 S.E.2d at 272.

Still, the Court found evidence in the record that some working retirees may have had written contracts detailing the terms of the program, while others who did not have signed documents may have relied on statements made by the State when deciding whether to retire and enter the working retiree program. *Id.* Therefore, this Court remanded that issue to the circuit court for a "case by case factual determination of whether any actions of the State with regard to individual old working retirees constituted a breach of contract." *Id.* at 643, 630 S.E.2d at 272–73.

On remand, the circuit court considered whether Election of Non-Membership forms signed by employees electing to enter the working retiree program created a contract between the State and Retirees. The circuit court found they did not. However, the court provided the Retirees equitable relief, ruling the State is estopped from changing the terms of the working retirees program for those employees who retired prior to July 1, 2005, and further ordering the State to return funds previously withheld.[5] The circuit court also

[5] Having found for the plaintiffs with an estoppel order, the circuit court declined to reach the additional issues raised. Both the *Ahrens* and *Arnold* plaintiffs argued that the State's action in withholding retirement contributions was: (1) an unlawful taking, (2) impairment of contract, and (3) a violation of due process. In raising these issues, both sets of plaintiffs requested injunctive relief. The *Arnold* plaintiffs additionally argued quantum meruit.

ordered that notice be given to the certified class of *Ahrens* and *Arnold* plaintiffs that a judgment has been made in favor of the class.[6] This appeal follows.

ISSUES

I. Did the circuit court err in holding that no contract exists between the Retirees and the State?

II. Did the circuit court err in ruling that the State is estopped from requiring Retirees to contribute to the Retirement Systems?

III. Did the circuit court err in certifying the class of Retirees?

IV. Did the circuit court err in granting summary judgment in favor of the State on the Retirees' causes of action for unconstitutional taking, violation of due process, impairment of contract, and quantum meruit?

V. Did the circuit court err in denying the State's motion to dismiss based on the State's claim that Retirees failed to exhaust their administrative remedies under the Claims Procedure Act before bringing the dispute to the circuit court?

---

[6] By order dated Nov. 17, 2008, Judge Williams certified the *Ahrens* class as the following: "[a]ll persons currently employed by the State of South Carolina or its agencies or political subdivisions who retired and returned to work prior to July 1, 2005 ("Working Retirees"). Excluded from the classes are persons who are participants in the TERI program." In an order dated Nov. 11, 2008, Judge Williams certified the *Arnold* class with a similar class definition.

STANDARD OF REVIEW

An action seeking damages for breach of contract is an action at law. *Eldeco, Inc. v. Charleston County Sch. Dist.*, 372 S.C. 470, 476, 642 S.E.2d 726, 729 (2007). However, the doctrine of estoppel is equitable in nature. *Knight v. Stroud*, 212 S.C. 39, 42–43, 46 S.E.2d 169, 170 (1948). When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. *Corley v. Ott*, 326 S.C. 89, 92, 485 S.E.2d 97, 99 (1997). In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Inlet Harbour v. S.C. Dep't of Parks, Rec. & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). However, the appellant is not relieved of its burden of convincing the appellate court the circuit judge committed error in his findings. *Pinkney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001). When an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and the reason for its decision. *Dearybury v. Dearybury*, 351 S.C. 278, 283, 569 S.E.2d 367, 369 (2002). In an action at law tried by a judge, an appellate court's scope of review extends merely to the correction of errors of law. *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599–600, 675 S.E.2d 414, 415 (2009).

ANALYSIS

I. Whether a Contract Exists Between the State and Retirees

Retirees argue that where the statute did not create a contract, the Retirement Systems had the authority to "fill up the details" by requiring Retirees sign forms stating they would not be required to pay into the Retirement Systems, and in doing so, these forms created a contract between the State and Retirees, which was then breached when the State began requiring these contributions. We disagree.

This Court has often described a state agency's rulemaking power as its authority to "fill up the details" of the laws promulgated by the General Assembly. *Heyward v. S.C. Tax Comm'n*, 240 S.C. 347, 355, 126 S.E.2d 15, 19–20 (1962); *S.C. Hwy. Dept. v. Harbin*, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955). While "[t]he Legislature has the right to vest in the administrative officers and bodies of the state a large measure of discretionary authority . . . to make rules and regulations," an agency may not make rules that "conflict with, or . . . change in any way the statute conferring such authority." *Fisher v. J.H. Sheridan Co., Inc.*, 182 S.C. 316, 326, 189 S.E. 356, 360 (1936). Accordingly, an agency does not have the power to convert a right that is merely statutory into a contractual right. *McKinney v. S.C. Police Officers Ret. Sys.*, 311 S.C. 372, 375, 429 S.E.2d 797, 798 (1993).

Therefore, to fully address Retirees' argument that the Retirement Systems created a contract by filling up the details of the statute, it is necessary to examine this Court's basis in *Layman* for determining that the legislature intended to create a contractual right in the TERI statute, but did not intend the same when drafting the Working Retirees statutes.

Ordinarily, statutes do not create contractual rights. *Layman*, 368 S.C. at 637, 630 S.E.2d at 268. In South Carolina, the legislature may only create contractual rights in a statute through the express language of the statute. *Id.* at 638, 630 S.E.2d at 268. This Court found in *Layman* that the old TERI statute outlined the rights and responsibilities of each party. *Id.* at 639, 630 S.E.2d at 269. In exchange for the right to lock in a retirement benefit based on the average final compensation of the member, "a program participant *shall agree* to continue employment with an employer participating in the system for a program period, not to exceed five years." S.C. Code Ann. § 9-1-2210(A) (Supp. 2001) (emphasis added). During this term of employment, the receipt of retirement benefits was deferred, and placed in a non-interest bearing trust account. *Id.* § 9-1-2210(B). A program participant was not required to make any further retirement contributions, accrued no service credit, and was not eligible to receive certain employment benefits. *Id.* § 9-1-2210(D). This Court found the following terms used in the old TERI statute as "indicative of a contract: 'A . . . member who is *eligible* [to retire under

TERI] . . . and *complies* with the *requirements* of this article . . . . *shall agree* to continue employment . . . .'" *Layman*, 368 S.C. at 639, 630 S.E.2d at 269 (*quoting* S.C. Code Ann. § 9-1-2210(A)) (emphasis added).

In contrast, this Court found that the General Assembly did not outline the rights and responsibilities of each party in the SCRS statute. *See* S.C. Code Ann. § 9-1-1790(A) (Supp. 2001). The SCRS statute provided that sixty days after a state employee officially retires, he "*may* return to employment covered by the system and earn up to fifty thousand dollars a fiscal year without affecting the monthly retirement allowance he is receiving from the system." *Id.* (emphasis added). Under this statute, an employee's decision to return to work after retiring was optional, as was an employer's decision to re-hire that employee. The question of whether the PORS statute created a contractual right was not before this Court in *Layman*. However, because the language of the PORS statute is largely similar to the SCRS statute, [7] we find our analysis of the SCRS statute in *Layman* to be binding precedent with regard to the PORS statute.

With this in mind, we disagree with Retirees' contention that the Retirement Systems filled up the details and created binding contracts between the State and Retirees through the use of signed forms. The various forms that were required to be signed by employees wishing to enter the old working retirees program contained substantially the same language:

> I hereby notify you that I am an employee of the State of South Carolina or its political subdivisions, and that I meet the requirements not to become a member of the South Carolina Retirement System or the Police Officers Retirement System, and I hereby exercise my option to become a non-member.

[7] Section 9-11-90 (4)(a) provides, in pertinent part, "a retired member of the system who has been retired for at least fifteen consecutive calendar days may be hired and return to employment covered by this system . . . without affecting the monthly retirement allowance he is receiving from this system."

> I take this action under the provisions of the Retirement Act with full knowledge that I will not be credited with retirement service for this period of employment since I have elected non-membership and, as such, will not be making retirement contributions.

Retirees argue that the language of these forms is contractual in nature and is similar to the language used in the TERI statute. However, we believe the language used in the form supports the contrary. The form states that the authority to enter the working retiree program is derived from "the provisions of the Retirement Act"—the statute that this Court held in *Layman* did not create a contractual right. *See Layman*, 368 S.C. at 643, 630 S.E.2d at 271.

Even assuming these forms, on their own, were binding contracts, we do not believe that the Retirement Systems had the authority to create contracts without the statutory directive of the legislature. In *McKinney v. South Carolina Police Officers Retirement System*, this Court decided this exact issue. 311 S.C. 372, 429 S.E.2d 797 (1993). In that case, the PORS terminated the plaintiff's retirement benefits, finding that the plaintiff did not establish twenty-five years of creditable service as required by the statute. On appeal, the plaintiff argued that certain correspondence from the Retirement Systems created a binding contract entitling the plaintiff to benefits not authorized by the statute. *Id.* This Court found that the source of the plaintiff's right "is the statutes, not a contract," and that neither the plaintiff nor the PORS "have the authority to convert a statutory right into a contractual one." *Id.* at 375, 429 S.E.2d at 798. Despite the dissent's contention that the facts of *McKinney* do not apply here, we believe the important premise that an agency cannot convert a statutory right to a contractual right maintains in this case. Any other holding would permit an executive agency to usurp the essentially legislative function of amending laws by binding the legislature through contract where it had no intention of being bound. We cannot support such a result.

Additionally, in stating there is no basis for treating the TERI statute and the Working Retirees statutes differently, the dissent overlooks important

distinctions that weighed heavily on our determination in *Layman* that the TERI statute created a contract and the SCRS statute did not. Employees who retired under TERI were *required*, as a condition of their retirement, to continue employment with an employer participating in the TERI system for the program period. S.C. Code Ann. § 9-1-2210(A) (Supp. 2001). Importantly, state employees who retired under the Working Retirees statutes were not bound by this same obligation. Under those statutes, when an eligible employee retired, that employee had the option of returning to employment after having retired for sixty days or fifteen days (depending on the statute); and even their return was conditioned on whether an employer in the system chose to hire that employee. *Id.* § 9-1-1790(A) (Supp. 2001) & 9-11-90(4)(a) (Supp. 2002). The dissent claims that the Working Retirees statutes constituted a valid offer to eligible participants that was then accepted by the signing of Election of Non-Membership forms. We respectfully disagree. Because there was no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retiree statutes as providing a mere option to retirees, rather than an offer. Additionally, the TERI statute specifically provided in its text that "a program participant makes no further employee contributions into the system." *Id.* § 9-1-2210(D). The Working Retirees statutes are void of this express guarantee that retirement contributions would not be required. With an absence of consideration in the Working Retirees statutes, these statutes provide no framework to which a contractual right can attach. *See Alston v. City of Camden*, 322 S.C. 38, 45, 471 S.E.2d 174, 177 (1996) ("South Carolina law is clear that public employees generally have no contractual rights in their employment merely by virtue of a statute describing the terms of that employment.").

II. Estoppel

The State argues that the circuit court erred in holding that the Retirement Systems were estopped from applying Act 153 to Retirees because, under these circumstances, estoppel cannot lie against the State, and because the Retirees failed to establish the elements of equitable estoppel. We agree.

A. Estoppel Against the State

Generally, "estoppel will not lie against a governmental body for the unauthorized acts of its officers and agents." *Townes Assoc., Ltd.v. City of Greenville*, 266 S.C. 81, 87, 221 S.E.2d 773, 776 (1976). However, under certain circumstances, the State can be subject to the estoppel doctrine. *Id.* When agents or officers of a governmental body act within the proper scope of their authority, the government "cannot escape liability on a contract within its power to make." *Id.* Additionally, the government may be estopped in matters that do not affect the exercise of its police power or the application of public policy. *Grant v. City of Folly Beach*, 346 S.C. 74, 81, 551 S.E.2d 229, 232 (2001).

In determining whether an agent of the State acted within its authority, the law is clear that "[a] public officer derives his authority from statutory enactment, and all persons are in law held to have notice of the extent of his powers, and therefore, as to matters not really within the scope of his authority, they deal with the officer at their peril." *Baker v. State Highway Dep't*, 166 S.C. 481, 490, 165 S.E. 197, 201 (1932), *rev'd on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 349 S.E.2d 741 (1985).

The record is replete with testimony that Retirement Systems agents told Retirees that upon entering the working retiree program, they would not be required to make contributions to the system. These agents were, no doubt, representing the law as it stood at the time. However, even if this Court found that the Retirement Systems and its agents made representations that caused the Retirees to prejudicially rely, because this Court has ruled that the Working Retiree statute did not create a binding contractual right, estoppel cannot lie against the state, as these representations were made outside of the agency's authority. Therefore, we reverse the circuit court's estoppel holding.

B. The Elements of Estoppel

Although the issue of estoppel may be disposed of under the State's first argument, for purposes of clarifying the necessary elements to prove estoppel against the government, we address this issue and find that Retirees failed to sufficiently prove these elements. "To prove estoppel against the government, the relying party must prove (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." *Grant*, 346 S.C. at 80–81, 551 S.E.2d at 232. In concluding that the State was estopped from requiring retirement contributions from Retirees, the circuit court judge applied a six element test derived from *Brading v. County of Georgetown*, 327 S.C. 107, 114, 490 S.E.2d 4, 7 (1997). Because the *Grant* elements have been specifically applied by this Court to claims against the government, we believe it is the appropriate test in this case.

As to the first element, it is uncontested that the Retirement Systems provided forms, brochures and, in some cases, made oral statements representing that when the Retirees returned to work, they would not be required to make retirement contributions. However, it is difficult for Retirees to claim they did not know, or had no means of knowing that these terms would ever change.

The form signed by many of the Retirees required them to attest their understanding that the terms of the working retiree program derived from the Retirement Act. Since the Retirement Act was enacted, the SCRS statute has been amended 29 times and the PORS statute 27 times. In fact, several Retirees testified that they were at least aware that laws could change, and nearly all of the Retirees whose testimony is included in the record stated that they never specifically asked a Retirement Systems agent if the law regarding contribution requirements could ever change.[8] While the majority of

[8] The record does not include the testimony of all 23 named plaintiffs. The burden of proving the elements of estoppel, however, lies with its proponent.

amendments to the Retirement Act have afforded working retirees more favorable terms, we do not believe this means that more favorable terms should be legally expected.

In further support that Retirees had knowledge that the terms of the Working Retirees statutes could change, the Retirement Systems regularly published a pamphlet containing an overview of retirement benefits with the following disclaimer:

> The information contained in this brochure is meant to serve as a guide, but does not constitute a binding representation of the South Carolina Retirement Systems. The statutes governing the South Carolina Retirement Systems are found in Title 9 of the South Carolina Code of Law, and should there be any conflict between this brochure and the statutes, the statutes will prevail. Because state statutes are subject to change by the South Carolina General Assembly, please contact us for the most current information.

Finally, even if the Retirees were not aware that the terms of the Working Retiree statutes could change, "citizens are presumed to know the law and are charged with exercising 'reasonable care to protect their interests.'" *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (*quoting Smothers v. U.S. Fidelity & Guar. Co.*, 322 S.C. 207, 210–11, 470 S.E.2d 858, 860 (Ct. App. 1996)).

Second, Retirees did not prove justifiable reliance on representations made by the Retirement Systems. The testimony among the named plaintiffs is varied with regard to whether or not they would have retired had they known they would be required to make retirement contributions without accruing additional service credit. For many of the named plaintiffs, the motivating factor for retiring was the promise of receiving two sources of

---

Retirees have not submitted any information that precludes the finding that Retirees had knowledge, or the means to gain knowledge, that the provisions of the Retirement Act were subject to change.

income, and they stated they would have retired nevertheless. Still, others avidly contended that if they had known contributions would be required, they would not have retired when they did.[9] The presence of reliance in these latter cases, however, is not dispositive unless that reliance was justified. Recognizing the well-established rule that citizens are presumed to know the law and are charged with using care to protect their interests, we find that any reliance created by the representations of the Retirement Systems was not justified; especially in light of the disclaimers included in the Retirement Systems' distributed material, and the Retirees' knowledge that laws are subject to change.

Lastly, we find that any reliance created by the forms, brochures, or statements of the Retirement Systems and its agents did not cause a prejudicial change in position. We sympathize with Retirees' argument that if they had continued working as non-retired employees, the contributions made to the Retirement Systems would have increased the retirement benefits they would eventually receive. However, a comparison of the two options, either entering the working retiree program or continuing with employment, reveals that the monetary benefit of having five years additional service credit is minimal when compared to the effect of simultaneously receiving a salary and a retirement allowance. Therefore, we find that any change in position caused by the alleged misrepresentation was not prejudicial to the Retirees.

The amount of retirement allowance that an SCRS retiree receives is set by statute at "one and eighty-two hundredths percent of his average final compensation, multiplied by the number of years of his credible service." S.C. Code Ann. § 9-1-1550(B)(1) (Supp. 2009).[10] To demonstrate this point, assume that Employee A and Employee B both work for the State making

[9] Nancy S. Ahrens, Ann Mercer, James B. Arnold, Jamie Harrelson, Johnnie R. Deas, Dan Furr, and Marion E. White, Jr. all testified to this effect.

[10] The PORS uses a different calculation; however, plugging the PORS denominator for a Class Two employee into the following scenario yields similar results. *See* S.C. Code Ann. § 9-11-60(2)(a)–(c) (Supp. 2009).

$40,000 per year and with 28 years of service credit. If Employee A becomes a working retiree, during the five year period of the program he would receive $101,920 in retirement benefits,[11] in addition to his salary. In the five years after Employee A discontinues working he will receive another $101,920 in retirement allowances for a ten year total of $203,840 in retirement benefits. Under the second scenario, Employee B does not retire and accrues five additional years of service credit and merit pay increases of two percent per year. With 32 years of service credit and an AFC of $44,163, Employee B will receive $128,603 in retirement allowances in the five years following retirement,[12] as compared to the $203,840 that Employee A has received in retirement benefits up to the same point in time.[13] In fact, it would take twenty-five years for Employee B to receive a higher lifetime retirement benefit than Employee A. In our opinion, a prejudice that takes twenty-five years to occur, if at all, does not merit an estoppel holding.

Therefore, we do not believe the Retirees adequately proved the elements of estoppel. Consistent with our holding with regard to estoppel against the state, we reverse the circuit court's estoppel order and find that the State is not required to return contributions previously deducted.

III. Certifying the Class

The State argues that the circuit court erred in certifying the class of Retirees for three reasons: (1) this Court decertified the class definition that the circuit judge ultimately certified, (2) on the merits, the prerequisites of a

[11] We assume that the Average Final Compensation (AFC) of Employee A is $40,000, and we arrive at this five year retirement allowance total as follows: 28 year service credit x .0182 (statutory multiplier) x $40,000 AFC x 5 years.

[12] 32 years x .0182 (statutory denominator) x $45,470 (AFC) x 5 years.

[13] Notably, this demonstration does not take into account cost of living adjustments that are calculated each year to increase retirement allowances. However, these being consistent among each employee, we do not believe it substantially affects the analysis.

class action have not been satisfied, and (3) class treatment is not appropriate for claims based on estoppel. Because we conclude that the named plaintiffs have neither a contractual nor an equitable remedy, we decline to address these issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

IV. Summary Judgment on Additional Causes of Action

Retirees argue that the circuit court erred in granting summary judgment to the State on the issues of unconstitutional taking, violation of due process, impairment of contract, and quantum meruit. Claims of unconstitutional taking, violation of due process, and impairment of contract are founded on the presumption that a contractual right has been unfairly taken away. Because we find that the Retirees did not have a contractual right to the terms of their employment, we find it unnecessary to address these constitutional issues. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

Further, Retirees raised the issue of quantum meruit, but failed to argue it in their brief. An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court. *State v. Hiott*, 276 S.C. 72, 86, 276 S.E.2d 163, 170 (1981).

Therefore, we affirm the circuit court's grant of summary judgment on these issues.

V. Exhaustion of Remedies

The State argues that the circuit court lacked the statutory authority to hear Retirees' claims because the Claims Procedures Act, S.C. Code Ann. §9-21-10 *et seq.* (Supp. 2009), provides the "exclusive remedy for dispute or controversy between the retirement systems and a member . . . arising pursuant to or by virtue of Title 9 of the Code of Laws of South Carolina, 1976." S.C. Code Ann. § 9-21-30. Because we rule in favor of the State on both issues of contract and estoppel, we presume that the State will withdraw this issue.

CONCLUSION

We hold that a contract did not exist between the State and Retirees, neither by way of forms signed nor representations made. Accordingly, we conclude that summary judgment was proper as to the constitutional issues raised by Retirees because those issues are premised on the existence of a contract. Additionally, we find the circuit court's estoppel holding to be in error.

AFFIRMED IN PART; REVERSED IN PART.

BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur. HEARN, J., dissenting in a separate opinion.

JUSTICE HEARN: I concur in the majority's resolution of the issues of estoppel, class certification, summary judgment as to the additional causes of action, and exhaustion of remedies. However, I part company with the majority on whether a contract existed and respectfully dissent. In my view, the old working retirees statutes, together with the mandatory forms signed by the working retirees, created a binding contract between the State and the working retirees which could not be unilaterally rescinded by the State with the passage of Act 153.

In its simplest terms, a contract is formed when a legitimate offer is accepted, accompanied by a valuable consideration. Here, the original working retiree statutes permitted participants to retire, return to work for the State, and continue to receive their retirement. The only retirement contributions required were those by the employer: "An employer shall pay to the system the employer contribution for active members prescribed by law with respect to any retired member . . . ." S.C. Code Ann. § 9-1-1790(B) (as amended through 2004); *see also id.* § 9-11-90.

The old working retirees statutes thus constituted an offer to eligible program participants to retire, be re-hired, and receive their retirement benefits without contributing any further payments into the retirement system. While this Court in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), quite rightly found the old working retirees statutes did not in and of themselves establish a contract, they most certainly constituted a legally significant offer to those qualified for the program.

In order to return to work and accept the offer contained in the old working retirees statutes, participants were required to sign a form stating their election of non-membership in the retirement system. The Participating Employer Procedures Manual, published by the South Carolina Retirement Systems, states that "[a] service retiree (TERI or non-TERI) . . . must complete an Election of Non-Membership (Form 1104) upon returning to work for an employer covered by the Retirement Systems." This mandatory form, entitled "ELECTION OF NON-MEMBERSHIP," stated: "I take this action under the provisions of the Retirement Act with full knowledge that I

will not be credited with retirement service for this period of employment since I have elected non-membership and, as such, will not be making contributions."

When signed by the participant and his employer, this mandatory form constituted the participant's acceptance of the State's offer of re-employment contained in the working retirees statutes. The benefits flowing to the State from being able to re-hire experienced workers without having them accrue additional retirement benefits and the detriment to the participants in foregoing further retirement benefits from the State clearly satisfied the requirement of consideration for the formation of a binding contract.[14] *See McLeod v. Sandy Island Corp*, 265 S.C. 1, 13, 216 S.E.2d 746, 751 (1975) (citing *Furman University v. Waller*, 124 S.C. 68, 117 S.E.2d 356 (1923)) ("A valuable consideration may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.").

There is nothing in the form which the working retirees had to execute prior to re-hiring that indicates their election of non-membership in the retirement system was anything other than permanent. Indeed, Peggy Boykin, head of the South Carolina Retirement Systems, testified that if "[the working retirees] retired prior to July 1, 2005, they did not have to make any contributions." The old adage that the proof is in the pudding hits the bulls-eye here, given the undisputed fact that not one of the working retirees who executed the form and returned to work prior to the passage of Act 153 had any monies taken out of their paychecks. All parties—the working retirees, their State employers, and the State retirement system—all recognized that a legally binding contract existed.

[14] As stated by Cy Wentworth, the Human Resources Manager for the South Carolina Judicial Department, himself a working retiree: "The employee agreed to retire and not make any further contributions to the Retirement System and the State continued to be able to employ a seasoned, experienced employee for a cost which saved the State money."

As this Court correctly stated in *Layman*: "Once the bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration." 368 S.C. at 640, 630 S.E.2d at 269. Consistent with *Layman*, I would hold that the State may not unilaterally alter its agreement with the working retirees by forcing them to contribute to the retirement system. With all due respect to the majority, I cannot, in good conscience, treat the working retirees differently than this Court treated the TERI participants in *Layman*.

Nor do I agree with the majority's reliance on *McKinney v. South Carolina Police Officers Retirement System*, 311 S.C. 373, 429 S.E.2d 797 (1993), for the proposition that no viable contract could be formed through execution of the forms here. *McKinney* held that certain correspondence from the state retirement system could not create a binding contract with the plaintiff for benefits not authorized by the statute. *Id.* at 375, 429 S.E.2d at 798. That is a totally different situation than what is presented here where the retirement system generated forms to carry out the intent and purpose of the original statutes, and the participants were required to execute those forms prior to being rehired. While I agree with the reasoning expressed in *McKinney* that mere letters from the retirement system could not provide benefits not authorized by statute, I am at a loss to see its application to the facts of this case.

Consistent with the principles enunciated in *Layman*, I would hold that the State created a binding contract with the working retirees through its unambiguous statutory scheme and the participants' execution of mandatory forms which could not be altered unilaterally by the State to the detriment of the working retirees.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jane Roe and John Roe, Appellants,

v.

Craig Reeves, Victoria A., John Doe, Biological Father and Baby Boy, an infant, Respondents.

Appeal From Greenville County
Alex Kinlaw, Jr., Family Court Judge

Opinion No. 26967
Heard December 2, 2010 – Filed May 2, 2011

REVERSED

Philip J. Temple, Temple, Mann, Briggs & Hill, of Greenville, and Robert Norris Hill, Law Offices of Robert Hill, of Newberry, for Appellants.

Andrea B. Williams, of Greenville, and Mary Alice H. Godfrey, Godfrey Law Firm, of Greenville, for Respondents.

Katherine H. Tiffany, Guardian Ad Litem, of Carter Smith Merriam Rogers & Traxler, of Greenville.

JUSTICE HEARN: In this case, Craig Reeves (Father) claims his consent was necessary prior to another couple adopting his child. The family court agreed, finding that he met the requirements of Section 63-9-310(A)(5)(b) of the South Carolina Code (2010) and awarding him custody of the child. We find that Father did not undertake sufficient good faith efforts to assume parental responsibility and comply with section 63-9-310(A)(5)(b), and hold that his consent to the adoption is not required. Therefore, we reverse the family court and order that custody be immediately returned to the adoptive parents (Appellants).

FACTUAL/PROCEDURAL BACKGROUND

Father began a sexual relationship with Victoria A. (Mother) in July 2007, when he was nineteen years old and she was fifteen.[1] At that time, Mother already had one son from a previous relationship with another man. Mother and Father's relationship was not a stable one. Over the next several months, Mother and Father broke up and reconciled several times. However, in May 2008, Mother, then sixteen years old, discovered she was pregnant with Father's child. She first told him that she was pregnant in July, at which point he was in a relationship with another woman. His response was less than encouraging. He initially texted her, "We dnt hav a baby jstop txtn me and sendin me pics." Approximately twenty-four hours later, apparently in response to another text from Mother, Father texted this: "Go hav an abortion

[1] Father and Mother never lived together during their relationship or Mother's subsequent pregnancy.

or sumthn get a life stop txtn me damn."[2] Although Father maintains he did not believe Mother when she told him that she was pregnant,[3] he did not undertake any effort to see her or otherwise confirm if she was, in fact, pregnant.

Shortly after receiving these initial text messages, Mother contacted an adoption agency about placing the child for adoption. She settled on Appellants as the prospective adoptive parents. From that point on, Appellants drove Mother to all of her remaining doctor appointments until the child was born. Additionally, Appellants made regular payments to the adoption agency for an allowance that was distributed to Mother for pregnancy and other miscellaneous expenses. However, Mother's medical expenses were covered by Medicaid. During the term of her pregnancy, Mother lived at home with her mother and other child. Her living expenses were covered by her mother and the food stamps they received, and were supplemented by the payments made by Appellants through the adoption agency.

Father soon learned of Mother's plans to place their child up for adoption. When he found out, he texted her: "If ur putn it w people and ur hapy then f*kn stop begin me 2 cum b there its not gna hapn." Less than a month later, he texted Mother: "Leav me tha f*k alone im nt gna txt u bak and I want nothng 2 do w u so jus get out mx [sic] life already." He made no further effort to inquire about Mother or their unborn child until November of that year when Mother visited Father at his workplace. According to Father, it was only at that time he realized she was indeed pregnant. It was then, some five or six months into Mother's pregnancy, that Father first informed Mother he wanted custody of the child and asked that she stop the adoption.

---

[2] Father stated in an affidavit to the family court that he offered to pay for an abortion.

[3] During the course of their rocky relationship, Mother would use various excuses in an attempt to win Father back. For example, she told Father that her other son missed him, her cousin was in a car accident, and her grandfather was dying. Father therefore testified he initially believed Mother's pregnancy was another ruse to rekindle their relationship.

At this point, Mother began having some reservations about whether to proceed with the adoption. She changed her mind about her decision several times and acknowledged that Father expressed at least some desire to raise the child, telling him that she would consider it "if he was serious." When Father asked if he could speak with Appellants about calling off the adoption, she refused to give him their names. However, Father claims Mother told him that he would be able to take the child home from the hospital when it was born.

During the remainder of the pregnancy, Father bought some diapers for Mother's other son and made her a one-time offer of $100, which she refused. According to Father, Mother would not accept money for their child, but she would accept things for herself and her other son. In that vein, he paid eleven dollars for a T-shirt and sweat pants for Mother at Old Navy. He did not pay any medical expenses because Mother was receiving Medicaid, nor did he pay living expenses because Mother lived with her mother and received food stamps. He did gratuitously repair Mother's family vehicle, which was owned by her mother.[4]

At this time, Father earned nine dollars per hour plus average monthly commissions of $900 working at an auto parts store. He also had a second job performing automobile repossessions. However, very little of his commissions and none of his income from repossessions were reported on his financial declaration. He had $4,000 in savings[5] and $34,000 in property, which included several cars and motorcycles he planned to sell for cash. Although he appears to own most of his vehicles, his car payments totaled $500 per month, and he listed an additional $80 per month expense just for tires. Like Mother, Father lived at home with his parents. He anticipated that should he have custody of the child, it would stay with him at his parents' house. To that end, he converted some space in his parents' house into a

[4] Had this work been performed at an automobile repair shop, Father estimated it would have cost approximately $750.

[5] His savings were not reported on his financial declaration, but rather in the report from the guardian ad litem.

nursery and purchased diapers, clothes, blankets, bottles, and other similar items.

After arranging the adoption, Mother had weekly meetings with the adoption agency to evaluate her progress. During one of these meetings in January 2009, Mother asked about Father's rights as the biological father of the child. One of the agency's employees told Mother what state law requires of a biological father and asked her whether Father had offered her any support. She told the employee of Father's one-time offer of $100, but said that he had made no other offers. The employee expressed her opinion that the offer was not legally sufficient to establish his rights as the father, but she told her to let the agency know if he made any more offers. At no point did the agency advise her to not accept any offers from Father; in fact, the agency specifically told her to not hide from Father. Despite this, she told Father the agency told her to refuse his offers of support and that she should not even be speaking to him.

In March 2009, Mother gave birth to a baby boy. Appellants drove Mother to the hospital and spent the night with her there. Mother did not contact Father when she went into labor, but after their son was born she sent him a text message with a picture of the baby, stating that he was "with his parents," referring to Appellants. Father then went to the hospital to see Mother and the child, but hospital staff informed him that Mother was a "no information" patient and would not accept his visit. When Father attempted to get in touch with Mother, she lied and said she was at her father's house. The next day, Mother signed an adoption consent form, and Appellants took the child home.

Very soon thereafter, Father retained an attorney and moved for temporary emergency relief. The family court awarded Appellants temporary custody of the child. Once Father's paternity was established, the court awarded him weekly visitation and ordered him to pay child support.[6] During the period of time prior to the hearing on the issue of Father's consent

[6] Appellants refused to accept money from Father directly and requested that he pay the child support into the court.

to the adoption, Father exercised his right to visit the child, but he fell into arrears on his child support. In fact, it was not until the day before the consent hearing that this account was made current. At the hearing, Father testified that he "tried to be there" for Mother, but she refused his help and said he would never see his child. He also believed that Mother was jealous of his new relationship and did not want Father to raise the baby with another woman. On the other hand, Mother testified that she never believed Father was serious about raising their child and he "had his chance to step up . . . and he didn't." During the hearing, both Mother and Father acknowledged that they had not been truthful throughout these proceedings. Mother admitted she was untruthful to Father, Appellants, the adoption agency, and the guardian ad litem; Father admitted he lied in his deposition to make his relationship with Mother appear more stable. The family court found that Father had undertaken sufficient prompt and good faith efforts to assume parental responsibility as required by section 63-9-310(A)(5)(b). Accordingly, the court found his consent was required for Appellants to adopt the child and ordered that the child be returned into Father's custody. This appeal followed.

ISSUE PRESENTED

Did the family court err in finding Father was required to consent to the adoption of the child?

STANDARD OF REVIEW

"[A]doptions are equitable proceedings, and therefore, the Court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence." *Adoptive Parents v. Biological Parents*, 315 S.C. 535, 542 n.6, 446 S.E.2d 404, 408 n.6 (1994) (citing S.C. Const. art 5, § 5). "This broad scope of review does not require the Court to disregard the findings of the family court judge, who saw and heard the witnesses and was in a better position to evaluate their credibility." *McCann v. Doe*, 377 S.C. 373, 382, 660 S.E.2d 500, 505 (2008).

LAW/ANALYSIS

Appellants argue the family court erred in finding Father undertook a sufficient effort to assume parental responsibility. We agree.

The relationship between an unwed father and his child is deserving of constitutional protection because the father possess an "opportunity no other male possesses to develop a relationship with his offspring" when the child is born. *Abernathy v. Baby Boy*, 313 S.C. 27, 31, 437 S.E.2d 25, 28 (1993).

> However, this opportunity interest is constitutionally protected only to the extent that the biological father who claims protection wants to make the commitments and perform the responsibilities that give rise to a developed relationship, because it is only the combination of biology and custodial responsibility that the Constitution ultimately protects.

Id. Put differently, it is only "[i]f he grasps that opportunity and accepts some measure of responsibility for the child's future [may he] enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." *Lehr v. Robertson*, 463 U.S. 248, 262 (1983). Accordingly, section 63-9-310(A)(5)(b), provides,

> (A) Consent or relinquishment for the purpose of adoption is required of the following persons:
>
> . . . .
>
> (5) the father of a child born when the father was not married to the child's mother, if the child was placed with the prospective adoptive parents six months or less after the child's birth, but *only if*:
>
> . . . .
>
> (b) the father *paid a fair and reasonable sum*, based on the father's financial ability, for the *support of the child* or for the expenses incurred *in connection with the mother's pregnancy or with*

> *the birth of the child*, including, but not limited to, medical, hospital, and nursing expenses.

(emphasis added). In enacting section 63-9-310(A)(5)(b), the General Assembly set the minimum standards an unwed father must meet in a timely fashion to "demonstrate his commitment to the child, and his desire to 'grasp [the] opportunity' to assume full responsibility for his child."[7] *Abernathy*, 313 S.C. at 32, 437 S.E.2d at 29 (quoting *Lehr*, 463 U.S. at 262). An unwed father must therefore demonstrate a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child in order for this relationship to obtain constitutional protection. *Id.* at 31, 437 S.E.2d at 28.

However, we do not always require strict compliance with the literal requirements of section 63-9-310(A)(5)(b). For example, a father's ability to cultivate the sort of relationship we recognized in *Abernathy* can be thwarted by the mother's refusal to accept the father's expressions of interest in and commitment to the child. *Id.* at 32, 437 S.E.2d at 29. We therefore extend the constitutional protection of a father's relationship with his child "not only when he meets the literal requirements of section 63-9-310(A)(5)(b), but also when he undertakes sufficient prompt and good faith efforts to assume parental responsibility and to comply with the statute." *Id.* Otherwise, a father's constitutional right to form a relationship with his child that receives constitutional protection is subject to the whim of the mother. *Id.* at 32-33, 437 S.E.2d at 29.

---

[7] Section 63-9-310(A)(5)(a) does not condition the necessity of the unwed Father's consent on financial contributions. That section provides his consent is required where he openly lived with the mother or the child for a period of at least six months immediately preceding the adoption *and* he openly held himself out as the child's father during this time. S.C. Code Ann. § 63-9-310(A)(5)(a). Because the child was placed with Appellants immediately after his birth and Father and Mother never lived together, this section does not apply.

We begin our analysis by determining whether Mother thwarted Father's efforts to provide for her and their child in order to establish the proper standard under which we will evaluate Father's contributions. In the case before us, we find that Mother has not thwarted Father's attempts to form a relationship with their child as was the case in *Abernathy*. In *Abernathy*, both the mother and father of the child were on active duty in the Navy when they commenced a casual sexual relationship. *Id.* at 29, 437 S.E.2d at 27. In contrast to Father's actions here, when the mother, while she was on leave, informed the father by phone of her pregnancy, he begged her not to consider abortion, and she agreed. *Id.* When the mother returned, the father met her at the airport and offered to support her and the child. *Id.* The mother told him they would discuss the situation when he returned from sea duty; nevertheless, when the father shipped out, he turned over his car and his bank account to the mother. *Id.* While the father was at sea, the mother determined she desired no further involvement with him. *Id.* When he returned, she rebuffed his advances and rejected his offer of marriage. *Id.* She thereafter avoided contact with him, refused his telephone calls, and basically hid away from him. *Id.* When the father later learned of the birth and the pending adoption action, he sought to intervene and assert his parental rights. *Id.* at 30, 437 S.E.2d at 27. Under these compelling facts, this Court rightly concluded that literal compliance with the predecessor to section 63-9-310(A)(5)(b) was not necessary. *Id.* at 32-33, 437 S.E.2d at 29.

The facts of this case bear little resemblance to those presented in *Abernathy*. Here, Father not only advised Mother to have an abortion and stop bothering him when he was initially told of her pregnancy, he also told her several weeks later that if she was happy with giving up the baby for adoption, that was fine with him. It was when Mother was five or six months into her pregnancy and went to visit Father that he told her he wanted to raise the child, and he claims Mother told him that when the child was born, he would be able to take him home from the hospital. It was not until the child was born that Mother prevented Father from seeing the child and went through with the adoption. During her entire pregnancy, the only support Mother refused was Father's one-time offer of $100. Beyond that, the record contains no evidence Mother actually hid herself from Father or refused his

assistance. If this is sufficient to constitute thwarting, the exception to literal compliance with the requirements of section 63-9-310(A)(5)(b) has swallowed up the rule.

The situation before us therefore falls far short of the extraordinary factual scenario presented in *Abernathy* which prompted this Court to require less than literal compliance with the statutory provision in question.[8] Given that Father was an adult at the time this child was conceived, we are not persuaded he would have been so easily thwarted in his efforts to assume his parental responsibilities by this sixteen-year-old girl who did not hide from him as in *Abernathy*, but continued to live in the same house throughout her pregnancy and delivery. The Court of Appeals of Kansas summed up an unwed father's obligation as follows:

> He must [provide support] regardless of whether his relationship with the mother-to-be continues or ends. He must do this regardless of whether the mother-to-be is willing to have any type of contact with him whatsoever or to submit to his emotional or physical control in any way. . . .
>
> Even in the most acrimonious of situations, a father-to-be can fund a bank account in the mother-to-be's name. He can have property or money delivered to the mother-to-be by a neutral third party. He can—and must—be as creative as necessary in providing *material assistance* to the mother-to-be during the pregnancy and, the law thus assumes, to the child once it is born. He must not be deterred by the mother-to-be's lack of romantic interest in him, even by her outright hostility. If she justifiably or unjustifiably wants him to stay away, he must respect her wishes but be sure that his support does not remain equally distant.

[8] Even if we were to agree with the dissent that the father in *Doe v. Queen*, 347 S.C. 4, 552 S.E.2d 761 (2001), did less to assume parental responsibility than Father in this case, the dissent loses sight of the fact that the father in *Queen* was thwarted and was held to a lower standard. Because Father here was not thwarted, he must literally comply with the statute.

In re Adoption of M.D.K., 58 P.3d 745, 750-51 (Kan. Ct. App. 2002) (Beier, J., concurring) (emphasis added). The thwarting recognized by this Court in *Abernathy* is far more severe than that referenced in the above-quoted passage from *Adoption of M.D.K.* In order for an unwed father to be thwarted, the mother must be more than acrimonious or hostile; she must actively hide and avoid the father's attempts to provide support. However, the situation before us today is more akin to that referenced in *Adoption of M.D.K.*, not what occurred in *Abernathy*. Accordingly, Mother did not sufficiently thwart Father's efforts to establish a relationship with his child such that literal compliance with section 63-9-310(A)(5)(b) is excused.

We turn now to whether Father has complied with the statutory requirements. Section 63-9-310(A)(5)(b) clearly "conditions the necessity of a father's acquiescence in an adoption on his payment of support or financial assistance to the birth mother." *Ex parte Black*, 330 S.C. 431, 435, 499 S.E.2d 229, 231 (Ct. App. 1998). It is not enough that the father simply have a desire to raise the child; he must act on that interest and make the material contributions to the child and the mother during her pregnancy required of a father-to-be. Accordingly, a father's attempts to assert his parental rights are insufficient to protect his relationship with the minor child "unless accompanied by a *prompt, good-faith effort* to assume responsibility for either a financial contribution to the child's welfare or assistance in paying for the birth mother's pregnancy or childbirth expenses." *Id.* (emphasis added). According to Father, it was only when Mother appeared at his place of work in November 2008 that he realized she was indeed pregnant; moreover, he then ostensibly realized that she had not followed his advice to have an abortion. However, even assuming *arguendo* that Father's initial responses to news of Mother's pregnancy and her decision to place the child for adoption were excusable, his actions to assume parental responsibility beginning in November 2008 were still insufficient to require his consent under our adoption statute. Even taking Father's testimony as true, we find that he did not pay "a fair and reasonable sum . . . for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child."

First, Father's payments and purchases for Mother's older child and the repairs made to her mother's car are not within the purview of section 63-9-310(A)(5)(b). Payments made to other children in the family or repairs to the vehicle of the grandmother, which was not a necessary support for the pregnancy because the adoptive parents drove Mother to her doctor appointments, are not embraced by the statute and should not be considered. Furthermore, Father's actions in setting up a nursery at his parents' home—when the child already had a place to sleep at Mother's should he not reside with Appellants—and legal fees he incurred to challenge the adoption likewise are not valid considerations under the statute. Similar to the payments for Mother's older child and the repairs to her mother's vehicle, these expenditures are not for "the support of the minor child" or "expenses incurred in connection with mother's pregnancy or with the birth of the child" as required by section 63-9-310(A)(5)(b).

Father testified he paid eleven dollars for a T-shirt and sweatpants for Mother. This single payment represents the sole expenditure by Father which complies with section 63-9-310(A)(5)(b), assuming these clothing items were related to the pregnancy. He paid no medical expenses for Mother because she was on Medicaid, and did not pay any living expenses because Mother lived with her mother and received food stamps. However, this does not excuse Father from contributing more than eleven dollars towards Mother's pregnancy. Simply because she was receiving some government benefits to cover her basic needs does not relieve Father of his obligation to provide for Mother during her pregnancy. Indeed, Appellants contributed regularly to Mother during her pregnancy despite the availability of these benefits. Even if Mother had accepted Father's offer of $100, the resulting $111 contribution would still be inadequate, especially in light of the money Father spent on himself during Mother's pregnancy; the payments Father made for tires on his car alone far exceeded that amount.

The record does not support the conclusion that Father undertook a sufficient effort to make the sacrifices fatherhood demands. Father had the means and opportunity to provide more, but he simply chose not to and to

rely on others to provide for Mother. Even though she rebuked some of his efforts, that did not alleviate or in any way mitigate his obligation. *See Adoption of M.D.K.*, 58 P.3d at 750-51 (Beier, J., concurring). The fact that he now wishes to raise his son does not overcome his lack of support and contribution while Mother was carrying his child or after he was born. In short, he did not fully "grasp [the] opportunity" to come forward and demonstrate a full commitment to the responsibilities of parenthood through prompt and good faith efforts. We accordingly hold that Father's contributions were not sufficient compliance with the statute to establish his right to consent to the adoption of this minor child.[9] Although we are not unmindful of the findings of the learned and able family judge in this case, our review of the record compels us to find that Father has not met the requirements imposed by section 63-9-310(A)(5)(b).

CONCLUSION

For the foregoing reasons, we reverse the order of the family court requiring Father's consent to the adoption of this child. Appellants are to obtain immediate custody of the child.

TOAL, C.J. and KITTREDGE, J., concur. PLEICONES, J., dissenting in a separate opinion in which BEATTY, J., concurs.

[9] Father argues that his payment of child support per the family court's order is per se reasonable under the statute. Father's argument ignores that he understated his income on his financial declarations and was in arrears on the payments until the day before the hearing. We therefore decline to reach whether, in a proper case, payment of child support is per se reasonable.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, the family court correctly determined Father's consent was required for the adoption of the child because Father demonstrated sufficient and prompt good faith efforts to assume parental responsibility such that his literal compliance with § 63-9-310 (A)(5)(b) should be excused.

In appeals concerning adoption proceedings, as in any appeal from family court, this Court may find the facts in accordance with its own view of the preponderance of the evidence. McCann v. Doe, 377 S.C. 373, 382, 660 S.E.2d 500, 505 (2008). This broad scope of review does not require the Court to disregard the findings of the family court judge, who saw and heard the witnesses and was in a better position to evaluate their credibility. Id.

I disagree with the majority's conclusion that Mother did not thwart Father's attempts to form a relationship with the child because she did not actually hide herself and the only financial support she rejected was Father's "one-time offer of $100." In my opinion, the family court correctly found Mother thwarted Father's attempts to provide financial support based on the adoption agency's advice about birth father's rights. The majority states Father made Mother a one-time offer of $100, which she refused. Father's testimony, however, contradicted this. Father testified he offered Mother money "a lot" but that Mother told him the agency advised her not to accept any offers of support or even speak to him. Father testified Mother would accept money for herself and her other son but wouldn't accept anything "immediately for [the child]." After assessing the credibility of the witnesses, the family court found Mother refused Father's offers of support based on the agency's advice about birth father's rights. Although we may find the facts in accordance with our own view of the preponderance of the evidence, we are not required to disregard the findings of the family court, who saw and heard the witnesses and was in a better position to evaluate their credibility.

Further, the majority focuses solely on the financial considerations that are to be made in determining whether a father's consent is required. In doing so, the majority fails to recognize Father's offers of non-financial support. "The United States Supreme Court has recognized that an unwed father may

possess a relationship with his child that is entitled to constitutional protection." Abernathy at 31, 437 S.E.2d at 28 (citing Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)). However, "parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Id. (quoting Lehr v. Robertson, 463 U.S. 248, 260 (1983)). Thus, an unwed father must demonstrate a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child before his interest in personal contact with his child acquires substantial constitutional protection. Id. The mere existence of a biological link does not merit equivalent constitutional protection. Id.

In my view, the constitutional protection afforded Father by virtue of his demonstrated commitment to the child far outweighs his failure to literally comply with the requirements of the statute. The majority states the facts favorable to Father in this case do not rise to the level of those in Abernathy. The Abernathy Court considered not only father's offers of financial support, but also took into account the fact that father did not seek legal advice about how to protect his paternal interests because of mother's assurance that she would not place the child for adoption. Abernathy at 33, 437 S.E.2d at 29. The Court also noted the father "immediately manifested his willingness to assume sole custody of the child once he discovered adoption proceedings had commenced." Id.

Turning to the facts of the present case, once Father realized Mother was actually pregnant, he immediately manifested his willingness to raise the child. Father pleaded with Mother to stop the adoption process, even offering to call Appellants to discuss the matter. Father also relied on Mother's misrepresentations to him on several occasions that she would not go through with the adoption. In fact, Father believed he would be able to take the child home from the hospital after its birth. The record also clearly shows that Mother used the adoption process as leverage to try to lure Father back.

The majority focuses on distinguishing the facts of the present case from the "extraordinary factual scenario" presented in Abernathy. Although

Abernathy is the seminal case on this issue, it is not the only case where the Court has determined a father was not required to literally comply with the statute. In Doe v. Queen, 347 S.C. 4, 552 S.E.2d 761 (2001), the factual scenario presented certainly did not reach that of Abernathy. We nonetheless affirmed the family court's ruling that the father demonstrated sufficient prompt and good faith efforts to assume parental responsibility such that his literal compliance with the statute was excused. In that case, the mother lied to the father and told him she had an abortion after he tried to convince her to keep the child. Queen at 6, 552 S.E.2d at 762. The mother also signed a criminal warrant against the father, which resulted in a bond condition that father have no contact with the mother. Id. The father was notified of the child's birth in November, approximately two months after the child was born. Id. When the adoptive parents requested the father sign the consent forms, the father obtained an attorney, but did not file responsive pleadings until the day of the hearing the next August. Id. The father began saving money, prepared a nursery, and arranged for medical insurance for the child. Id. We found the father's failure to provide support during the mother's pregnancy was no fault of his own, and that the father's actions subsequent to learning of the child's birth demonstrated sufficient prompt and good faith efforts to assume parental responsibility. Queen at 9, 552 S.E.2d at 764. If the father's actions in Queen constituted sufficient prompt and good faith efforts to assume parental responsibility, then Father has surely exceeded that standard here. In my view, the father in Queen did very little to support his child after learning of its birth. Here, Father exercised regular visitation and paid child support, in addition to preparing a nursery.

Moreover, in focusing on distinguishing the present case from Abernathy, the majority fails to recognize the numerous cases in our jurisprudence where our courts have determined the father's consent was not required. These cases are, in my opinion, instructive owing to their contrast with the factual scenario under consideration. See Doe v. Roe, 369 S.C. 351, 631 S.E.2d 317 (Ct. App. 2006) (father's contributions to mother were insubstantial and inconsistent, mother never refused father's help but, rather, requested it, mother attempted to reach father on several occasions but he avoided her); Arscott v. Bacon, 351 S.C. 44, 567 S.E.2d 898 (Ct. App. 2002)

(mother informed father she had given birth, and even with this direct information from mother, father still did not believe that she had ever been pregnant and had given birth, and father did nothing, despite knowing that mother had a child and he could be the father); Parag v. Baby Boy Lovin, 333 S.C. 221, 508 S.E.2d 590 (Ct. App. 1998) (father could have sought the exact location of his child and could have made efforts to cultivate a relationship with the child three months prior to taking any action; father never offered any financial support to mother in connection with the expenses of her pregnancy and birth; and father never offered any financial support for the child after learning of his birth); and Ex parte Black, 330 S.C. 431, 499 S.E.2d 229 (Ct. App.1998) (assuming unwed father took prompt measures to determine paternity and assert parental rights after biological mother informed father of child's existence, where father failed to offer to support child or assist in medical expenses, his consent to adoption was not required).

In my opinion, the present case is distinguishable from those cases in which our courts have determined a father's consent was not required. Mother never requested assistance from Father, but rather, told him she did not want to "mess up the adoption" by accepting money from him. After the child's birth, Father showed his commitment to the child by immediately moving for temporary relief, preparing a nursery, regularly exercising his visitation rights, and paying child support. Father also offered to reimburse Appellants for all of their expenses incurred during Mother's pregnancy.

In my opinion, Father timely demonstrated his willingness to develop a relationship with his child and therefore acquired constitutional protection. I would therefore affirm the family court's finding that Father's consent was required and find that custody of the child should remain with the Father.

BEATTY, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Madison Compton, Respondent ,

v.

South Carolina Department of Corrections, Jon Ozmint, Director, David Tatarsky, General Counsel for SCDC, James Brennan, Assistant Division Director of Inmate Records, and South Carolina Law Enforcement Division, Robert M. Stewart, Chief, Defendants,

Of Whom South Carolina Department of Corrections, Jon Ozmint, Director, David Tatarsky, General Counsel for SCDC and James Brennan, Assistant Division Director of Inmate Records are, Appellants.

Appeal From Richland County
J. Michelle Childs, Circuit Court Judge

Opinion No. 26968
Heard March 3, 2011 – Filed May 2, 2011

AFFIRMED AS MODIFIED

Daniel R. Settana, Jr. and Erin M. Farrell, of McKay Cauthen Settana & Stubley, all of Columbia, for Appellants

Kenneth C. Hanson, of Hanson Law Firm, PA, of Columbia, for Respondent.

JUSTICE HEARN: The South Carolina Department of Corrections (SCDC) and three of its officers[1] (Appellants) appeal the order of the circuit court enjoining them from forwarding certain information regarding James Madison Compton to the Department of Probation, Parole, and Pardon Services (DPPPS). Appellants argue the circuit court erred in granting Compton a preliminary injunction because Compton has failed to demonstrate a likelihood of success on the merits of his claim. We disagree and affirm the circuit court as modified.

FACTUAL/PROCEDURAL BACKGROUND

In September 1977, Compton committed burglary in the first degree, assault and battery with intent to kill, armed robbery, and aggravated assault and battery in Pickens County, South Carolina. He then fled South Carolina

[1] The suit names Jon Ozmint, Director of SCDC; David Tatarsky, General Counsel for SCDC; and James Brennan, Assistant Division Director of Inmate Records for SCDC as parties. The State Law Enforcement Division and its director, Robert Stewart, also were parties originally, but they were dismissed in 2007.

for Georgia, but he was apprehended there a short time later and returned voluntarily to South Carolina for prosecution. Georgia filed fugitive from justice charges against Compton, but they were dismissed for failure to present them to a grand jury. In October 1977, Compton pled guilty to all the charges pending against him in South Carolina and was sentenced to life plus forty-five years imprisonment.

In 1982, Compton was away without leave (AWOL) from prison for a period of time when he walked off while on trustee status; however, the matter was handled internally, so no charges were filed against him when he returned. In 1995, Compton went AWOL again, but he was not returned to SCDC's custody until 2002 when he was apprehended while hiding in North Carolina. An arrest warrant and indictment were issued for Escape under Section 24-13-410 of the South Carolina Code (2002), but the charge was *nol prossed* after the State twice failed to appear before the grand jury. The circuit court in Spartanburg County issued an order in 2005 for the destruction of the arrest warrant records and indictment in connection with the 1995 incident.

SCDC's Inmate Classification Summary Report currently contains the following notations pertaining to Compton's escape history in what Appellants call his "Escape Screen":

> Escapes
>
> 10/13/95 Other Escape Related Code Not in Table
> 09/21/77 Other Escape Related Code Not in Table

Compton's criminal history in the report references the charges for which he was incarcerated in addition to crimes he committed while he was AWOL, but it does not mention anything regarding the escapes themselves. Under the heading "History of Movements," the report reflects that he was "ESCAPED-AWOL" from 1995 through 2002. Additionally, the report notes an "Escape" in 1982 under the heading "History of Earned Work Credit Assignments." SCDC maintains that it keeps records of these movements, regardless of whether there was an associated criminal prosecution, for

security and classification purposes.[2] Compton currently is eligible for parole, and SCDC forwards all of this information to DPPPS for Compton's parole hearings. During these hearings, DPPPS has questioned Compton specifically about his escape history. To date, DPPPS has not granted Compton parole.

Compton brought the instant declaratory judgment action seeking a declaration that SCDC has failed to comply with the order to destroy the records of his 1995 escape and any reference to his escapes must be destroyed pursuant to Section 17-1-40(A) of the South Carolina Code (2003 & Supp. 2010). Compton subsequently filed a motion for contempt and injunctive relief, requesting the court hold Appellants in contempt for not complying with the destruction order and order them to "destroy *all* evidence of the three charges remaining on his SCDC record" and prevent the dissemination of this evidence to other state agencies, in particular DPPPS, under section 17-1-40(A). The circuit court found Appellants were not in willful violation of any court order and accordingly denied Compton's motion for contempt. As to the records, the court found the 1977 and 1995 entries are maintained for security and classification purposes and therefore are not subject to "complete destruction" under section 17-1-40(A). However, the court enjoined Appellants from forwarding information regarding the 1995 escape to DPPPS based on its reading of the statute. The court also found there was no 1982 charge in SCDC's records that it could enjoin Appellants from forwarding to DPPPS. On Compton's motion to alter or amend, the court extended its order to cover the 1977 flight as well. This appeal followed.

[2] SCDC's policies provide that an escape history will dictate to which level of institution an inmate will be assigned.

LAW/ANALYSIS

Appellants argue the circuit court erred in granting Compton a preliminary injunction because Compton cannot show a likelihood of success on the merits of his claim.[3] We disagree.

The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). Accordingly, the applicant must establish three elements to receive this relief: (1) he will suffer immediate, irreparable harm without the injunction; (2) he

[3] At oral argument, attorneys for the parties took the position that the circuit court's order was a decision on the merits of Compton's claims. However, despite the parties' belief as to the scope of the circuit judge's ruling, she acknowledged on the record at the hearing that the case would not be concluded upon her decision, but rather would continue for a hearing on the merits. Further, a decision on the merits at this procedural juncture would be erroneous. *See Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (stating that a preliminary injunction "is made without prejudice to the rights of either party pending a hearing on the merits," and the merits "are determined without reference" to the preliminary injunction at trial); *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969) ("It is well settled that, in determining whether a temporary injunction should issue, the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a prima facie showing has been made. When a prima facie showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits."). Accordingly, we decline to reach Appellants' and Compton's arguments regarding the merits of section 17-1-40(A)'s applicability.

has a likelihood of success on the merits; and (3) he has no adequate remedy at law. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). Appellants' challenge to the injunction concerns the second element, whether Compton has demonstrated a likelihood of success on the merits.[4]

Whether to grant a preliminary injunction is left to the sound discretion of the trial court and will not be overturned unless it is clearly erroneous. *Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007). In evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. *Helsel*, 307 S.C. at 32, 413 S.E.2d at 826. Accordingly, the circuit court's analysis was limited to only whether Compton's complaint stated a prima facie case that SCDC violated the provisions of section 17-1-40(A) and Compton will be immediately and irreparably harmed.

Section 17-1-40(A) provides, in pertinent part,

> A person who after being charged with a criminal offense and the charge is discharged, proceedings against the person are dismissed, or the person is found not guilty of the charge, the arrest and booking record, files, mug shots, and fingerprints of the person must be destroyed and *no evidence of the record pertaining to the charge may be retained by any municipal, county, or state law enforcement agency.*

S.C. Code Ann. § 17-1-40(A) (Supp. 2010) (emphasis added). Appellants do not argue Compton has failed to make a prima facie showing of his

[4] Appellants also argue the court erred in not balancing the equities in this case. However, we recently announced that balancing the equities is no longer a requirement for a preliminary injunction. *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010).

entitlement to relief for Appellants' purported violation of this statute. Instead, they argue that based on the circuit court's determination the records are not subject to complete destruction, the plain language of section 17-1-40(A) contains no further restriction on their use and Compton's claim must fail. However, Appellants misconstrue the nature of the inquiry. The court must determine only the *likelihood* of whether Compton will prevail on the merits based on the allegations in his complaint, not whether these records *actually* are subject to destruction. Therefore, their reliance on the court's determination regarding the destruction of the records is misplaced. Compton's complaint alleges he was never convicted of the 1977 fugitive from justice charge or the 1995 escape charge. He further alleges there is an order expunging the 1995 charge from his records. Nevertheless, SCDC keeps a record of those events in Compton's file.[5] Based on a plain reading of the statute, Compton argues Appellants have failed to comply with it because these are records pertaining to criminal charges that were not destroyed despite the fact that the proceedings against him all have been dismissed. Compton further alleges he will be immediately and irreparably harmed by Appellants' actions because DPPPS will continue to deny him parole based on his escape history. Indeed, a transcript of a recent parole hearing for Compton shows DPPPS specifically questioning him about the 1995 incident.

We find the circuit court's conclusion that Compton has demonstrated a likelihood of success on the merits of his claim is not clearly erroneous. The statute plainly prohibits the retention of any evidence pertaining to the charge once it has been dismissed or there has been an acquittal. The notations regarding the 1977 and 1995 escapes on the Escape Screen appear to be related to the fact that there were charges filed for each of those incidents. Importantly, the Escape Screen contains no mention of the 1982 escape—for which no charges were filed—while that incident is reflected elsewhere on the report. Compton has also alleged he will continue to be denied parole so long as DPPPS receives this information. In fact, Appellants do not appear to

[5] Whether SCDC is a law enforcement agency for purposes of section 17-1-40(A) is not before us. The parties all seem to agree SCDC falls within the ambit of the statute.

argue Compton will not suffer immediate, irreparable harm. Therefore, we can find no clear error in the conclusion Compton has made out a prima facie case that SCDC has violated the plain language of the statute and will suffer immediate, irreparable harm. Accordingly, he has demonstrated a likelihood of success on the merits and the circuit court did not err in granting preliminary injunctive relief.[6]

What remains to be determined is the scope of the injunction. Because the sole authority for Compton's complaint is section 17-1-40(A), the injunction granted by the circuit court will extend only as far as that section does. Section 17-1-40(A) applies only to "evidence of the record pertaining to the *charge*," including but not limited to the arrest and booking records, files, mug shots, and fingerprints. (emphasis added). It therefore does not apply to any recordation of historical events beyond the charge itself. For example, the facts precipitating the charge are not covered by this statute because they are mere events that exist irrespective of any criminal proceedings. As applied to the instant case, the distinction drawn under section 17-1-40(A) is the distinction between "capital-e Escape"—a criminal charge—and "lower-case-e escape"—a mere fact that a person was AWOL. Section 17-1-40(A) prohibits the retention, and by extension the dissemination, of the former; it contains no restrictions with respect to the latter. Based on our conclusion above that Compton has stated a prima facie case that the notions on his Escape Screen are related to the charges filed

[6] Appellants argue the circuit court erred in awarding any relief at all because DPPPS is a necessary party under Rule 19(a), SCRCP, who was not joined. However, Appellants never moved for DPPPS to be joined under Rule 19, and the only time they made a "motion" to dismiss on this ground was in their memorandum in opposition to Compton's motion for contempt and injunctive relief. Furthermore, the circuit court never addressed this argument, and Appellants did not file a Rule 59(e) motion. Therefore, this issue is not preserved for review. *See Duncan v. CRS Sirrine Eng'rs, Inc.*, 337 S.C. 537, 543-44, 524 S.E.2d 115, 119 (Ct. App. 1999) ("[H]is contentions are not preserved for appeal because Duncan failed to plead the issue, failed to raise the issue to the circuit court, the circuit court failed to rule on the issue, and Duncan failed to file a Rule 59(e), SCRCP motion.").

against him in 1977 and 2002, Appellants are enjoined from forwarding this information to DPPPS. However, Appellants are not enjoined from forwarding any notations of historical events to DPPPS, such as the fact that Compton was AWOL, found under Compton's "History of Movements" and "History of Earned Work Credit Assignments." We express no opinion as to whether the information on Compton's Escape Screen actually is evidence pertaining to the criminal charges filed in connection with those incidents under section 17-1-40(A). We merely hold that because Compton has stated a prima facie case that it is, the preliminary injunction will cover this information.

Appellants argue an injunction preventing them from disseminating this information prevents them from exercising their statutory duty to forward information to DPPPS. *See Frady v. Student Loan Servicing Ctr.*, 313 S.C. 561, 564, 443 S.E.2d 580, 582 (Ct. App. 1994) ("[O]ne may not generally enjoin a state agency from the performance of duties imposed by valid statute . . . ."). Section 24-21-70 of the South Carolina Code (2007) requires Appellants to "keep a record of the industry, habits, and deportment of the prisoner, as well as other information requested by [DPPPS] and furnish it to them upon request." We find no conflict. Section 24-21-70 speaks broadly to a prisoner's *conduct* as it relates to his "industry, habits, and deportment," which does include the existence of legal proceedings such as criminal charges. A prisoner absenting himself from a prison (commonly referred to as an escape) is a fact that exists regardless of whether charges are filed in connection with it, which certainly falls within the ambit of the prisoner's "deportment." Because the injunction we affirm today only enjoins the dissemination of records pertaining to criminal charges and not historical facts, Appellants are not enjoined from forwarding information they have a statutory duty to send to DPPPS.[7]

[7] We do note that section 24-21-70 also requires Appellants to forward "other information requested by" DPPPS beyond just the industry, habits, and deportment of the prisoner. To the extent this would permit DPPPS to request Appellants to forward a record of a prisoner's criminal charges, section 24-21-70 presupposes those records validly exist in the prisoner's file. If they must be destroyed by virtue of section 17-1-40(A), then no obligation

CONCLUSION

For the foregoing reasons, we affirm the order of the circuit court as modified. In doing so, we express no opinion as to section 17-1-40(A)'s ultimate application to the information contained in Compton's records. Until the circuit court determines the merits of Compton's claim, Appellants are enjoined from forwarding the notations on Compton's Escape Screen to DPPPS, but they are not enjoined from forwarding historical evidence of Compton's movements. When the court makes such a determination, it will be done with no reference to the order of the circuit court before us today.

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

---

arises to forward them under 24-21-70. At this stage in the proceedings, Compton has shown a likelihood of success on the merits that the entries on his Escape Screen must be destroyed. It is therefore appropriate to enjoin Appellants from forwarding this information until it can be determined at a final hearing whether they actually must be destroyed in order to prevent irreparable harm to Compton.

The Supreme Court of South Carolina

In the Matter of Ronald A. Hightower, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition requesting the Court either place respondent on interim suspension or transfer him to incapacity inactive status pursuant to Rule 17(b), RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent is transferred to incapacity inactive status until further order of this Court.

IT IS FURTHER ORDERED that Stanley Lamont Myers, 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. Myers shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Myers 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 Stanley Lamont Myers, 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 Stanley Lamont Myers, 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. Myers' office.

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

s/ Jean H. Toal C. J.

FOR THE COURT

Columbia, South Carolina

April 26, 2011

The Supreme Court of South Carolina

RE: Rule Amendments

O R D E R

On January 27, 2011, the following were submitted to the General Assembly pursuant to Article V, §4A, of the South Carolina Constitution:

(1) An order amending Rule 219 of the South Carolina Appellate Court Rules.

(2) An order amending Rules 16, 26, 28, 33, 34, 37 and 45 of the South Carolina Rules of Civil Procedure.

(3) An order amending Rule 3 of the South Carolina Rules of Civil Procedure.

(4) An order amending Rule 29 of the South Carolina Rules of Criminal Procedure.

A copy of these orders is attached. Since ninety days have passed since submission without rejection by the General Assembly, the amendments

contained in the above orders are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 28, 2011

The Supreme Court of South Carolina

RE: Amendment to the South Carolina Appellate Court Rules

O R D E R

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 219 of the South Carolina Appellate Court Rules (SCACR) is amended as shown in the attachment to this order. This amendment shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 27, 2011

Amendment to South Carolina Appellate Court Rules (SCACR)

Rule 219, SCACR, is amended to read as follows:

RULE 219
HEARING OR REHEARING OF CASES BY THE COURT OF APPEALS *EN BANC*

(a) When Hearing or Rehearing *En Banc* Will Be Ordered. It shall require the affirmative vote of six (6) members of the Court of Appeals to hear or rehear an appeal or other proceeding *en banc*. A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(b) Suggestion of a Party for Hearing or Rehearing *En Banc*. If a party desires to suggest that a matter be heard initially *en banc*, the suggestion shall made in writing, and must be served and filed not later than twenty (20) days prior to the hearing date. If a suggestion for rehearing *en banc* is to be made, it shall be included in the petition for rehearing. No response shall be filed by other parties unless the Court shall so order. The Clerk of the Court of Appeals shall transmit the suggestion to all judges of the Court. A vote will not be taken to determine if the matter shall be heard or reheard *en banc* unless a member of the Court calls for a vote on the suggestion. If no vote is taken on the suggestion, the parties shall be advised that the suggestion has been rejected.

The Supreme Court of South Carolina

RE: Amendments to South Carolina Rules of Civil Procedure

O R D E R

Pursuant to Article V, § 4 of the South Carolina Constitution, Rules 16, 26, 28, 33, 34, 37 and 45 of the South Carolina Rules of Civil Procedure are hereby amended as shown in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 27, 2011

Rule 16(b), SCRCP is amended to provide as follows:

(b) Pre-trial Orders. The court shall make a written order which recites the action, if any, taken at the hearing, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified on motion, or at the trial to prevent manifest injustice. The order may, in the court's discretion, also: (1) provide that exhibits or witnesses not listed at the hearing may not be called or admitted in evidence at the trial, unless such witness or exhibit is discovered after pre-trial hearing and promptly disclosed to opposing parties; (2) provide that all motions pending at the time of the hearing which are not presented for disposition are deemed abandoned; (3) provide that all or part of the pre-trial hearing be continued to a future time, or that additional pre-trial hearings be scheduled to promote the orderly and efficient disposition of the action; (4) establish provisions for disclosure or discovery of electronically stored information; and (5) include any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production.

Rule 26, SCRCP, is amended to provide as follows:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

. . .

(**5) Claims of Privilege or Protection of Trial Preparation Materials.**

(A) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The producing party must preserve the information until the claim is resolved.

(6) Electronically Stored Information.

(A) A party need not provide discovery of electronically stored information from sources that the party identifies to the

requesting party as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery, including allocation of expenses associated with discovery of the electronically stored information.

(B) On motion or on its own motion, the court shall limit the frequency or extent of discovery otherwise allowed by these rules if the court determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

. . .

(f) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorneys for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery;

(5) A statement of any issues relating to discovery of electronically stored information, including the form or forms in which it should be produced;

(6) A statement of any issues relating to claims of privilege or of protection as trial preparation material, including—if the parties agree on a procedure to assert such claims after production—whether the parties wish to have the court include their agreement in an order; and

(7) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires. Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial hearing authorized by Rule 16.

. . . .

Rule 33(c), SCRCP, is amended to provide as follows:

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Rule 34, SCRCP, is amended to provide as follows:

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents, or electronically stored information (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information (or if no form was specified in the request) the responding party must state the form or forms it intends to

use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

Unless the parties otherwise agree, or the court otherwise orders:

> **(1)** If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and
>
> **(2)** a party need not produce the same electronically stored information in more than one form.

. . . .

Rule 37, SCRCP, is amended to add the following provision:

(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as result of the routine, good-faith operation of an electronic information system.

Rule 45, SCRCP, is amended to provide as follows:

(a) Form; Issuance.

(1) Every subpoena shall:

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the county in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the county designated by the notice of deposition as the county in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the county in which production or inspection is to be made. Provided, however, that a subpoena to a person who is not a party or an officer, director or managing agent of a party, commanding attendance at a deposition or production or inspection shall issue from the court for the county in which the non-party resides or is employed or regularly transacts business in person.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of a court in which the attorney is authorized to practice.

. . .

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises

except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

. . .

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

. . . .

The following language is added to the Notes in each of the above rules:

Note to 2011 Amendment:

The amendments to Rules 16, 26, 33, 34, 37 and 45 of the South Carolina Rules of Civil Procedure concerning electronic discovery are substantially similar to the corresponding provisions in the Federal Rules of Civil Procedure. The rules concerning electronic discovery are intended to provide a practical, efficient and cost-effective method to assure reasonable discovery. Pursuit of electronic discovery must relate to the claims and defenses asserted in the pleadings and should serve as a means for facilitating a just and cost-effective resolution of disputes.

The Note to Rule 28, SCRCP, is amended to add the following:

Rule 28(d) is consistent with the South Carolina Uniform Interstate Depositions and Discovery Act, which is codified at S.C. Code Ann. § 15-47-100 et seq.

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules of Civil Procedure

---

O R D E R

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 3 of the South Carolina Rules of Civil Procedure (SCRCP) is amended as shown in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 27, 2011

Amendments to South Carolina Rules of Civil Procedure (SCRCP)

(1) Rule 3, SCRCP, is amended to read as follows:

RULE 3
COMMENCEMENT OF ACTION

(a) Commencement of civil action. A civil action is commenced when the summons and complaint are filed with the clerk of court if:

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or

(2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

(b) Filing *In Forma Pauperis*.

(1) Except as provided in (2) below, a plaintiff who desires to file an action *in forma pauperis* shall file in the court a motion for leave to proceed *in forma pauperis*, together with the complaint proposed to be filed and an affidavit showing the plaintiff's inability to pay the fee required to file the action. If the motion is granted, the plaintiff may proceed without further application and file the complaint in the court without payment of filing fees.

(2) Where a party is represented in a civil action by an attorney working on behalf of or under the auspices of a legal aid society or a legal services or other nonprofit organization funded in whole or substantial part by funds appropriated by the United States Government or the General Assembly of the State of South Carolina, which has as its primary purpose the furnishing of legal services

to indigent persons, or the South Carolina Bar Pro Bono Program, fees related to the filing of the action shall be waived without the necessity of a motion and court approval. Before the filing fees will be waived, the attorney representing the party must file with the clerk a written certification that representation is being provided on behalf of or under the auspices of the society, organization or program, and that the party is unable to pay the filing fees.

(2) The following note is added to the end of Rule 3, SCRCP:

Note to 2011 Amendment:

This amendment added the language of (b)(2) which allows for the waiver of the filing fees for an action when a party is represented by an attorney working on behalf of or under the auspices of a legal aid society, a legal services or other nonprofit organization, or the South Carolina Pro Bono Program.

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules of Criminal Procedure

---

O R D E R

Pursuant to Article V, § 4 of the South Carolina Constitution, the South Carolina Rules of Criminal Procedure (SCRCrimP) are amended as shown in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
January 27, 2011

Amendments to South Carolina Rules of Criminal Procedure (SCRCrimP)

(1) Rule 29, SCRCRimP, is amended to read as follows:

RULE 29
POST-TRIAL MOTIONS

(a) Generally. Except for motions for new trials based on after-discovered evidence, post-trial motions shall be made within ten (10) days after the imposition of the sentence. In cases involving appeals from convictions in magistrate's or municipal court, post-trial motions shall be made within ten (10) days after receipt of written notice of entry of the order or judgment disposing of the appeal. The time for appeal for all parties shall be stayed by a timely post-trial motion and shall run from the receipt of written notice of entry of the order granting or denying such motion. The time within which to make the motion shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the circuit judge shall retain jurisdiction of the action for the purpose of hearing and disposing of the motion if not heard and disposed of during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial or hearing was held. The motion may, in the discretion of the court, be determined on briefs filed by the parties without oral argument.

(b) New Trials Based on After-Discovered Evidence. A motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence. A motion for a new trial based on after-discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion. Leave of

the appellate court is not required if no appeal has been taken or if the appeal has been finally decided in the appellate court.

(2) The following note is added to the end of Rule 29, SCRCrimP:

Note to 2011 Amendment:

This amendment places a one year limit on the time to make a motion for a new trial based on after-discovered evidence.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Demetra Kerhoulas Grumbos, Respondent/Appellant,

v.

George Spyros Grumbos, Appellant/Respondent.

Appeal From Greenville County
R. Kinard Johnson, Jr., Family Court Judge

Opinion No. 4825
Heard February 8, 2011 – Filed April 27, 2011

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

O. W. Bannister, of Greenville, for Appellant-Respondent.

Robert M. Rosenfeld, of Greenville, for Respondent-Appellant.

WILLIAMS, J.: On appeal, George Grumbos (Husband) contests the family court's decision to impute certain income to Husband in setting Demetra Grumbos' (Wife) entitlement to both temporary and permanent alimony. Husband also argues the family court failed to properly consider the requisite statutory factors in awarding Wife permanent periodic alimony

and failed to consider certain marital debts when it divided the marital estate. On cross-appeal, Wife claims the family court erred in finding Husband's overpayment of temporary alimony negated his requirement to pay Wife attorney's fees and costs in the final order. We affirm in part, reverse in part, and remand.

FACTS

On September 21, 2006, Wife filed a complaint, seeking among other things, separate support and maintenance, custody of the parties' minor children, child support, and alimony. In response, the family court issued a temporary order on December 18, 2006, wherein the court found Husband earned $7,000 per month and Wife earned $550 per month. Based upon this finding, the family court awarded Wife $2,500 per month in temporary alimony. Three months later, Husband was found in contempt for failing to pay alimony and child support. On March 26, 2007, Husband filed a motion to reduce these obligations, which the family court denied.

At the final hearing on September 23-24, 2008, the family court permitted Wife to amend her complaint to seek a divorce on the ground of one year's continuous separation. During the two-day trial, the family court heard testimony from the parties and their witnesses. It also received into evidence numerous financial documents pertaining to the parties' income as well as evidence regarding the assets and debts of the marital estate.

The following evidence relevant to this appeal was adduced at the final hearing. Husband and Wife married on January 21, 1996, in Greenville, South Carolina. When the parties married, Husband was thirty-one years old and Wife was thirty-three years old. This was the parties' first marriage, and two minor children were born of the marriage. The parties were married for approximately ten years before they separated on September 21, 2006.

Prior to the parties' marriage, Wife earned a Bachelor of Economics degree from Clemson University, but she had not been employed outside the home in a full-time capacity since the birth of their first child in July 1998. Husband graduated from high school and took college courses from Greenville Technical College but never graduated. Husband, however,

worked at his parents' restaurant from an early age and had extensive experience in hosting, serving, and cooking, as well as operating and managing his parents' restaurant. At the time of trial, Husband earned $10 per hour working as a host at his brother-in-law's restaurant. Similarly, Wife earned $10 per hour working part-time as a hostess at a local restaurant. At the time of the divorce, both parties were in good health, despite a non-cancerous tumor being removed from Husband's abdomen in 2006.

In its final order, the family court found both parties were underemployed. The court found Wife had the ability to work full-time at her present job and earn a gross monthly wage of $1,733, but because Wife earned $2,000 per month in the past, the family court imputed this amount to Wife as her gross monthly wage.

In determining Husband's gross monthly income, the family court noted the discrepancy between Husband's W-2 form from the family restaurant and his testimony and financial declarations. According to Husband's testimony, he worked forty hours per week; however, a review of his W-2 forms demonstrated Husband's gross annual income reflected a workweek of no more than twenty hours.[1] The family court noted Wife documented Husband's payment of almost $54,000 in household expenses in the preceding twelve months, which computed to monthly expenses averaging approximately $4,500. Because of the discrepancies in Husband's documentation[2] and the family court's determination that Husband's testimony lacked credibility, it imputed $4,500 per month to Husband as his gross monthly income.

Also at issue during trial were the income and debt from Husband's family business ventures. Husband contended that while he held varying

[1] For instance, Husband claimed he earned $10,000 in 2004. Based upon Husband's stated hourly wage of $10 per hour, this computes to a nineteen-hour work week based on a fifty-two week year, which is approximately half of the hours Husband testified he worked at trial.

[2] For example, Husband's financial declaration submitted at the temporary hearing denoted his gross monthly income as almost half of what he submitted he earned on the date of the final hearing.

ownership interests in three family-held limited liability corporations,[3] the vast majority of the income from these businesses was a result of one-time events. Despite Husband's argument, the family court found based on the K-1 forms filed with the tax returns for these businesses, Husband earned $92,902 in 2004, $69,400 in 2005, and $80,865 in 2006.

In assessing the parties' debts, the family court considered three promissory notes in the amounts of $80,000, $23,000, and $6,000, which were executed by Husband on May 1, 2006, to his brother, his brother-in-law, and his parents, respectively. The court found each of these debts was nonmarital and noted Wife denied any knowledge of these notes or the underlying debts securing the notes.

Based on these findings, the family court awarded the parties a divorce on the ground of one year's continuous separation and granted Wife permanent periodic alimony in the amount of $630 per month. In dividing the parties' assets and debts, the family court found all debts pertaining to the family-held LLCs, including the three promissory notes, were nonmarital property. The family court awarded Wife attorney's fees; however, in doing so, it found Husband overpaid temporary alimony in excess of two years. Consequently, the family court retroactively reimbursed Husband for this overpayment by crediting Husband the balance of Wife's attorney's fees. Husband appealed, and Wife cross-appealed.

STANDARD OF REVIEW

In appeals from the family court, this court has the authority to find facts in accordance with our view of the preponderance of the evidence.

[3] Husband held a 2% interest in S&L Properties, LLC, a 50% interest in G&L Properties, LLC, and a 50% interest in Panagia Enterprises, LLC. Husband's parents owned 96% of S&L Properties, and Husband's brother owned the remaining 50% interest in G&L Properties and Panagia Enterprises. The primary asset of S&L Properties is a CVS building, which is situated on land owned exclusively by G&L Properties. Panagia's primary asset is a large parcel of property, which contains unimproved raw land and a small office park built by Husband and his brother.

Greene v. Greene, 351 S.C. 329, 335, 569 S.E.2d 393, 397 (Ct. App. 2002). This broad scope of review does not require us to disregard the findings of the family court. Id. Neither are we required to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Id.

LAW/ANALYSIS

I. Husband's Appeal

A. Imputing Income to Husband

a. Temporary Alimony

Husband claims the family court erred in initially imputing $7,000 per month to Husband as income for purposes of awarding Wife $2,500 per month in temporary alimony.[4] We disagree.

The allowance of temporary separate maintenance and support, or temporary alimony, is a matter largely addressed to the discretion of the family court whose ruling will not be disturbed on appeal absent an abuse of discretion. Armaly v. Armaly, 274 S.C. 560, 562, 266 S.E.2d 68, 69 (1980).

[4] Wife claims this issue is not preserved for review because Husband failed to appeal the alimony award after the temporary hearing. We disagree. In doing so, we reiterate that temporary hearings are not de facto final hearings, and we adhere to the principle that temporary orders must be without prejudice to the rights of the parties at the final hearing. See Rimer v. Rimer, 361 S.C. 521, 527 n.6, 605 S.E.2d 572, 575 n.6 (Ct. App. 2004). As this court aptly stated in Rimer, "To assign weight to the amount of support awarded pendente lite or view the award as having any precedential value at the merits hearing or on appeal would discourage parties from amicably agreeing upon temporary support for fear the slightest concession would prejudice their position at the final hearing." Id.

In awarding Wife $2,500 in temporary alimony, the family court found Husband earned $7,000 per month and Wife earned $550 per month. This finding was based on the financial declarations of the parties, their affidavits, and their respective tax returns. While the family court may only have been privy to that limited evidence based on the timing and nature of the temporary hearing, we discern no abuse in the family court's award of $2,500 per month in temporary alimony.

As noted by the family court in its final order, credibility and veracity of the parties were key factors in this case. Husband claimed he earned only $825 per month at the temporary hearing, yet his financial declaration submitted before the final hearing reflected a gross monthly income of $1,733. Husband failed to explain how his income doubled, despite his concession that he was working for the same wage with the same hours for the same employer. We find the family court was in the best position to question the accuracy of Husband's initial claim that he earned only $825 per month and thus was within its discretion to accordingly weigh Husband's testimony in its decision to impute additional income to him. See Marchant v. Marchant, 390 S.C. 1, 8, 699 S.E.2d 708, 712 (Ct. App. 2010) (finding question of husband's credibility was a function of the family court judge who was in the best position to determine whether husband properly stated his income for purposes of calculating alimony and child support).

Husband admits he received over $243,000 in revenue from the family-owned LLCs between 2004 and 2006, but he contends this income was nonrecurring, and as such, it was not a proper basis on which to award Wife temporary alimony. Even if we accept Husband's argument that this revenue was nonrecurring, Husband earned $80,856 alone in 2006 (or $6,738 per month) from his restaurant employment and LLCs, which provides ample basis for the family court's decision to impute $7,000 per month to Husband as income. Additionally, Husband never contested Wife's calculation of $4,100 per month in household expenses. Because Wife only earned $550 per month at the time of the temporary hearing, we discern no error in the family court's efforts to maintain the status quo by requiring Husband to pay Wife $2,500 per month in temporary alimony. See Cannarella v. Cannarella, 275 S.C. 516, 517-18, 273 S.E.2d 529, 529-30 (1980) (finding wife was entitled to temporary alimony considering her income, necessities, and

husband's means, particularly when wife earned $372 per month as a waitress, husband earned $7,000 per month from his restaurant business, and wife's monthly living expenses were $1,900).

b. Permanent Alimony

Husband also claims the family court erred in imputing $1,467 per month to Husband as additional income for purposes of calculating Wife's permanent alimony award. We disagree.

"It is well-settled in South Carolina that an award of alimony should be based on the payor spouse's earning potential rather than merely his current, reported earnings." Messer v. Messer, 359 S.C. 614, 629, 598 S.E.2d 310, 318 (Ct. App. 2004) (internal citation omitted). As a result, the family court has the discretion to impute income to a party with respect to awards of alimony or child support.

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

Dixon v. Dixon, 334 S.C. 222, 240, 512 S.E.2d 539, 548 (Ct. App. 1999) (internal quotation marks and citation omitted).

Husband claims the family court erred by basing Wife's alimony award on his past earnings rather than his reported earnings. In the case at hand, Husband testified he earns $10 per hour and routinely works forty hours per week as a host at his brother-in-law's restaurant. By Husband's calculation, this equates to $1,733 in gross income per month. Additionally, Husband claims he receives approximately $1,300 per month as rental income and business profits from the family-owned LLCs. In assessing Husband's income, the family court stated,

> It is difficult to determine Husband's earning potential. Husband's testimony lacks credibility. The only credible evidence before the [c]ourt as to the earning potential of Husband is that of Wife and Dr. Alford [Wife's expert witness] that the funds paid by Husband to Wife for the payment of household expenses for the twelve (12) months prior to the filing of this action was . . . $53,990.63 . . . which computes to a monthly average of . . . $4,499.24 . . . The Court imputes to Husband gross monthly income of . . . $4,500 . . . per month.

We find the family court properly weighed the testimony and the evidence to accurately assess Husband's income based on Husband's lifelong experience within the family's restaurant business. As noted by the family court, Husband failed to provide the court with a meaningful representation of his current income at trial. Specifically, Husband's reported earnings in his W-2 form reflected a twenty-hour work week, despite Husband's unwavering testimony that he worked forty hours per week. Moreover, conflicting evidence was presented regarding the amount of distributions Husband received from the LLCs as additional income. The distribution statements prepared by Husband's accountant for 2001, 2002, 2003, and 2006 varied by as much as $17,000 from the LLCs' tax returns.

Without a meaningful representation of Husband's current income, the family court was required to resort to other credible evidence, namely the parties' expenses, in assessing Husband's income. See Spreeuw v. Barker, 385 S.C. 45, 67, 682 S.E.2d 843, 854 (Ct. App. 2009) (finding father's testimony and evidence presented at trial demonstrated father understated his income, so that his financial declarations were not meaningful representations of his income, which precluded father from complaining of the family court's ruling on appeal). Because both parties agreed their household expenses were approximately $4,100 per month, it was not unreasonable for the family court to conclude Husband earned at least that amount when determining Husband's income. Thus, the family court did not err in imputing additional income to Husband when it calculated Wife's permanent alimony award.

B. Entitlement to Permanent Periodic Alimony

Husband contends the family court improperly awarded Wife permanent periodic alimony. We disagree.

An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002). An abuse of discretion occurs if the court's ruling is controlled by an error of law or if the ruling is based upon findings of fact that are without evidentiary support. Sharps v. Sharps, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000).

"The purpose of alimony is to provide the ex-spouse a substitute for the support which was incident to the former marital relationship." Love v. Love, 367 S.C. 493, 497, 626 S.E.2d 56, 58 (Ct. App. 2006). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." Craig v. Craig, 365 S.C. 285, 292, 617 S.E.2d 359, 362 (2005) (internal citations omitted). The objective of alimony should be to insure that the parties separate on as equal a basis as possible. Patel v. Patel, 347 S.C. 281, 291, 555 S.E.2d 386, 391 (2001) (internal citation omitted). Thus, "[i]t is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001).

When awarding alimony, the family court considers the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2010); Patel, 347 S.C. at 290, 555 S.E.2d at 391 (holding that

the family court is required to consider all relevant factors in determining alimony).

The family court awarded Wife $630 per month in permanent periodic alimony. In granting Wife alimony, the family court considered the relevant statutory factors from section 20-3-130(C), including: the length of the marriage, Husband's and Wife's education, the parties' health, both parties' past and current incomes, the parties' standard of living during the marriage, marital fault, and the marital and nonmarital properties of the parties.

Husband's primary contention is the family court failed to give proper weight to Wife's college degree and prior earnings in setting her alimony award.[5] The court clearly considered the parties' educational background, specifically that of Wife, when it stated, "[T]he Court is of the opinion that Wife has the educational background to enable her to obtain employment which provides her with an income and with benefits comparable to that which she had at her last full-time job." Further, despite Wife's stated income of $975 in her financial declaration, the family court imputed $2,000 to Wife as income based on her past employment and education. We find the family court's decision to award Wife only $630 in alimony in light of her current income and expenses to be reasonable under the circumstances. Accordingly, we find Husband's argument on this issue without merit.

C. Pre-separation Debts

Last, Husband claims the family court erred in omitting certain debts from the marital estate. We disagree.

[5] Husband also argues the alimony award was an abuse of discretion to the extent the family court awarded Wife alimony based on the income it imputed to Husband. Because we find the family court properly imputed income to Husband, we decline to address this argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

"Marital property" is defined as "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 . . . ." S.C. Code Ann. § 20-3-630(A) (Supp. 2010) (formerly § 20-7-473 (Supp. 2007)). For purposes of equitable distribution, a "marital debt" is a debt incurred for the joint benefit of the parties regardless of whether the parties are legally liable or whether one party is individually liable. Hardy v. Hardy, 311 S.C. 433, 436-37, 429 S.E.2d 811, 813 (Ct. App. 1993).

Marital debt, like marital property, must be specifically identified and apportioned in equitable distribution. Smith v. Smith, 327 S.C. 448, 457, 486 S.E.2d 516, 520 (Ct. App. 1997). In equitably dividing the marital estate, the family court must consider "liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage[.]" S.C. Code Ann. § 20-3-620(B)(13) (Supp. 2010) (formerly § 20-7-472(13) (Supp. 2007)). Section 20-3-620(B)(13) creates a rebuttable presumption that a debt of either spouse incurred prior to the beginning of marital litigation is a marital debt and must be factored in the totality of equitable apportionment. Hickum v. Hickum, 320 S.C. 97, 102, 463 S.E.2d 321, 324 (Ct. App. 1995) (citing to former section 20-7-473). When the debt is incurred before marital litigation begins, the burden of proving a debt is nonmarital rests upon the party who makes such an assertion. Id. at 103, 463 S.E.2d at 324.

Husband enumerates three debts he claims were incurred during the parties' marriage. These debts include: (1) a $23,000 debt to his brother-in-law; (2) a $6,000 debt to his parents; and (3) a $95,000[6] debt to two of the LLCs in which Husband holds an interest.

In excluding these debts from the marital estate, the family court considered the intra-family nature of the debts and noted the lack of credible documentation and testimony to substantiate these debts. See Allen v. Allen,

[6] The initial note was executed in favor of Husband's brother, a co-owner in the LLCs, for $80,000 with the handwritten notation that the final amount was to be determined by their accountant.

287 S.C. 501, 506-07, 339 S.E.2d 872, 875-76 (Ct. App. 1986) (finding loans from close family members must be closely scrutinized for legitimacy, particularly when the parties present conflicting evidence over the timing and amount of the loans). While Husband personally executed a note for all of these debts on May 1, 2006, neither Husband's brother-in-law nor his parents testified at trial to substantiate why, when, or how these debts were incurred. Husband claimed the notes were all executed on May 1, 2006, because of a possible life-threatening tumor; however, the family court believed Wife's testimony that the execution of the notes occurred shortly after an incident that ultimately led to the demise of the marriage. Further, even though Husband claimed these debts were incurred over the course of the marriage, Husband failed to show either he or Wife ever attempted to repay any portion of these purported loans. Wife's testimony that she was unaware of any of these debts and only discovered their existence after she filed for divorce is additional evidence these debts were not incurred for the joint benefit of Husband and Wife. See Hickum, 320 S.C. at 103, 463 S.E.2d at 324 (stating that if the family court finds that a spouse's debt was not made for marital purposes, it need not be factored into the court's equitable apportionment of the marital estate, and the family court may order payment by the spouse who created the debt for nonmarital purposes). Accordingly, we conclude the family court did not err in excluding these debts from the marital estate.

II. Wife's Cross-Appeal

On cross-appeal, Wife contends the family court erred in finding Husband's overpayment of temporary alimony negated his requirement to pay Wife attorney's fees and costs. We agree.

In light of our holding that the family court properly awarded Wife temporary alimony, we necessarily reverse the family court's finding that this excess alimony adequately reimbursed Wife for her attorney's fees. In the family court's final order, it held Husband was required to pay "most" of the fees incurred by Wife. However, the family court then essentially held Husband was responsible for all of Wife's attorney's fees by crediting him the entire remainder of Wife's fees. Because of this discrepancy in the family court's order in addition to the lack of specific findings to support its decision, we remand the issue of attorney's fees to the family court.

Holcombe v. Hardee, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991) ("[W]hen an [o]rder is issued in violation of Rule 26(a), this Court may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence."). On remand, the family court should set forth the specific findings of fact as to each of the six factors from Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991), in determining the amount of attorney's fees to award Wife.

CONCLUSION

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

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

C-Sculptures, LLC, #1 Respondent,

v.

Gregory A. Brown and Kerry W. Brown, Appellants.

Appeal From Richland County
William P. Keesley, Circuit Court Judge

Opinion No. 4826
Heard December 8, 2010 - Filed April 27, 2011

AFFIRMED

John S. Nichols and William D. Robertson, III, both of Columbia, for Appellants.

Donald Ryan McCabe, Jr., of Columbia, for Respondent.

KONDUROS, J.: Gregory and Kerry Brown (the Browns) appeal the circuit court's confirmation of an arbitration award arising out of a dispute over money owed to C-Sculptures, LLC as general contractor in the construction of the their home. The Browns claimed C-Sculptures was precluded from seeking to enforce the contract because its contractor's license was for performing work valued at no more than $100,000, while the construction of their home cost over $800,000. They argue because the arbitrator manifestly disregarded the law on this point, the circuit court should have vacated the arbitration award. The Browns further appeal the award of attorney's fees to C-Sculptures arguing C-Sculptures improperly manipulated its pleadings and prayer for relief to position itself as the prevailing party. We affirm.

FACTS

C-Sculptures served as the general contractor for the construction of the Browns' home. At the time of contracting, C-Sculptures was licensed to perform work within Group Two as defined by section 40-11-260(A)(2) of the South Carolina Code (2001). Group Two license holders are limited to performing work not valued in excess of $100,000. None of the parties dispute initial estimates for construction of the home were over $700,000. As construction progressed, disagreements about the work, costs, and payments developed until C-Sculptures stopped work on the house claiming it was due $39,357.48. C-Sculptures filed a mechanic's lien in September of 2005 and filed an amended mechanic's lien in January of 2006 claiming it was owed $150,092.69 for work performed. C-Sculptures then filed a complaint seeking foreclosure of its lien, and the Browns moved to dismiss the complaint and submit the matter to arbitration pursuant to the contract between the parties. On July 26, C-Sculptures amended its complaint adding claims for unfair trade practices, quantum meruit, and breach of contract. The arbitrator, upon the Browns' motion, dismissed the quantum meruit claim. In November 2006, C-Sculptures submitted its pre-arbitration brief and the Browns submitted their brief detailing over $60,000 to which they were entitled in set-offs. The Browns also submitted a motion to dismiss C-Sculptures claims based on the fact that it did not have a valid license to

perform work of this value thereby making the contract void and unenforceable. On the first day of arbitration, C-Sculptures filed a motion to amend its pleadings to recognize credits claimed by the Browns totaling $59,854.

After a five-day hearing, the arbitrator entered its order (1) permitting C-Sculptures to amend its claim to reflect credits claimed by the Browns totaling $59,845.00 thereby reducing the amount claimed in arbitration to $90,155.00; (2) denying the Browns' motion to dismiss under the licensing statutes; (3) finding the balance due to be $85,863.00; (4) denying C-Sculptures' unfair trade practices claim; (5) finding in favor of the Browns for credits of $34,132.50.00; (6) finding C-Sculptures was due $51,730.50 under the contract; (7) awarding C-Sculptures interest of $10,484.74 under the contract; and (8) finding C-Sculptures was the prevailing party under the mechanic's lien statutes and contract supporting an attorney's fees award to it of $24,707.00.

The Browns petitioned the circuit court to vacate the arbitration award, but the circuit court denied their request and confirmed the arbitrator's award. This appeal followed.

LAW/ANALYSIS

I. Licensure

The Browns maintain the circuit court erred in confirming the arbitration award because the arbitrator showed a manifest disregard for the law in failing to find C-Sculptures held an invalid license and therefore could not enforce the contract pursuant to section 40-11-370(C) of the South Carolina Code (2011). We disagree.

"When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact. Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances." Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). A reviewing court should vacate an

arbitrator's decision only when the arbitrator has exceeded his or her authority or has manifestly disregarded or perversely misconstrued the law. Id. "[F]or a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." Id. "[M]anifest disregard of the law occurs when the arbitrator knew of a governing legal principle yet refused to apply it, and the law disregarded was well defined, explicit, and clearly applicable to the case." Bazzle v. Green Tree Fin. Corp., 351 S.C. 244, 268, 569 S.E.2d 349, 361 (2002), vacated and remanded on other grounds, 539 U.S. 444 (2003). "The focus is on the conduct of the arbitrator and presupposes something beyond a mere error in construing or applying the law." Gissel, 382 S.C. at 241, 676 S.E.2d at 323. An arbitrator manifestly disregards the law when he or she appreciates the existence of a clearly governing legal principle and decides to ignore it. Harris v. Bennett, 332 S.C. 238, 246, 503 S.E.2d 782, 787 (Ct. App. 1998).

Pursuant to section 40-11-30 of the South Carolina Code (2011), a person or entity acting as a general contractor is required to obtain a license if the work to be performed will be of a greater value than $5,000. The statute states:

> No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

Id. The chapter governing licensing also contains provisions regarding net worth requirements for general contractors who intend to do work within different cost ranges. The relevant statute states:

> (A) An applicant for a general contractor's license or a general contractor's license renewal who performs

> or offers to perform contracting work for which the total cost of construction is greater than $5,000.00, and an applicant for license group revisions must provide an acceptable financial statement with a balance sheet date no more than twelve months before the date of the relevant application showing a minimum net worth for each license group as follows: . . .
>
> (2) Group Two
> (a) bids and jobs not to exceed $100,000.00 per job;
> (b) required net worth of $20,000.00;
> (c) on initial application, an owner-prepared financial statement with an affidavit of accuracy;
> (d) on renewal, an owner-prepared financial statement with an affidavit of accuracy; . . .
>
> (5) Group Five
> (a) bids and jobs unlimited;
> (b) required net worth of $250,000.00;
> (c) on initial application, a financial statement audited by a licensed certified public accountant or a licensed public accountant in accordance with GAAP, including all disclosures required by GAAP;
> (d) on renewal, a financial statement reviewed by a licensed certified public accountant or a licensed public accountant in accordance with GAAP, including all disclosures required by GAAP.

S.C. Code Ann. § 40-11-260 (2011).

"A licensee is confined to the limitations of the licensee's license group and license classifications or subclassifcations as provided in this chapter." S.C. Code Ann. § 40-11-270(A) (2011). "The board may assess a penalty authorized by law against a licensee who undertakes or offers to undertake an

improvement exceeding the limitations of the licensee's group." S.C. Code Ann. § 40-11-280 (2001). The chapter defines an "unlicensed contractor" as "an entity performing or overseeing general or mechanical construction without a license." S.C. Code Ann. § 40-11-20(24) (2011). The chapter also addresses the limitation on the right of a general contractor to enforce a contract.

> An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. An entity that enters into a contract to engage in construction in a name other than the name that appears on its license may not bring an action either at law or in equity to enforce the provisions of the contract.

§ 40-11-370(C).

In Columbia Pools, Inc. v. Moon, 284 S.C. 145, 146-47, 325 S.E.2d 540, 541 (1985), the supreme court held a general contractor licensed in Michigan, but not licensed in South Carolina at the time he entered into a contract, could not enforce the contract pursuant to section 40-59-10 of the South Carolina Code (2009), which prevents unlicensed residential homebuilders from enforcing a contract.[1] In W & N Construction Co. v.

[1] S.C. Code Ann. § 40-59-30(B) (2011) provides:

> Notwithstanding Section 29-5-10, or another provision of law, a person or firm who first has not procured a license or registered with the commission and is required to do so by law may not file a mechanics' lien or bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the person or firm entered into in violation of this chapter.

Williams, 322 S.C. 448, 472 S.E.2d 622 (1996), the supreme court determined a general contractor whose license had been revoked for failure to pay taxes could not enforce a contract because contractors were required to be licensed. However, the opinion does not address the contractor classifications and does not reference section 40-11-370(C) because it was not enacted at the time.[2]

The present case revolves around the appellate court's standard of review in arbitration cases. While the Browns' contention that the contract entered into was invalid because C-Sculptures was underlicensed may be correct, no cases are directly on point and the enforcement provision in section 40-11-370(C) does not make the issue perfectly clear. The arbitrator's award indicated he considered all the applicable law and arguments in reaching his decision and the issue was sufficiently briefed and argued so as to bring it to his attention. Under our standard of review, we cannot conclude the arbitrator showed a manifest disregard for the law as the law on this issue is not well defined, explicit, and clearly applicable. Therefore, we affirm the circuit court's confirmation of the arbitration award.

II. Attorney's Fees

The Browns maintain the circuit court erred in not finding the arbitrator's award of attorney's fees to C-Sculptures was arbitrary and capricious or in manifest disregard of the law.[3] We disagree.

---

[2] It appears the enactment of section 40-11-370(C) was in response to W & N Construction.

[3] The Browns also claim the circuit court erred in confirming the award because the arbitrator found the Browns were the prevailing parties under the contract. However, because this analysis finds they are the prevailing party under the statute, which the Browns maintain is the controlling law, we need not address the issue of whether the contract supported an award of attorney's fees. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address

The mechanic's lien statute provides a method for determining the prevailing party in mechanic's lien cases and thereby is entitled to attorney's fees under the statute.

> For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. One verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims. The party whose offer is closer to the verdict reached is considered the prevailing party in the action. If the difference between both offers and the verdict is equal, neither party is considered to be the prevailing party for purposes of determining the award of costs and attorney's fees.
>
> If the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement.
>
> If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero.

S.C. Code Ann. § 29-5-10(b) (2007).

Here, C-Sculptures moved to amend its pleadings on the first day of the five-day arbitration. While this was late in the proceedings, the Browns took no action to indicate they were willing to settle the case based on that concession. The arbitrator's award was then closer to C-Sculptures' request

---

remaining issues when the determination of a prior issue is dispositive of the appeal).

than the Browns' settlement offer, which was zero under the terms of the statute.

The arbitrator followed the statutory scheme. The Browns' argument is really that the arbitrator should not have allowed C-Sculptures to amend its pleadings at that stage of the arbitration because that manipulated the range of the possible award to increase C-Sculptures' odds of "being closest to the pin" and therefore the prevailing party. However, whether to allow amendment of the pleadings is within the arbitrator's discretion. The attorney's fees award was neither arbitrary nor capricious and did not demonstrate a manifest disregard for the law. Consequently, the circuit court's confirmation of the arbitration award is

AFFIRMED.

HUFF and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

C-Sculptures, LLC, #3 Appellants,

v.

Gregory A. Brown and Kerry W. Brown, Respondents.

Appeal From Richland County
Joseph M. Strickland, Master-in-Equity

Opinion No. 4827
Submitted December 1, 2010 – Filed April 27, 2011

AFFIRMED

D. Ryan McCabe, of Columbia, for Appellant.

John S. Nichols and William D. Robertson, III, both of Columbia, for Respondent.

KONDUROS, J.: C-Sculptures argues the master-in-equity erred in finding the foreclosure of its mechanic's lien against the home of Gregory and

Kerry Brown (the Browns) was stayed pending their appeal of the arbitration award in the underlying lawsuit between the parties. We affirm.[1]

FACTS

C-Sculptures served as general contractor on the construction of a home for the Browns. A dispute arose regarding payment, and C-Sculptures filed a mechanic's lien against the property. C-Sculptures filed suit to foreclose the lien on January 20, 2006. The matter was referred to the arbitrator pursuant to the construction contract, and the parties agreed to stay the foreclosure proceeding pending arbitration. The arbitrator rendered his decision, and the Browns filed a motion to vacate the award. The circuit court confirmed the arbitration award, and the Browns filed a motion to alter or amend the circuit court's order, which was denied. The Browns filed a notice of appeal on February 8, 2008.

On March 1, 2008, the master issued a Summons and Order of Appointment setting a date for the foreclosure matter. The Browns filed a Motion to Halt Proceedings, and after several hearings, the master held the foreclosure action was automatically stayed by the South Carolina Appellate Court Rules. C-Sculptures appeals the master's order.

LAW/ANALYSIS

I. Rule 241, SCACR, and Rule 60(b), SCRCP

C-Sculptures contends the denial of a motion to vacate an arbitration award should be treated the same as the denial of a motion for relief from judgment under Rule 60(b), SCRCP. We disagree.

Rule 241(a), SCACR, sets forth the general rule regarding stays after a following a notice of appeal.

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

> **General Rule.** As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 60(b), SCRCP, deals with relief from a judgment and states:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is

> no longer equitable that the judgment should have prospective application.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court.

(emphasis added).

C-Sculptures argues the denial of the Browns' motion to vacate should be treated like the denial of a Rule 60(b) motion. However, C-Sculptures cites no authority for this proposition, and we are unpersuaded by its general argument. The South Carolina Supreme Court has ruled the execution of a judgment is not generally stayed by the denial of a Rule 60(b) motion because the denial of such a motion grants "no relief" to the movant so that there is nothing to stay. Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 375 S.C. 423, 426, 653 S.E.2d 274, 276 (2007). However, Rule 60(b) motions are made by parties seeking relief from a judgment for some reason other than the merits of the case. Here, the Browns raise none of the reasons listed in Rule 60(b) for setting aside the arbitrator's ruling. They simply disagree with his decision. As such, the denial of their motion to vacate is more akin to a traditional appeal on the merits. Therefore, we find no error in the master's ruling that the foreclosure action was stayed during the pendency of the Browns' appeal to this court.

II. Payment of Money/Sale or Delivery of Real Property

C-Sculptures maintains the master erred in finding the circuit court's order confirming the arbitration award did not direct the delivery of land or payment of money thereby necessitating the payment of a bond by the Browns to stay the execution. We disagree.

Section 18-9-130(A)(1) of the South Carolina Code (Supp. 2010) provides "[a] notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution." In this case, the master's order stated "[c]ounsel for C-Sculptures acknowledged during argument that the trial court's order is not one directing the payment of money." Because C-Sculptures did not file a motion to alter or amend that finding within the order, it is the law of the case. See Judy v. Martin, 381 S.C. 455, 459, 674 S.E.2d 151, 153 (2009) ("[A]n unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal.").

Section 18-9-170 of the South Carolina Code (1985) indicates if the judgment appealed from directs the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless the party against whom judgment is entered obtains a bond with two sureties guaranteeing the property will not be wasted during the pendency of the appeal. The master found the circuit court's confirmation order did not "direct the sale or delivery of real property" because it did not order the sale of the property but rather referred the case to the master for foreclosure proceedings. We agree with the master that the foreclosure proceedings would "contemplate an order for the sale of the Browns' real property and setting the terms and conditions of that sale." The foreclosure decree would be the type of order covered by section 18-9-170, not the circuit court's order confirming the arbitration award. See Gerald v. Gerald, 31 S.C. 171, 182, 9 S.E. 792, 796 (1889) ("This language [found in the predecessor to section 18-9-170] shows that the intention was to embrace appeals from judgments of

foreclosure, for that is a judgment directing the sale of real property . . . .") (emphasis added).

CONCLUSION

Because the foreclosure proceedings were stayed pursuant to Rule 241, SCACR, and because the circuit court's order confirming the arbitration award did not direct the payment of money or the sale or delivery of real property, the order of the master is

AFFIRMED.

HUFF and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elise Burke, Respondent,

v.

AnMed Health, Appellant.

Appeal From Anderson County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 4828
Heard February 16, 2011 – Filed April 27, 2011

AFFIRMED

Stephen Dallas Baggett and Stephen Dallas Baggett, Jr. of Greenwood, for Appellant.

John S. Nichols and Blake A. Hewitt, both of Columbia and Joseph G. Wright, III, of Anderson, for Respondent.

FEW, C.J.: AnMed Health admitted liability to Elise Burke arising out of a preoperative procedure, and the jury returned a $250,000.00 verdict for Ms. Burke. AnMed contends the trial court erred in refusing to excuse for cause potential jurors who were allegedly indebted to AnMed, in admitting

costs of Ms. Burke's initial operation as evidence of damages, and in refusing to grant AnMed's motion for a new trial. We affirm.

Seventy-three-year-old Elise Burke arrived at AnMed to have an abdominal hysterectomy on March 22, 2005. During a routine preoperative procedure, a nurse inadvertently left a cleansing sponge inside Ms. Burke's vagina. The hysterectomy was performed later the same morning but the sponge was not discovered. After the surgery, Ms. Burke experienced increasing discomfort, discolored vaginal discharge, and an offensive odor she was unable to prevent those around her from noticing. Over the following two months, Ms. Burke contacted her doctor on six separate occasions seeking medical assistance to address these concerns. On May 23, 2005, Ms. Burke's doctor performed a vaginal exam and discovered fragments of the sponge that had been left in her body. The rest of the sponge was surgically removed the following day. Additional facts related to the issue of damages are discussed in our analysis of the trial judge's decision not to grant a new trial.

I. Jury Venire

During pretrial motions, AnMed moved to excuse prospective jurors who owed "bad debts and judgments" to AnMed. The trial court removed the four venire members against whom AnMed held judgments but denied the request to remove others whose debts to AnMed were allegedly in default. AnMed contends this was error and asks this court to recognize a bright-line rule to categorically exclude from jury service all prospective jurors who have been referred to debt collection agencies as the result of failing to pay a debt owed to a party.

A litigant's right to an impartial jury is a fundamental principle of our legal system. S.C. Code Ann. § 14-7-1050 (2008) ("[I]n all civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury."); Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, 446, 682 S.E.2d 489, 492 (2009) ("Under South Carolina law, litigants are guaranteed the right to an impartial jury."). To safeguard this right, prospective jurors must be excused for cause when either an automatic

disqualification applies to the juror or when the trial court determines that the juror cannot be fair and impartial. However, our courts have hardly ever recognized an automatic disqualification.[1] We decline to create a new category of persons automatically disqualified from jury service in this case. Rather, we hold that when a party asks that a prospective juror be excused for cause because of a debt owed to the party, the trial court must conduct an individual analysis as to that juror to determine whether the juror should be excused. See Abofreka v. Alston Tobacco Co., 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986) (stating a juror should be disqualified if it appears to the trial court "that the juror is not indifferent in the case").

In this case, the trial judge asked the jury panel every question proposed by the parties during voir dire, including whether any of the prospective jurors had a relationship with Ms. Burke; worked for AnMed; had ever been dissatisfied with treatment received from a hospital; or had sued a hospital or a physician. The trial court also asked the panel: "Does any member feel like they have any interest, sensitivity, bias or prejudice

---

[1] Compare Alston v. Black River Elec. Coop., 345 S.C. 323, 331, 548 S.E.2d 858, 862 (2001) (adopting a per se rule disqualifying cooperative members from jury service when the cooperative is a party); S. Bell Tel. & Tel. Co. v. Shepard, 262 S.C. 217, 222, 204 S.E.2d 11, 12 (1974) (a stockholder in a corporation is incompetent to serve on a jury in a case in which the corporation is a party or has any pecuniary interest); with State v. Manning, 329 S.C. 1, 7, 495 S.E.2d. 191, 194 (1997) (mere exposure to pretrial publicity does not automatically disqualify a juror); State v. Jones, 298 S.C. 118, 121, 378 S.E.2d 594, 596 (1989) (a prospective juror is not disqualified merely because he is a friend or acquaintance of a murder victim); State v. Franklin, 267 S.C. 240, 248, 226 S.E.2d 896, 899 (1976) (the fact that a venire member is a friend of the prosecuting attorney does not per se disqualify him from jury service); State v. Hilton, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1911) ("There is no rule of the common law, nor is there a statute, disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree."); Hollins v. Wal-Mart Stores, Inc., 381 S.C. 245, 252, 672 S.E.2d 805, 808 (Ct. App. 2008) (a prior business relationship between a venire member and a party does not disqualify a juror as a matter of law).

which would prevent you from being a fair and impartial juror in this case?" There was no response to any of these voir dire questions. AnMed specifically chose not to request additional voir dire to address the concern that some venire members may be biased as a result of being indebted to AnMed, explaining, "We are trying to avoid embarrassing jurors who might be called upon to stand up and say that—to verify whether they have this certain debt owed to the hospital." We find that the trial judge acted within his discretion when he decided not to excuse any additional jurors for cause. See Johnson v. Nat'l Bank of Sumter, 213 S.C. 458, 464, 50 S.E.2d 177, 180 (1948) ("It is well settled that questions . . . relating to the fitness of jurors to serve in a case are largely left to the discretion of the trial judge.").

II. Admissibility of Cost of Hysterectomy

AnMed contends that the trial court erred in admitting the expenses AnMed charged Ms. Burke for her hysterectomy as evidence of actual damages. We find the issue is not preserved for our review.[2]

AnMed moved to exclude evidence of expenses associated with the initial surgery on the ground that the evidence was not relevant. The trial court ruled in limine that the evidence was relevant and admissible. During Ms. Burke's testimony, she sought to introduce Exhibit 8, which included the medical bills associated with her hysterectomy. The trial court asked AnMed if it had any objection to Exhibit 8, and AnMed responded, "No objection, Your Honor." The trial court admitted the exhibit.

A contemporaneous objection is typically required to preserve issues for appellate review. Hill v. S.C. Dep't. of Health & Envtl. Control, 389 S.C. 1, 23, 698 S.E.2d 612, 624 (2010) (citing Sea Cove Dev., LLC v.

[2] Though Ms. Burke did not argue issue preservation, we can affirm for any reason that appears in the record. See Rule 220(c), SCACR; I'on LLC v. Mount 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.").

Harbourside Cmty. Bank, 387 S.C. 95, 108 n.5, 691 S.E.2d 158, 165 n.5 (2010)) (noting that a contemporaneous objection is required to preserve an issue for appellate review). However, "'where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection.'" Wright v. Hiester Constr. Co., 389 S.C. 504, 514, 698 S.E.2d 822, 827 (Ct. App. 2010) (quoting State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)).

In this case, AnMed not only failed to renew its objection when evidence of the medical bills was offered, AnMed affirmatively stated that it had no objection to the introduction of this evidence. In State v. Dicapua, the defendant objected in limine to the admission of a videotape. 373 S.C. 452, 646 S.E.2d 150 (Ct. App. 2007), aff'd, 383 S.C. 394, 680 S.E.2d 292 (2009). When the State later offered the video into evidence the defendant said, "no objection." 373 S.C. at 454, 646 S.E.2d at 151. This court held that the statement "no objection" constituted "a waiver of any issue [the defendant] had with the videotape." 373 S.C. at 455, 646 S.E.2d at 152. We find Dicapua controlling. When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review.

III. AnMed's Motions For A New Trial

AnMed appeals the trial court's denial of its motion for a new trial, arguing the motion should have been granted under the thirteenth juror doctrine, as a new trial absolute, or in the alternative, as a new trial nisi remittitur. We affirm.

Under the thirteenth juror doctrine, a trial court may grant a new trial if the judge determines the jury's verdict is "contrary to the fair preponderance of the evidence." R.C. McEntire v. Mooregard Exterminating Servs., Inc., 353 S.C. 629, 633, 578 S.E.2d 746, 748 (2003). The trial court's discretion to grant or deny a new trial as the thirteenth juror is very broad. "As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the Nth degree . . . ." Worrell v. S.C. Power Co., 186 S.C. 306, 313-14, 195

S.E. 638, 641 (1938). An order denying a new trial on this theory will hardly ever be reversed. As this court recently stated, "'to reverse the denial of a new trial motion under [the thirteenth juror doctrine,] we must, in essence, conclude that the moving party was entitled to a directed verdict at trial.'" Curtis v. Blake, Op. No. 4792 (S.C. Ct. App. filed Feb. 16, 2011) (Shearouse Adv. Sh. No. 6 at 90) (quoting Parker v. Evening Post Publ'g Co., 317 S.C. 236, 247, 452 S.E.2d 640, 646 (Ct. App. 2001)).

A trial judge also has the power to grant a new trial absolute. However, this power may be exercised only when the verdict "is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 635, 529 S.E.2d 758, 761 (2000).[3] A jury's determination of damages is entitled to "substantial deference." Todd v. Joyner, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008), aff'd, 385 S.C. 421, 685 S.E.2d 595 (2009). The decision to grant or deny a "new trial motion rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." Brinkley v. S.C. Dep't of Corrs., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009).

If the trial court determines that the verdict is "merely excessive," the court has the power to reduce the verdict by granting a new trial nisi

[3] Courts have used varying language to describe the circumstances in which a circuit judge may grant a new trial absolute. See O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) ("If the amount of the verdict is *grossly* inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute."); Chapman v. Upstate RV & Marine, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct. App. 2005) ("'The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives.'" (quoting Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996)).

remittitur. "A motion for a new trial nisi remittitur asks the trial court to reduce the verdict because the verdict is merely excessive." James v. Horace Mann Ins. Co., 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006). Even as to a new trial nisi remittitur, the trial judge's discretion is broad. "The denial of a motion for a new trial nisi is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion." Id.; see also Bailey v. Peacock, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) ("If an award is merely inadequate or unduly liberal, the trial judge alone has the discretion to grant a new trial *nisi additur*.").

We agree with AnMed that the jury's verdict of $250,000.00 is generous.[4] However, as an appellate court, we sit neither to determine whether we agree with the verdict nor to decide whether we agree with the trial judge's decision not to disturb it. As described above, we employ a highly deferential standard of review when considering the trial judge's ruling on each of the grounds for a new trial. In exercising this deference, we recognize the unique position of the trial judge to hear the evidence firsthand, evaluate the credibility of the witnesses, and assess the impact of the wrongful conduct on the plaintiff in terms of damages.

We find this deference is particularly appropriate on the facts of this case. The distress Ms. Burke endured is certainly compelling. We believe the trial court was uniquely able to understand Ms. Burke's damages, and likewise, uniquely able to evaluate the appropriateness of the jury's award. Thus, though we recognize the generosity of the award, we find the trial judge's ruling to deny the motion for a new trial was within his discretion.

Ms. Burke testified about six visits she made to her doctor attempting to identify the reason for her increasing discomfort after the hysterectomy. She first went to her doctor's office on April 13 with vaginal discharge, slight odor, and pain in her right side. She returned on April 18 and again complained of the pain she was experiencing. She went back to the doctor on April 21, and described "pain in [her] side," "real black vaginal discharge" and said the "odor was terrible."

[4] The cost of the hysterectomy was $21,558.83, and the cost of the procedure to remove the sponge was $7,754.20.

On May 3, a nurse who cared for Ms. Burke called the doctor on her behalf to describe the pain Ms. Burke was experiencing. Ms. Burke testified that the nurse noticed the odor "which was very embarrassing." On May 6, she went to her doctor for a fifth time and complained of brown vaginal discharge, strong odor, and pain in her side. Ms. Burke described the odor, "even though I had taken a bath just before I left home and everything, you just couldn't get away from it, it was so bad." Lillie Rumsey, Ms. Burke's friend, testified, "She had a terrible odor. It was terrible."

Kenneth Stone, Ms. Burke's son, testified, "she'd drive down the road with me taking her to the doctor's office apologizing and crying because she was ashamed of the odor that she had." Stone further explained, "she was sitting there crying she was in so much pain." On May 23, Ms. Burke's doctor finally performed a vaginal examination. Ms. Burke testified, "And when he did examine me, he pulled on something in that right side where I had been having all that pain. And I almost came off the table it hurt so bad."

Ms. Burke told the jury about the impact the experience had on her physically and emotionally:

> I had suffered the whole time for nine weeks and trying to tell him that something was wrong, and he did nothing about it. And it was so embarrassing – I mean, when my friends would come in – from the odor. And I would sit real still in my recliner. I was afraid to move for fear they would detect the odor and all even though I kept myself as clean as possible. I never had took so many showers, I don't think, in my life in one day. And also changing pads. I think I almost bought out Wal-Mart buying pads. I had to use so many because I was trying to keep down, you know, the odor.

Finally, Ms. Burke testified that she was still suffering from the effects of the injury at the time of the trial—more than three years after the surgery.

She testified that she "still [has] pain in [her] side occasionally" and is now "weak" and requires help to complete household chores. Stone testified that "since [the surgery], she's a completely different woman. . . . [S]he hasn't driven since the surgery whatsoever."

We find the trial court did not abuse its discretion in deciding to leave the jury's verdict undisturbed.

IV. Other Issues

AnMed contends the trial court erred in admitting the testimony of Cynthia Hurley, a surgical nurse who testified about the general process she follows in performing similar procedures, the location at which the sponge was left inside Ms. Burke's body, and related potential side effects. AnMed contends that because the case went to trial only on the question of damages the evidence was inadmissible under Rules 402 and 403, SCRE. We find that the trial court was within its discretion to admit the evidence as context for the jury to understand the injury Ms. Burke suffered and the resulting damages. See Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 413, 697 S.E.2d 558, 561 (2010) ("The admission of evidence is within the sound discretion of the trial judge and will not be reversed absent a clear abuse of discretion.").

AnMed contends the trial court erred in denying its request to charge the jury: "A plaintiff in a medical malpractice action cannot recover damages for his or her original injury." This was a request for a specific charge to be given on proximate cause. While a trial court must charge the current and correct law, Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000), there is no error in refusing "a specific request to charge when the substance of the request is included in the general instructions." Burroughs v. Worsham, 352 S.C. 382, 391-92, 574 S.E.2d 215, 220 (Ct. App. 2002). AnMed concedes the charge was correct on the law of proximate cause.

AFFIRMED.

SHORT and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mark S. Steinmetz, Respondent,

v.

American Media Services, LLC, New Jersey Radio Partners, LLC, Arizona Radio Partners, LLC, Asheville Radio Partners, LLC, Tri-City Radio, LLC, Trans-Rockies Radio, LLC, and Hawaii Radio, LLC, Appellants.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge
M. Dawes Cooke, Jr., Arbitrator

Opinion No.4829
Heard February 9, 2011 – Filed April 27, 2011

APPEAL DISMISSED

Steven L. Smith and William Mark Koontz, both of North Charleston, for Appellants.

Justin O'Toole Lucey, of Mt. Pleasant, for Respondents.

LOCKEMY, J.: American Media Services, LLC, and several limited liability companies (collectively AMS) it created to upgrade radio stations appeal an arbitration award in favor of Mark S. Steinmetz. We dismiss AMS's appeal.

FACTS/PROCEDURAL HISTORY

Steinmetz brought suit against his employer AMS and several transactional limited liability companies created by AMS to upgrade radio stations. Steinmetz claimed AMS breached his employment agreement, violated the South Carolina Payment of Wages Act[1] and converted his interests in the transactional LLCs. The parties consented to arbitration, and after a hearing, the arbitrator found in favor of Steinmetz on his claims for breach of contract and conversion. AMS filed a motion to reconsider, which was denied. AMS appealed the arbitrator's order denying its motion to reconsider to this court. Steinmetz cross-appealed "to preserve his [a]ppellate rights."

Nine months later, Steinmetz sought to confirm the arbitrator's award in circuit court. Steinmetz also filed a motion to stay the appellate proceedings, which this court granted. AMS declined to consent to confirmation because it was unsure how consent would affect its appeal. However, AMS also submitted it did not "have any legal basis to oppose" confirmation of the arbitrator's award. The circuit court entered final judgment in accordance with the arbitrator's order finding "no basis for the denial of the motion for confirmation[,] no motion to vacate or modify[,] and no showing of manifest disregard." Steinmetz withdrew his cross-appeal which was remitted to the circuit court.

Steinmetz filed a motion to dismiss AMS's appeal with this court, arguing AMS waived its appellate arguments by failing to appeal the circuit

[1] S.C. Code Ann. §§ 41-10-10 to -110 (Supp. 2010).

court's order confirming the arbitrator's award. AMS filed a return maintaining its appeal directly from the arbitrator's order denying its motion to reconsider was properly perfected and confirmation was a mere formality. This court denied the motion to dismiss and ordered the parties to brief the issue as the first issue on appeal. This appeal followed.

LAW/ANALYSIS

Steinmetz argues this court lacks jurisdiction because AMS has not appealed an order of the circuit court enumerated in section 15-48-200(a) of the South Carolina Code (2005). We agree.

When a case is sent to arbitration, the circuit court is divested of jurisdiction over the case. Main Corp. v. Black, 357 S.C. 179, 181, 592 S.E.2d 300, 301-02 (2004). However, after the arbitrator issues an award, the circuit court has the authority to "enter judgment on [the] award." S.C. Code Ann. § 15-48-180 (2005). Thus, upon motion of either party to confirm, vacate, modify, or correct the arbitrator's award, the circuit court resumes jurisdiction over the case. S.C. Code Ann. §§ 15-48-120, -130, -140 (2005); Main Corp., 357 S.C. at 181, 592 S.E.2d at 302.

In an arbitration case, the only appeals that may be taken are from an order of the circuit court enumerated in section 15-48-200. Main Corp., 357 S.C. at 181-82, 592 S.E.2d at 302. Section 15-48-200(a) enumerates the orders of the circuit that may be appealed in an arbitration case:

> (1) An order denying an application to compel arbitration . . . ;
> (2) An order granting an application to stay arbitration . . . ;
> (3) An order confirming or denying confirmation of an award;
> (4) An order modifying or correcting an award;
> (5) An order vacating an award without directing a rehearing; or
> (6) A judgment or decree entered pursuant to the provisions of [the Uniform Arbitration Act].

Here, AMS appealed the order of the arbitrator denying its motion to reconsider. Because AMS has not appealed the order of the circuit court confirming the arbitrator's award, this court lacks jurisdiction over AMS's appeal. See S.C. Code Ann. § 14-8-200(a) (Supp. 2010) (providing this court with jurisdiction over only "order[s], judgment[s], or decree[s] of the circuit court, family court, a final decision of an agency, a final decision of an administrative law judge, or the final decision of the Workers' Compensation Commission"); Main Corp., 357 S.C. at 181-82, 592 S.E.2d at 302.

AMS contends its appeal is properly perfected because Main Corporation is inapplicable after the circuit court resumed jurisdiction and issued the order confirming the arbitrator's award. AMS's argument overlooks the court's reasoning in Main Corporation. The basis of the court's holding in Main Corporation is that in arbitration cases, this court only has jurisdiction over appeals from orders of the circuit court enumerated in section 15-48-200. In other words, the type of order appealed from triggers this court's jurisdiction, not the fact that the circuit court has resumed jurisdiction and issued an order enumerated in section 15-48-200. See Main Corp., 357 S.C. at 182, 592 S.E.2d at 302 ("If the circuit court has not resumed jurisdiction and issued one of the orders enumerated in Section 15-48-200, there is no court order that can be the subject of an appeal."). The post-arbitration motions allowed by statute in circuit court are more than a mere formality; they provide the basis for a properly perfected appeal of an arbitration award to this court.

CONCLUSION

For the foregoing reasons, AMS's appeal is

DISMISSED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James C. Miller, Appellant.

Appeal From Lexington County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 4830
Submitted February 8, 2011 – Filed April 27, 2011

AFFIRMED

Appellate Defender Elizabeth A. Franklin-Best, of Columbia, for Appellant.

J. Benjamin Aplin, of Columbia, for Respondent.

LOCKEMY, J.: James C. Miller appeals an order of the circuit court tolling his probation while he is civilly committed as a sexually violent predator (SVP). Miller argues the trial court erred because tolling is not authorized by statute and renders his civil commitment punitive. We affirm.

FACTS

In 1998, the mother of a one-year-old baby walked into a room and found Miller leaning over her child with his pants down while the baby's diaper was off. In re Care & Treatment of James Carl Miller, 385 S.C. 539, 541, 685 S.E.2d 619, 620 (Ct. App. 2009). While exiting the room, Miller punched the mother. Id. Miller pled guilty to committing a lewd act on a minor under the age of sixteen and criminal domestic violence of a high and aggravated nature. The trial court sentenced Miller to 15 years' imprisonment suspended upon service of 10 years' imprisonment and five years' probation for the lewd act charge, and a concurrent sentence of 10 years' imprisonment for the criminal domestic violence charge.

Prior to his release from prison, Miller was civilly committed as an SVP. Id. at 545, 685 S.E.2d at 622. Approximately two years later, the State issued a probation citation "to give [the circuit] court subject-matter jurisdiction" to entertain its request to "stop and toll time on [Miller's] current probation sentence." At the revocation hearing, the State requested the circuit court toll Miller's probation until he is released from civil commitment. The circuit court found Miller would benefit from supervision in the community and was unable to live in the community while committed as an SVP. Accordingly, the court tolled Miller's probation until his release from civil commitment. This appeal followed.

ISSUES ON APPEAL

Did the circuit court err in tolling Miller's probation while he is civilly committed as an SVP?

STANDARD OF REVIEW

Probation matters are addressed to the sound discretion of the circuit court and will not be disturbed on appeal absent an abuse of discretion. State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006). "An abuse of discretion occurs when the trial court's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court

is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious." Id. at 94, 634 S.E.2d at 656.

LAW/ANALYSIS

Miller contends the circuit court erred in tolling his probation while he is committed as an SVP for two reasons. First, Miller argues neither the Sexually Violent Predator Act[1] (the Act) nor the probation statutory scheme[2] provide the circuit court with the authority to toll probation. We disagree.

Section 24-21-410 of the South Carolina Code (Supp. 2010) provides the trial court with authority to suspend the imposition and execution of a sentence "and place the defendant on probation" or "impose a fine and also place the defendant on probation." The period of probation "shall not exceed . . . five years and shall be determined by the [circuit court] . . . ." S.C. Code Ann. § 24-21-440 (2007). "Sections 24-21-410 and 24-21-440 vest the [circuit court] with broad authority to determine the beginning date of a term of probation, so long as the term of the probation does not exceed five years." State v. Lee, 350 S.C. 125, 134, 564 S.E.2d 372, 377 (Ct. App. 2002).

Here, the circuit court determined Miller was incapable of complying with the conditions of probation while committed as an SVP and would benefit from supervision in the community. The circuit court determined the beginning date of Miller's probation as the date of his release from civil commitment at which time he could comply with the conditions of probation. We find the circuit court acted within its broad discretion to determine the beginning date of Miller's probation. See id. (finding the circuit court had "the authority to order a probationary period to begin upon a defendant's release from incarceration on a separate charge, even if that release is the result of the defendant being paroled").

[1] S.C. Code Ann. §§ 44-48-10 to -170 (Supp. 2010).
[2] S.C. Code Ann. §§ 24-21-410 to -490 (2007 & Supp. 2010).

Furthermore, our supreme court has recognized the circuit court has the authority to toll probation in at least two instances: partial revocation and continuance, State v. Crouch, 355 S.C. 355, 359 n.2, 585 S.E.2d 288, 290 n.2 (2003), and absconding from supervision, State v. Hackett, 363 S.C. 177, 182, 609 S.E.2d 553, 555-56 (Ct. App. 2005). We are mindful that in both these instances the probationer has generally committed some affirmative act to violate the conditions of probation. Although Miller was civilly committed against his will, he admitted to committing a lewd act on a minor under the age of sixteen which contributed to the basis for his civil commitment. See S.C. Code Ann. § 44-48-30(1)-(2) (Supp. 2010) (enumerating "committing . . . [a] lewd act upon [a] child under sixteen" as a "sexually violent offense" for purposes of determining whether an individual is a sexually violent predator).

Finally, tolling Miller's probation under these circumstances is consistent with the policy considerations supporting probation. The purpose of probation is to rehabilitate the probationer in the community and to protect the public. 24 C.J.S. Criminal Law § 2145 (2006). Rehabilitation is accomplished by requiring the probationer to comply with conditions of probation designed "to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." Griffin v. Wisconsin, 483 U.S. 868, 875 (1987); see also S.C. Code Ann. § 24-21-430 (Supp. 2010) (outlining thirteen conditions probationers must comply with while on probation). Here, Miller cannot benefit from the rehabilitative aspect of probation and supervision in the community until he is released from civil commitment. Furthermore, the State cannot ensure the public is protected if Miller is not required to live in the community subject to the conditions of probation. See Griffin, 483 U.S. at 875 (noting that intensive supervision in the community can reduce recidivism). Accordingly, we find the circuit court did not abuse its discretion in tolling Miller's probation until he is released from civil commitment.

Second, Miller argues tolling his probation converts his civil commitment into a punitive commitment by extending the length of his criminal sentence. We disagree.

The Act expressly defines the nature of SVP commitment as civil commitment. See S.C. Code Ann. § 44-48-20 ("The General Assembly finds that a mentally abnormal and extremely dangerous group of sexually violent predators exists who require involuntary civil commitment in a secure facility for long-term control, care, and treatment."). Furthermore, our supreme court concluded in In re Matthews that the Act was civil and not criminal in nature and that commitment pursuant to the Act was non-punitive. 345 S.C. 638, 648-51, 550 S.E.2d 311, 315-17 (2001). Accordingly, Miller's argument is without merit.

CONCLUSION

For the foregoing reasons, we find the trial court properly tolled the start date of Miller's probation until his release from civil commitment as an SVP. The decision of the trial court is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph S. Matsell and Pamela A. Matsell, Respondents,

v.

Crowfield Plantation Community Services Association, Inc., Appellant.

Appeal From Berkeley County
Kristi L. Harrington, Circuit Court Judge

Opinion No. 4831
Submitted October 1, 2010 – Filed April 27, 2011

AFFIRMED

D. Gary Lovell and Douglas W. MacKelcan, both of Charleston, for Appellant.

David B. Wheeler and Trudy H. Robertson, both of Charleston, for Respondents.

KONDUROS, J.: Crowfield Plantation Community Services Association (the Association) appeals the trial court's finding the Hamlets of Crowfield Covenants and Restrictions (the Covenants) do not allow the Association to approve fence construction applications for lots that abut the lake, lagoons, or golf course in the Hamlets, except for stated limited circumstances and the Association violated such determination by approving the projects. We affirm.[1]

FACTS

The Hamlets is a subdivision within Crowfield Plantation. The Covenants were drafted by Westvaco Development Corporation and recorded in 1991. The Covenants created an Architectural Review Board (ARB), and the Association assumed full control of the ARB in 2003.

Article V, Section 5.01, of the Covenants, Architectural Control, provide in part:

> No construction, reconstruction, remodeling, alteration, or addition to any structure, building, fence, wall, driveway or improvement of any nature shall be commenced without obtaining the prior written approval of the [ARB] as to location, plans and specifications. . . . In addition to the Architectural Guidelines, and not as any limitation thereof, the following restrictions shall apply to the lands subject to these Covenants:
>
> . . . .
>
> c. Fencing of Lots that abut the lake or the golf course is not authorized except as provided in paragraphs 5.01 d, e, and f. Fences may be erected on other than lake and golf lots . . . .

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

> d. Dog kennel pens may be authorized with prior approval of the ARB as to location, size, and type of fencing. Fencing will usually be ornamental in nature and not exceed 6 feet in height. Kennel location will abut the house when possible and in every case will be as close to the rear of the house as practical; kennels/pens will not be visible from the street.
>
> e. . . . . A wall or fence at least 4-feet high, with self-locking gates, shall completely enclose the pool or surrounding yard. For Lots that abut the lake or golf course, the pool fencing cannot extend more than 20 feet from the edge of the pool. . . .
>
> f. Residential tennis courts may be authorized for construction on a lot with prior approval of the ARB as to location, lighting, and fencing. . . . Fencing should be that customarily used with tennis courts and may exceed 6 feet in height depending upon the locations of the courts and the visibility from the street.

The Matsells live in the Hamlets, and their lot abuts the golf course. In 2005, the Matsells' next-door neighbors built a fence that covers the majority of the backyard and can be seen from the street. On November 30, 2007, the Matsells filed an amended complaint seeking a declaratory judgment ordering the Association to comply with, abide by, and enforce section 5.01 of the Covenants. Further, the Matsells sought an order that the Association's approval of the fence in their neighbors' yard violated the Covenants. The Matsells also sought an injunction requiring the removal of their neighbors' fence, along with other similarly approved fences in the Hamlets.

The Matsells and the Association both filed motions for summary judgment. Following a hearing on the matter, the trial court granted summary judgment to the Matsells. The trial court found:

> The clear language of the Covenant provides that fences on lots that abut the lake, lagoons, or golf course are not allowed except when enclosing a dog kennel pen (or enclosing a swimming pool or tennis court as further stated in subsections (e) and (f)). When the dog kennel pen exception applies, the fence must be located as close to the rear of the house as is practical, and the fence will not be visible from the street.

The trial court found the Association could not dispute that the lot adjoining the Matsells' lot has a fence that can be seen from the street and covers most of the backyard. The court stated, "Section 5.01 (c) through (f) is clear, unambiguous, and explicit. There is no genuine issue of fact as to its construction as it plainly provides that no fences are permitted on lots abutting a lake, lagoon, or golf course within The Hamlets except in limited circumstances." Accordingly, the court found "[a] declaratory judgment is appropriate in this instance as the relief sought is a declaration regarding the proper interpretation of this provision of the Covenants." The court further found that injunctive relief was "fair, just, and effective." This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493,

567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

LAW/ANALYSIS

The Association contends the trial court erred in ruling the Covenants do not allow it to approve fence construction applications for lots abutting a lake, lagoon, or golf course except for stated limited circumstances and the Association violated such determinations by approving the projects. It maintains the ARB has vast authority over all construction projects in the Hamlets and the language in 5.01(c) does not limit that authority. We disagree. [2]

"Restrictive covenants are construed like contracts and may give rise to actions for breach of contract." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006). "Summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument." Wallace v. Day, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App. 2010) (internal quotation marks omitted). "The court is without authority to

[2] The Association filed a letter with this court pursuant to Rule 208(b)(7), SCACR, to bring to our attention the recently decided case of Buffington v. T.O.E. Enterprises, 383 S.C. 388, 680 S.E.2d 289 (2009), requiring the court to balance the equities before issuing an injunction once it determines a restrictive covenant has been violated. Rule 208(b)(7) provides, "There shall be a reference either to the page of the brief or to an issue to which the citations pertain, but the letter shall, without argument, state the reasons for the supplemental citations." At no point prior to this letter has the Association asserted the trial court failed to balance the equities before issuing the injunction. Accordingly, the Association cannot assert this issue on appeal.

consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). "Construction of an ambiguous contract is a question of fact to be decided by the trier of fact." Id.

"Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution." Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). "Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." Id. at 4, 498 S.E.2d at 863-64 (internal quotation marks omitted). When "the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning." Shipyard Prop. Owners' Ass'n v. Mangiaracina, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992). "A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Taylor, 332 S.C. at 5, 498 S.E.2d at 864.

An action seeking an injunction to enforce restrictive covenants sounds in equity. Santoro v. Schulthess, 384 S.C. 250, 261, 681 S.E.2d 897, 902 (Ct. App. 2009). "[U]pon a finding that a restrictive covenant has been violated, a court may not enforce the restrictive covenant as a matter of law. Rather, the court must consider equitable doctrines asserted by a party when deciding whether to enforce the covenant." Buffington, 383 S.C. at 394, 680 S.E.2d at 292.

The Covenants state that lots on a lake, lagoon, or golf course can only have fences that are either a dog kennel, around a pool, or around a tennis court. The first sentence of the Architectural Control Guidelines states that no construction of a fence can begin without approval of the ARB. These two sentences do not conflict. Nothing in this language supports the Association's assertion that the ARB can approve fences for lots on the lake

and golf course that do not fall within the exceptions. The Association does have discretion in fences around other lots in the neighborhood, but the Covenants explicitly state for lots on the lake or golf course the only fences allowed are dog kennels or around a pool or tennis court. Accordingly, the Covenants do not create an ambiguity and the trial court properly granted summary judgment to the Matsells. Therefore, the trial court's decision is

AFFIRMED.

WILLIAMS and PIEPER, JJ., concur.