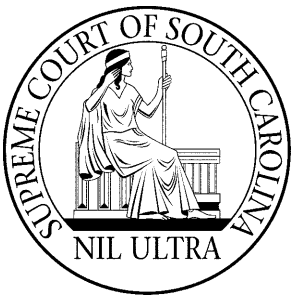

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
August 2, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mary Robyn Priester, Individually and as Natural Mother/Next of Kin, and Personal Representative of the Estate of James Lloyd Priester, Appellant,

v.

Preston Williams Cromer, Stage Light Management, d/b/a Showgirls(z); and Lloyd Brown, individually and doing business as Showgirls(z), and Nikki D's Inc., and Ford Motor Co., Defendants,

Of whom Ford Motor Co. is, Respondent.

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

Opinion No. 26846
Heard March 16, 2010 – Filed August 2, 2010

AFFIRMED

Darrell T. Johnson, Jr., of Hardeeville, and James B. Richardson, Jr, of Columbia, for Appellant

Curtis L. Ott and Carmelo B. Sammataro, both of Turner, Padget, Graham & Laney, of Columbia, and Robert W. Powell, of Dickinson Wright, of Detroit, Michigan for Respondent.

William C. Wood, Jr, of Nelson, Mullins, Riley & Scarborough, of Columbia, for Amicus Curiae Product Liability Advisory Council.

JUSTICE KITTREDGE: This case concerns whether Federal Motor Vehicle Safety Standard 205 (49 C.F.R. § 571.205 (1971)) preempts a state law products liability claim premised solely on a manufacturer's choice of tempered glass for a vehicle's side windows. Federal Motor Vehicle Safety Standard 205 (Regulation 205) mandates that "[g]lazing materials[1] for use in motor vehicles … shall conform" to the American National Standard Institute "safety code for safety glazing materials." Courts across the country faced with this issue have struggled with the preemptive effect, if any, of Regulation 205 and have reached opposite conclusions. Pending resolution from the United States Supreme Court, we join those jurisdictions finding the federal regulation preempts state law, and therefore, we affirm the trial court's grant of summary judgment in favor of Ford Motor Company.

I.

In the early morning hours of August 17, 2002, Preston Cromer was driving a 1997 Ford F-150 pickup truck at excessive speed near St. George, South Carolina, when he drove off the road and rolled the truck several times.

[1] The term "glazing materials" here refers to the glass used in a motor vehicle.

Appellant's son, James Lloyd Priester, who was in the rear seat of the truck and not wearing his seatbelt, was ejected and died at the scene. Cromer and Priester, both of whom were under twenty-one years old, were apparently intoxicated after they had allegedly been served alcohol at Showgirls(z), a strip club located in Santee, South Carolina.

Appellant filed a products liability claim against Ford.[2] Specifically, Appellant alleged Ford "breached said warranty by using inappropriate glazing materials which would retain occupants inside the vehicle, and which would not shatter on impact." Ford moved for summary judgment, arguing Regulation 205 preempted the claim. Ford asserted Regulation 205 provided car manufacturers with options of types of glass they were permitted to use, and since Ford used one of the glass options, the state law products liability suit was preempted by the regulation. Although the court recognized the Fifth Circuit Court of Appeals issued an opinion holding Regulation 205 did not preempt state law, the trial court agreed with Ford's position and granted its motion for summary judgment.

II.

The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Two "cornerstones" of United States Supreme Court preemption jurisprudence provide: 1) the purpose of Congress is the ultimate touchstone in every preemption case; and 2) courts should begin with a presumption against preemption. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1195 (2009).

A federal law may either expressly preempt a state law through specific language clearly stating its intent or it may impliedly preempt a state law through field preemption or conflict preemption. *Hillsborough County, Fla.*

[2] Additionally, Appellant filed a negligence suit against Cromer and a dram shop liability suit against Showgirls(z) and Nikki D's alleging the sale of alcohol to minors.

v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985). Field preemption occurs when the scheme of federal regulation is so pervasive that it is reasonable to infer that Congress left no room for the states to regulate. *Id.* On the other hand, conflict preemption occurs where compliance with both federal and state regulations is physically impossible or where the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This case implicates conflict preemption.

a. Regulation 205

Under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, the National Highway Traffic Safety Administration (NHTSA) promulgated Regulation 205. This regulation provides:

> S1. Scope. This standard specifies requirements for glazing materials for use in motor vehicles and motor vehicle equipment.
>
> S2. Purpose. The purpose of this standard is to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions….

Regulation 205 does not itself specify which types of glazing materials may be used in motor vehicles. Rather, it requires adherence to the following safety code developed by the American National Standards Institute:

> S5.1.1.6
> Multipurpose passenger vehicles. Except as otherwise specifically provided by this standard, glazing for use in multipurpose passenger vehicles shall conform to the requirements for glazing for use in trucks as specified in ANS Z26.

ANS Z26 provides that laminated glass or tempered glass may be used on the side windows of motor vehicles, so long as the glass meets certain testing requirements.[3] Laminated glass differs from tempered glass in that laminated glass consists of two or more sheets of glass held together by an intervening layer or layers of plastic material. Laminated glass will crack and break under sufficient impact, but the pieces of glass tend to adhere to the plastic. Conversely, tempered glass consists of a single sheet of specially treated glass, and when broken, the entire piece immediately shatters into innumerable small, granular pieces. Thus, it can be stated generally that tempered glass is safer for vehicle occupants wearing seatbelts, where the risk of ejection is reduced, because it provides less risk of additional injuries. Laminated glass is safer for unbelted passengers, where the risk of ejection is increased, because it is likely to keep a passenger inside the vehicle due to the "adhering" quality of the glass.

b. NHTSA Study

During the 1990s, NHTSA began a research program to study rollover accidents in an effort to maximize the protection of occupants. NHTSA focused on Regulation 205 and considered whether to modify the regulation to mandate manufacturers to use advanced glazing[4] on side windows in order to reduce the likelihood of ejections. *See* NHTSA, Rollover Prevention, Advance Notice of Proposed Rulemaking, 57 Fed. Reg. 242 (Jan. 3, 1992). After studying the costs and benefits associated with the use of advanced glazing in side windows, NHTSA issued a notice of withdrawal, indicating Regulation 205 would not be modified. *See* Notice of Withdrawal, 67 Fed. Reg. 41, 365 (June 18, 2002). In the final report explaining the decision not to require advanced glazing, NHTSA reported that it found advanced glazing increased the risk of neck and back injuries in rollover accidents. NHTSA was "extremely reluctant to pursue a requirement that may increase injury

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[3] Laminated glass is the only type of glazing material manufacturers are allowed to use on windshields.

[4] Advanced glazing refers to laminated glass and glass-plastic glazing material, which can withstand more impact before shattering compared to tempered glass.

risk for belted occupants to provide safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle," and thus, "the agency will not continue to examine potential regulatory requirement for advanced side glazing."

c. United States Supreme Court

In *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000), the United States Supreme Court granted a writ of certiorari from the District of Columbia Circuit Court of Appeals in order to resolve a dispute among courts across the country regarding whether Regulation 208[5] preempted state law products liability claims. Regulation 208 specifies performance requirements for passive restraint systems for the protection of occupants in vehicle crashes in order to reduce the number of deaths and severity of injuries. The regulation set forth a detailed timeline in which manufacturers were required to gradually introduce airbag technology prior to 1997. Manufacturers were permitted to choose which restraint, among a range of different passive restraint devices, e.g.: airbags; automatic seatbelts; ignition interlock devices, to incorporate into their vehicles.

The plaintiff in *Geier* filed a state law products liability claim against Honda. Although the vehicle was equipped with a proper seatbelt system and was in compliance with Regulation 208, the plaintiff alleged the vehicle was defective because Honda failed to equip the vehicle with airbags. The United States Supreme Court determined that in promulgating Regulation 208, the Department of Transportation deliberately provided the manufacturer with a range of choices among different passive restraint devices to be gradually introduced. The Court found this phase-in program would lower costs, encourage technological developments, overcome technical safety problems, and win consumer acceptance – "all of which would promote [Regulation] 208's safety objectives." *Id.* at 876. In a five to four decision, the Supreme

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[5] Federal Motor Vehicle Safety Standard 208 (49 C.F.R. § 571.208).

Court held that the plaintiff's suit would stand as an obstacle to the accomplishment of this objective, and therefore, Regulation 208 preempted the state law action.

d. Appellate Courts

Of the three appellate courts that have faced this issue, one court found no preemption, while two courts found Regulation 205 preempted any state law claim.[6]

In *O'Hara v. General Motors*, 508 F.3d 753 (5th Cir. 2007), the plaintiff brought suit alleging General Motors' use of tempered glass in the side window was unreasonably dangerous and contended the use of advanced glazing would have decreased the likelihood of passenger ejection. The Fifth Circuit first found Regulation 205 differed from Regulation 208. The court then reviewed the text and history of Regulation 205 and determined "it is best understood as a minimum safety standard." *Id.* at 762. Thus, the Fifth Circuit held the regulation did not preempt the plaintiff's products liability suit.

Conversely, when faced with the same issue, the West Virginia Supreme Court held Regulation 205 did preempt a claim against a manufacturer in which the plaintiff alleged his vehicle was defective because Ford used tempered glass in the side window. *Morgan v. Ford Motor Co.*, 680 S.E.2d 77 (W. Va. 2009). Although the court recognized the Fifth Circuit's position in *O'Hara*, the court found "[Regulation] 205 permits the manufacturer to make a choice between available safety options for side-

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[6] Several trial courts and districts courts have faced this issue. *See Erickson v. Ford Motor Co.*, 2007 WL 2302121 (D. Mont. 2007); *Martinez v. Ford Motor Co.*, 488 F. Supp.2d 1194 (M.D. Fla. 2007) (finding preemption) and *Raley v. Hyundai Motor Co.*, 2010 WL 199971 (W.D. Okla. 2010); *Spruell v. Ford Motor Co.*, 2008 WL 906648 (W.D. Ark. 2008); *Burns v. Ford Motor Co.*, 2008 WL 222711 (W.D. Ark. 2008); *MCI Sales and Serv., Inc. v. Hinton*, 272 S.W.3d 17 (Tex. App. 2008) (finding no preemption).

window glass; a design defect claim would foreclose choosing one of those options." *Id.* at 94. In reaching this conclusion, the court observed that although this suit concerned only one glass option – tempered glass – other lawsuits could theoretically eliminate all options allowed by Regulation 205 and "eviscerate the unitary federal regulation and leave manufacturers with no options for glazing materials in vehicle side windows." *Id.* The court ultimately found its decision was controlled by *Geier* and held Regulation 205 preempted the suit because the purpose of the regulation was to give manufacturers the option of choosing between laminated and tempered glass in side windows.

In *Lake v. Memphis Landsmen, LLC*, the Court of Appeals of Tennessee agreed with the West Virginia Supreme Court and found Regulation 205 preempted a state law products liability claim. 2010 WL 891867 (Tenn. Ct. App. March 15, 2010). The court determined that in issuing the notice of withdrawal and declining to require advanced glazing, NHTSA intended to adopt a policy that allows the option of tempered glass based on cost and safety considerations. Thus, the court held because "a rule requiring laminated glass in side windows, as proposed by the [plaintiff's state law] claims…would serve as 'an obstacle to the accomplishment and execution of' a federal policy" Regulation 205 preempted the suit. *Id*. at 9 (citing *Geier*, 529 U.S. at 881).

III.

Clearly, courts across the country are struggling over Regulation 205 and whether it preempts conflicting state law actions. Nonetheless, in the absence of a determination from the United States Supreme Court on this matter, we must render our best judgment as to whether Regulation 205 provides a manufacturer with options and, therefore, preempts Appellant's suit, or merely provides a safety floor and allows Appellant's suit to go forward.

We agree with the reasoning espoused in *Morgan* and *Lake* and hold Regulation 205 preempts this suit. In our view, the purpose of this regulation

is to provide an automobile manufacturer with a range of choices among different types of glazing materials, as opposed to providing a minimum standard. Regulation 205 directs manufacturers that they "shall conform" to ANS Z26, which specifically provides manufacturers the option of using tempered glass for side windows.[7] In issuing the notice of withdrawal, NHTSA declined to modify Regulation 205 and require advanced glazing. Thus, the notice of withdrawal kept Regulation 205 intact, thereby preserving the manufacturer's option to use tempered glass on side windows.

To allow this suit to go forward would sanction a jury verdict finding the Ford F-150 pickup truck to be defectively designed solely because it selected the federally authorized choice of tempered glass. Because we believe such a result would stand as an obstacle to achieving the purposes and objectives of Regulation 205, this state tort action presents a conflict between federal law and state law. Thus, Regulation 205 preempts this state law claim based on Ford's selection of tempered glass for the side windows of the F-150 pickup truck. *Compare Wyeth*, 129 S.Ct. 1187 (finding no preemption where the regulation provided a safety floor for warning labels for drug manufacturers, and the FDA did not prohibit manufacturers from adding further warnings to the label; therefore, a state law tort claim would not stand as an obstacle to the accomplishment of Congress' purposes).

IV.

We affirm the trial court's order granting Ford's motion for summary judgment.

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[7] We recognize the Foreword to ANS Z26 contains language which supports a finding of no preemption, but the Foreword also provides that it "is not part of" ANS Z26. A careful review of the actual standard, including its technical and testing requirements, sets forth clear standards and choices for manufacturers and, therefore, favors a finding of preemption.

AFFIRMED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

The Supreme Court of South Carolina

Zachary Vincent Miller, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

Petitioner filed an application for post-conviction relief (PCR) in December 2005. Following the denial of the application, petitioner filed a pro se "59(E)/60(B) Motion." Thereafter, both PCR counsel and petitioner filed notices of appeal. The pro se motion was never ruled on because of the filing of the notices of appeal. The Court of Appeals denied a subsequent petition for a writ of certiorari filed pursuant to Johnson v. State.[1]

Thereafter, the circuit court entertained the pending pro se motion and issued an order denying and dismissing it. Petitioner has filed a pro se notice of appeal from that order.

[1] 294 S.C. 310, 364 S.E.2d 201 (1988).

Since there is no right to "hybrid representation" that is partially pro se and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed pro se by a person represented by counsel are not to be accepted unless submitted by counsel. State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989). Because petitioner was represented by counsel, the pro se motion was not proper, should not have been accepted, and should not have been ruled upon. The motion was essentially a nullity.

We therefore vacate the order ruling on the motion and dismiss petitioner's notice of appeal as moot. We also take this opportunity to remind judges and clerks of court of our directive in Foster not to accept substantive documents, with the exception of motions to relieve counsel, filed pro se by a party who is represented by counsel.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
July 8, 2010

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tammy Coleman Maro, Appellant,

v.

James Neil Lewis, Respondent.

Appeal From Georgetown County
Edward B. Cottingham, Circuit Court Judge

Opinion No. 4715
Heard February 17, 2010 – Filed July 28, 2010

REVERSED AND REMANDED

Natasha M. Hanna, of Myrtle Beach, for Appellant.

Robert J. Moran, of Murrells Inlet, for Respondent.

LOCKEMY, J.: In this breach of contract action, Tammy Maro appeals the trial court's grant of James Lewis's motion for directed verdict. Maro argues the trial court erred in granting the motion because she proved all elements of the breach of contract and breach of contract accompanied by

fraud causes of action. Further, Maro argues the trial court erred in allowing certain documents into evidence and allowing questioning regarding the documents. We reverse and remand.

FACTS

In 2005, Lewis and his ex-wife owned a parcel of land on Pawleys Island. The land was approximately 1.7 acres of commercial property where a gas station, convenience store, and other businesses were located at the time. Lewis wished to sell his property and contacted Maro, a real estate agent, for assistance in 2005.

Maro and Lewis entered into an exclusive right to sell real estate agreement on May 11, 2005. In paragraph 7, section J of the agreement, Maro agreed to sell Lewis's property, and Lewis, as seller, agreed "[n]ot to deal directly with prospective buyers of this property during the period of agency and shall refer any inquiries received directly and immediately to [Maro]." Maro testified Lewis signed the contract after she discussed all five pages with him at his store.

After both parties signed the contract, Maro testified Lewis informed her he had some exclusions to the contract or "some people that he had been talking with about purchasing the property previous to [her] contract." Maro said this would not be a problem, but according to Maro, Lewis never provided her with those names. Thereafter, Lewis and Maro entered into a second contract dated May 13, 2005. The terms of the second contract were nearly identical to the contract signed May 11 with the exception of one clause stating:

> OTHER TERMS AND CONDITIONS: Broker will advertise the property for sale and will have the term of the listing to have the property sold. Should a buyer become available that was listed as an owner contact – Seller will have the right to sell to them

> after the contract expires and there will be no commission charge. Names are on this agreement.

However, the May 13, 2005 agreement did not list any names as Lewis's previous contacts. Maro testified she attempted to obtain the names of Lewis's previous contacts, but he never gave her specific names and was vague when asked to provide them. Lewis had still failed to provide Maro with names when he signed the second contract on May 24, 2005.[1]

Maro attempted to sell the property, and she advertised the property in several newspapers as well as on the internet through commercial listing services. However, Maro was unsuccessful in her attempts, and her exclusive right to sell period expired on November 13, 2005. The contract contained a ninety-day extension period. Specifically, the ninety-day extension clause stated:

> If the property is sold within 90 days of the expiration or termination of this Agreement (which shall be the "protection period") to a Buyer to whom the property was shown by Owner, Broker, another broker, or any other person or firm during the term of this Agreement, Broker's full fee shall be payable by Owner. The protection period shall be terminated if Owner enters into a listing agreement with another broker during the protection period.

Thus, the protection period continued through February 13, 2006. Maro attempted to sell the property to no avail and spent more than $10,000 in her endeavor.

Ultimately, Peggy Wheeler-Cribb purchased the property from Lewis. Wheeler-Cribb negotiated the purchase of the property directly with Lewis and entered into three contracts with him for its purchase. Without involving

[1] We note the effective date of the second right to sell agreement is different from the date that Maro signed the agreement.

Maro, Lewis and Wheeler-Cribb entered into a contract on August 28, 2005. Wheeler-Cribb paid earnest money on the contract. Negotiations fell through because several contingencies to the contract did not occur. Thereafter, Wheeler-Cribb and Lewis entered into a second contract for the purchase of the property in December of 2005, and again the contract did not close. Finally, Wheeler-Cribb and Lewis entered into a third contract in April 2006, which closed in May 2006.

On March 22, 2006, Maro brought an action for breach of contract and breach of contract accompanied by fraudulent intent against Lewis. Lewis answered and made several counterclaims. During the trial, Maro maintained Lewis breached the real estate contract even though he sold his property after the contract expired. At the conclusion of Maro's case, the trial court directed a verdict for both causes of action in Lewis's favor.[2] The trial court reasoned: "[I]f I accept [Maro's] position . . . [Lewis] would be bound for the rest of his life because he had some preliminary conversation in March of 2005. And that simply can't be the law." Additionally, the trial court stated: "I don't see any way in the world as a matter of law that I can give her a commission of $120,000.00 on a piece of property that sold within seven days [and] one year later; and the contract expired six months earlier; and certainly [ninety] days." The trial court believed Wheeler-Cribb had no plans to purchase the property until several issues concerning the property were resolved including bank financing and zoning. In summation, the trial court held Maro did not meet the conditions of the contract in that the property was sold on May 2, 2006, nearly one year after the initial contract, and far beyond the ninety-day protection period. This appeal followed.

STANDARD OF REVIEW

"In deciding a motion for directed verdict, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party." Minter v. GOCT, Inc., 322 S.C. 525, 527, 473 S.E.2d 67,

[2] The record does not contain a final written order of the court addressing the directed verdict motions. Instead, the record contains a discussion regarding the motions.

69 (Ct. App. 1996). "If more than one inference can be drawn from the evidence, the case must be submitted to the jury." Id. "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Harvey v. Strickland, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002).

LAW/ANALYSIS

I. Directed Verdicts on Causes of Actions

Maro argues the trial court erred in granting Lewis's motions for directed verdicts on her causes of action for breach of contract and breach of contract accompanied by a fraudulent act. Specifically, she maintains she met her burden as a plaintiff in the action by presenting evidence on all elements for both causes of action.

In reply, Lewis admits that a contract existed between Maro and himself. Further, Lewis admits he breached the contract. However, Lewis maintains that not every breach of contract cause of action entitles the non-breaching party to damages. Specifically, Lewis admits being in contact with the ultimate purchaser of the property, Wheeler-Cribb, but he argues Maro would only be entitled to damages if he entered into a contract within the contract term or the ninety-day protection period. In this case, Lewis contends Wheeler-Cribb was not a ready buyer of the property on October 2, 2005, thereby precluding Maro from receiving a commission per the parties' contract. To determine whether Maro presented evidence that met her burden of proof, we must examine the evidence presented and the contracts at issue.

A. Breach of Contract

"This being an action for the breach of contract, the burden was upon the [plaintiff] to prove the contract, its breach, and the damages caused by such breach." Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The general rule is that for a breach of contract the

defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Id. "The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed." Minter v. GOCT, Inc., 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996). "The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." Id.

Here, Lewis admits to entering into an enforceable contract with Maro. Further, he admits breaching the contract by not fulfilling several of his obligations as seller. Therefore, at this juncture, we must determine whether Maro presented sufficient evidence Lewis's breach proximately caused her to lose commission and money she spent attempting to sell the property. Viewing the evidence in the light most favorable to Maro's breach of contract claim, we find the trial court erred in granting Lewis's motion for directed verdict for two specific reasons.

First, the record contains conflicting evidence regarding the number of potential buyers who inquired about the property to Lewis during the course and scope of his contract with Maro. This is a factual conflict in both parties' stories that clearly lies within the jury's domain. A jury could infer from the evidence that Maro could have sold the property had Lewis disclosed the information about the potential buyers and involved Maro in the negotiations.

Under the second scenario, a jury could infer that Maro is entitled to expenses, commission, or both pursuant to the terms of the contract. We find some evidence demonstrates Lewis's duty, his breach, and that the breach proximately caused Maro's damages. First, Lewis owed a duty to disclose potential inquiries regarding the property to Maro. Second, he breached this duty by failing to notify Maro of at least two inquiries. Finally, Lewis entered into a contract with Wheeler-Cribb on August 27, 2005, and again in December 2005. Though these sales contracts never closed, Wheeler-Cribb was the ultimate purchaser of the property. Further, the terms of the exclusive right to sell agreement do not require the contracts to close. Rather, in order for Maro to earn her commission, the exclusive right to sell

agreement only requires a contract be entered into between Lewis and a third party. We find one could construe entering into a contract with the purchaser of the property as breaching the conditions of the exclusive listing agreement between Lewis and Maro. Accordingly, we find the record includes sufficient evidence to survive the directed verdict motion, and the trial court should have submitted the case to the jury.

B. Breach of Contract Accompanied by a Fraudulent Act

To recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish (1) the contract was breached; (2) the breach was accomplished with a fraudulent intention; and (3) the breach was accompanied by a fraudulent act. Minter, 322 S.C. at 529-30, 473 S.E.2d at 70. "In an action for breach of contract accompanied by a fraudulent act, the fraudulent act element is met by any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." Perry v. Green, 313 S.C. 250, 254, 437 S.E.2d 150, 152 (Ct. App. 1993).

We find because the record contains some evidence of a breach of contract accompanied by a fraudulent act, the action should have survived a directed verdict motion. We have already addressed the elements for a breach of contract cause of action in the above section. Maro presented some evidence of both fraudulent intent and fraudulent action as well. A jury could find Lewis hid his negotiations from Maro and that Lewis hid these actions in an attempt to evade payment of a broker's commission. Therefore, we reverse the trial court's grant of Lewis's motion for directed verdict on the cause of action for breach of contract accompanied by a fraudulent act.

II. Exclusive Right to Sell Agreement and Closing Date

Next, Maro argues the trial court erroneously concluded the contract must be valid, enforceable, and close during the term of the listing agreement or protection period before the commission is earned. Specifically, Maro argues paragraph 3(A) of the contract states the commission is due and payable when the contract is signed. Further, Maro maintains the three-

sentence contract entered into by Lewis and Cribb-Wheeler was sufficient to trigger the broker's commission becoming due and payable. We agree.[3]

In Wilbur Smith & Associates v. National Bank of South Carolina, our supreme court affirmed a trial court's decision to award a broker commission when the executor of the estate completed the sale of the property. 274 S.C. 296, 263 S.E.2d 643 (1980). Specifically, the trial court found the broker was entitled to $70,000 in commission because of a valid exclusive listing contract and the property was sold during the listing period. Id. at 299, 263 S.E.2d at 644. In affirming the trial court's decision, the supreme court found realtors have the sole right to sell property under an "exclusive sales contract" and are entitled to commission even when the property owner sells the land. Id. at 302, 263 S.E.2d at 646. Therefore, pursuant to Wilbur Smith, Maro would be entitled to commission if Lewis sold the property during the time period expressed in the exclusive sales contract.

As Maro maintains, paragraph 3A of the exclusive right to sell agreement states the broker is entitled to commission "if Broker, Owner, another broker, or any other person or company produces a Buyer who is ready, willing, and able to purchase the property on the terms described above or on any terms acceptable to the Owner." Later in paragraph 3A, the contract provides:

> The broker fee shall be earned, due, and payable when an agreement to purchase, option, exchange, lease or trade is signed by Owner. However, if Owner shall fail or refuse to sell the described property for the price and terms set forth herein, or if

[3] We note Lewis's reliance on Carolina Business Brokers v. Strickland, 299 S.C. 237, 384 S.E.2d 72 (Ct. App. 1989), and his assertion that Strickland is a persuasive decision, factually similar to this appeal. However, Lewis does not develop this argument, and in fact, the South Carolina Supreme Court reversed Strickland. See Carolina Bus. Brokers v. Strickland, 300 S.C. 492, 388 S.E.2d 815 (1990).

> Owner shall fail or refuse to complete the sale of such property under any written Agreement to Buy and Sell Real Estate to which Owner has agreed, Broker's full fee shall be due and payable by Owner.

(emphasis added).

Here, Maro presented evidence that Lewis sold the property to Wheeler-Cribb during the period of Maro's exclusive right to sell agreement. Even in his brief, Lewis states "Maro's strategy was to deny Lewis'[s] pre-existing relationship with Wheeler-Cribb, focus on the first sales contract executed during the term of the listing contract, and characterize each and every subsequent event as somehow compromising portions of the same contract of sale." (emphasis added). Per the parties' listing agreement, executing a contract for sale of the property during the listing period appears all that was necessary to secure Maro's commission. Therefore, we find a jury could have determined that she was entitled to commission. Accordingly, we hold the trial court erred in directing verdicts in favor of Lewis.

III. Admission of Evidence

Maro argues the trial court erred by admitting certain evidence that was never produced to Maro, and that such evidence was highly prejudicial and made Lewis's attorney a witness in the case. Because we reverse the trial court's decision to grant Lewis's motion for a directed verdict, we decline to address this argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

We find the trial court erred in granting Lewis's motions for directed verdict. We find a jury could conclude from the evidence in the record that

Maro proved all elements of her causes of action and therefore is entitled to damages. Because this conclusion will require a new trial, we decline to address the final issue. Accordingly, the decision of the trial court is

REVERSED AND REMANDED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Savannah K. Johnson, Personal Representative of the Estate of Susan Johnson, Respondent,

v.

Horry County Solid Waste Authority, Appellant.

Appeal From Horry County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4716
Heard May 19, 2010 – Filed July 28, 2010

AFFIRMED

Douglas C. Baxter, of Myrtle Beach and Mason A. Summers, of Columbia, for Appellant.

Luke A. Rankin, of Conway, for Respondent.

KONDUROS, J: Horry County Solid Waste Authority (the County) appeals the trial court's decision to suppress evidence regarding the decedent's blood alcohol level in this wrongful death action. The County also claims the trial court erred in referencing the South Carolina Commercial Driver's License Manual (the CDL Manual) in its charge to the jury warranting a new trial. We affirm.

FACTS

Susan Johnson (Decedent) was involved in a one-car, roll-over accident around 4 a.m. on January 5, 2005. Decedent drove off the right side of the road and then over-corrected, causing the accident. Her vehicle, a black sports utility vehicle (SUV), came to rest facing oncoming traffic and inside the safe zone of the road.[1] Tommy Bell approached Decedent's vehicle driving a Horry County Solid Waste Authority Truck. Bell testified he saw Johnson's vehicle, then a blur, and then he felt a bump. He pulled over and saw Decedent's body lying on the side of the road and called 911. Decedent suffered catastrophic injuries having been crushed between the County's truck and her SUV. Her daughter, Savannah Johnson, brought a wrongful death action against the County as person representative of Decedent's estate.

At trial, Johnson made a motion in limine to exclude evidence of Decedent's blood alcohol level, which was .14, and evidence showing traces of marijuana and cocaine in Decedent's bloodstream. Johnson argued no independent evidence linked Decedent's intoxication to the second accident. At the trial court's request, the County attempted to establish such a connection. The County raised several pieces of evidence. First, Lieutenant Robert Lee, a South Carolina State Trooper and head of the Major Accident Investigation Team for the Pee Dee Region, had testified in his deposition that Decedent's single-car accident occurred because she was under the influence of alcohol or drugs and ran off the shoulder of the road. He stated

[1] This area may commonly be called the emergency lane or shoulder of the road, but we will refer to it as the safe zone. The safe zone in this case is the area to the right side of the white line demarking the end of the actual road.

fatigue may have also been a factor. The County also argued its expert, James Middleton, would testify Decedent was standing on the white line separating the safe zone and road at the time of impact and that her intoxication would have impaired her judgment. Finally, the County also indicated the cocaine and marijuana in Decedent's system had been ingested within hours of the accident.[2]

Johnson maintained Lee's explanation for the first accident was not really independent but was colored by his knowledge of Decedent's toxicology report. Johnson also argued Middleton's deposition testimony was ambiguous and did not give a definite opinion as to where Decedent was standing when she was struck.

After hearing arguments, the trial court granted Johnson's request to exclude the evidence. The trial court concluded no evidence indicated Decedent's intoxication contributed to the second accident and the evidence was substantially more prejudicial than probative under Rule 403, SCRE. The trial court indicated the motion could be reconsidered upon presentation of sufficient evidence that Decedent's intoxication contributed to the accident.

Johnson called Lieutenant Lee at trial.[3] He testified his investigation and conclusions focused on a tire print found on the white line separating the road from the safe zone. He testified the tire print matched the print of the County's truck and such a print would only be made when a vehicle had an impact against another object sufficient to create a vibration, stamping the print onto the line. Lieutenant Lee further testified in his opinion, based on Decedent's injuries and the damage to the County's truck and the SUV, Decedent was not in the road at the time she was struck.

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[2] The pathologist's testimony on this point was not specifically brought to the attention of the trial court at this time, but the pathologist's unredacted deposition was proffered and it supports this contention. His redacted deposition was read into the record.

[3] Lieutenant Lee was technically a First Sergeant the day he testified at trial with his promotion due to take effect four days later.

The redacted deposition testimony of pathologist Dr. Edward Proctor, Jr. was read into the record. He testified Decedent's injuries were consistent with her being hit on the right side of her body and being rotated around as the truck pinned her against her SUV. Dr. Proctor also stated Decedent would have been standing relatively close to her car for the injuries to have occurred the way they did. He opined this would likely mean she was either standing inside or no further than on the white line delineating the road from the safe zone.

Another expert in accident reconstruction, Woodrow Poplin, testified next. Poplin stated in his expert opinion, the County's truck had drifted over into the safe zone and struck Decedent.[4] He opined Decedent was not across the white line separating the road and safe zone but was just inside it, right at its edge. Like Lee, Poplin believed the tire print on the white line was made by the County's truck. Poplin also testified he believed Decedent had moved her vehicle into the safe zone during the time between the first and second accidents.

At this time, the County again sought to have the drug and alcohol evidence admitted into the record, arguing Poplin's testimony that Decedent had moved her SUV should change the trial court's analysis. The County maintained Decedent's driving the vehicle into an unsafe position, not far enough off the road, made her driving under the influence a contributing factor in the second accident. The trial court again excluded the evidence concluding the link between Decedent's intoxication and the second accident was too tenuous.

Decedent's ex-husband testified he saw her at a local bar and grill earlier in the evening on the night of the accident. The two spoke briefly, but he did not observe Decedent's activities and did not see her consume any alcohol.

[4] Bell did not dispute evidence that his tire was over the white line demarcating the road from the safe zone.

The defense called its accident reconstruction expert, James Middleton. Middleton disagreed with the other experts regarding the tire print. Based on his analysis, the tire print was not necessarily made by the County's truck. In his opinion, Decedent was standing in the road "straddling the white line" at the time she was struck.

Johnson had asked Bell about the amount of sleep he had gotten prior to the accident and attempted to establish through Middleton that Bell's fatigue could have been a factor in the second accident. In allowing such questioning, the trial court assured the County that it could likewise question witnesses about circumstantial evidence of Decedent's alcohol consumption. In response, the County indicated no witness could testify to seeing Decedent consume alcohol, but her mere presence at the bar prior to the accident was at least circumstantial evidence of her intoxication.

When that discussion was concluded, the parties stipulated Middleton would have testified the level of alcohol in Decedent's bloodstream would have impaired her judgment and that her intoxication contributed to the second accident. The County did not raise the blood alcohol evidence again.

The jury found the County eighty-five percent negligent for Decedent's injuries and found Decedent fifteen percent negligent and awarded damages in the amount of $500,000.[5] This appeal followed.

LAW/ANALYSIS

I. Admission of Blood Alcohol Evidence

The County contends the trial court erred in concluding Decedent's blood alcohol was inadmissible because insufficient evidence linked her intoxication to the second accident, making the evidence substantially more prejudicial than probative. We disagree.

[5] This amount was capped at $300,000 pursuant to the South Carolina Tort Claims Act, Section 15-78-120(1) of the South Carolina Code (2005).

Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue. Rule 401, SCRE; Rule 402, SCRE. However, otherwise relevant evidence may be excluded when its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Owens, 346 S.C. 637, 666, 552 S.E.2d 745, 760 (2001) overruled on other grounds by State v. Gentry, 368 S.C. 93, 610 S.E.2d 494 (2005). "An appellate court reviews Rule 403 rulings pursuant to an abuse of discretion standard and gives great deference to the trial court." Lee v. Bunch, 373 S.C. 654, 658, 647 S.E.2d 197, 199 (2007). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." State v. Adams, 354 SC. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003).

One of the leading cases in this area is Lee, 373 S.C. at 654, 647 S.E.2d at 197. In Lee, the South Carolina Supreme Court determined evidence of Lee's blood alcohol content was relevant and admissible.[6] Id. at 659, 647 S.E.2d at 200. In making this determination, the court relied upon corroborating evidence that Lee had been drinking at the time of the accident and that his intoxication was a cause of the accident. Id. at 658-59, 647 S.E.2d at 199-200. Lee admitted to drinking shortly before the wreck and expert testimony showed Lee's blood alcohol level would have impaired his judgment and ability to operate a motorcycle. Id. An eyewitness also saw Lee going over the speed limit, and the accident occurred left of the center line. Id. at 659, 647 S.E.2d at 200.

Kennedy v. Griffin, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2004), stands in contrast. In Kennedy, a tractor-trailer turned left in front of Kennedy as he approached in his pickup truck. Id. at 125-26, 595 S.E.2d at 249. Kennedy struck the eighteen-wheeler on its rear set of tires. Id. According to a witness, Kennedy had enough time to see the truck and apply his brakes sooner than he did. Id. at 126, 595 S.E.2d at 250. The other driver indicated he believed he had a safe distance to make the turn, while Kennedy

[6] This decision affirmed the trial court.

testified the tractor-trailer bolted out in front of him. Id. This court reversed the trial court's admission of toxicology reports showing the presence of marijuana in Kennedy's bloodstream. Id. at 128-29, 595 S.E.2d at 251. The court reasoned no evidence regarding the level of marijuana in Kennedy's system or how long it had been present was presented. Id. at 128, 595 S.E.2d at 251. Also, no witnesses testified Kennedy smelled of marijuana and no marijuana was found at the accident scene. Id. Furthermore, the circumstances of the accident did not "necessarily suggest that [Kennedy] was driving under an impairment." Id. Under those circumstances, the court concluded, the danger of unfair prejudice substantially outweighed the probative value of the toxicology report. Id. at 128-29, 595 S.E.2d at 251.

This case lies between Lee and Kennedy. We have more corroborating evidence than in Kennedy. The toxicologist's unredacted deposition testimony indicated Decedent had ingested marijuana and cocaine within hours of her death. That testimony also revealed Decedent's blood alcohol level to be well in excess of the limit for driving under the influence. Decedent's ex-husband testified she was at a bar from approximately midnight until 4 a.m. the night of the accident, and Lieutenant Lee testified in his deposition that the circumstances of Decedent's first accident indicated it occurred because she was intoxicated or possibly fatigued. Furthermore, Middleton, at trial, placed Decedent at least partially in the road at the time of impact.

However, no one witnessed the first or second accident, and there is no "smoking gun" like in Lee, when the accident inarguably occurred to the left of the center line. Taking the second accident independently, the County presented no evidence Decedent's intoxication contributed to her being struck by the County's truck. In attempting to establish the link between intoxication and the second accident, no expert testimony was proffered for the trial court's consideration regarding how her judgment would have been impaired with respect to staying out of the road. Almost all the expert testimony placed Decedent within the safe zone at the time of impact. Even Bell testified he did not see Decedent in the road. Furthermore, although

Decedent's ex-husband placed her at a bar prior to the accident, he did not testify to seeing her consume any alcohol.

Essentially, the jury was presented with a battle of the experts. Middleton testified that in his opinion, Decedent was straddling the white line when she was struck. However, that opinion, as well as the other expert opinions, was rendered on the physical evidence at the scene of the accident. Her intoxication would not have changed the expert opinion of any of the witnesses, and the jury simply had to choose which expert they believed based on their explanations of how the accident occurred.

Under the circumstances, evidence of Decedent's blood alcohol level was relevant and had some probative value. However, giving due deference to the trial court's decision, we agree the prejudice created by admitting Decedent's blood alcohol level substantially outweighed the probative value. Therefore, the trial court's ruling excluding the evidence is affirmed.

II. Jury Charge

The County takes exception to the portion of the trial court's jury charge referencing the CDL Manual. The County argues the trial court erred in charging from the CDL Manual because doing so imposed a higher standard of care on Bell as a commercial driver when the CDL Manual guidelines do not carry the force of law. We disagree.

The objectionable portion of the jury charge is as follows:

> I charge you that South Carolina's commercial driver[']s license program requires high standards and skills of commercial motor vehicle operators.
>
> In reference to staying centered in a lane, I charge you that the [CDL] Manual states that a driver needs to keep the vehicle centered in the lane to keep safe

> clearance on either side. If the vehicle is wide, there is little room to spare.
>
> In reference to how far ahead to look, the [CDL] [M]anual states that most good drivers look twelve to fifteen seconds ahead. That means looking ahead the distance you will travel in twelve to fifteen seconds. At lower speeds, that's about one block. At highway speeds it's about a quarter of a mile assuming [visibility] permits. If you're not looking that far ahead, you may have to stop too quickly to make the quick lane changes.

The County lodged an objection stating: "We talked earlier about the charge, about the South Carolina Commercial Driver's License Program requires higher standards, skills, and I don't think the mere fact that someone has a CDL they then have a higher standard of care than anyone else on the roadway." Johnson argues this issue is not preserved for our review because the County did not specifically state the CDL Manual does not carry the weight of law. We disagree. Questioning whether the CDL Manual established a particular standard of care, as the common law or statue may, implicitly calls into question the force of the CDL Manual as something less than law. See State v. Hamilton, 344 S.C. 344, 361, 543 S.E.2d 586, 595 (Ct. App. 2001) overruled on other grounds by State v. Gentry, 368 S.C. 93, 610 S.E.2d 494 (2005) ("In order to preserve for review an alleged error, the objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial [court]."). Therefore, we will proceed to the merits of this issue.

The information contained in this charge was already introduced through the testimony of Bell himself and Poplin. Nevertheless, jury instructions are to charge the current and correct law of the state, and the County is correct in pointing out the CDL Manual does not carry the force of law. See McCourt v. Abernathy, 318 S.C. 301, 306, 457 S.E.2d 603, 606 (1995) ("The trial judge is required to charge only the current and correct law

of South Carolina."). Consequently, the trial court erred in referencing the manual and its guidelines when charging the jury.

In reviewing jury charges for an alleged error, the appellate court "must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999).

In this case, the charge, read as a whole, indicates the standard of care to establish negligence is that of a reasonable person. The trial court instructed:

> Negligence means that a person did not use the same amount of care that a person of ordinary reason and prudence would exercise in the same circumstances. . . . It can be said that a negligent person has done something that a reasonable person would not have done, if faced with the same situation; or, on the other hand failed to do something that a reasonable person would have done if faced with the same situation . . . . Now that is negligence.

The trial court further charged the jury regarding the laws of South Carolina pertaining to the operation of a motor vehicle.

> I charge you under South Carolina law that the driver of an automobile also has a duty to keep the automobile under proper control so that the driver is able to slow down, stop, or turn the automobile to avoid colliding with other vehicles, pedestrians, and objects lawfully on the road.

> I charge you that the driver of a vehicle approaching a person engaged about an automobile in the highway owes that person the duty to exercise reasonable care to avoid injuring him.
>
> I charge you that the first duty of a motorist is to keep a sharp lookout to discover presence of those who might be in danger, and if he performs that duty and discovers that someone is in danger, a second duty arises to use every possible available means to avert injury and, if [a] motorist fails to perform that duty, his negligence is a proximate and immediate cause of injury.
>
> I charge you that the discovery of danger by the defendant or the duty to discover it in exercise of due care includes the duty under the circumstances to appreciate peril in time to take steps necessary to avert an accident.
>
> I charge you that a driver on the public roads owes a duty to keep a proper lookout for persons or objects upon the highway. That duty is not merely one of looking, but one of seeing.
>
> I charge you that a person using the public roadways of this state owe a duty to exercise ordinary care at all time to avoid an accident.

These charges all address the care that any driver is required to exhibit in operating a motor vehicle. Furthermore, the trial court's general charge on the meaning of negligence comports with requiring a driver to use the ordinary care another driver would use under the same circumstances. On the whole, the trial court's jury instructions properly stated the appropriate standard of care so that we do not believe the reiteration of some guidelines

from the CDL Manual prejudiced the County. Accordingly, we do not believe the trial court committed reversible error in including the CDL Manual reference in the jury instructions.

CONCLUSION

We affirm the trial court's decision to exclude evidence of Decedent's blood alcohol level because a sufficient link was not established between her intoxication and the second accident and because the probative value of the evidence was substantially outweighed by the likelihood of unfair prejudice. Additionally, we find the trial court did not commit reversible error by referencing the CDL Manual in the charge when the instructions, as a whole, accurately conveyed the proper standard of care to be applied by the jury. Based on all of the foregoing, the rulings of the trial court are

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Renee M. High, Respondent/Appellant,

v.

John A. High, II, Appellant/Respondent.

Appeal From Georgetown County
Jan B. Bromell-Holmes, Family Court Judge

Opinion No. 4717
Submitted June 1, 2010 – Filed July 28, 2010

AFFIRMED

Marian D. Nettles, of Lake City, and John M. Prosser, Jr., of Johnsonville, for Appellant/ Respondent.

V. Lee Moore and Elizabeth J. Saraniti, of Surfside Beach, for Respondent/Appellant.

PER CURIAM: In this child custody case, John High (Father) appeals from the family court's order granting Renee High (Mother) sole custody of the couple's two children, arguing the family court erred in: (1) refusing to qualify Teressa Harrington, LPC as an expert witness; (2) prohibiting the introduction of statements made by the couple's minor daughter to Harrington; (3) refusing to admit Harrington's records into evidence; (4) making certain findings of fact relevant to the issue of custody which are not supported by the record; (5) failing to consider important factors contained in the record in its award of primary custody to Mother; (6) awarding Mother sole custody based on the fact that Mother was historically the caregiver of the minor children; and (7) granting Mother custody based on the primary caretaker factor. In her cross-appeal, Mother argues the family court erred in (1) hearing Father's untimely motion to alter or amend, and (2) failing to award her attorney's fees and costs. We affirm.[1]

FACTS

Mother and Father were married on May 4, 1996, and subsequently the couple parented two children, Daughter and Son. A day after their ten-year anniversary, Father confronted Mother about having an affair. Mother admitted to the affair, and the parties separated. After the separation, Father admitted he had several affairs early in the marriage.

On June 29, 2006, Mother filed a complaint seeking an order of separate support and maintenance. Mother also requested sole custody of the minor children, child support, equitable distribution of the assets and debts, a personal restraining order, and attorney's fees.[2] She later filed a supplemental

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

[2] On September 27, 2006, the Family Court issued a temporary order in which the court granted the parties joint custody of the children, ordered Father to pay child support to Mother, and prohibited the parties from (1) having the children in the presence of a paramour; (2) discussing or allowing third parties to discuss the case in the presence of the children; and (3) having any contact with each other, "including telephone, e-mail, in person, at their homes, their places of business or any other place or allowing any third party

complaint to request a divorce on the ground of one-year separation. Father filed an answer and counterclaim requesting the same relief and a divorce on the ground of adultery. Mother filed a reply including the affirmative defense of recrimination. Prior to trial, Mother and Father reached an agreement concerning the children's health insurance, equitable division of the assets and debts, alimony, tax liability, and communications between the parties, and the terms were included in the final order filed on October 25, 2007.

Mother proceeded with the divorce on the ground of one year's separation, and a four-day trial was held on October 22 and 25, 2007, and January 15 and 16, 2008. During the trial, the court heard the remaining issues of divorce, custody, visitation, child support, Guardian ad Litem fees, and attorney's fees, as well as a Rule to Show Cause filed by Mother seeking to have Father held in contempt of court for violation of the temporary order. On May 8, 2008, the court issued a final order, granting Mother's divorce from Father and awarding Mother sole custody of the children and child support. The order also divided the Guardian ad Litem costs, requiring Mother to pay $3,701.95 and Father to pay $6,000. The court also issued an order on the Rule to Show Cause, holding Father in contempt of court.[3] Neither party filed a motion for reconsideration within the ten-day time period pursuant to Rule 59(e), SCRCP; however, on June 6, 2008, the family court filed a supplemental order with consent of the parties to address the restraining order language because Father was concerned it would impact his job as a police officer. On June 18, 2008, Father filed a motion to alter or amend the judgment. Mother filed a memorandum in opposition to the motion to alter or amend the judgment, and a hearing on the matter was held on September 30, 2008. In its order denying Father's motion, filed on January 21, 2009, the court found the motion was untimely and only raised issues that were fully addressed in the May 8, 2008 order, which had not been

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to do so." This order was amended on November 2, 2006, to increase the amount of child support by fifteen cents.

[3] The family court found Father had violated the terms of the September 27, 2006 temporary order by discussing the case with Daughter and constantly and repeatedly harassing Mother by telephone and e-mails. The court also ordered Father to pay Mother's attorney's fees for the Rule to Show Cause.

modified by the June 6, 2008 order; however, the court addressed the merits of Father's motion. Mother and Father both appealed to this court, and Mother filed a motion to dismiss Father's appeal,[4] which was denied on April 13, 2009.

STANDARD OF REVIEW

In an appeal from the family court, this court has the jurisdiction to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. Fiddie v. Fiddie, 384 S.C. 120, 124, 681 S.E.2d 42, 44 (Ct. App. 2009). "Although this court may find facts in accordance with our own view of the preponderance of the evidence, we are not required to ignore the fact that the [family] court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony." Id. "In particular, an appellate court 'should be reluctant to substitute its own evaluation of the evidence on child custody for that of the [family] court.'" Chastain v. Chastain, 381 S.C. 295, 302, 672 S.E.2d 108, 111 (Ct. App. 2009) (quoting Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996)); Altman v. Griffith, 372 S.C. 388, 393, 642 S.E.2d 619, 622 (Ct. App. 2007) (stating custody determinations largely rest in the sound discretion of the family court judge); Shirley v. Shirley, 342 S.C. 324, 330-31, 536 S.E.2d 427, 430 (Ct. App. 2000) ("Custody decisions are matters left largely to the discretion of the [family] court."); Paparella v. Paparella, 340 S.C. 186, 189, 531 S.E.2d 297, 299 (Ct. App. 2000) (noting appellate courts should be reluctant to supplant the family court's evaluation of witness credibility regarding child custody).

[4] Mother argued Father's appeal should be dismissed because Father's motion to alter or amend was not timely filed.

LAW/ANALYSIS

I. Father's Appeal

A. Expert Witness

First, Father argues the family court erred in refusing to qualify Teressa Harrington as an expert witness by misapprehending the law relevant to the admission or exclusion of expert witnesses. We disagree.

It is within the family court's discretion to determine whether a witness is qualified as an expert and whether his or her opinion is admissible on a fact in issue. Edwards v. Edwards, 384 S.C. 179, 183, 682 S.E.2d 37, 39 (Ct. App. 2009). "On appeal, the family court's ruling to exclude or admit expert testimony will not be disturbed absent a clear abuse of discretion." Id. "There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." Gadson v. Mikasa Corp., 368 S.C. 214, 228, 628 S.E.2d 262, 270 (Ct. App. 2006). "The party offering the expert has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony." Id. "Defects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony." Edwards, 384 S.C. at 183, 682 S.E.2d at 39 (quoting Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005)).

Father alleges the family court incorrectly held that prior qualification as an expert was a precondition to admission of an expert. At trial, Father sought to have Harrington, a licensed professional counselor, qualified as an expert in child counseling. Mother objected to Harrington being admitted as an expert because Harrington did not have any published works that were recognized and relied upon by other professionals in her field. Additionally,

Mother objected because Harrington had only spoken on topics like educational counseling techniques, and she had never testified in court before this case. Mother stated she did not object to Harrington testifying about the treatment she provided to Daughter. The court allowed Harrington to testify and reserved the right to rule on whether she was an expert.

In its June 6, 2008 order, the court stated it had considered Harrington's testimony, but the court had declined to admit Harrington as an expert in child counseling. The order noted that Harrington had never testified in court, and therefore, had never been admitted as an expert in any court proceeding concerning child custody, but did not state that was the reason it had declined to admit her as an expert. In the court's order denying Father's motion to alter or amend, the court further addressed the issue:

> As far as the counselor is concerned whom [Father] maintains should have been admitted as an expert, although she had extensive experience in counseling children, such experience does not necessarily qualify her as an expert in child custody matters. It was clear to this Court that [Father] had exercised undue influence over the child. Even if she had been qualified as an expert witness, her opinion was that it was the desire of [Daughter] to be with [Father] and that [Daughter] would have a more difficult time in adjusting if [Mother] were granted custody. Such opinion would not have changed my ruling as I had to consider numerous factors. . . . The Court did consider the counselor's testimony as a whole and noted that the child exhibited better coping skills at the end of the counseling sessions.

We find the family court did not abuse its discretion in refusing to qualify Harrington as an expert in child counseling. Furthermore, we find Father was not prejudiced by the court's decision because the court allowed Harrington to testify and considered her testimony in making its decision.

Second, Father argues the family court erred in prohibiting the introduction of statements made by Daughter to Harrington. We disagree.

Father sought to have the statements made by Daughter to Harrington during the course of her treatment admitted under Rule 703, SCRE. However, Rule 703, SCRE, only applies to experts, and the family court found Harrington was not qualified as an expert in child counseling; therefore, the court properly excluded the introduction of statements made by Daughter to Harrington. See Rule 703, SCRE; Jones v. Doe, 372 S.C. 53, 62-63, 640 S.E.2d 514, 519 (Ct. App. 2006) (holding Rule 703, SCRE, permits an expert giving an opinion to rely on facts or data "that are not admitted in evidence or even admissible into evidence"; however, it "does not allow for the unqualified admission of hearsay evidence merely because an expert has used it in forming an opinion"). Also, Rule 703 does not allow the admission of hearsay evidence simply because an expert used it in forming their opinion; it only provides the expert can give an opinion based on facts or data that were not admitted into evidence. Id. (quoting 2 Kenneth S. Broun et al., McCormick on Evidence § 324, at 418 (2006) and finding the expert may testify to the inadmissible evidence, but "[i]t is received only for the limited purpose of informing the jury of the basis of the expert's opinion and therefore does not constitute a true hearsay exception"). Furthermore, a family court's ruling on the admission or exclusion of evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law. Judy v. Judy, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct. App. 2009).

The court permitted Harrington to give her diagnosis of Daughter's condition; however, the court would not allow her to mention any of Daughter's statements:

> I don't want to hear anything the child says. If [Harrington] wants to testify as to what she diagnosed the child to have or whatever her condition is, that's fine, but I'm not hearing any hearsay concerning the child. The Court may determine on

> its own volition to talk with [Daughter] itself if she's as bright as everyone said she is.

Harrington was also permitted to testify to her opinion that it was the desire of Daughter to live with Father, and Daughter would have a more difficult time adjusting if Mother were granted sole custody. Further, Harrington was allowed to refer to her notes and testify about every session she had with Daughter and how Daughter was feeling at each meeting. Therefore, Father was not prejudiced by the court's exclusion of Daughter's statements. As a result, we find the family court did not abuse its discretion in prohibiting the introduction of statements made by Daughter to Harrington.

Third, Father argues the family court erred in refusing to admit Harrington's records into evidence. We disagree.

A family court's ruling on the admission or exclusion of evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law. Judy, 384 S.C. at 641, 682 S.E.2d at 839. Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears; however, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Id. Determinations of the relevance of evidence rest within the family court's discretion. Id.

Father sought to have Harrington's complete record on Daughter admitted into evidence and Mother objected, arguing it contained hearsay statements made by Daughter to Harrington and Daughter was available to testify. Father argued Harrington's records were admissible under Rule 803(6), SCRE, the Business Records Exception to the hearsay rule. Rule 803(6) provides that memorandum, reports, records, or data compilation, in any form, of acts, events, conditions, or diagnoses can be admissible if they are (1) made at or near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) made and kept in the course of a regularly-conducted business activity; (4) identified by the custodian or a qualified witness who can testify

regarding the mode of preparation of the record; and (5) found to be trustworthy by the court. See Rule 803(6), SCRE; Ex parte Dep't of Health & Envt. Control, 350 S.C. 243, 249, 565 S.E.2d 293, 297 (2002).

In its order denying Father's motion to alter or amend, the court stated "there was no reason or need for the records of [Harrington] to be admitted into evidence as she testified based upon her records and the Court was not going to allow the introduction of evidence which would be cumulative and which might contain hearsay testimony not otherwise admissible." Because the court permitted Harrington to review her notes and testify extensively about each of her sessions with Daughter, we find the family court did not abuse its discretion in prohibiting the introduction of Harrington's records.

Father also argues Daughter's statements, contained in Harrington's consultation notes, were admissible under Rules 803(3) and (4), SCRE, as statements made as to her then existing mental, emotional, or physical condition and for the purpose of diagnosis and treatment. Rule 803(3) provides an exception for statements of present state of mind, emotion, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but does not include statements of memory or belief to prove the fact remembered or believed. Rule 803(3), SCRE. Harrington was allowed to testify about every session she had with Daughter and Daughter's preference to live with Father; therefore, we find Father was not prejudiced by the court's exclusion of Harrington's consultation notes. Rule 803(4) provides "that the admissibility of statements made after the commencement of the litigation is left to the court's discretion," and Daughter did not begin seeing Harrington until after the case was filed. Rule 803(4), SCRE. Because the admission of evidence is within the discretion of the family court, and the court did not abuse that discretion, we find the family court did not err in refusing to admit Harrington's records into evidence.

B. Child Custody

1. Findings of Fact

Father argues the family court erred in making several findings of fact relevant to the issue of custody because they are not supported by the record. We disagree.

In an appeal from the family court, this court has the jurisdiction to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. Fiddie, 384 S.C. at 124, 681 S.E.2d at 44. However, the court is not required to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Id. Child custody decisions are matters left largely in the discretion of the family court. Shirley, 342 S.C. at 330, 536 S.E.2d at 430. Thus, this court should be reluctant to substitute its own evaluation of the evidence on child custody for that of the family court. Woodall, 322 S.C. at 10, 471 S.E.2d at 157.

First, Father argues the family court erred in finding Mother did not discuss the litigation with Daughter. Specifically, in its order, the court stated, "unlike [Father], [Mother] would not discuss the litigation with the child as directed by the Court order." Father claims this was in error because Mother explained that she and Father had been unfaithful when Daughter asked her what the word unfaithful meant; however, Mother testified she did not remember having the conversation with Daughter. Mother's mother, Mary Michau, testified she also overheard a conversation between Daughter and Father, wherein Father told Daughter that Mother and Father had both been unfaithful, but Mother would not forgive him, and his only mistake was telling Mother the truth. Father testified he told Daughter that Mother was seeing Trotter, and he told her that he was dating a girl named Alexis. Father also testified he told Daughter an overview of what was going to happen as a result of the litigation. Further, Father was found to be in contempt of court for violating the terms of the September 27, 2006 temporary order by

discussing the case with Daughter and constantly and repeatedly harassing Mother by telephone and e-mails. Mother's counselor, Margaret Judy-Kauffman, testified Mother was adamant that she did not want anyone to involve the children in the litigation. Additionally, Crystal Guyton, Mother's co-worker, testified at court that "[Daughter] was wanting to have conversations about, you know, what was going on and [Mother] was just matter of fact. She said it's an adult situation; she said that mommy is not going to discuss adult situations with you." Therefore, the record supports the family court's finding that Mother did not discuss the litigation with Daughter.

Second, Father asserts the court incorrectly surmised that "Father or someone with his interest at heart" improperly shared information with Daughter about Father's arrest.[5] Father asserts Daughter knew about the arrest because she was present when Father was arrested, and he denied discussing the details of the charges with her. However, Officer Morris testified that when Father was arrested, he was not handcuffed in front of the children, had freedom of movement, and was allowed to go inside and change clothes. Also, only one of the police cars was marked and only one officer was in uniform. Father testified he told Daughter an overview of what was going to happen as a result of the litigation. Harrington also testified Daughter was angry about "what she was told regarding the issues surrounding court, the charges and as a result of the court's decision," and she was concerned about whether she had been told the truth about the incident.

[5] At some point, Mother and her paramour, Edwin Scott "Scottie" Trotter, gave written statements and video-taped interviews to law enforcement that led to Father's arrest for criminal domestic violence and harassment against Mother. Officer Dustin Morris of the Georgetown County Sheriff's Department testified that Mother did not initiate the matter and she was reluctant "to get this thing rolling." Trotter testified that he did not tell Mother he contacted the police about Father's threats against him, and it was a co-worker that told Mother about it. Father was a police officer for the City of Jamestown, South Carolina, and as a result of the allegations, Father was arrested and placed on unpaid administrative leave for four months. After a trial in March 2007, Father was found not guilty of both charges.

Further, Father asserts the court incorrectly found Mother was "merely a witness" because she was an "active participant." In contrast, Officer Morris testified that Mother did not want to pursue the criminal prosecution at first, she did not have any control over whether charges were filed against Father, and she was "strictly a witness." Therefore, the record supports the family court's findings.

Third, Father states the court erred in finding Father's MySpace, written, and e-mail communications supported the granting of custody to Mother because no evidence was presented that the documents were shared with or seen by the children. Father also claims Mother sent e-mails to him mentioning her relationship with Trotter. In its order, the family court stated that after viewing the evidence and testimony, the court found that "Mother possesses the strongest ability to foster a positive parent/child relationship between the minor children and . . . Father." The court noted it "observed great hostility, animosity, and anger exhibited by . . . Father with respect to . . . Mother." The court stated the contents of e-mails between Mother and Father also supported awarding custody to Mother, and the court commented that one of Father's MySpace comments was disturbing:

> The court is further disturbed by the statement of [Father] contained in his myspace [sic] web page admitted into evidence . . . wherein he states, "I'm actually a little sorry for [Mother] just because losing her job affects my children. Well, maybe not. Now I'm financially more than able to support them if [Mother] gets out of the way or is pushed out. I can provide them the life they deserve and even better that [sic] they lost . . . I have a wonderful life planned with a wonderful woman and my only goal now is making sure my children share it with us.

Therefore, we find the record supports the family court's findings.

Fourth, Father claims the court erred in finding Father told Daughter she had to choose between her parents and she was unduly influenced by Father in her preference to live with him. The court's order states, "The evidence presented to the Court also proves that the minor daughter in this action was told that she had a choice to make in this matter concerning which parent she wanted to have custody of her." Harrington testified that Daughter expressed to her that she did not want to choose between her parents and she thought Harrington was going to help her choose. The order does not state it was Father who told her she had to choose. The order does state the court found "that [Daughter] was unduly influenced by [Father] in her stated preference to live with him," and Daughter had not reached "the age or maturity level to decide what is in her best interest and particularly where or who she lives with in this matter." Harrington testified that Daughter placed a majority of the blame on Mother for the breakup of the family, the loss of the family home, and Father's arrest. Harrington also said Daughter was angry at Mother because she thought Mother was not telling her the truth about the divorce, and when they tried to work on communication, it was "like [Daughter] had already made up her mind ahead of time what the correct answers were." Father testified he discussed the divorce with Daughter by giving her an overview of what was going to happen, whereas Mother did not want to involve the children in the litigation. Therefore, the evidence supports the family court's finding that Daughter was influenced by Father in her preference to live with him.

Finally, Father argues the court erred by stating that Mother was terminated from her job because of Father's "constant harassment of Mother by e-mails and telephone calls during office hours." Father asserts Mother sent him an e-mail from her work e-mail account telling him that Trotter had just left the office, thereby sharing the responsibility for her ultimately losing her job. Father also states that if the loss of a job is a relevant factor to be considered in the child custody analysis, that the court should have considered that Mother's allegations about Father led to his arrest and being placed on unpaid administrative leave for four months. However, Father was found to be in contempt of court for violating the terms of the September 27, 2006 temporary order by constantly and repeatedly harassing Mother by

telephone and e-mails. In that order, the court found Father "constantly and repeatedly harass[ed] [Mother] through e-mails and telephone calls, such that as a result of [Father's] conduct, [Mother] lost her job." Crystal Guyton, who worked with Mother, testified that Father would often call and e-mail Mother at work and she would get upset, which disrupted their work. Also, Mother's employer wrote a letter to the parties' attorneys stating that Father had been contacting Mother at work, and requesting that he cease contacting her at work. Therefore, we find the evidence supports the family court's finding that Mother was terminated from her job because of Father's harassment of Mother by e-mails and telephone calls.

2. Child Custody Factors

Father argues the family court erred in failing to consider important factors contained in the record in its award of primary custody to Mother. We disagree.

The controlling considerations in child custody cases are the welfare of the children and what is in their best interest. Ford v. Ford, 242 S.C. 344, 349, 130 S.E.2d 916, 920 (1963). In making its determination on custody, the family court should consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the children, as well as the psychological, physical, environmental, spiritual, educational, medical, family, emotional and recreational aspects of the children's lives. Woodall, 322 S.C. at 11, 471 S.E.2d at 157. "[A]ll the conflicting rules and presumptions should be weighed together with all of the circumstances of the particular case, and all relevant factors must be taken into consideration." Id. While this court has jurisdiction to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence, child custody decisions are matters left largely in the discretion of the family court. Shirley, 342 S.C. at 329-30, 536 S.E.2d at 429-30. Thus, this court should be reluctant to substitute its own evaluation of the evidence on child custody for that of the family court. Woodall, 322 S.C. at 10, 471 S.E.2d at 157.

Father asserts the Guardian ad Litem noted Daughter had a closer relationship with Father than Mother, Daughter preferred to live with Father, and Father was a "very fit" parent. In contrast, Father claims the Guardian ad Litem noted Daughter was in the process of "working through" her resentment of Mother, and Mother was just a "fit" parent. Father also asserts Harrington testified she thought Daughter was adjusted to the joint custody arrangement, and Daughter would have a greater adjustment period if she were required to live primarily with Mother due to Daughter's anger issues toward Mother.

In its supplemental final order, the court specifically addressed the factors it considered in making its decision to award Mother sole custody of the children:

> There are many factors which have been considered by this Court . . . including: who has been the primary caretaker; the conduct and character of the parties; the fitness of each parents [sic] to handle the physical and emotional needs of the children; conduct which would affect the welfare of the children; the willingness of each parent to facilitate a relationship between the child and the other parent; attitude and inclinations on the part of each parent as they impact the children and the psychological, physical, environmental, spiritual, educational, medical, familial, emotional and recreational aspect of the children's life. Considering the totality of the circumstances and all evidence presented as well as the credible testimony of . . . Mother, . . . Mother's witnesses and the testimony of . . . Father of which the court did not find to be credible at all times and . . . Father's witnesses, it is in the minor children's best interest for . . . Mother to have physical custody and the legal right to make all decision making with

> respect to the minor children with . . . Father having visitation.

Thus, the family court properly considered all the factors it is required to consider when making a child custody determination. Additionally, although this court may find facts in accordance with our own view of the preponderance of the evidence, the family court was in a better position to evaluate the witnesses' credibility and assign comparative weight to their testimony. Therefore, we find the family court did not err in awarding Mother sole custody of the children.

3. Caregiver Consideration

Father argues the family court erred in awarding Mother sole custody based on the fact that Mother was historically the caregiver of the minor children. We disagree.

In South Carolina, the rule is there is no preference given to the father or mother in regard to the custody of the child, and "[t]he parents stand in perfect equipoise as the custody analysis begins." Kisling v. Allison, 343 S.C. 674, 678, 541 S.E.2d 273, 275 (Ct. App. 2001). However, "[a]lthough 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." Patel v. Patel, 359 S.C. 515, 527, 599 S.E.2d 114, 120 (2004).

Father argues the court erred in placing "a great deal of emphasis" on the fact that Mother had been the primary caretaker of the children. Also, in making the custody decision, Father argues the court failed to consider that Father is now the Chief of Police for Jamestown and can set his own work schedule, whereas Mother now works a full work day. Additionally, Father asserts the court failed to consider that Mother has been unwilling to share important dates and holidays with Father, while Father has been more amenable.

We already found the family court properly considered all of the factors it should consider when making a child custody determination. Also, although we may find facts in accordance with our own view of the preponderance of the evidence, we noted the family court was in a better position to evaluate the witnesses' credibility and assign comparative weight to their testimony. Therefore, we find the family court did not err in awarding Mother sole custody of the children.

II. Mother's Appeal

A. Motion to Alter or Amend

Mother argues the family court erred in hearing Father's untimely motion to alter or amend. We disagree.

Mother argues Father failed to file his motion to alter or amend the May 8, 2008 order within ten days after May 14, 2008, the date the notice of judgment was mailed to all parties. The supplemental order was filed on June 6, 2008, and Father filed his Rule 59(e), SCRCP, motion on June 18, 2008. Mother also asserts Father filed his motion based on the supplemental order; however, the grounds of his motion only addressed issues that were fully addressed in the May 8 order, and not modified by the June 6 order.

The supplemental final order states that the May 8, 2008 order inadvertently omitted language that both parties had agreed to include; "therefore, such Order is rescinded ab initio and replaced by this Order." Black's Law Dictionary states that the term ab initio is Latin for "from the beginning." Black's Law Dictionary 4 (7th ed. 1999).

Mother does not disagree it was the parties' intent to void the first order to protect Father's job as a police officer. However, she asserts the family court judge lost jurisdiction to modify the May 8 order because the term had ended and only the correction of clerical errors could be made after that time. She also asserts that because the second order was filed after the court had lost jurisdiction to alter the order and with the consent of the parties, it was

akin to a consent order, which cannot be attacked by the parties either by direct appeal or in a collateral proceeding.

In an affidavit filed March 10, 2009, Father's attorney, John Prosser, states the family court signed Mother's proposed order on May 8, 2008, prior to Prosser's review of the order, and mailed it to Prosser on Saturday, May 10, 2008.[6] Prosser states he received the order on or after Monday, May 12, 2008, and a telephone conference was held between the court and counsel on Wednesday, May 14, 2008. Prosser asserts that during the conference, the parties agreed the order was signed prematurely and would be held void ab initio. The supplemental order was signed by the court on Monday, June 2, 2008, and filed on June 6, 2008. Prosser claims he did not receive a copy of the supplemental order until June 9, 2008, and he filed the Rule 59(e), SCRCP, motion on June 18, 2008.

There are few family court cases in South Carolina concerning the effect of the phrase "ab initio." In Lukich v. Lukich, 368 S.C. 47, 627 S.E.2d 754 (Ct. App. 2006), affirmed by 379 S.C. 589, 666 S.E.2d 906 (2008), this court was faced with the question of whether an annulment order declaring Wife's first marriage void ab initio related back so as to validate her purported second marriage. This court found that "an annulment that declares a pre-existing marriage void ab initio does not relate back so as to give validity to a marriage that was bigamous before the annulment was granted." Id. at 55, 627 S.E.2d at 758. Therefore, had the second marriage occurred after the annulment declaring the marriage void ab initio, the second marriage would have not been bigamous because legally the first one had never occurred. Id.; see Joye v. Yon, 355 S.C. 452, 455, 586 S.E.2d 131, 133 (2003) ("A subsequent marriage that is void ab initio is deemed to never have existed."); Rodman (Fried) v. Rodman, 361 S.C. 291, 296, 604 S.E.2d 399, 402 (Ct. App. 2004) ("There is no legal distinction between a marriage which is annulled and one terminated by reason of bigamy, as they are both void ab initio, or 'from the inception.'").

[6] This is also recounted in a letter from Prosser to Judge Holmes, dated August 20, 2008.

Thus, in this case, because the first order was rescinded ab initio it was as if it had never existed. As a result, the second order, filed June 6, 2008, was the only order from which Father could have filed a motion to reconsider, and his motion was timely filed. Therefore, we find the court did not err in hearing Father's motion.

B. Attorney's Fees

Mother argues the family court erred in failing to award her attorney's fees and costs. We disagree.

In family court, the award of attorney's fees is left to the discretion of the judge and will only be disturbed upon a showing of abuse of that discretion. Tracy v. Tracy, 384 S.C. 91, 100, 682 S.E.2d 14, 19 (Ct. App. 2009). In determining whether to award attorney's fees, the court should consider four factors: (1) each party's ability to pay his or her own fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fee on each party's standard of living. Griffith v. Griffith, 332 S.C. 630, 645, 506 S.E.2d 526, 534 (Ct. App. 1998). The court must consider six factors when determining the amount of attorney's fees to award: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

Mother argues the family court failed to take into consideration that her income is used to support herself and her two children, and even though she receives child support from Father, her monthly expenses exceed her monthly income. Therefore, she asserts the court erred in refusing to award her attorney's fees and costs. Also, Mother asserts she attempted to settle the case several times, but Father declined her proposals. She claims that her attorney's fees would have been greatly reduced had he accepted the offers.

In determining whether to award attorney's fees, the family court stated it had reviewed the Glasscock factors, and specifically considered (1) the nature and difficulty of the case; (2) that the bulk of the time was devoted to child custody; (3) that the hourly fees were reasonable and customary for similar services; (4) and that both parties were financially capable of paying their own fees. Therefore, the court determined that each party was responsible for their own attorneys' fees. We find no error in this determination.

CONCLUSION

Accordingly, the family court's order is

AFFIRMED.

HUFF, SHORT, and WILLIAMS, JJ., concur.