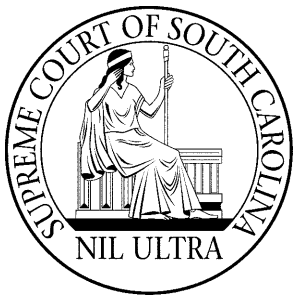

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

May 24, 2004

ADVANCE SHEET NO. 21

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marcus R. Durlach, III, Appellant,

v.

Sherry T. Durlach and Daniel O. Legare as Sequestrator, Respondents.

Appeal from Charleston County
Frances P. Segars-Andrews, Family Court Judge

Opinion No. 25823
Heard February 18, 2004- Filed May 17, 2004

AFFIRMED AS MODIFIED

Michael A. Molony and Lea B. Kerrison, both of Young, Clement, Rivers & Tisdale, of Charleston, for Appellant.

Jack D. Cordray, of Cordray Law Firm, of Charleston, and Samuel H. Altman, of Derfner, Altman, & Wilborn, of Charleston, for Respondents.

CHIEF JUSTICE TOAL: Marcus R. Durlach, III (Husband) appeals the family court order holding him in civil contempt, sentencing him to serve not more than six months in jail, suspended on payment of $292,953.86. We affirm the contempt order but reduce the amount owed to $248,890.26, finding that the family court erred in awarding pre-judgment interest.

FACTUAL/PROCEDURAL BACKGROUND

On March 1, 1996, Husband filed for divorce from Respondent Sherry T. Durlach (Wife). Wife counterclaimed and was granted a divorce on grounds of physical cruelty by order dated April 16, 1998. The parties have engaged in legal battles concerning the marital property ever since.

Upon divorce, the marital property was divided equally. Among other things, Wife was awarded King at Market LP (KAM), a business formed during the marriage of which Wife was an original limited partner. KAM's business purpose is the ownership and management of historic buildings located in the heart of Charleston's retail and hospitality district. A retail clothing and accessories business incorporated by Wife three and a half years before the marriage is located in one of the buildings.

According to the April 16, 1998 divorce decree, KAM was to be transferred to Wife effective December 10, 1997, the last day of trial. The transfer was to include, "all current assets, records, cash, receivables, prepayments, deposits, rents and all other assets," including any management agreements with KAM held by Husband. The decree also provided that "[a]ny arrearage, discrepancy, damage (including damages to or changes in the assets), debt, or other charge on the [KAM] partnership or its assets shall be subject to review by this Court …." Finally, the decree specified that "the outstanding loan to Wachovia Bank in the amount of $892,500 is secured by the Husband's interest in Parkshore" and therefore "Husband shall also be responsible for that debt."

Husband appealed several provisions of the divorce decree.[1] During the time the appeal was pending, Husband and Wife entered into a consent order (the Parkshore[2] Order) dated October 15, 1998, which was approved by

[1] In an unpublished opinion, the Court of Appeals affirmed the divorce decree in all material respects.

[2] Parkshore Centre I L.P. (Parkshore) was a business formed by Husband for the purpose of acquiring and developing property. Husband's partnership

the Charleston County Family Court. The primary purpose of the Parkshore Order was to give Husband the authority to re-finance a piece of marital property "to preserve the marital estate." In addition, the Parkshore Order provided the following:

> a. [Husband] continues to manage [KAM], but makes Wachovia payments separately from his other funds. Only ordinary, normal, reasonable expenses shall be paid from the [KAM] account and all other [KAM] funds shall be kept in the [KAM] account.
>
> …
>
> c. All issues concerning management, oversight and control of marital property pending resolution of the various appeals shall be in the jurisdiction of the Family Court, with hearing only after meaningful mediation efforts. These issues are designated herein by the parties as local issues.

The Parkshore Order also gave Wife the authority to hire an agent to oversee the KAM accounts and management.

Approximately six months later, Wife contended that Husband had mismanaged KAM affairs. In response to Wife's claims, the family court judge appointed a sequestrator (Legare) to manage and control KAM in every respect. The appointment was prompted after the court discovered canceled checks drawn on the KAM account for payment of the Wachovia debt,[3] which directly contradicted the terms of the divorce decree and the Parkshore Order. The judge also found that there was an improper accounting of the

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interest in Parkshore was deemed marital property for purposes of equitable distribution.

[3] The Wachovia loan was primarily secured by Husband's interest in Parkshore. The court found that Husband was responsible for paying this debt.

KAM funds and "enjoined and restrained [Husband] from making any withdrawals or disbursements from the accounts of [KAM]." Accordingly, in addition to managing KAM, Legare was directed to investigate whether KAM assets had been mismanaged.

In his investigation, Legare found that Husband diverted funds from KAM totaling $160,100.83. Subsequently, Wife and Legare petitioned the court for a rule to show cause, seeking reimbursement of the funds Husband diverted (plus pre-judgment interest, Legare's fees, and Legare's attorney's fees), and requesting that Husband be held in contempt for violating court orders. Husband filed a return and counterclaimed.

After a hearing on December 6, 2001, the court found Husband in contempt, sentencing him to serve not more than six months in jail, suspended on payment of $292,953.86, which represents the amount of KAM funds diverted, pre-judgment interest, and fees owed to Legare and his attorney. Husband raises the following issues on appeal:

I. Did the family court properly hold Husband in contempt?

II. Did the family court properly order Husband to pay pre-judgment interest?

III. Was Husband denied due process?

LAW/ANALYSIS

STANDARD OF REVIEW

When reviewing the factual findings of the family court, this Court may take its own view of the preponderance of the evidence. *Woodall v. Woodall*, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). But if the evidence is in dispute, the appellate court should give the trial judge's findings broad deference. *Id.*

More specifically, this Court should reverse a decision regarding contempt "only if it is without evidentiary support or the trial judge has abused his discretion." *Stone v. Reddix-Smalls*, 295 S.C. 514, 516, 369

S.E.2d 840 (1988); *see also Henderson v. Henderson*, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989) ("A finding of contempt rests within the sound discretion of the trial judge.").

I. CIVIL CONTEMPT

Husband argues that the family court erred by holding him in contempt. We disagree.

Courts have the inherent power to punish for contempt. *In re Brown*, 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998). Willful disobedience of a court order may result in contempt. *In re Brown*, 333 S.C. at 420, 511 S.E.2d at 355. A willful act is one done voluntarily and intentionally, with the specific intent of doing something the law forbids. *Id.*

Civil contempt must be proved by clear and convincing evidence. *Poston v. Poston*, 331 S.C. 106, 113, 502 S.E.2d 86, 89 (1998) (citation omitted). "The purpose of civil contempt is to 'coerce the defendant to do the thing required by the order for the benefit of the complainant.'" *Id*. at 111, 502 S.E.2d at 88.

In the present case, the family court judge held Husband in contempt for the following: (1) using KAM funds to make payments on the Wachovia debt in 1998 and 1999 in the amount of $140,040.41; (2) writing checks from KAM funds to his attorney in the amounts of $4069 and $1900; (3) paying the Commissioner of Public Works $148.67 from KAM funds for another, non-KAM property; (4) failing to pay KAM $69,383 in unpaid rent and late charges for Durlach Associates office space; (5) bartering rent with Louis's Restaurant, providing space at KAM in return for a food-and-beverage credit of $350 per month, owing KAM $9,800; (6) bartering rent at KAM for legal services related to the divorce, owing KAM $11,980; (7) bartering advertising with Charleston Business Journal, owing KAM $7,000; and (8) paying himself commissions from the KAM account in the amount of $15,879.32.

In sum, the judge found that Husband "made repeated payments of the funds of KAM for obligations of his own or obligations of other entities. He

willfully and knowingly violated the requirements of the orders of this court." Based on these findings, Husband was ordered to pay $292,953.86, representing the amount of misused KAM funds, pre-judgment interest, and professional fees for Legare and his attorney.

On appeal, Husband does not dispute that he made the payments and agreements delineated in the contempt order. Instead, he contends that his actions did not violate court orders. We disagree.

The following orders and their relevant mandates were effective throughout this litigation:

(1) August 19, 1996 Supplemental Order: "Both parties are enjoined and restrained from in any manner mortgaging, selling, secreting, pledging, encumbering, destroying, damaging, giving away, or in any other manner disposing of any real or personal property marital of the parties, pending the final hearing on the merits."

(2) September 11, 1997 Ex Parte Restraining Order: "[Husband] or any other entity or institution holding martial property is hereby enjoined and restrained from in any manner mortgaging, selling, secreting, pledging, encumbering, destroying, damaging, giving away, or in any other manner disposing of any real or personal marital property of the parties, pending the final hearing on the merits."

(3) September 24, 1997 Pre-trial Order: "[P]rior to the initiation of any transaction involving the buying, selling, refinancing or leasing of real property by [Husband] of any of [Husband's] entities, the terms of the said transaction shall be fully disclosed to [Wife] and the proposed transaction shall require her consent."

(4) April 16, 1998 Final Order, Decree of Divorce, and Judgment: "Because the outstanding loan to Wachovia

Bank … is secured by the Husband's interest in Parkshore, Husband shall be responsible for that debt." The order also transfers KAM to Wife effective December 10, 1997.

(5) October 15, 1998 Consent Order as to Parkshore Refinancing: States that "[Husband] continues to manage [KAM] but makes Wachovia payments separately from his other funds."

First, Husband violated the divorce decree and the Parkshore Order when he used KAM funds to make payments on the Wachovia debt in 1998 and 1999. The April 16, 1998 divorce decree specifically stated that Husband was personally responsible for the Wachovia debt. This responsibility was reiterated in the October 15, 1998 Parkshore Order. Therefore, payment of the Wachovia debt with KAM funds violated both the divorce decree and the Parkshore Order.

Second, Husband violated court orders when he bartered free rental space at KAM properties in exchange for food-and beverage credits, legal services, and advertising services. Such activity benefited Husband alone and diminished the value of KAM. Agreements entered into before the divorce decree violated pre-trial restraining orders, and those entered into afterward violated the divorce decree itself.

Third, Husband violated the divorce decree when he paid himself commissions from KAM funds between May 1998 and February 1999. The divorce decree terminated all management and leasing agreements held by Husband and transferred those agreements, and commissions associated with those agreements, to Wife. In addition, Husband violated the divorce decree when he used KAM funds to pay his own legal fees. The receipt of commissions and the payment of legal fees from KAM funds violated the divorce decree.

Fourth, Husband violated pre-trial restraining orders and the divorce decree when he failed to pay overdue rent to KAM on office space for Durlach Associates. Delinquency prior to the date KAM was transferred to Wife diminished the value of KAM in direct violation of the pre-trial

restraining orders. Delinquency after the date KAM was transferred to Wife violated the divorce decree itself.

Again, Husband does not deny that he engaged in the activity outlined above. He contends, instead, that he did not violate court orders by managing KAM as he did. Nonetheless, Husband would, at times, reimburse KAM when he discovered that he "inadvertently" drew from KAM funds. We find that these reimbursements signified Husband's awareness that his conduct was contrary to court orders. By willfully disobeying court orders on multiple occasions, Husband provided the family court with clear and convincing evidence upon which to base its decision. Accordingly, we hold that Husband was properly held in contempt.

In addition to challenging the family court's findings regarding the misuse of KAM funds, Husband raises various challenges concerning other findings in the order and events leading up to its issuance. First, Husband argues that the family court judge erred in requiring him to pay a majority of Legare's and Legare's attorney's fees. Although the June 8, 1999 order for sequestration provided that Legare would be paid by KAM, we believe that this provision did not anticipate the extent of Husband's inappropriate use of funds and Husband's failure to cooperate with Legare. Therefore, we find that it was within the judge's discretionary authority to order Husband to pay a majority of the fees.

Second, Husband argues that the family court judge should have permitted the parties to mediate their dispute before proceeding with a hearing. We find that it was within the judge's discretion to conduct a hearing concerning Legare's report (and subsequently issue the contempt order) without first requiring that the parties engage in mediation. The Parkshore Order provisions concerning mediation applied during the period pending the appeal, which ended November 8, 2000, one year before the hearing took place. Consequently, it was within the judge's discretion to proceed with the hearing accordingly.

Third, Husband argues that his management activities at KAM before Legare was appointed as sequestrator should be deemed "valid" since the original sequestrator did not object or otherwise contest Husband's activities

during that time. We disagree. The original sequestrator's lack of objection does not necessarily mean that Husband managed KAM in accordance with court orders. In addition, we find that (1) there is no evidence that the original sequestrator even conducted an investigation, and (2) Legare replaced the original sequestrator and became the sequestrator for all purposes, including for purposes of investigating questions of mismanagement of assets.

Fourth, Husband argues that Legare should not have considered transactions occurring before December 10, 1997, the date KAM was effectively transferred to Wife. We disagree. In his investigation, Legare reviewed activity dating as far back as September 1997, the date of the ex parte restraining order issued against Husband, which was appropriate given that this order controlled Husband's activities.

For the foregoing reasons, we hold that the family court properly held Husband in contempt.

II. AWARD OF PRE-JUDGMENT INTEREST

Husband argues that the family court erred by ordering him to pay pre-judgment interest. We agree.

Parties must plead for pre-judgment interest in order for it to be recovered. *Calhoun v. Calhoun*, 339 S.C. 96, 103, 529 S.E.2d 14, 17 (2000). When such a plea is made, pre-judgment interest may be recovered "on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty." *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 375, 585 S.E.2d 292, 299 (2003); *see also* S.C. Code Ann. § 34-31-20(A) (2003) (authorizing pre-judgment interest at a rate of 8.75 percent per year "in all cases wherein any sum or sums of money shall be ascertained and due").

In the present case, we find that Wife and Legare pled for pre-judgment interest in their petition in support of rule to show cause. Additionally, the court, relying on Legare's comprehensive report, was able to arrive at a sum

certain that was due KAM. The sum certain represented the amount of money Husband had used in violation of pre-trial restraining orders, the divorce decree, and the Parkshore Order.

But because the money due under the contempt order was not part of the judgment in this case, we hold that Wife and Legare are not entitled to pre-judgment interest. The divorce decree represents the judgment in this case, and there is no allegation that money due under the decree was not paid or divided as ordered or agreed to by the parties. The contempt order was issued not because Husband failed to abide by the distribution of funds and property in accordance with the divorce decree but because Husband *misused* funds in violation of various court orders, including the decree itself.

The purpose of the contempt order was to coerce Husband to reimburse money spent in a manner not approved by the court. As a coercive device, the contempt order is more like a citation than a judgment. Consequently, the sums due under the contempt order are not subject to interest as are money judgments. For these reasons, Wife and Legare are not entitled to pre-judgment interest on money due under the contempt order.

III. DUE PROCESS

Finally, Husband argues that he was denied due process because the family court did not conduct a "separate and distinct" hearing to "certify" Legare's report. Further, Husband contends he was denied notice of the sequestrator's claims and the opportunity to object. We disagree.

"A due process claim raised for the first time on appeal is not preserved." *Bakala v. Bakala*, 352 S.C. 612, 625, 576 S.E.2d 156, 163 (2003).

Husband's due process claim was not raised in the family court and is raised for the first time here. Therefore, this issue is not preserved for review.

CONCLUSION

Based on the foregoing analysis, we affirm the family court order finding Husband in contempt. But we modify the contempt order in one respect: Husband is not required to pay $44,063.60 in pre-judgment interest. Therefore, Husband owes KAM $248,890.26, representing the amount of funds diverted from KAM and fees for Legare and his attorney.

MOORE, WALLER, PLEICONES, JJ., and Acting Justice J. C. Nicholson, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anand B. Patel, Appellant-Respondent

v.

Nalini Raja Patel, Respondent-Appellant.

Appeal From Dillon County
James A. Spruill, III, Family Court Judge

Opinion No. 25824
Heard February 19, 2004 - Filed May 24, 2004

AFFIRMED AS MODIFIED

John O. McDougall, Peter George Currence, and Emma I. Bryson, of McDougall & Self, of Sumter, for Appellant-Respondent.

Harvey L. Golden and J. Michael Taylor, of Golden, Taylor, Potterfield & Barron, of Columbia, for Respondent-Appellant.

Richard Giles Whiting, of Columbia, Guardian ad Litem.

ACTING JUSTICE MACAULAY: This is a domestic relations case. Both parties appeal. We affirm as modified.

FACTS

This domestic relations dispute has continued for more than eight years without resolution. Anand B. Patel (Husband) and Nalini Raja Patel (Wife) were married on July 7, 1980. Three children were born of the marriage. The parties' oldest son, is seventeen. The parties' only daughter, is thirteen. The parties' youngest son, is eleven.

Husband sued Wife for divorce in December 1995. On October 23, 1997, the family court issued the final divorce decree. The family court ruled that neither party was entitled to alimony, awarded custody of the children to Husband, split the marital estate 65 percent/35 percent in favor of Husband, and awarded Husband $41,920.94 in attorney's fees.

In June 1998, Husband informed Wife by letter that he was relocating with the children to Southern California. The court denied Wife's request for a restraining order prohibiting the move. The appeal of the relocation order was consolidated with the appeal from the divorce decree.

In October 2000, the Court of Appeals issued a unanimous, unpublished opinion, in which it (1) reversed the family court's award of custody and ordered Husband to return the children to South Carolina, (2) reversed and remanded the denial of alimony to Wife, and (3) reversed the award of attorney's fees to Husband, but affirmed the 65/35 property division in favor of Husband. Patel v. Patel, Op. No. 2000-UP-653 (S.C. Ct. App. dated Oct. 26, 2000). In January 2001, this Court granted Husband's petition for an emergency supersedeas to stay the return of the children to South Carolina.

This Court denied Wife's petition for a writ of certiorari on the property division issue, and granted Husband's petition on the alimony and custody matters. The Court issued an opinion remanding the issues to the trial court for a new hearing on the custody and alimony issues. Patel v. Patel, 347 S.C. 281, 555 S.E.2d 386 (2001).

While the remand trial was pending, Wife filed a motion for pendente lite alimony. The family court awarded Wife $2,500.00 per month in pendente lite alimony. The issue of retroactive alimony was reserved for the final trial on remand.

The final merits hearing on the remanded issues of alimony, child custody, and child support was held over seven days in October and December 2002. The trial court held Wife was entitled to permanent periodic alimony of $1,500.00 per month beginning February 1, 2003. The court did not address the issue of retroactive alimony. The trial court awarded custody of the oldest child to Husband and awarded custody of the two younger children to Wife. The order required Husband to pay $1,150.00 per month in child support and denied either party attorney's fees and costs.

Both Husband and Wife appeal. On February 18, 2003, this Court assumed jurisdiction pursuant to Rule 204(b), SCACR.

ISSUES

I. Did the family court properly deny Husband's motion to recuse?

II. Did the family court abuse its discretion in awarding custody of the two younger children to Wife?

III. Did the family court abuse its discretion in awarding alimony to Wife, denying Wife retroactive alimony, and setting the amount of alimony at $1,500.00 per month?

IV. Did the family court abuse its discretion in setting the amount of child support and denying Wife transportation expenses?

V. Did the family court abuse its discretion in denying Wife attorney's fees and litigation expenses?

LAW/ANALYSIS

Where a family court order is appealed, we have jurisdiction to find facts based on our own view of the preponderance of the evidence. The Court is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to evaluate their credibility. Strout v. Strout, 284 S.C. 429, 327 S.E.2d 74 (1985). Our broad scope of review does not relieve the appealing party of the burden of showing that the family court committed error. Skinner v. King, 272 S.C. 520, 252 S.E.2d 891 (1979).

I. Recusal

The underlying circumstances supporting Husband's motion to recuse arose after we remanded the case to the family court for a new hearing on custody and alimony. In August 2002, Wife contacted three State Senators, asking for their help in having a trial date set for the remand trial.[1] All of these senators wrote letters on behalf of Wife to The Honorable James A. Spruill III, the family court judge presiding over the matter. [2] Two of the senators sent copies of their letters to Chief Justice Toal.

Judge Spruill wrote the three senators advising them that he was not permitted to consider these communications and immediately set a trial date for October 14, 2002. Husband filed a Motion to Recuse and requested a continuance. Judge Spruill denied both motions. Husband then filed suit in federal court against Judge Spruill and the three senators alleging a violation of due process. The pleadings were served on Judge Spruill prior to the merits hearing. The final hearing on the merits began on October 14 and

[1] The trial date had originally been set for May 6, 2002, but had been postponed. In April 2002, both parties requested a continuance, which was granted, in part, to allow time for discovery to be conducted in California.

[2] The letters were respectively dated August 23, 2002, August 30, 2002, and September 3, 2002.

Husband renewed his motion for continuance and recusal, both of which Judge Spruill denied.

Husband asks this Court to acknowledge the appearance of impropriety with the activities of the three senators, and their alleged attempts to sway the opinions of Judge Spruill and Chief Justice Toal. Husband does not wish for the case to be remanded on the custody issue based on Judge Spruill's failure to disqualify himself. On the issue of alimony, Husband requests this Court deny alimony because he was denied a hearing before an impartial tribunal. We conclude Judge Spruill was not required to disqualify himself. Accordingly, Husband was not denied an impartial tribunal based on Judge Spruill's failure to disqualify himself.

Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. Roche v. Young Bros., Inc., 332 S.C. 75, 504 S.E.2d 311 (1998). In Roche, the Court applied Canon 3(E)(1)(a) of Rule 501, SCACR. Under Canon 3(E)(1)(a), a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party. It is not sufficient for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice. Mallet v. Mallet, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal. Ellis v. Procter & Gamble Dist. Co., 315 S.C. 283, 433 S.E.2d 856 (1993).

A judge's impartiality might reasonably be questioned when his factual findings are not supported by the record. Ellis, 315 S.C. at 285, 433 S.E.2d at 857. There is no evidence in the record suggesting that Judge Spruill was prejudiced by the senators' letters. Judge Spruill acted promptly to alleviate any perception of injustice. Shortly after receiving the letters, Judge Spruill wrote the senators advising them that he is not permitted to consider communications from outside the court. Judge Spruill sent copies of these letters to both parties' attorneys. In his January 2, 2003 order, Judge Spruill chastised Wife for her "inappropriate attempt" to influence the court

by her contact with the legislators. Because there is no evidence in the record supporting Husband's contention, we conclude Judge Spruill did not err in failing to disqualify himself.

We granted Husband's motion to argue against precedent on the issue of judicial recusal. Husband urges this court to adopt the standard for judicial recusal set forth in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). Additionally, Husband argues that this Court should adopt a de novo standard of review on the recusal issue. In Liljeberg, the United States Supreme Court considered the construction of 28 U.S.C. § 455(a) (2001). The federal statute is similar to Canon 3(E)(1)(a). Section 455(a) provides, "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The issue before the Supreme Court was whether Section 455(a) could be violated based on the appearance of impartiality. The Court held that under Section 455(a), recusal is required even when there is no evidence of bias if a reasonable person, knowing all the circumstances, would expect that the judge is biased. Liljeberg, 486 U.S. at 860-61, 108 S.Ct. at 2203, 100 L.Ed.2d 855 at 872-73. Husband argues that the Supreme Court's holding imputes an objective test in applying Section 455(a), in that it does not require evidence of judicial prejudice to warrant disqualification.

We have carefully considered Husband's arguments. Assuming without deciding that there is merit in Husband's policy arguments supporting the federal rule and de novo standard of review, we decline to adopt these standards at this time because Husband has not demonstrated that he would prevail under the Liljeberg test under these facts even if reviewed de novo. There is no evidence in the record leading an objective observer to question Judge Spruill's impartiality after he received the senators' letters. The letters would not have caused an objective mind, viewing all the facts of the case, to determine Judge Spruill was biased. Disqualification issues are necessarily decided on the facts of each case. In some cases, contact by legislators with members of the judiciary may warrant disqualification. However, to hold that disqualification was mandated under the facts of this

case, would require every judge to recuse himself upon receiving unsolicited contact from the legislature, or other potentially influential persons/ organizations, or even officious intermeddlers. Such a holding could invite the less scrupulous to employ this stratagem to eliminate any judge. Therefore, we conclude Husband has failed to show Judge Spruill erred in failing to disqualify himself.

II. Custody

The best interest of the child is the controlling factor in custody cases. South Carolina Code Ann. § 20-7-100 (Supp. 2003) provides, in part, that "[t]he welfare of the minor child shall be the first consideration and the court having jurisdiction shall determine all questions concerning the guardianship of the minor."

The family court concluded the older son should remain in California with Husband to complete the remainder of his junior year and the entirety of his senior year in high school and that the two younger children should return to South Carolina to live with Wife.

On appeal Husband argues the family court erred in granting custody of the two younger children to Wife because (1) the court expressed reservations about Wife's fitness, (2) Dillon schools were adequate only if the children attended in-state colleges, and (3) daughter's preference for living with Wife was given controlling weight in awarding her custody of daughter and younger son.

The family court expressed reservations about Wife's many episodes of uncontrollable anger that took place within the presence of the children. The court found that Wife's anger management problems were ameliorated because the anger was directed toward Husband, not the children. Wife's conduct is clearly unacceptable. The recorded telephone calls between Husband and Wife reveal the extent of her anger and use of profanity.

Husband's fitness as a parent is also problematic. Dr. Boland, a clinical psychologist, testified Husband has exhibited signs of histrionic personality disorder. One characteristic associated with the disorder is a tendency to over-react to minor events and display abrupt outbursts of sarcasm. A former employee of the Days Inn in Dillon testified Husband would scream at Wife when she called. Additionally, Wife's calls to the children had to go through Husband first.

Husband has engaged in additional acts of manipulative behavior. While the children were in California, Husband did not make any effort to keep Wife informed about their children's health. He did not inform Wife that older son was diagnosed with Attention Deficit Disorder and had been treated for depression. Husband did not inform Wife that both sons were seeing a psychiatrist.

Both parents have exhibited far less than exemplary behavior. In determining custody, the trial court weighed heavily the fact that Wife had been the primary caretaker before the separation. Although there is no rule of law requiring custody be awarded to the primary caretaker, there is an assumption that custody will be awarded to the primary caretaker. Roy T. Stuckey, Marital Litigation in South Carolina, 433 (3d ed. 2001). In the present case, the court found that Husband devoted long hours to his work, but remained active in the lives of the children. A breadwinner's work habits are relevant to custody decisions when considered in the context of the time spent with the children. See Paris v. Paris, 319 S.C. 308, 311, 460 S.E.2d 571, 573 (1995) (awarding custody to the primary caretaker over the primary breadwinner). In the present case, Wife saw to the children's day-to-day needs, prepared their meals, took them to school, and saw that the children attended school related activities and religious functions.

Under the facts of this case, we find that the family court did not abuse its discretion in concluding that Wife is a fit parent, despite the court's concerns. Moreover, the court did not abuse its discretion in weighing heavily the fact that Wife was the children's primary caretaker.

Second, Husband contends the trial court gave insufficient weight to the superiority of the schools in California in making the custody decision. The family court stated that the schools in Dillon are sufficient to provide the children with the tools to succeed in the colleges within South Carolina. Husband relies primarily on PPSE (Pupil Performance Scholarship Exams) scores in evaluating the schools. We conclude that the best interests of the children are not compromised by attending the Dillon, South Carolina schools. The Dillon schools do not directly and adversely affect the best interests of the children, despite the fact that the California schools have higher PPSE scores. Therefore, we decline to modify the custody award simply because one form of schooling is commonly considered superior to another when both schools are adequate.

Third, Husband argues daughter's preference for living with Wife was given controlling weight in the family court's custody decision. South Carolina Code Ann. § 20-7-1515 (Supp. 2003) provides:

> In determining the best interest of a child, the court must consider the child's reasonable preference for custody. The court shall place weight upon the preference based on the child's age, experience, maturity, judgment, and ability to express preference.

The leading case is Guinan v. Guinan, 254 S.C. 554, 176 S.E.2d 173 (1970). In Guinan, the Court gave "great weight" to the wishes of a sixteen year old. In this case, daughter, who is now thirteen years old, has consistently expressed a definite desire to live with Wife. The younger son, who is now eleven years old, did not seem to have as definite a preference, although he expressed some interest in staying in California.[3]

[3] Husband characterizes younger son's preference as one for the "Father." The Guardian ad Litem testified younger son liked "California a little bit more now, that he likes his school, had friends, and was doing well." We conclude that although younger son expressed some positive opinions about living in California, he did not necessarily attribute this to living with Husband as opposed to Wife.

We hold that the family court did not abuse its discretion in awarding custody of the two younger children to Wife. Several witnesses testified that the two younger children were happy in Dillon when they visited their mother. A teacher at Dillon Christian School testified that her daughter and the parties' daughter have maintained a friendship and that daughter has other friends in Dillon. Another parent with children enrolled at the school testified that the parties' daughter visited his daughter in Dillon and has maintained friendships with other students. Both parties agree that the two younger children should not be separated. We agree. Although the legislature gives family court judges the authority "to order joint or divided custody where the court finds it is in the best interests of the child," S.C. Code Ann. § 20-7-420(42) (Supp. 2003), joint or divided custody should only be awarded where there are exceptional circumstances. Under the facts of this case, we hold the trial judge did not abuse his discretion in awarding custody of the two younger children to Wife.

III. Alimony

The amount of alimony is within the trial court's sound discretion and should not be disturbed on appeal unless an abuse of discretion is shown. Smith v. Smith, 264 S.C. 624, 627-28, 216 S.E.2d 541, 543 (1975). An abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support. Townsend v. Townsend, 356 S.C. 70, 587 S.E.2d 118 (Ct. App. 2003).

The trial court awarded Wife $1,500.00 per month in permanent, periodic alimony. Husband appeals the award of any alimony. Wife appeals the amount of the award and the trial court's denial of retroactive alimony.

Husband argues any award of alimony in this case discourages Wife from procuring employment. See Brandi v. Brandi, 302 S.C. 353, 358, 396 S.E.2d 124, 127 (Ct. App. 1990) (trial judge abused his discretion in the award of alimony because Wife's expenses appear excessive when considered in conjunction with the fact that she has not procured employment

since her separation). We disagree and affirm the award and amount of permanent, periodic alimony.

The family court did not abuse its discretion in awarding Wife alimony. Three important factors in awarding periodic alimony are (1) the duration of the marriage; (2) the overall financial situation of the parties, especially the ability of the supporting spouse to pay; and (3) whether either spouse was more at fault than the other. The fact that this was a long marriage of seventeen years weighs in favor of alimony. Second, Husband has the ability to pay the alimony award. The trial court found that both parties have substantial property from the division of the estate. Third, Husband is highly educated, having degrees in biochemistry and pharmacy. Husband currently manages a successful motel business. Wife has a high school education and has been out of the work force for more than twenty years.

Wife contends the $1,500.00 per month alimony award is insufficient. The trial court gave considerable weight to Wife not seeking any employment in the five years since the divorce. Wife testified she has not sought employment for the last five years because her efforts on this case have required her full attention. Wife has engaged in what she considers "community service" work in the Indian community. Wife writes and sells articles for the India Post newspaper. In working for the paper, Wife attends various conferences throughout the country and is "reimbursed" from the sponsoring organizations.

We conclude the family court did not abuse its discretion in awarding Wife $1,500.00 per month in permanent, periodic alimony. The family court's findings are consistent with an application of the factors set forth in South Carolina Code Ann. § 20-3-130(C) (Supp. 2003).[4] The family

[4] The factors are as follows: (1) the duration of the marriage together with the ages of the parties at the time of the marriage and at the time of the divorce or separate maintenance action between the parties; (2) physical and emotional condition of each spouse; (3) the educational background of each spouse, together with the need of each spouse for

court noted the extended length of the marriage, Husband's superior educational background, and the employment history of the parties. Wife, thirty-six years old at the time of the divorce, has a twelfth-grade education. During the marriage she worked in both family businesses instead of seeking salaried employment. While an award of alimony is appropriate in this case, we agree that any increase in the permanent, periodic alimony would act as a disincentive to Wife in pursuing employment. Accordingly, we find no error.

Wife argues the Court should award her retroactive alimony. We agree, albeit, not in the amount Wife requests. Wife asks this Court to award her $152,500.00 in unpaid alimony plus judgment interest.[5] This Court has not specifically addressed whether a party is entitled to retroactive alimony when an appellate court remands for reconsideration of alimony (but does not award alimony on appeal) and the family court then awards alimony. In Green v. Green, 320 S.C. 347, 465 S.E.2d 130 (Ct. App. 1995), the Court of

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additional training or education in order to achieve that spouse's income potential; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated earnings of both spouses; (7) the current and reasonably anticipated expenses and needs of both spouses; (8) the marital and nonmarital properties of the parties, including those apportioned to him or her in the divorce or separate maintenance action; (9) custody of the children, particularly where conditions or circumstances render it appropriate that the custodian not be required to seek employment outside the home, or must be of limited nature; (10) marital misconduct or fault of either; (11) the tax consequences to each party as a result of the particular form of support awarded; (12) existence of support from a prior marriage or any other reason of either party; and (13) such other factors the court considers relevant.

S.C. Code Ann. § 20-3-130(C) (Supp. 2003)

[5] Wife derives the $152,500.00 by multiplying the original $2,500.00 pendente lite award by the sixty-one months that passed between Husband's last payment of $2,500.00 in May of 1997 and Judge Spruill's August 12, 2002 pendente lite award, which awarded $2,500.00 per month.

Appeals concluded that under these circumstances a family court may award alimony retroactive to the date of the original hearing unless it would be an abuse of discretion.

Under our view of the facts, Wife should be awarded alimony for all months she was not paid since the date of the original hearing at a rate of $1,500.00. Therefore, Wife should be awarded $1,500.00 per month in retroactive alimony for the sixty-one months she requests. Husband owes Wife $91,500.00 plus interest at a rate of fourteen percent per annum.[6] Interest is due on alimony at the time each support payment becomes due. See Thornton v. Thornton, 328 S.C. 96, 114, 492 S.E.2d 86, 96 (1997). Accordingly, Wife's post-judgment interest on the alimony arrearage should be calculated from the date each payment was due.

IV. Child Support

Child support awards are addressed to the sound discretion of the family court and absent abuse of discretion will not be disturbed on appeal. Townsend, supra. Wife appeals the trial judge's award of $1,150.00 in child support per month.

Wife argues the family court improperly imputed $900.00 per month in minimum wage to her and improperly imputed $1,958.00 per month of interest on her income. Wife contends that even if the trial judge properly imputed income to her, the award of $1,150.00 deviates from the South Carolina Department of Social Services Guidelines formula.

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[6] South Carolina Code Ann. § 34-31-20(B) (Supp. 2003) provides all money decrees shall draw interest at a rate of twelve percent per year. However, this statute was amended, effective January 1, 2001. Therefore, the twelve percent interest rate only applies to causes of action arising or accruing on or after January 1, 2001. 2000 S.C. Act No. 344, § 4. Because this action arose prior to January 1, 2001, the applicable interest rate is fourteen percent per annum.

We hold the family court properly imputed income to Wife. It is proper to impute income to a party who is voluntarily unemployed or underemployed. Mazzone v. Miles, 341 S.C. 203, 532 S.E.3d 890 (Ct. App. 2000). Wife testified that she has not sought employment because her full-time job is "to get custody of [her] children." Wife also indicated that she has no intention of seeking employment if she acquires custody of the children. Although Wife has been out of the work force for more than twenty years, the family court found she is capable and energetic.

Wife argues that under the Guidelines, she is entitled to $1,605.00 in child support per month. The family court was not required to follow the Guidelines in this case. In cases where the parents' combined income exceeds the highest amount contemplated by the Guidelines, courts are to decide the issue of amount on a case-by-case basis.[7] 27 S.C. Code Ann. Reg. 114- 4710(A)(3) (Supp. 2003). We find no abuse of discretion in the family court's child support award.

Additionally, Wife argues the trial judge erred in ordering that both parties share equally in transportation expenses to effect the visitation order. We hold that under the circumstances of this case, and considering Husband's unilateral action in moving to California, Husband should bear the transportation expenses for older son to travel to South Carolina and the two younger children to travel to California to effect the visitation schedule set forth by the family court's order dated January 2, 2003 and filed January 6, 2003.

V. Attorney's Fees and Litigation Expenses

Wife argues the trial court erroneously failed to award her reasonable attorney's fees and litigation expenses. We disagree.

Pursuant to South Carolina Code Ann. § 20-7-420(38) (Supp. 2003), attorney's fees may be assessed against a party in an action brought in

[7] Cases where the parents' combined income exceeds $15,000 per month or $180,000 per year are decided on a case-by-case basis.

the family court. An award of attorney's fees rests within the sound discretion of the trial judge and should not be disturbed on appeal unless there is an abuse of discretion. Ariail v. Ariail, 295 S.C. 486, 369 S.E.2d 146 (Ct. App. 1997).

Wife's counsel agreed to represent her in the remand trial for a flat fee of $35,000.00. The flat fee did not include costs such as depositions, Guardian ad Litem fees, and other expenses. The flat fee of $35,000.00 plus other expenses totals more than $90,000.00.

The family court concluded that "each party is well able to pay reasonable attorney's fees to their respective attorney" and each party should pay their own attorney's fees because each was "entirely unreasonable with respect to part of the remand issues." The family court went on to note that Husband has substantially greater wealth than Wife, but Wife "appears to have paid her fees prior to the trial and the fees will not affect the standard of living of either party."

In determining whether to award attorney's fees, the court should consider each party's ability to pay his or her own fee; the beneficial results obtained by the attorney; the parties' respective financial conditions; and the effect of the fee on each party's standard of living. E.D.M. v. T.A.M, 307 S.C. 471, 415 S.E.2d 812 (1992). The only factor weighing in favor of Wife is the beneficial results achieved by her attorney. The trial judge found that Wife could pay her attorney's fees and that it would not affect her standard of living. The family court judge did not abuse his discretion. Wife has not shown she is unable to pay her attorney's fees and by all accounts has, in fact, paid the $35,000 portion of her fee. See R.G.M. v. D.E.M., 306 S.C. 145, 410 S.E.2d 564 (1991) (denying wife's request for attorney's fees where the wife provided no reasons for not being able to pay fees).

The same considerations that apply to awarding attorney's fees apply to awarding litigation expenses. Nienow v. Nienow, 268 S.C. 161, 173, 232 S.E.2d 504, 510 (1977). Wife has a stronger case for litigation expenses than attorney's fees. Wife argues she paid $6,000.00 for her California attorneys, $811.38 for the two depositions, and $1,962.00 for

Husband's CPA in California. Wife would not have incurred these expenses had Husband not moved to California. The Court has awarded litigation expenses in other cases, where one party has incurred expenses as a result of the unilateral action of another. See e.g., Stevenson v. Stevenson, 295 S.C. 412, 368 S.E.2d 901 (1988) (reimbursable expenses include the reasonable and necessary expenses incurred in obtaining evidence of spouse's infidelity). We order Husband to pay Wife $8,773.38 in litigation expenses.

CONCLUSION

For the foregoing reasons we affirm as modified the decision of the family court. We conclude (1) the family court judge did not abuse his discretion in failing to recuse himself; (2) the family court did not abuse its discretion in awarding custody of the two younger children to Wife; (3) Wife is entitled to $1,500.00 per month in permanent periodic alimony and $91,500.00 in retroactive alimony plus interest at a rate of fourteen percent per annum; (4) Husband is to pay Wife $1,150.00 per month in child support and transportation expenses needed to effect the family court's visitation schedule; and (5) Wife is responsible for her own attorney's fees, but is owed $8,773.38 in litigation expenses by Husband.

AFFIRMED AS MODIFIED.

MOORE, A.C.J., WALLER, PLEICONES, JJ., and Acting Justice John W. Kittredge, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anand B. Patel, Appellant,

v.

Nalini Raja Patel, Respondent.

Appeal From Dillon County
James A. Spruill, III, Family Court Judge

Opinion No. 25825
Heard February 19, 2004 - Filed May 24, 2004

AFFIRMED

J. Leeds Barroll, IV, of Columbia, and John O. McDougall, of McDougall & Self, P.A., of Columbia, for Appellant.

J. Michael Taylor and Harvey L. Golden, both of Golden, Taylor, Potterfield & Barron, of Columbia, for Respondent.

ACTING JUSTICE MACAULAY: The issue before us is whether the family court erred in denying Anand B. Patel post-judgment interest on funds in a brokerage account, which the family court had previously ordered escrowed pending appeal. We affirm.

FACTS

Anand B. Patel ("Husband") and Nalini Patel ("Wife") were married on July 7, 1980. The final decree of divorce dated October 23, 1997, and filed November 12, 1997 awarded Husband 65 percent of the marital estate and Wife 35 percent. The marital estate included funds in an A.G. Edwards brokerage account (the "account"). The funds in the account were generated primarily from the sale of the parties' Holiday Inn and lot in San Diego, California. Husband's attorney transferred these funds to an account pursuant to an order issued by the family court appointing him trustee for the parties and ordering him to place the funds in an interest bearing account.

On November 14, 1997, Husband, who still maintained control of the account, withdrew the entire balance of the account amounting to $1,870,143.63. Husband used some of the funds to pay taxes, leaving the remainder for disbursement between Husband and Wife. Husband issued Wife a check for $659,744.00.[1] Wife returned the check to Husband's counsel to be reinvested in the account.

On December 15, 1997, Wife filed a motion requesting that Husband be required to re-deposit all funds withdrawn from the account. On January 12, 1998, the family court issued an order directing Husband to restore $1,093,070.00 to the account, or other similar trust account, bearing the best possible interest rate.[2] The court ordered that these funds remain in the account until conclusion of the appeal.

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[1] The divorce decree awarded Wife $701,665.00 from this account. Husband deducted $41,920.94 for attorney's fees and costs the family court ordered Wife to pay under the Final Divorce Decree. The attorney's fee award was later reversed by the Court of Appeals. Patel v. Patel, Op. No. 2000-UP-653 (S.C. Ct. App. dated Oct. 26, 2000). We affirmed.

[2] The final order to disburse funds indicates $1,093,070.00 was the specified amount because that amount was needed to protect Wife's interest.

On November 19, 2001, Husband and Wife executed an agreement to disburse the funds in the account. However, the parties disagreed on whether Husband was entitled to post-judgment interest on the account and explicitly left this issue unresolved. In their agreement, the parties calculated their respective shares of the account based on the percentages allocated in the final divorce decree. The divorce decree awarded $701,655.00 from the account to Wife, with the balance to Husband. The $701,665.00 constituted 64.19 percent of the account, leaving 35.81 percent of the account for Husband.[3] The parties agreed Wife would receive $791,840.41, which amounted to 64.19 percent of the balance of the account on the date of the agreement. However, the parties agreed to subtract $150,000 from Wife's disbursement to remain in the account pending resolution of the parties' dispute over Husband's entitlement to post-judgment interest. Pursuant to the agreement, Husband received his full 35.81 percent.

On May 17, 2002, Wife filed a motion alleging Husband failed to communicate with her about resolving his post-judgment interest claim on the 35.81 percent of the account he was awarded under the parties' agreement. Wife requested the court award her the $150,000 plus accrued interest, which had been withheld from her portion of the funds. The court awarded the $150,000 plus accrued interest held in escrow to Wife.

ISSUE

Did the family court err in denying Husband's claim for post-judgment interest and awarding Wife the $150,000 plus accrued interest remaining in the A.G. Edwards account?

ANALYSIS

On appeal, Husband argues he is entitled to $142,447.00 minus the interest on the $41,000 in attorney's fees originally assessed against

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[3] Wife's 35 percent of the marital estate includes 64.19 percent of the account.

Wife.[4] We disagree.

In Casey v. Casey, 311 S.C. 243, 428 S.E.2d 714 (1993), we held that fixed awards of money for equitable distribution do, in fact, accrue interest at the post-judgment rate from the date of the judgment. However, we qualified our holding stating,

> We leave intact the family court's broad discretion to provide for the payment of interest as part of the equitable distribution award. Thus, the family court may provide for the amortization of payments with a rate of interest different from the post-judgment rate or deny interest altogether on payment due at a future date.

Id. at 716. Our decision in Casey is controlling. The family court's January 12, 1998 order specifically provided that the $1,093,070.00, which the family court ordered to remain in the account or other similar trust account, was to bear the "best possible interest rate." In designating the controlling interest rate, the family court exercised its discretion in providing for an interest rate other than the post-judgment interest rate. Therefore, Husband is not entitled to post-judgment interest on his share of funds in the account. Accordingly, we hold that the family court did not err in awarding Wife the remaining $150,000 plus accrued interest.

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[4] Husband adopts the family court's computation. In its order to disburse funds, the court considers how much Husband would be entitled to at a 14 percent post judgment interest rate assuming he is entitled to such an award. The court concluded, at most, Husband would be entitled to $142,447.00 in accrued interest on $391,405.00. The court reasoned that of the $1,093,070.00 ordered to be held in escrow, $701,665.00 of those funds were Wife's according to the divorce decree, leaving only $391,405.00 of Husband's money in the account. The court also noted the $142,447.00 did not include the offset Wife would be entitled to receive for judgment interest on the approximately $41,000.00 in attorneys fees originally assessed against her and which was reversed on appeal.

Husband argues that the divorce decree dated October 23, 1997, was silent as to the rate of interest to be applied to the equitable division award, rendering the post-judgment rate applicable. According to Husband, the post-judgment rate applies because Wife failed to appeal within thirty days of the final divorce decree.

In appeals from the family court, a notice of appeal must be served on respondents within thirty days after receipt of written notice of entry of the order or judgment. Rule 203(b)(3), SCACR. However, when a timely motion pursuant to Rule 59, SCRCP, has been made, the time for appeal for all parties is stayed and runs from receipt of written notice of entry of the order granting or denying the motion. Rule 203(b)(1), SCACR.

Wife filed two timely Rule 59(e) motions raising the issue of whether at least part of the marital funds divided between the parties should be placed in escrow pending appeal. Wife subsequently filed a more specific motion requesting an emergency hearing due to fears Husband might leave the jurisdiction and dispose of marital funds. The emergency hearing was held and resulted in the January 12, 1998 order directing Husband to return funds to the brokerage account. The January 12 order was reiterated in the June 4, 1998 order disposing of both of Wife's motions to reconsider. Subsequently, Wife timely filed her notice of appeal.

CONCLUSION

For the foregoing reasons we affirm the holding of the family court and order the remaining $150,000 plus accrued interest in the A.G. Edwards account be disbursed to Wife.

AFFIRMED.

MOORE, A.C.J., WALLER, PLEICONES, JJ., and Acting Justice John W. Kittredge, concur.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Lewis C. Patterson, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Greenwood County
Gary E. Clary, Trial Judge
Wyatt T. Saunders, Post-Conviction Judge

Opinion No. 25826
Submitted April 21, 2004 - Filed May 24, 2004

REVERSED

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Adrianne L. Turner, all of Columbia, for petitioner.

Robert M. Pachak, of Columbia, for respondent.

JUSTICE BURNETT: Respondent Lewis Clarence Patterson (Patterson) pled guilty to possession of crack cocaine, second offense, and was sentenced to seven (7) years imprisonment and fined $10,000. Patterson was previously convicted of possession of marihuana. Concluding trial counsel rendered ineffective assistance of counsel by advising Patterson to plead guilty to a second offense in connection with the crack cocaine charge, the post-conviction (PCR) judge granted relief.

ISSUE

Did the PCR judge err in holding Patterson's counsel was ineffective because Patterson was sentenced as a second-time offender?

ANALYSIS

The State argues the PCR judge erred by concluding Patterson's counsel was ineffective in advising him to plead guilty where Patterson's sentence for possession of crack cocaine was enhanced to second offense due to Patterson's 1989 conviction for possession of marihuana. We agree.

To establish a claim of ineffective assistance of counsel, the PCR applicant must establish that trial counsel's representation fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability the result would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of trial. Id. 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. The PCR judge's findings will be upheld by this Court when they are supported by any evidence of probative value. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, the Court will not uphold the findings of the PCR court if no probative evidence supports those findings. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

There is no statutory law or judicial precedent in this State concluding, under similar facts, the trial judge improperly enhanced Patterson's sentence. An attorney is not required to anticipate potential changes in the law, which are not in existence at the time of the conviction. State v. Gilmore, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). Therefore, Patterson's counsel was not deficient in advising Patterson to plead guilty in connection with the crack cocaine charge.

Although, unnecessary for resolution of Patterson's claim, we address whether Patterson was incorrectly sentenced as a second-time offender. Patterson was sentenced pursuant to S.C. Code Ann. § 44-53-375(A) (2002), which provides:

> For a second offense, the offender is guilty of a felony and, upon conviction, must be imprisoned not more than ten years…. For a third or subsequent offense, the offender is guilty of a felony and, upon conviction, must be imprisoned not less than ten years nor more than fifteen years….

S.C. Code Ann. § 44-53-375(A) (2002).

Section 44-53-375(A) does not define second offense. South Carolina Code Ann. § 44-53-470 (2002), generally defines "second or subsequent offense" as when an offender "has at any time been convicted under this article or under any State or Federal statute relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs."

Under Section 44-53-470, a prior offense is any drug offense, including possession of marihuana. Sections 44-53-375(A) and 44-53-470 are part of the same general law and can be read together without conflict. Cf. In re Keith Lamont G., 304 S.C. 456, 405 S.E.2d 404 (1991) (statutory sections that are part of the same general statutory law must be construed together). Moreover, all rules of statutory construction are secondary to the rule that legislative intent

must prevail if it can be reasonably discerned from the statutory language. Samuels v. State, 356 S.C. 635, 591 S.E.2d 606 (2004). The legislature could not have intended to exclude marihuana possession as a second or subsequent offense under Section 44-53-375(A) when Section 44-53-470 specifically defines a "second or subsequent offense" as any drug offense, including marihuana. When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994). Therefore, Patterson's sentence was properly enhanced based on his prior conviction for marihuana.

The PCR judge relied on Rainey v. State, 307 S.C. 150, 414 S.E.2d 131 (1992). Rainey is inapposite to the case at bar. Rainey pled guilty to distribution of crack cocaine and was sentenced as a second offender under former Section 44-53-375 because of prior convictions for marihuana possession. Under former Section 44-53-375(B) (Supp. 1990), the prior offense was limited to narcotic drugs. The Court explained:

> [Rainey] was sentenced as a second offender under the crack cocaine statute [S.C. Code Ann. § 44-53-375 (Supp. 1990)] based on his prior convictions for marijuana and possession with intent to distribute marijuana. Pursuant to § 44-53-375(B), an enhanced sentence is required for a "second offender, or if, in the case of a first conviction of a violation of this section, the offender has been convicted of any [law] … relating to *narcotic drugs*…" (Emphasis added). Since [Rainey] does not have a prior crack cocaine conviction and marijuana is not a narcotic drug as defined by S.C. Code Ann. § 44-53-110 (1985), he should not have been sentenced as a second offender under § 44-53-375(B).

Rainey, 307 S.C. at 151, 414 S.E.2d at 132 (footnote omitted). The State argued Rainey was a second offender under Section 44-53-470. In affirming the order of the PCR judge, the Court concluded:

> Because there is a conflict between § 44-53-375(B) and the general second offense statute, the later, more specific crack cocaine statute must prevail. The PCR judge was correct in finding that [Rainey] is not a second offender under § 44-53-375(B) and should not, therefore, have been sentenced as one.

Rainey, 307 S.C. at 152, 414 S.E.2d at 132.

Here, Sections 44-53-375(A) and 44-53-470 are not in conflict. See also Thomas v. State, 319 S.C. 471, 465 S.E.2d 350 (1995) (finding no conflict between Sections 44-53-370(e)(1) (Supp. 1994) and 44-53-470 (1985) for purposes of sentence enhancement); State v. Dupree, 354 S.C. 676, 583 S.E.2d 437 (Ct. App. 2003) (finding no conflict between Sections 44-53-375(C)(1)(b) (2002) and 44-53-470 (2002) for purposes of sentence enhancement).

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kiawah Property Owners Group, Appellant,

v.

The Public Service Commission of South Carolina; and Kiawah Island Utility Company, Inc. Respondents,

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Appeal From Richland County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 25827
Heard January 21, 2004 - Filed May 24, 2004

AFFIRMED

Stephen L. Brown, Michael A. Molony and Lea Kerrison, all of Young, Clement, Rivers, and Tisdale, of Charleston, for Appellant.

Fred David Butler, of Columbia, for Respondent South Carolina Public Service Commission.

G. Trenholm Walker and Amanda R. Maybank, both of Pratt-Thomas, Epting and Walker, of Charleston, for Respondent Kiawah Island Utility Company.

ACTING CHIEF JUSTICE MOORE: This matter arises from a utilities rate dispute between the Kiawah Island Utility Corporation (Utility) and the Kiawah Property Owners Group (KPOG). On appellate review, the circuit court judge found that the Public Service Commission's (PSC) approval of an increase of the Utility's rates and charges that would allow for an operating margin of 6.5% was supported by substantial evidence. We affirm.

FACTS

In 1996, the Utility, which is wholly owned by Kiawah Resort Associates (Developer), applied to the PSC for a rate increase that would increase its operating margin to 5.43%. The PSC approved a rate increase that allowed for only a 3.55% operating margin. On appeal, the circuit court judge upheld the rate increase, and this Court reversed and remanded, finding that the PSC order permitting the rate increase was unsupported by the evidence. Kiawah Prop. Owners Group v. Pub. Serv. Comm'n, 338 S.C. 92, 525 S.E.2d 863 (1999) (KPOG I). Upon remand, a subsequent PSC order, and an appeal to the circuit court, the matter was again appealed to this Court, resulting in the opinion finding that the subsequent PSC order was supported by the evidence. Kiawah Prop. Owners Group v. Pub. Serv. Comm'n, (Op. No. 25782, S.C. Sup. Ct. Filed February 9, 2004, Shearouse Adv. Sh. No.6 p. 14) (KPOG II).

Upon this backdrop, another rate dispute began in 1999, when the Utility set out to raise its rates and charges to permit an operating margin of 9.5%. The PSC submitted an order, which was affirmed on appeal by the circuit court, authorizing a rate increase that would generate a 6.5% operating margin. KPOG has appealed the circuit court decision, raising the following issues for review:

I. Did the trial court err in finding that the PSC's decision to allow the Utility to set its operating margin at 6.5% was supported by the record?

II. Did the circuit court err in affirming the PSC's treatment of several of the Utility's fee assessments and other affiliated transactions?

III. Did the circuit court judge err in affirming the PSC's refusal to require the Developer and Utility to modify their cross-collateralized loan agreement with the bank?

IV. Did the circuit court err in refusing to require the PSC to stay this proceeding until this Court issued its opinion in KPOG II?

STANDARD OF REVIEW

The PSC is a government agency of limited power and jurisdiction, which is conferred either expressly or impliedly by the General Assembly. City of Camden v. South Carolina Pub. Serv. Comm'n, 283 S.C. 380, 382, 323 S.E.2d 519, 521 (1984). South Carolina Code Ann. § 58-5-210 (Supp. 2003) grants the PSC the "power and jurisdiction to supervise and regulate the rates and services of every public utility in this State…."

The PSC should establish rates that will produce revenues for the utility "reasonably sufficient to assure the confidence in the financial soundness of the utility … and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." Bluefield WaterWorks and Improvement Co. v. Pub. Serv. Comm'n of West Virginia, 262 U.S. 679, 693, 43 S. Ct. 675, 679, 67 L. Ed. 1176 (1923).

The PSC is considered "the 'expert' designated by the legislature to make policy determinations regarding utility rates; thus, the role of a court reviewing such decisions is very limited." Hamm v. South Carolina Public Service Comm'n, 289 S.C. 22, 344 S.E.2d 600 (1986); Patton v. South Carolina Pub. Serv. Comm'n, 280 S.C. 288, 312 S.E.2d 257 (1984). Therefore, the party challenging a PSC order must establish that (1) the PSC decision is not supported by substantial evidence and (2) the decision is clearly erroneous in light of the substantial evidence in the record. Patton,

280 S.C. at 291, 312 S.E.2d at 259; Greyhound Lines, Inc. v. South Carolina Pub. Serv. Comm'n, 274 S.C. 161, 262 S.E.2d 18 (1980).

ISSUE I

Did the trial court err in finding that the PSC's decision to allow the Utility to set its operating margin at 6.5% was supported by the record?

The Utility applied for a rate increase in 1999, requesting that the PSC allow it to charge rates sufficient to sustain a 9.5% operating margin. The PSC determined that a 6.5% operating margin was appropriate. KPOG asserts that the PSC's decision to set the Utility's operating margin at 6.5% is unsupported in the record. We disagree.

At the PSC hearing, the Utility's treasurer, Townsend Clarkson (Clarkson), testified that the application for a rate increase was prompted by (1) a 20.2% increase in the cost of water since the Utility's prior rate application; (2) the capital cost incurred to improve and maintain 45 miles of transmission lines; and (3) the fact that the Utility had operated at a net loss since 1995. In addition, PSC staff member Thomas Ellison (Ellison) testified that the Utility had an operating margin of negative 1.02% and recommended that PSC permit the Utility to raise rates to sustain an operating margin of 8.03%.

Based on this testimony, the PSC concluded that the Utility could raise its rates and charges to generate a 6.5% operating margin, up from the 3.55% margin that the PSC had approved in the Utility's prior rate application.

We hold that the PSC's decision to set the Utility's operating margin at 6.5% -- a number much less than what the PSC staff recommended -- was supported in the record by the testimony of Clarkson and Ellison.[1]

[1] KPOG asserts that since the PSC determined that the expert testimony of the Utility's accountant, who testified that 9.5% was a reasonable operating margin, was not credible; the PSC erred in arriving at the 6.5% figure. But as the circuit court judge duly noted, the PSC does not have to arrive at the

ISSUE II

Did the circuit court err in affirming the PSC's treatment of several of the Utility's fee assessments and other affiliated transactions?

BUILDING INCENTIVE FEES

KPOG asserts that the trial court erred in affirming the PSC's determination that the Developer's building incentive fee, charged to owners of undeveloped property, should not be recognized by the Utility for ratemaking purposes. We disagree.

An evaluation of the building incentive fee requires (1) an analysis of the nature of the building incentive fee as compared to the "availability fee" and (2) an application of a recent opinion by this Court: Total Envtl. Solutions, Inc. v. South Carolina Pub. Serv. Comm'n, 351 S.C 175, 568 S.E.2d 365 (2002).

KPOG argues that the building incentive fee -- a $40 fee the Developer (who owns 100% of the Utility) assesses quarterly to all property owners of undeveloped property -- does not differ from the "availability fee" -- a $40 fee that the Developer *formerly* charged per quarter to property owners of undeveloped property once the water and sewer lines approached within 100 feet of their lot line until the property owner connected to the water and sewer system.

Historically, the PSC ruled that the "availability fees" would be recognized as a contribution by the parent-Developer to the subsidiary-Utility in aid of construction, which would be recorded on the Utility's balance sheet as an appreciation or improvement to an asset -- a recognition that only affects the Utility's rate base.

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appropriate operating margin based on any expert testimony. Rather, it arrives at the operating margin figure based on its own staff's research, and "the rejection of [the accountant's] testimony did not leave [PSC] without an evidentiary basis for its findings."

In prior orders, the PSC found that (1) the "building incentive fee" charged by the Developer was instituted "for the same purpose as the former availability fee…," and (2) the former "availability fee" was "now known as the 'building incentive' fee." The PSC also determined in the prior orders that the proceeds from the building incentive fees should be recognized as a contribution by the Developer to the Utility in aid of construction, the same treatment given to the "availability fees."

In the present case, the PSC determined that, based on the evidence presented at the PSC hearing, the $40 quarterly building incentive fee would *not* be treated as a contribution by the Developer in aid of construction. At the hearing, Clarkson testified that the building incentive fee was "not collected to assure water and sewer availability but instead to encourage building houses on vacant lots."[2] The PSC refused to recognize the building incentive fees as contributions in aid of construction because KPOG failed to establish that building incentive fees were the same as the old "availability fees" and that "there was no proper methodology for characterizing building incentive fees." While we are skeptical of the PSC's historic inconsistent treatment of these fees, we agree that Clarkson's testimony supports the conclusion that the building incentive fees were not assessed to help subsidize the Utility's sewer and water infrastructure.[3]

In Total Envtl. Solutions, this Court concluded that the PSC lacks jurisdiction to regulate availability fees when there is no evidence that the

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[2] The building incentive fee assessment did not hinge on whether the water and sewer infrastructure was within 100 feet of the undeveloped property owner's property line. Rather, the fee was assessed to *all* undeveloped property owners.

[3] There are inconsistencies in how the PSC has treated these fees. It admits that the fees are one in the same, and it seems that the only difference in the two fees is, in fact, the name, for they both are collected to encourage development. But since KPOG did not meet the evidentiary standard, we hold that the circuit court did not err in upholding the PSC's decision.

utility received or directly benefited from the assessment. 351 S.C. at 180, 568 S.E.2d at 369. Since KPOG provided no evidence that the Utility directly benefited from the building incentive fee, we find that the circuit court correctly affirmed the PSC's decision to not recognize the fee as a contribution in aid of construction.

OTHER AFFILIATED TRANSACTIONS

KPOG asserts that the Developer should reimburse the Utility (1) $64,000 of the $100,000 management fee that the PSC did not recognize for ratemaking purposes, and (2) $139,807 that the Utility paid the Developer for fire hydrants in 1991. We find that the PSC lacks the authority to order the Developer to reimburse the Utility for the management fee or the cost of the fire hydrants. KPOG II.[4]

KPOG also asserts that the PSC erred in (1) recognizing the Utility's transfer and distribution lines and the expenses involved with their upkeep for ratemaking purposes and (2) refusing to include tap-in fees charged by the Developer to the Utility from 1992 to 1996 as revenues to the Utility. Since KPOG first broached the transfer line issue in its petition for rehearing to the PSC, the issue is not preserved. See Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment); see also McGee v. Bruce Hosp Sys., 321 S.C. 340, 468 S.E.2d 633 (1996) (a party may not raise an issue for the first time in a motion for a new trial).

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[4] KPOG II provides that under S.C. Code Ann. § 58-5-20 (1976), the PSC only retains the authority to regulate a utility "with respect to its activities in the provision of utility services" and does not grant the PSC the authority "to order a *separate entity* to … make payments to the Utility for certain assets, [or] to donate fire hydrants to the [U]tility." KPOG II, at 18 (emphasis added).

Accordingly, based on this reasoning from KPOG II, the circuit court did not err in finding that PSC does not have any authority over the Developer, even though the Developer owns 100% of the Utility's stock.

Further, KPOG has not preserved the tap-in fee issue because, while it initially raised the issue before the PSC, it did not petition the circuit court to review the PSC's decision to not recognize the tap-in fees as revenue. See Pringle v. Builders Transp., 298 S.C. 494, 381 S.E.2d 731 (1989) ("A petition for circuit court review pursuant to the Administrative Procedures Act (APA) must direct the court's attention to the abuse allegedly committed below, including a distinct and specific statement of the rulings of which appellant complains.").

ISSUE III

Did the circuit court judge err in affirming the PSC's refusal to require the Developer and Utility to modify their cross-collateralized loan agreement with the bank?

KPOG argues that the Utility's 1995 modification of its loan contract with Bank of America to cross-collateralize and cross-default the Developer's outstanding loan with the bank was unfair. We disagree.

As we noted in KPOG II, the argument that the cross-collateralized loan agreement will harm ratepayers in the future does not present a justiciable controversy. KPOG II, at 22-23 (citing Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)). Thus, this Court will not review this issue at present.

ISSUE IV

Did the circuit court err in refusing to require the PSC to stay this proceeding until this Court issued its opinion in KPOG II?

KPOG asserts that the PSC should have stayed the Utility's rate application review until this Court issued its opinion in KPOG II. While these two appeals cover similar issues, they arise from separate controversies: two different rate applications.

Further, the Utility is statutorily authorized to file a rate application every twelve months, and the PSC must act upon the application within six months. S.C. Code Ann. § 58-5-240(C) and (F) (Supp. 2002). The PSC only has authority to stay issuance of its order for five days beyond the six-month period. S.C. Code Ann. § 58-5-240(D). Therefore, PSC did not abuse its discretion in failing to grant KPOG's request for stay pending our decision in KPOG II.

CONCLUSION

Based on the forgoing reasoning, we find that the PSC's decision to raise the Utility's rates to sustain a 6.5% operating margin is supported by the record. We further find that the PSC's treatment of the building incentive fees was also supported by the evidence. All of KPOG's other claims are without merit. Accordingly, we **AFFIRM** the circuit court's affirmance of the PSC order.

WALLER, BURNETT, PLEICONES, JJ., and Acting Justice G. Thomas Cooper, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Geneva Covington, Respondent,

v.

Gary George individually, and as agent for Momentum Logistics of South Carolina, Inc., formerly doing business as Anderson Armored Car and Bank Air Courier, Inc., Appellants.

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 25828
Heard April 7, 2004 - Filed May 24, 2004

AFFIRMED

Kirby D. Shealy III, of Baker, Ravenel & Bender, LLP, of Columbia, for Appellant

John P. Ford, Jr., and Kristi F. Curtis, both of Bryan, Bahnmuller, Goldman & McElveen, LLP, of Sumter, for Respondent.

JUSTICE PLEICONES: Gary George (George) and Geneva Covington (Covington) were involved in an automobile accident in March 1999. At trial, George sought to introduce evidence that the hospital that

treated Covington accepted as full payment an amount less than that billed to Covington. The trial judge excluded the testimony pursuant to Rule 403, SCRE, finding the information would confuse the jury. George appealed and the case was transferred from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm the trial court's ruling.

FACTS

George rear-ended Covington on Highway 378 while Covington was stopped for a school bus. The damage to both vehicles was minor.[1] At trial, George admitted that he was liable for the accident, therefore the only issue was damages. George argued that Covington was entitled to only a modest damage award because there was a low-impact collision resulting in only soft tissue injuries.

At trial, George proffered testimony of Ranell Benehaley, manager of medical records for Tuomey Health Care System. Benehaley testified, *in camera*, that Covington was billed $1,430.00 for services performed in May 1999, but that Tuomey accepted $276.86 as full payment for the services. Benehaley also testified that Covington was billed $1969.00 for services performed June 1999, but Tuomey accepted $370.61 as payment on that account, while $58.05 was still owed. The trial judge would not allow the jury to hear the testimony, ruling that under Rule 403, SCRE, the testimony would confuse the jury. George did not seek to enter into evidence the source of the payments to Tuomey.[2]

ISSUE

Did the trial court err in refusing to allow George to present evidence that the amount Covington's medical provider accepted in payment was less than what it charged for its services?

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[1] The damage to Covington's car was estimated at $1,519.97.

[2] It is not clear from the record, but Respondent's brief states Medicare made the payments.

ANALYSIS

George argues that this Court's opinion in Haselden v. Davis, 353 S.C. 481, 579 S.E.2d 293 (2003), allows a defendant to introduce evidence that a medical provider accepted as full payment an amount less than was billed for the services. We disagree and hold the trial court properly excluded the evidence of the amount Covington's medical provider accepted as payment (hereinafter "actual payment amount").

In Haselden, the question was whether the Plaintiff could recover the amounts "written off" by healthcare providers. Id. A majority of this Court held that those amounts are recoverable by a plaintiff in a personal injury suit. Id. In the case at hand, George argues that since Covington has the burden of proving reasonable and necessary medical expenses as part of her damages, George should be able to dispute the reasonableness of those charges through introduction of the proffered testimony.

Whether the actual payment amount may be utilized to establish the reasonableness of medical expenses was ancillary to the main issue in Haselden because both the billed amount and the actual payment amount were admitted into evidence. In Haselden, the Plaintiff submitted evidence that she incurred medical expenses in the amount of $77,905.21. 341 S.C. 486, 501, 534 S.E.2d 295, 303 (Ct. App. 2000). Medicaid paid $24,109.04 to cover the services. 534 S.E.2d at 303. The difference between the amounts billed and the amounts actually paid by Medicaid was $51,620.59. Id. Defendants entered a letter as a court exhibit, which showed the gross amount of the bills for Plaintiff's services and the corresponding Medicaid payments. The admissibility of the actual payment amount was not an appellate issue in Haselden, but rather the issue was Plaintiff's entitlement to *recover* the difference between the billed amount and the actual payment amount.

The case at hand differs substantially from the situation in Haselden. Here, George did not object to Covington's introduction of the full amount of the bill but thereafter sought to introduce the actual payment amount. Covington's objection to this offer was sustained.

The question for this Court is whether a party can introduce evidence of the actual payment amount to challenge the reasonableness of the medical expenses sought by the plaintiff. We hold that the collateral source rule is directly implicated in this case, and the actual payment amount was properly excluded. Haselden, insofar as the actual payment amount was before the court as evidence of reasonableness, is limited to its facts.

The collateral source rule provides "that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer." Citizens and S. Natl. Bank of South Carolina v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 317 (1995). A tortfeasor cannot "take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is 'an insurance company, an employer, a family member, or other source.'" Pustaver v. Gooden, 350 S.C. 409, 413, 566 S.E.2d 199, 201 (Ct. App. 2002)(citations omitted). In this case, the actual payment amounts were made by a collateral source.

George argues that because he seeks only to introduce the *fact* of compromised payments as opposed to their *source*, that no violence has been done to the collateral source rule. While facially appealing, this argument ignores the reality that unexplained, the compromised payments would in fact confuse the jury. Conversely, any attempts on the part of the plaintiff to explain the compromised payments would necessarily lead to the existence of a collateral source. Inevitably, the inquiry would lead to the introduction of matters such as contractual arrangements between health insurers and health care providers, resulting in the very confusion which the trial judge sought to avoid in his proper application of Rule 403, SCRE.

Other jurisdictions have held that the actual payment amount is not admissible as evidence of reasonableness of damages because that evidence would violate the collateral source rule. For example, in Radvany v. Davis, 551 S.E.2d 347 (Va. 2001), the Supreme Court of Virginia held that:

> payments made to a medical provider by an insurance carrier on behalf of an insured and amounts accepted by medical providers are one and

the same. Regardless of the label used, they are payments made by a collateral source and are not admissible in evidence for that reason.

> *Furthermore, such amounts are not evidence of whether the medical bills are "reasonable, i.e., not excessive in amount, considering the prevailing cost of such services."* The amounts accepted by [Plaintiff's] health care providers represent amounts agreed upon pursuant to contractual negotiations undertaken in conjunction with [Plaintiff's] health insurance policy. Such negotiated amounts, presumably inuring to the benefit of the medical providers, the insurance carrier, and [Plaintiff], do not reflect the "prevailing cost" of those services to other patients. Id. at 348 (emphasis supplied)(internal citations omitted).

In Goble v. Frohman, a Florida court held the collateral source rule prohibited introduction of contractual discounts that were "written off" by the medical providers. 848 So.2d 406 (Fla. 2d DCA 2003). The court stated that "[t]o challenge the reasonableness or necessity of the medical bills, [Defendant] could have introduced evidence on the value of or need for medical treatment…there generally will be other evidence having more probative value and involving less likelihood of prejudice than the victim's receipt of insurance-type benefits." Id. at 410. See also Fye v. Kennedy, 991 S.W.2d 754, 764 (Tenn. Ct. App 1998)(holding that payments that are forgiven, or paid by a third party is not evidence of the reasonableness of a charge).

CONCLUSION

The trial judge correctly applied Rule 403 and the collateral source rule in excluding evidence of the actual payment amount. While a defendant is permitted to attack the necessity and reasonableness of medical care and costs, he cannot do so using evidence of payments made by a collateral source. The judgment of the trial court is **AFFIRMED**.

TOAL, C.J., WALLER, BURNETT, JJ., and Acting Justice John W. Kittredge, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RIM Associates, a South Carolina general partnership, Respondent,

v.

John E. Blackwell, Appellant.

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 3747
Heard October 8, 2003 – Filed February 23, 2004
Withdrawn, Substituted and Re-Filed May 14, 2004

REVERSED

G. Dana Sinkler, Mark S. Sharpe, Paul E. Tinkler, and R. Bruce Wallace, all of Charleston, for Appellant.

Richard S. Rosen and Daniel F. Blanchard, III, both of Charleston, for Respondent.

BEATTY, J.: RIM Associates, a South Carolina general partnership, sued John Blackwell, a partner, seeking contribution for a partnership debt the partnership had incurred as a result of a debt owed

to Blackwell. The trial court ordered Blackwell to make a contribution. We reverse.

FACTS

John Blackwell's company, R.I. of North Charleston ("R.I."), owned a Ramada Inn. In 1985, Everett Smith, Joe Edens and James Finley ("the partners") decided to purchase the hotel. Blackwell agreed to sell the hotel for 4.575 million dollars. As part of the purchase price, R.I. accepted a note of 1.3 million dollars ("the Blackwell note"). Blackwell also received a twenty-five percent partnership interest in RIM Associates ("RIM"), the partnership formed by Blackwell and the partners "to invest in, own, and operate" the hotel. The partners financed the transaction by taking out a bank loan for the 3.275 million dollar balance owed to Blackwell. The partners did not place any capital in the transaction, but they guaranteed seventy-five percent of the Blackwell note.

RIM fell behind on its payments on the Blackwell note and, in 1989, Blackwell and RIM renegotiated its terms. Blackwell extended the maturity date of the Blackwell note and the partners guaranteed it one hundred percent. The parties contemporaneously entered into an indemnification agreement ("the 1989 agreement") that provided in part:

> The Partners acknowledge and agree that each Partner, as the owner of a twenty-five (25%) interest in the Partnership, is responsible for twenty-five (25%) of the Partnership indebtedness and each Partner agrees to indemnify and hold the others harmless from liability for such Partner's share of any such indebtedness . . . .
>
> Edens, Smith, and Finley have, in the Note Modification, agreed to jointly and severally guarantee the payment of the Note in its

> entirety. It is agreed, however, that the indebtedness evidenced by the Note and any other Partnership indebtedness in excess of the amounts above set forth shall remain Partnership debts, the payment of which shall continue to be the obligation of the Partnership, but Blackwell shall have no personal liability therefor other than to the extent of his interest in the Partnership and Edens, Smith and Finley shall not have the right to require contribution from Blackwell on account of any payment which they may have to make on the Note. Any such payment(s) shall be deemed to be a capital contribution(s) to the Partnership by the party making the same.[1]

(emphasis added).

Notwithstanding the 1989 agreement, RIM again fell behind on its payments. In 1997, Blackwell sued the partners for repayment as guarantors of the Blackwell note. The partners brought a third party complaint against RIM, seeking indemnification for the amounts due under the Blackwell note. The partners then caused RIM to bring suit against Blackwell seeking contribution from him in case RIM was required to indemnify the partners.

The parties reached a settlement in April or June of 1999 ("the 1999 settlement"). The 1999 settlement provided in part:

> 1) The guarantors would pay $2 million including principal, interest, attorney's fees, and costs, to John and Hazel Blackwell. John and Hazel will satisfy the Note.

[1] The Partnership Agreement prohibited the withdrawal of capital contributions.

> 2) All of the pending litigation against John and Hazel Blackwell will be dismissed with prejudice.
>
> 3) John Blackwell will remain in the Partnership.
>
> 4) The Partnership will not attempt to borrow the money to pay John and Hazel except with the prior written approval of John Blackwell.

(emphasis added).

Following the court-ordered 1999 settlement, Blackwell moved to amend the order to include that "John Blackwell cannot be required to respond to a capital call as a result of the settlement found by the Court." The judge refused, reasoning that "[the] issue may have been raised by [Blackwell] but it is a post-settlement issue and not properly before this court at this time." On July 14, Edens and Smith paid two million dollars pursuant to the 1999 settlement. Finley did not contribute any funds.[2]

On August 5, the trial judge ordered "[t]he action . . . ended and dismissed with prejudice as [to] all parties." RIM moved to amend the order. As a result, the trial judge rescinded that order and issued a second order that dismissed with prejudice all causes of action "by and against" Blackwell "asserted within the action," all claims by RIM "in the Amended Fourth Party Complaint," and all actions by Blackwell. The trial judge also dismissed all actions by the individual partners Eden, Smith, and Finley against RIM but without prejudice.

In April 2000, RIM sued Blackwell. RIM's Amended Complaint claimed breach of the partnership agreement and sought contribution and specific performance. Following a bench trial, the court found:

[2] Jim Finley has died; RIM is now suing his estate.

> The Partnership did not "borrow" the money to pay the settlement in violation of the settlement agreement and did not receive monies from Smith and Edens.
>
> Blackwell was obligated to make a contribution to the Partnership to fund the expenses of his own settlement.
>
> The 1989 agreement, which expressly prohibits any such contribution, had been rescinded by the Blackwell settlement.
>
> The Partnership did not assert these claims in the prior litigation.
>
> The Partnership claims were not barred by the dismissal with prejudice.
>
> The Partnership was entitled to recover attorneys fees and costs.

The trial judge ruled that Blackwell had breached his contractual and statutory obligations to make contributions under the partnership agreement and the South Carolina Uniform Partnership Act. Blackwell appeals.

ISSUES

Blackwell raises eight exceptions to the trial judge's rulings, but those exceptions can be condensed in the following six issues:

I. Did the trial court err in finding that the partnership was authorized to bring this action?
II. Did the trial court err in holding that Blackwell could be required to contribute to the payment of his own note?
III. Did the trial court err in not finding that the claims of the partnership had previously been dismissed with prejudice?

IV. Did the trial court err in not finding that the partnership borrowed the settlement funds in violation of the settlement agreement and the 1989 agreement?

V. Did the trial court err in allowing this action without first requiring an accounting?

VI. Did the trial court err in awarding attorneys' fees to the partnership?

STANDARD OF REVIEW

RIM alleges two causes of action against Blackwell. RIM characterizes them as "Contribution" and "Breach of Contract / Specific Performance." However, an appellate court is not bound by a party's characterization of the actions. Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 129, 399 S.E.2d 163, 164 (Ct. App. 1990) (citing Ariail v. Ariail, 295 S.C. 486, 491, 369 S.E.2d 146, 149 (Ct. App. 1988)). Whether an action is at law or in equity is determined by the main purpose of the suit. Mortgage Recovery Fund-Riverbend, Ltd. v. Heritage Clipper Riverbend Trust, 327 S.C. 491, 493, 489 S.E.2d 655, 656 (Ct. App. 1997) (citing Baughman v. AT&T, 298 S.C. 127, 130, 378 S.E.2d 599, 600 (1989)). The court should determine the main purpose of an action from the body of the complaint. Carjow, LLC v. Simmons, 349 S.C. 514, 518, 563 S.E.2d 359, 362 (Ct. App. 2002) (citing Ins. Fin. Servs., Inc. v. South Carolina Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) ("The main purpose of the action should generally be ascertained from the body of the complaint.")). "Whether the action is one at law or in equity is determined by the nature of the pleadings and the character of the relief sought." In re Estate of Holden, 343 S.C. 267, 278, 539 S.E.2d 703, 709 (2000) (citing Bell v. Mackey, 191 S.C. 105, 119, 3 S.E.2d 816, 824 (1939) ("The nature of the issues as raised by the pleadings or the pleadings and proof, and character of relief sought under them, determines the character of an action as legal or equitable.")).

Notwithstanding RIM's characterization of its complaint, RIM alleges only one single cause of action for breach of contract and

requests the remedy of specific performance.[3] An action for specific performance lies in equity.[4] Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 290 (2000); see also Barnacle Broadcasting, Inc. v. Baker Broadcasting, Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000) (explaining that "[a]n action for specific performance [on a contract] lies in equity"). Because the action is in equity, the

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[3] The reference in RIM's complaint to a cause of action for contribution is a misnomer. RIM merely alleges that Blackwell breached the partnership agreement since that agreement provided for capital calls and Blackwell refused to contribute when requested. RIM's complaint does not reflect any allegation that RIM had paid the partnership debt. An action for contribution cannot be maintained prior to the payment of a debt. First Gen. Serv. of Charleston, Inc. v. Miller, 314 S.C. 439, 443, 445 S.E.2d 446, 448 (1994) (affirming the dismissal of an action for contribution where the plaintiff had not made any payment since "the right to contribution does not arise prior to payment"); Andrade v. Johnson, 345 S.C. 216, 225, 546 S.E.2d 665, 670 (Ct. App. 2001) (defining contribution as "the '[r]ight of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear'"), rev'd on other grounds, Andrade v. Johnson, 356 S.C. 238, 588 S.E.2d 588 (2003); 18 Am. Jur. 2d Contribution § 19 (2004) (explaining that a party seeking contribution is entitled to recover "the amount he has paid in excess of his share … a ratable sum of the loss actually sustained"). Therefore, the right of contribution rises only after a party "has been compelled to pay what another should have paid." 18 Am. Jur. 2d Contribution § 2 (2004). Here, since RIM does not allege in its complaint that it paid the Blackwell note, it is doubtful that RIM can sustain an action for contribution. Even if RIM's cause of action for contribution was feasible, the standard of review would be the same since an action for contribution lies in equity. See Few v. Few, 239 S.C. 321, 334, 122 S.E.2d 829, 835 (1961) (noting that "the right to contribution is ordinarily enforced in equity"); Kafka v. Pope, 521 N.W.2d 174, 176 (Wis. Ct. App. 1994) (explaining that the contribution process "is based on principles of equity . . . ").

[4] RIM alleges the lack of an adequate remedy at law.

appellate court "may find facts in accordance with its own view of the preponderance of the evidence" in reviewing such an action. Id.

LAW/ANALYSIS

I. RIM's authority to bring this action

Blackwell argues that the trial judge erred in ruling that RIM was authorized to bring this action against Blackwell. We disagree.

The partnership agreement states that "[i]f any Partner fails to make contributions to capital as provided for by the terms of this Agreement, the remaining Partners who are not in default shall have the right to seek and obtain damages from the defaulting Partner . . . ." Blackwell argues that language allows only the partners, and not the partnership, to sue Blackwell for damages and specific performance. However, the partnership agreement was signed in 1985, at a time when partnerships could not bring an action in their own name. See Haddock Flying Serv. v. Tisdale, 288 S.C. 62, 64, 339 S.E.2d 525, 526 (Ct. App. 1986) ("However, a partnership is not such a legal entity that it may maintain a suit in its name alone."). Had the partnership agreement stated otherwise, any such authority would have been meaningless. The legislature remedied the situation in 1986 by adopting S.C. Ann. Code § 15-5-45 (2003) which states that "[a]ny partnership formed under the laws of this State . . . shall have the capacity . . . to sue and be sued in the courts and agencies of this State as a separate entity . . . ."

Moreover, while the partnership agreement did not authorize the partnership to sue a defaulting partner, neither did it forbid such an action. The partnership agreement is silent on the matter. In such a situation, we look to state law to determine whether the action is permissible. See Weeks v. McWilliams, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (1987) (ruling that the dissolution of a partnership was permissible because the partnership agreement did not specifically forbid it). The state of South Carolina granted partnerships the power to sue on their own behalf in 1986. Therefore, RIM can bring this action.

II. The parties' agreements

The trial court ruled that the 1989 agreement was inoperative and ordered Blackwell to contribute to RIM in order to repay Edens and Smith for their payment of the Blackwell note. That ruling was error.

In reaching its conclusion, the trial court relied partially on the South Carolina Uniform Partnership Act, S.C. Code Ann. § 33-41-510 (1994). The Act states in pertinent part: "The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business or for the preservation of its business or property." § 33-41-510(2). But that very section subordinates that general principle to the parties' agreements, explaining that the "rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules . . . ." § 33-41-510 (emphasis added). The question then becomes what agreements existed among Blackwell, the partners, and RIM and what effect those agreements had on the issue of contributing additional capital. The record indicates that the partners had a partnership agreement, an Amended and Restated Indemnification Agreement (the 1989 agreement), and the 1999 settlement.[5] The trial judge found that

[5] The partners contend that the parties reached a settlement on April 9, as per a letter from Blackwell to the partners. Blackwell disputed the settlement, but the trial judge found in his June 11 Order that the parties had reached a settlement "according to the terms of the March 31st letter." Contrary to RIM's assertion, however, the March 31 letter does not represent the complete settlement between the parties. In response to a motion to reconsider the June 11 Order, the trial court ruled in its July 1, 1999 Order that certain items not included in that letter are "the basis for the settlement." Moreover, the trial court indicated that the April 9, 1999 letter mentioned at least one term not contained in the March 31 letter, which term is also a condition of the settlement. We therefore must glean the complete terms of the 1999 settlement from

the parties' 1999 settlement rescinded the 1989 agreement. There is no evidence to support that conclusion.

Any modification of a written contract must satisfy all the requirements of a contract, including a meeting of the minds. First Union Mortgage Corp. v. Thomas, 317 S.C. 63, 70, 451 S.E.2d 907, 912 (Ct. App. 1994). Here, there is no evidence of any discussion, action, or agreement to rescind the 1989 agreement by implication or otherwise.[6] There can be no "meeting of the minds" if the issue was not a part of the parties' agreement. Just as importantly, the July 1999 Order specifically states that "[t]he Amended and Restated indemnification Agreement dated 1 February, 1989 was not addressed in the settlement agreement reached by the parties and therefore it is not part of the settlement."

Moreover, there is no evidence that the 1989 agreement and the 1999 settlement materially contradict each other. Both documents provide that Blackwell would remain a partner and share in the partnership's profits and debts, including the Blackwell note. And both documents placed restrictions on how the Blackwell note could be paid. The 1989 agreement stated: "Eden, Finley, and Smith shall not have the right to require contribution from Blackwell on account of any payment they may have to make on the Note. Any such payment(s) shall be deemed to be a capital contribution(s) to the Partnership by the party making the same." The 1999 settlement, too, forbade RIM to borrow money to pay the Blackwell note without Blackwell's prior permission. Although Blackwell may be required to contribute to the payment of the note, the documents, when read together, limit Blackwell's contribution toward the Blackwell note to his share of the funds generated by RIM and only if RIM did not default on the note.

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more than one document. The parties are appealing neither the June 11 nor the July 11 Orders.

[6]The parties had expressly invalidated "in its entirety" their 1985 Indemnification Agreement, replacing it with the 1989 agreement. Had they wished to invalidate the 1989 agreement, they certainly could have included similar language in the 1999 settlement.

This conclusion is reinforced by RIM's pleading in the prior action. Paragraphs 37 and 39 of RIM's Amended Third Party Answer And Claims state that RIM relied on Blackwell's representation that the "[s]o-called [Blackwell note] would be a 'cash flow,' 'soft' note and would be paid from distributions from operations and refinancing of the hotel."[7] It is clear that the parties never agreed that Blackwell would make a capital call contribution to pay the Blackwell note.

III. Effect of prior rulings

Blackwell raises a res judicata argument, asserting that the trial court erred when it held that its November 2, 1999 Order did not bar RIM's current action seeking contribution from Blackwell. We agree.

"A case that is dismissed 'with prejudice' indicates an adjudication on the merits and, pursuant to res judicata, prohibits subsequent litigation to the same extent as if the action had been tried to a final adjudication." Nelson v. QHG of S.C., Inc., 354 S.C. 290, 311, 580 S.E.2d 171, 182 (Ct. App. 2003). "To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Res judicata is an affirmative defense that must be pled at trial in order to be pursued on appeal. Wagner v. Wagner, 286 S.C. 489, 491, 335 S.E.2d 246, 247 (Ct. App. 1985). An affirmative defense is waived if not pled. Howard v. S. C. Dep't of Highways, 343 S.C. 149, 152, 538 S.E.2d 291, 294 (Ct. App. 2000). Generally, claims or defenses not presented in the pleadings will not be considered on appeal. McNeely v. S.C. Farm Bureau Mut. Ins. Co., 259 S.C. 39, 41, 190 S.E.2d 499, 499 (1972).

On appeal, RIM insists that a res judicata defense is not available to Blackwell because Blackwell did not raise it in his answer.

[7] When the hotel was refinanced, RIM retained the excess proceeds and did not pay the Blackwell note.

Blackwell counters that the res judicata issue is preserved because RIM did not object when Blackwell argued the issue before the trial court and because the trial court ruled on the matter in its appealed order. Generally, "res judicata must be pleaded to be established," but an exception to the broad rule exists "where the matter 'becomes an issue without objection based upon the lack of pleading.'" Baty v. Stanley, 291 S.C. 546, 548, 354 S.E.2d 571, 572 (Ct. App. 1987) (citing Beall v. Doe, 281 S.C. 363, 367, 315 S.E.2d 186, 188 (Ct. App. 1984)). Therefore, RIM waived any valid objection it might have otherwise had by not timely objecting to Blackwell's res judicata argument.

We agree that the issue was preserved and we hold that the 1999 settlement does preclude the current claim. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Dev. Co., 334 S.C. at 34, 512 S.E.2d at 109. The doctrine bars not only the claims that were actually raised, but also those "issues which might have been raised in the former suit." Id. (citation omitted) (emphasis added).

The 1999 settlement stipulated that "[a]ll of the pending litigation against John and Hazel Blackwell will be dismissed with prejudice." And in an amended order, the trial court dismissed with prejudice "all causes of action and claims by and against" Blackwell that were "asserted" as well as "all claims made by RIM" in the Amended Fourth Party Complaint. At the time, RIM had numerous claims against Blackwell, including one for "Estoppel/Breach of Partnership Agreement." RIM sought indemnification as a remedy. In its 2001 action against Blackwell, RIM again claimed "Breach of Partnership Agreement," but attempted to add a claim for contribution. The question then is whether this claim is a new and separate one, as to be beyond the reach of the 1999 documents.

RIM asserts that the contribution claim is permissible because it had not accrued and was not yet "asserted" in 1999. Since we find that RIM did not plead a cause of action for contribution, its argument may well be moot. However, we choose to address it and hold that the claim

is barred by res judicata. It is well settled that "[r]es judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties." Nelson, 354 S.C. at 304, 580 S.E.2d at 178 (emphasis added). The source was the same in RIM's prior action as in the action sub judice: the payment of the Blackwell note. Therefore, RIM's current action is barred.

RIM also contends that res judicata does not apply because the earlier action was one for indemnification, not contribution. But RIM is merely seeking a different remedy here. "A different remedy, however, does not alter the fact that the claims are identical." Plum Creek Dev. Co., 334 S.C. at 35, 512 S.E.2d at 109 (citing 46 Am. Jur. 2d Judgments § 536 (1994) ("A claim for damages is a claim for relief rather than an assertion of a different cause of action for purposes of determining the applicability of res judicata.")). "[F]or purposes of res judicata, 'cause of action' is not the form of action in which a claim is asserted but, rather the 'cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.'" Id. at 36, 512 S.E.2d at 110 (citing 50 C.J.S. Judgment § 749 (1997)).[8] As stated earlier, the genesis of this action and of the previous one is the collection of the Blackwell note. Additionally, the parties involved are the same. Therefore, res judicata is applicable and bars this action.

IV. RIM's borrowing

Blackwell argues the trial court erred when it found that RIM did not borrow the funds to pay the Blackwell note in violation of the 1999 settlement. We agree.[9]

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[8]RIM could also have brought an action for exoneration whereby it could have sought payment from Blackwell even before satisfying the Blackwell note. See 38 Am. Jur. 2d Guaranty § 124 (1994).

[9] The Court understands that the debt was indeed paid. We maintain only that RIM never alleged in its complaint that it had paid the debt.

The 1999 settlement included a stipulation that RIM would not attempt to borrow money to pay the Blackwell note, "except with the prior written approval of John Blackwell." Aware of that condition, RIM asked its accountant, Marty Ouzts, to treat the two million dollars from Edens and Smith as an "advance." But an advance is nothing more than a loan. See Tuller v. Nantala Park Co., 276 S.C. 667, 281 S.E.2d 474 (1981) (treating advances as money given as part of a loan); Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 336, 577 S.E.2d 468, 473 (Ct. App. 2003) (finding that a company was entitled to repayment even though the money it gave was identified as an advance). As Outzts himself admitted, "an advance is something that is anticipated to be repaid." Smith, one of the partners, repeated as much during his testimony. He was asked: "In your terminology, does a loan and an advance mean two different things, or is it the same thing?" Smith responded: "I don't know of any difference." In this instance, RIM entered the money received from Smith and Edens as an advance, and that advance – used to pay the Blackwell note – entitled Smith and Edens to immediate repayment. Clearly, to the extent that RIM "paid" the debt, it borrowed the money from Smith and Edens. Under the 1999 settlement, RIM was not allowed to do so since Blackwell had not agreed to the loan in writing.[10] Therefore, RIM's action for contribution is barred.

RIM argues that the payment was made directly to Blackwell by the partners as guarantors of the note. Thus, it was not a loan to RIM.[11] If this were true, then RIM would have had no need to record the money given to Blackwell in its books as an advance from the partners.

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[10] In the order now on appeal, the trial court declared that Blackwell had given his "prior written approval" to a loan "by virtue of the settlement that was reached . . . and confirmed in writing" by the parties. Again, the record does not provide a scintilla of evidence for such a conclusion. Reaching a settlement is a far cry from agreeing that a debt can be repaid with a loan.

[11] We note that this argument supports the notion that RIM cannot bring a cause of action for contribution since RIM was not the party that paid the debt.

RIM's argument convinces the Court that the surviving guarantors of the Blackwell note were cognizant of the restrictions in the 1989 agreement and in the 1999 settlement and attempted to circumvent those restrictions. The only reasonable conclusion from looking at the evidence is that RIM borrowed the money to pay the Blackwell note in violation of the 1999 settlement.

The trial court's finding that the partnership agreement authorized capital calls is unavailing to RIM. The 1989 agreement exempted Blackwell from contributing to the partners for any payment made on the Blackwell note. See supra. The 1989 agreement also required that such payment be considered a capital contribution. Since the partnership agreement prohibited the partners from withdrawing their capital contributions, any payment on the Blackwell note would be payable only upon the dissolution of the partnership. Therefore, RIM had no immediate debt to the partners, and Blackwell had no duty to make a contribution.

CONCLUSION

We find that (1) RIM had the authority to bring the current action; (2) the 1999 settlement did not rescind the 1989 agreement, and Blackwell had no duty to contribute under that agreement; (3) the 1999 litigation precludes the current action pursuant to res judicata; and (4) to the extent that RIM paid the Blackwell note, RIM borrowed the money, clearly violating the parties' agreements. Having so found, we need not reach Blackwell's remaining arguments. The trial judge's ruling is

REVERSED.

GOOLSBY and HUFF, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Roger A. Gaddy, M.D.,
as Attorney-in-Fact for Ms. M, Respondent,

v.

George G. Douglass, III and
William P. Sherrod, as purported
Attorneys-in-Fact for Ms. M, Appellants.

Appeal From Fairfield County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 3797
Heard January 14, 2004 – Filed May 17, 2004

AFFIRMED IN PART AND VACATED IN PART

Desa A. Ballard, of West Columbia and S. Murry Kinard, of Lexington, for Appellants.

S. Jahue Moore, of West Columbia and Thomas H. Pope, III and W. Chad Jenkins, both of Newberry, for Respondent.

KITTREDGE, J.: Dr. Roger A. Gaddy brought this action as the attorney-in-fact for Ms. M[1] against George G. Douglass, III and William P. Sherrod (Appellants) seeking to declare invalid a March 12, 1999 power of attorney executed by Ms. M in favor of Appellants and the concomitant revocation of Ms. M's durable power of attorney executed in 1988. Appellants, third cousins of Ms. M, appeal the trial court's order finding that Ms. M lacked capacity to execute the documents. We affirm, finding that on March 12, 1999, Ms. M was suffering from chronic and severe dementia caused by the advanced state of Alzheimer's disease. We, however, vacate the trial court's *sua sponte* finding that Ms. M lacked testamentary capacity on March 12, 1999.

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "[A]n action to set aside a power of attorney and an instrument revoking a power of attorney on the ground of a lack of mental capacity sounds in equity." In re Thames, 344 S.C. 564, 571, 544 S.E.2d 854, 857 (Ct. App. 2001). We thus utilize an equity standard of review. As such, this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." Id. Additionally, Appellants carry the burden of proving that the trial court made erroneous findings. Id., 344 S.C. at 387, 544 S.E.2d at 623-24.

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[1] We recognize that Ms. M's true identity may be discovered through public records and otherwise. We merely desire to preserve some vestige of respect and decency for this elderly woman as she faces the end of her life's journey in the grip of debilitating dementia caused by Alzheimer's disease.

FACTS

Ms. M was born in 1918 and grew up in Fairfield County. She moved to Greenville, where she majored in sociology at Furman University and later worked for the South Carolina Department of Social Services. After retiring, Ms. M returned to Fairfield where she lived on her family farm with her brother, a dentist, until his death in the early 1980s. Ms. M never married.

Dr. Gaddy was Ms. M's physician and a close family friend.[2] Ms. M and Dr. Gaddy's family lived on nearby farms and visited each other frequently throughout the 1980s and 1990s. For many years Ms. M spent holidays and birthdays with the Gaddy family rather than her own family. She also attended the Gaddy family reunions and visited Dr. Gaddy's family in Aiken. Eventually, Ms. M grew to refer to Dr. Gaddy as her "son" and his children as her "grandchildren."

Conversely, Ms. M had little contact with many of her relatives, including Appellants.

In 1988, Ms. M asked Dr. Gaddy to accompany her to a meeting with Albert C. Todd, III, her estate-planning attorney.[3] After Ms. M met privately with Todd, Dr. Gaddy was called into Todd's office, at which point Todd informed Dr. Gaddy that Ms. M desired for Dr. Gaddy to handle her affairs. Dr. Gaddy consented. Ms. M then executed a durable general power of attorney (1988 durable power of attorney) designating Dr. Gaddy as her attorney-in-fact. She also executed a will (1988 Will) leaving Dr. Gaddy her personal property and farm, and appointing him as trustee of a revocable trust

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[2] Dr. Gaddy has continuously practiced medicine in Fairfield County since 1981, during which time he served as chief of staff at a local hospital and president of the South Carolina Medical Association.

[3] At one time, Ms. M's assets included a 200-acre farm in Fairfeld County, on which her home was situated, securities, and a checking account containing approximately $339,000 in cash.

she created to provide scholarships to the Medical University of South Carolina.

Dr. Gaddy did not immediately record the 1988 durable power of attorney, and Ms. M continued to manage her affairs. However, by 1994, Ms. M began showing signs of dementia. For example, she became forgetful, locked herself out of her home, and neglected her personal hygiene. She eventually stopped cooking and cleaning for herself. Concerns about Ms. M's progressively worsening mental condition prompted Dr. Gaddy to file the 1988 durable power of attorney in November 1995. Pursuant to the 1988 durable power of attorney, Dr. Gaddy began to act as Ms. M's attorney-in-fact and assumed control of her finances, farm, and health care. His responsibilities included paying her bills, tilling her garden, repairing fences, and hiring caregivers.

In March 1996, Dr. Gaddy discovered Ms. M had fallen in her home and fractured a vertebra. Ms. M was hospitalized for six weeks. During the hospitalization, Dr. Gaddy fumigated and cleaned her home, which had become flea-infested and unclean to the point where rat droppings were found in the house. Finding that Ms. M was not mentally competent to care for herself, he arranged for full-time caretakers to attend to her after she recovered from the injuries she sustained in her fall. He made improvements in her home, including replacing moth-eaten area rugs with new rugs and upgraded her kitchen to enable caretakers to prepare her meals. Dr. Gaddy also made plumbing repairs to the house, and took steps to adapt a bathroom to make it safer for caretakers to bathe Ms. M, who was incapable of doing so unassisted. During Ms. M's hospitalization, neither of the Appellants visited her in the hospital or sought to assist her in any manner.

Dr. Gaddy had Ms. M examined and evaluated by Dr. James E. Carnes, a neurologist, in December 1996. After examining Ms. M, Dr. Carnes found that she suffered from dementia and confirmed she was unable to handle her affairs.

As Ms. M's Alzheimer's disease progressed and her faculties deteriorated, Dr. Gaddy managed her financial affairs, oversaw maintenance

of her properties, and ensured that she received constant care including food, clothing, bathing, and housekeeping. He also constructed a metal barn for multiple purposes, including the storing of Ms. M's personal property and farm equipment used to maintain the 200-acre farm. The barn also included small living accommodations that Dr. Gaddy planned to use to house a caretaker or someone to maintain the farm.

Ms. M's long-standing distant relationship with some members of her family, including Appellants, changed in March of 1999.

On March 12, 1999, Appellants visited Ms. M, and with the help of disgruntled caretaker Lil Heller, took her to an appointment with Columbia attorney Douglas N. Trulsow to "get rid of Dr. Gaddy."[4] On the drive to Truslow's office, Heller had to remind Ms. M several times of their destination and purpose. At Truslow's office, Ms. M signed a document revoking the 1988 Will and the 1988 durable power of attorney. She also signed a new durable power of attorney (1999 durable power of attorney) naming Appellants as her attorneys-in-fact. Appellants failed to disclose Ms. M's dementia to Truslow.[5] David Byrd, a witness to the execution of the March 12 documents, was likewise not informed of Ms. M's dementia.

Armed with the revocation of the 1988 power of attorney and recently executed power of attorney in their favor, Appellants prohibited Dr. Gaddy

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[4] The trial court found that Heller "had at least some bias in favor of" Appellants because Dr. Gaddy had declined her repeated requests to be switched from her weekend shift to a weekday shift. Once Appellants assumed control of Ms. M's affairs in March 1999, they rewarded Heller with the shift she wanted and several pay raises.

[5] Ms. M did not schedule the appointment with Truslow. It is not our intent to assign nefarious motives to Truslow, for he was simply a pawn in Appellants' scheme to gain control over Ms. M's assets. Indeed, Truslow admitted that he "might have done things differently" had he known the truth about Ms. M's condition. When asked if "there's some things that you now know that you did not know when you [sic] executed the revocations" Truslow responded, "That's an understatement."

from contacting Ms. M. Dr. Gaddy was even threatened with arrest if he tried to visit Ms. M.

On March 15, 1999, three days after Ms. M purportedly revoked the 1988 documents and executed the 1999 durable power of attorney, Dr. Gaddy initiated the present action as her attorney-in-fact pursuant to the 1988 durable power of attorney. He alleged, among other things, that the purported revocation of the 1988 durable power of attorney and the execution of the 1999 durable power of attorney were invalid because "on March 12, 1999, the date on which Ms. M purportedly signed the 1999 power of attorney and the revocation, she was not mentally competent" due to "senile dementia of the Alzheimer's type." The action sought declaratory judgment to render the 1999 durable power of attorney invalid and declare the 1988 durable power of attorney valid.

The case proceeded to trial on February 19, 2001. By order of the Chief Justice of the South Carolina Supreme Court, and with the consent of the parties, Judge Thomas L. Hughston, Jr. was appointed to preside over the case.[6] Judge Hughston conducted a four-day bench trial. During the trial, substantial medical and lay evidence was presented regarding Ms. M's progressively degenerative mental state.

Medical testimony was presented from five physicians who had examined Ms. M. One was Dr. Carnes, who examined Ms. M on three occasions from December 1996 through September 2000. Dr. Carnes, a neurologist and expert in the field of dementia, had treated "thousands" of Alzheimer's disease patients over a fifteen-year period.

Dr. Carnes first conducted a neurological exam of Ms. M in December 1996, when she was accompanied by one of her long-time caretakers, Rosemary Wade. During the examination, Ms. M could not answer simple questions such as naming the President of the United States or recalling the year or month. Dr. Carnes said he administered a typical memory test in

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[6] The resident judges of the sixth judicial circuit, where Fairfield County is located, were disqualified due to conflicts.

which he showed her three objects and named the objects, and then a very short time later asked her to name the objects. Ms. M was unable to name the objects. Ms. M also had difficulty with tests designed to assess memory, language function, and "intellectual performance." Based on this first examination, Dr. Carnes determined Ms. M had moderate "senile dementia of the Alzheimer's type" and was "not capable of handling financial affairs." [7] He concluded that she was not able to make rational decisions or exercise proper judgment.

Dr. Carnes' second examination of Ms. M occurred on March 19, 1999, seven days after Ms. M executed documents revoking her 1988 Will and 1988 durable power of attorney, and executed the 1999 durable power of attorney. She was accompanied by Wade and her minister. Dr. Carnes found Ms. M "pleasant" but "disoriented." When asked to identify the month and year, she would not answer. Dr. Carnes asked Ms. M to "just name any President," and she was unable to do so. She was also unable to recall three simple objects shown to her by Dr. Carnes, and was not able to reproduce simple line drawings. The balance of the examination produced similarly revealing results, leading Dr. Carnes to conclude that Ms. M's level of dementia was "moderate to severe" or in the "later stages of moderate." Dr. Carnes further opined that Ms. M would not have been able to understand the nature and effects of her acts, make rational decisions, or exercise proper judgment. He added that she would not have been able to know the extent of her estate, exercise proper judgment regarding the distribution of her estate, or have been able to understand the execution and meaning of legal documents.

Dr. Carnes examined Ms. M a third time in September 2000. She was accompanied by Lil Heller, the caretaker who accompanied Ms. M to attorney Truslow's office, and Lynn Douglass, a third cousin of Ms. M's. During this examination, Ms. M did not know the month or year. According to Dr. Carnes, she was unable to determine whether the time of day was

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[7] Dr. Carnes found nothing to suggest Ms. M suffered from brain tumors or stroke. He further determined that her medications or outside stress did not affect his diagnosis.

morning, afternoon, or evening. Ms. M told him that she was taking no medications, although she was taking a variety of prescription medicine on a daily basis. She also told Dr. Carnes that she lived alone, cared for herself, and cooked for herself. However, she had received full-time care for several years.

Based on Dr. Carnes's third examination of Ms. M, he concluded that she was severely demented although physically normal for a person her age. Dr. Carnes noted that Ms. M had "senile dementia of the Alzheimer's type … that had progressed beyond the point when [he] saw her previously and that she had … clearly shown progression of this disease …." Dr. Carnes added that she was "unable to handle her financial affairs" and "would need help managing her daily activities …."

When asked whether Ms. M may have had a "lucid moment" in her stage of dementia, Dr. Carnes responded, "No … [a] lucid moment is … a term that doesn't fit well with … Alzheimer's Disease." He then distinguished a psychiatric disease from Alzheimer's disease, noting the former involves treatable chemical defects while the latter involves the "progressive death of brain cells." Dr. Carnes further observed that dementia results in a "faulty rational process" or an "intellectual process that is impaired." He stated that dementia sufferers do not "fully understand the nature of what they [are] doing and they [do] not fully understand the ramifications of what [is] there."

A second neurologist, Dr. Robert R. Taylor, Jr., also examined Ms. M on March 19, 1999, the same day that Dr. Carnes examined her for the second time. Dr. Taylor practiced neurology from 1967 until his retirement in 2000, during which time he treated "thousands" of Alzheimer's patients. He described Alzheimer's disease as a cerebral degenerative disease that is organic, rather than chemical, in nature. He added that the Alzheimer's is a "primary" disease, resulting in the destruction of brain cells. As the brain disease progresses, according to Dr. Taylor, patients have increased memory problems until they are "unable to perform the daily activities of living adequately and have to have caregivers."

Dr. Taylor tested six components of Ms. M's mental faculties, including intellect, attention span, affect, and memory, "especially recent memory." He noted that her memory and intellect were "markedly impaired" and that her "judgment did not appear adequate …." For example, she "didn't recall what she had for breakfast or supper," nor did she know the month, year, or day of the week.

Dr. Taylor concluded that Ms. M was "very demented" and that her level of dementia from Alzheimer's disease was "severe" and in "advanced stages." In Dr. Taylor's judgment, Ms. M "was mentally incompetent to manage any of her business affairs or manage her daily activities of living" such as "dressing appropriately" and "prepar[ing] food adequately." In such a condition, Dr. Taylor opined that Ms. M was susceptible to influence of others and unable to "make rational decisions or exercise reasonable judgment about legal matters or any kind of business matter." He additionally noted that Ms. M would be unable "to understand the execution and meaning of legal documents, such as [a] power of attorney and wills or revocations of those." Dr. Taylor found that Ms. M had been in such a condition "certainly for several years" before his March 1999 meeting with her. Dr. Taylor finally determined, consistent with the view expressed by Dr. Carnes, that Ms. M would not "ever have moments of lucidity" to "understand legal documents …."

Additional expert testimony was provided by a third neurologist, Dr. Charles B. McClure, who was selected by the parties to conduct an independent medical evaluation of Ms. M. Board certified in neurology and psychiatry, Dr. McClure estimated he had examined "around a thousand" Alzheimer's patients during the preceding twenty years in his practice.

Prior to examining Ms. M, Dr. McClure thoroughly reviewed her medical records, including notes from Drs. Carnes and Taylor. He performed a neurological evaluation on September 26, 2000. During his examination, he performed a "mental status exam" that indicated Ms. M was "perfectly awake and alert." Ms. M, however, did not know the President's name or the year, and that she "could not repeat three objects immediately after [Dr. McClure] gave her the objects." Based on this information and other aspects

of the examination, Dr. McClure assessed that Ms. M "had a substantial dementia" and that "her dementia dated back to at least 1996." When asked if he would classify her impairment as "moderate," Dr. McClure responded, "No, I think she had significant cortical impairment." Dr. McClure explained that Ms. M doesn't "think well" and that her "memory is poor and she's just not able to cognate well."

Dr. McClure added that Alzheimer's disease, which he described as a degenerative illness in which brain cells die and never regenerate, caused Ms. M's dementia. He confirmed that the disease causes a decrease in higher cortical functioning, which leads to a loss of reasoning and impaired judgment. Dr. McClure concluded that on March 12, 1999, Ms. M lacked "sufficient mental capacity to understand legal documents such as a revocation or creation of a power of attorney."

Dr. Linda June Campbell, who saw Ms. M for a physical examination on March 12, 1999, testified for Appellants.[8] As an internist, Dr. Campbell acknowledged that a neurologist "would definitely have more expertise than an internist" for evaluating a patient's mental status.

Ms. M was by accompanied to Dr. Campbell's office by Lynn Douglass and caretaker Lil Heller. Lynn Douglass had called Dr. Campbell and scheduled the appointment. Dr. Campbell testified that while Ms. M was in her office, one of her nurses attempted a "mini mental status exam" of Ms. M, but Ms. M's lack of cooperation prevented the nurse from finishing. She testified that Ms. M "definitely had Alzheimer's" disease and "had some mild dementia, for sure." Nevertheless, Dr. Campbell testified that on March 12, 1999, Ms. M understood "the objects of her affection and extent of properties," and "the nature and the effect of her actions, particularly with regards to legal documents[.]" The trial court found, as do we, Dr. Campbell's testimony unpersuasive. When asked if she claimed "to have any

[8] Dr. Campbell testified that she had examined Ms. M approximately eight times since March 1999, but limited her testimony to the findings from her examinations in that month.

expertise in the area of Alzheimer's disease or dementia," she replied, "I don't."

Of similar import was the testimony of Appellants' second medical expert, Dr. Edward Zamrini. Dr. Zamrini, a "behavioral neurologist," determined that Ms. M suffered from "mild to moderate" dementia. He opined, however, that Ms. M had the ability on March 12, 1999, to make "a rational decision about what she wanted to do with her property[.]" Significantly, Dr. Zamrini never reviewed the records of the other neurologists, although he requested such records from Appellants. At trial, Dr. Zamrini acknowledged that he "definitely" would have preferred to have been provided with Ms. M's medical records. [9]

A review of the lay testimony supports the findings of the trial court. Frank Eppes, a former circuit court judge and long-time friend of Ms. M and her late brother, testified that he had been a frequent overnight guest in their home when he held court in Fairfield County. Judge Eppes visited Ms. M an estimated ten times a year for thirty years preceding 1998. He noted that Ms. M displayed photographs of Dr. Gaddy and his family in her home, that she considered Dr. Gaddy her son and his children her grandchildren, and that Ms. M enjoyed spending her holidays with the Gaddy's.

Judge Eppes observed that Ms. M's home had become flea-infested and full of junk. Judge Eppes was well aware of Ms. M's mental decline, even to the point that he discontinued his overnight stays due to concerns that in her confusion she might shoot him by accident. His visits with Ms. M came to an end in October 1998 because her confusion was so great that she no longer

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[9] In fairness to Dr. Zamrini, he was misled by Appellants, similar to their deceit of attorney Truslow. Dr. Zamrini's report reveals Appellants' efforts to recast the medical history of Ms. M. For example, Appellants desired that Dr. Zamrini believe that Ms. M's dementia was first noticed in 1996 with an "abrupt onset." A review of the medical records establishes the progressive nature of Ms. M's dementia. When confronted on cross-examination with the fact that short-term memory loss was documented in 1993, Dr. Zamrini could only respond, "I was not aware of that."

recognized him. It was Judge Eppes' firm conviction that Ms. M was permanently and mentally incapacitated, and unable to understand legal documents. Judge Eppes finally observed that it was Dr. Gaddy, not Ms. M's family, who had a positive presence in her life.

Earl Wilkes, a former neighbor of Ms. M's, began noticing a decline in Ms. M's health in 1996. He recounted incidents where Ms. M lost her car, locked herself out of her house, and seemed confused. He said she often appeared dirty and failed to take care of her personal hygiene.

Rosemary Wade, one of Ms. M's caretakers from the fall of 1997 until March 1999, testified that Ms. M did not understand what she watched on television, could not remember trips or locations from which she had just returned, and could not even order meals from a restaurant menu. Wade witnessed Ms. M suffer from nighttime agitation and wander from the house at night. She added that Ms. M required assistance to handle basic activities of daily living, such as dressing herself, preparing meals, or bathing.

David Byrd, a private investigator and process server to whom Appellants had paid approximately $1,500 for investigative work, witnessed Ms. M's execution of the 1999 durable power of attorney and revocation. Byrd first met Ms. M at attorney Truslow's office on March 12, 1999. Byrd admitted that at the time he had no knowledge of her Alzheimer's disease, dementia, or that Ms. M required constant care because of her dementia. Nevertheless, Byrd was willing to opine that Ms. M "understood the nature and effect of the action[s] she was taking" in signing the documents at Truslow's office.[10]

Ms. M's January 2002 deposition was also admitted. Ms. M claimed to pay her own bills and clean her own house, although she had done neither since at least 1996. She mistakenly claimed to drive her own car, as well as her tractor. Ms. M testified that she had no caretakers or aids, and that she

[10] The trial court assigned little weight to Byrd's testimony, primarily as a result of his financial ties to Appellants. Our assessment of Byrd's testimony is the same.

was capable of taking care of herself, although she had continuous caretakers since 1996. She claimed she had no attorney, although Cameron B. Littlejohn, Jr., her attorney of record, was seated with her at the deposition. She could not name the President of the United States, Vice President of the United States, or the Governor of South Carolina. Ms. M failed several simple memory tests, including identifying three objects shown to her minutes before. She could not recall where she ate lunch that day. When asked if she may have revoked the 1988 power of attorney, Ms. M replied, "Good Lord, what do you expect me to remember something [sic] twelve years ago? I don't remember what happened yesterday."

The trial court issued its final order in May 2001. Having determined that Dr. Gaddy's witnesses were "particularly credible," he found, as do we, that "the medical testimony clearly indicates … that [Ms. M] lacked mental capacity to understand or to execute any kind of legal documents in March 1999." He based his conclusion on evidence that she suffered from severe dementia caused by Alzheimer's disease, which he found progressively destroys brain cells, resulting in the progressive loss of cognitive functioning.

The trial court concluded that Ms. M lacked contractual and testamentary capacity "from March 12, 1999 and continuously thereafter." As a result, he invalidated the 1999 revocation of the 1988 durable power of attorney and the 1988 Will. He also invalidated the 1999 durable power of attorney, and declared valid the 1988 durable power of attorney. Finally, he awarded Dr. Gaddy litigation expenses to be paid from Ms. M's assets.

DISCUSSION

Since 1986, the South Carolina Legislature has expressly authorized and sanctioned the use and efficacy of *durable* powers of attorneys.[11] S.C. General Assembly Act No. 539, § 1. Section 62-5-501 of the Code of Laws of South Carolina (Supp. 2003) provides in part:

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[11] "Durable" is a term of art signifying that a power of attorney survives the principal's disability. See 3 Am.Jur.2d Agency § 28 (1986).

> (A) Whenever a principal designates another his attorney in fact by a power of attorney in writing and the writing contains (1) the words "This power of attorney is not affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing his own estate",… or (3) similar words showing the intent of the principal that the authority conferred is exercisable notwithstanding his physical disability or mental incompetence or either physical disability or mental incompetence, the authority of the attorney in fact is exercisable by him as provided in the power on behalf of the principal notwithstanding later physical disability or mental incompetence of the principal …

Upon the execution of a durable power of attorney, the attorney-in-fact retains authority to act on the principal's behalf notwithstanding the subsequent physical disability or mental incompetence of the principal. To honor this unmistakable legislative intent, it is incumbent on courts to uphold a durable power of attorney unless the principal retains contractual capacity to revoke the then existing durable power of attorney or to execute a new power of attorney. Otherwise, the very purpose of section 62-5-501 would be undermined.

Contractual Capacity

Appellants contend the trial court erred in finding Ms. M was incompetent to execute the 1999 durable power of attorney and revocation. We disagree, and find the evidence compellingly supports the findings of the trial court.

"[I]n order to execute or revoke a valid power of attorney, the principal must possess contractual capacity." Thames, 344 S.C. at 570, 544 S.E.2d at 857. Contractual capacity is generally defined as a person's ability to understand in a meaningful way, at the time the contract is executed, the nature, scope and effect of the contract. In re Nightingale's Estate, 182 S.C.

527, 541, 189 S.E.2d 890, 896 (1937). Where, as here, the mental condition of the principal is of a chronic nature, evidence of the principal's prior or subsequent condition is admissible as bearing upon his or her condition at the time the contract is executed. 53 Am. Jur. 2d Mentally Impaired Persons § 157 (1996). In McCollum v. Banks, 213 S.C. 476, 483, 50 S.E.2d 199, 202 (1948), our supreme court held a testator's insanity, in order to invalidate a will, should be established at the time of execution, unless the insanity is "of a permanent or chronic nature." See also In re Brazman's Will, 172 S.C. 188, 194, 173 S.E. 623, 625 (1934) (stating if the evidence shows the insanity is chronic, it is presumed to continue).

Here, the credible medical and lay testimony presented compellingly indicates that Ms. M suffered from at least moderate to severe dementia caused by Alzheimer's Disease, a chronic and permanent organic disease, on March 12, 1999. We are firmly persuaded that Ms. M's dementia, chronic and progressive in nature, clearly rendered her incapable of possessing contractual capacity to revoke the 1988 durable power of attorney or execute the 1999 power of attorney. We find this conclusion inescapable based on the record before us.

Specifically, the evidence supplied by Doctors Carnes, Taylor and McClure established Ms. M's history of debilitating dementia dating back to 1996, as well as the progressive, chronic, organic, and irreversible nature of the disease. Although a patient suffering from such severe dementia may at times appear normal, they opined such a patient could not make rational decisions, understand the nature of his or her actions, or handle their business or legal affairs. The credible lay testimony of Judge Eppes, Earl Wilkes, and Rosemary Wade provides forceful evidence corroborating the testimony of these three neurologists.

In contrast, the only expert medical testimony supporting Appellants' position that Ms. M possessed sufficient capacity to execute or revoke a power of attorney came from their two medical experts, Drs. Campbell and Zamrini. As noted, Dr. Campbell, an internist, when asked if she claimed "to have any expertise in the area of Alzheimer's disease or dementia," replied,

"I don't." Dr. Zamrini's testimony is similarly lacking, primarily as a result of the false medical history provided to him by Appellants.

Based on our view of the evidence, we conclude that by at least March 12, 1999, and at all times thereafter, Ms. M lacked contractual capacity because she suffered from severe dementia caused by Alzheimer's disease, a chronic illness involving the irreversible degeneration of brain cells.[12]

Testamentary Capacity

Appellants assert the trial court erred in addressing Ms. M's testamentary capacity on March 12, 1999. We reluctantly agree, and vacate that portion of the trial court's order finding Ms. M lacked testamentary capacity on March 12, 1999.

Dr. Gaddy did not plead the issue of Ms. M's testamentary capacity. In his complaint, he sought relief from the attempted revocation of the 1988 power of attorney, not revocation of the 1988 Will. The trial court addressed the issue of testamentary capacity on its own volition because the revocations were contained in the same document, and because it believed the best use of judicial resources favored disposing of all issues in one action. We concur with the trial court's sentiment to achieve finality regarding testamentary capacity and to avoid further siphoning by Appellants of Ms. M's assets. Having failed, however, to plead the matter of testamentary capacity in the context of the purported revocation of the 1988 Will, we find it was error for the trial court to address and decide the issue, especially in light of Appellants' objection at the commencement of the trial to the trial court's

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[12] We in no way suggest that all people suffering some degree of dementia, from Alzheimer's disease or otherwise, invariably lack contractual capacity**.** We hold that the subject of contractual capacity of one suffering dementia should be decided in a fact-driven, individualized manner. There may well be situations where an individual at the onset of Alzheimer's disease, or in the early stages of dementia, may retain sufficient capacity to contract. This, however, is not such a case, for Ms. M's capacity to contract had long since passed when her previously absent family members entered her life and attempted to gain control of her assets.

consideration of the matter. We, therefore, vacate that portion of the circuit court judgment concerning the issue of testamentary capacity.[13]

Necessary Party

Appellants argue the trial court's decision must be vacated due to the absence of a necessary party, Ms. M. We disagree.

We find Ms. M was adequately represented in this action because Dr. Gaddy brought this action as Ms. M's attorney-in-fact, and therefore, the action was brought on her behalf. "Whenever a[n]…incompetent person has a representative, such as a general guardian, committee, conservator or other like fiduciary, the representative may sue or defend on behalf of the ... incompetent person ...." Rule 17(c), SCRCP. Ms. M was incompetent prior to and at the time Dr. Gaddy brought this action. Therefore, under Rule 17(c), Ms. M was not required to be individually named as a party in this action.[14]

We further note Appellants never raised this issue in the trial court.[15] Appellants, in an attempt to circumvent issue preservation rules, seek to recast the argument as one of subject matter jurisdiction by claiming that Ms. M is an indispensable party under Rule 19, SCRCP. Ms. M's incompetence involves her "capacity to sue or be sued" as the real party in interest which invokes Rule 17. "Rule 17… clearly indicates the question of real party in

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[13] Having disposed of this issue on the ground of failure to plead, we do not address the jurisdictional question whether one's testamentary capacity may be determined prior to death.

[14] From a legal and practical standpoint, it is beyond challenge (even from Appellants' view of the evidence) that Ms. M was incompetent when the case was tried. That undeniable fact essentially renders this issue moot, for Ms. M was either represented by Dr. Gaddy pursuant to the 1988 power of attorney or by Appellants pursuant to the 1999 power of attorney.

[15] At trial, Appellants only objected to the inclusion of the word "purported" in the caption when listing their names as Ms. M's attorneys-in-fact.

interest does not involve subject matter jurisdiction." Bardoon Properties, NV v. Eidolon Corp., 326 S.C. 166, 170, 485 S.E.2d 371, 373 (1997).[16] We conclude the issue is not preserved for our review. See Toal, Vafai, and Muckenfuss, Appellate Practice in South Carolina at 63 (2d Ed. 2002) (citing Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997) for the proposition that issue preservation requires "that the objection in the trial court must have been made by the party who raises the issue in the appellate court.").

Litigation Expenses

Appellants claim the trial court erred in authorizing Dr. Gaddy to reimburse his litigation expenses from Ms. M's assets. We affirm in result.

The 1988 power of attorney specifically authorizes Dr. Gaddy to "institute, prosecute … or otherwise engage in litigation involving me, my property or any interests of mine; … to employ … attorneys-at-law … for the proper administration of my property … to pay and adjust debts incurred by me or by my attorney-in-fact in connection with any power authorized hereunder." Because we find Dr. Gaddy was acting on behalf of Ms. M as her attorney-in-fact when he instituted this action, the language of the 1988 power of attorney, which provides for payment of such litigation expenses, controls. Therefore, we affirm the trial court's award of litigation expenses to Dr. Gaddy based on the language in the 1988 power of attorney. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 417, 526 S.E.2d 716, 722 (2000) (stating that the appellate court may affirm for any reason appearing in the record). We reiterate that Dr. Gaddy was acting appropriately and within his fiduciary capacity in bringing this action.[17]

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[16] For a more thorough discussion on the *lack* of a relationship between a party's status as a real party in interest and subject matter jurisdiction, see Bardoon Properties, NV v. Eidolon Corp., supra.

[17] We find it extremely troubling that by May 2001, Appellants had paid from Ms. M's funds approximately $160,000 for attorney fees and costs they incurred. Appellants did so without court authorization, as they apparently believed they could do so unilaterally under the language of the 1999 power

Propriety of Judge Hughston Serving as Trial Judge

Appellants argue that Judge Hughston lacked jurisdiction and impartiality. These contentions, asserted for the first time on appeal, are utterly specious. In light of the serious nature of these allegations, we elect to review the procedural history.

Judge Hughston was assigned by South Carolina's Chief Justice, through the Office of Court Administration, to a common pleas nonjury term in the sixth judicial circuit in October 1999. During that term of court, pending motions in this case came before Judge Hughston, one of which was a motion to designate the case as complex. Judge Hughston recognized that designation of a case as complex is generally a function of the chief administrative judge for the circuit. It was observed, however, that the resident circuit judges of the sixth circuit, including the then current administrative judge, were disqualified due to conflicts. Consequently, at the request of the parties, Judge Hughston agreed to resolve the motions, handle pretrial matters and preside over the trial.

The trial commenced on February 19, 2001. Judge Hughston was assigned by the Chief Justice to preside over the February 19 term of court. Following four days of testimony, Judge Hughston took the matter under advisement and issued his final order on May 2, 2001.

From Judge Hughston's initial involvement in this case in October of 1999 through the issuance of the final order, the record contains not the slightest hint of a challenge to Judge Hughston's authority or impartiality. Moreover, Appellants filed a motion to alter the judgment on May 18, 2001, containing forty-six grounds of error, none of which is directed against Judge Hughston's authority or impartiality. In sum, at the trial level, Appellants

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of attorney. Incredibly, Appellants criticize Dr. Gaddy for incurring approximately $90,000 in legal fees, while they make no mention of their unapologetic invasion into Ms. M's funds to pay their legal fees.

never took exception to either Judge Hughston's involvement in or handling of this case.

On appeal, we hear for the first time that Judge Hughston was an "advocate in these proceedings," and that his involvement "affected his ability to impartially try the case." The simple response is that this court will not address matters not raised and ruled upon in the trial court. Wilder Corp. v. Wilkie, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). In an effort to circumvent the issue preservation rule, a fundamental principle of appellate procedure with which Appellants are familiar, we are once again confronted with a subject matter jurisdiction claim. We reject this desperate, eleventh-hour attack on Judge Hughston and the assertion that he lacked jurisdiction to preside over this case. His authority to render judgment is beyond question, and if Appellants desired his recusal, they should have done so in a proper and timely manner. See Parker v. Shecut, 340 S.C. 460, 496-97, 531 S.E.2d 546, 566 (Ct. App. 2000) (holding the issue of recusal of the trial judge, to be preserved for appellate review, must be raised in the trial court).

Lifting of the Automatic Stay

On October 10, 2001, a panel of this court enforced an automatic stay of the trial court's order, and "revived" the March 12, 1999 revocation of the 1998 durable power of attorney, as well as the 1999 power of attorney naming Appellants as Ms. M's attorneys-in-fact. With our decision today, we immediately lift the automatic stay as provided in the October 10, 2001 order and Rule 225, SCACR. Dr. Gaddy shall immediately resume his responsibilities as the legal, duly authorized attorney-in-fact for Ms. M. Appellants George G. Douglass, III, and William P. Sherrod are hereby enjoined from conducting any business on behalf of Ms. M. Additionally, Appellants George G. Douglass, III, and William P. Sherrod shall within five days of receipt hereof deliver to Dr. Gaddy, through counsel, all documents pertaining to Ms. M, including all financial records, and as provided in the decree of the trial court's final order of May 2, 2001.

CONCLUSION

The very idea of a durable power of attorney is to protect the principal should he or she become incapacitated. This case is precisely the type of situation for which the durable power of attorney is intended. On March 12, 1999, Ms. M, due to her chronic and severe dementia, lacked capacity to revoke the 1988 durable power of attorney and execute the 1999 power of attorney, and the evidence in this regard is overwhelming. In so holding, we return to Dr. Gaddy his fiduciary obligations to Ms. M, which he faithfully discharged prior to Appellants' regrettable involvement. The decision of the trial court is

AFFIRMED IN PART AND VACATED IN PART.

HEARN, C.J., and HOWARD, J., concur.