Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

M E D I A R E L E A S E
September 6, 2005

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of the seat for which the prospective candidate intends to apply. Correspondence and questions must be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Senate Counsel
Post Office Box 142, Columbia, South Carolina 29202
(803) 212-6629

The Commission will not accept applications after 12:00 noon on Wednesday, October 5, 2005.

The term of the office currently held by the Honorable Costa M. Pleicones, Justice of the Supreme Court, Seat 2, will expire on July 31, 2006.

The term of the office currently held by the Honorable Thomas E. Huff, Judge of the Court of Appeals, Seat 8, will expire on June 30, 2006.

A vacancy will exist in the office currently held by the Honorable Howard P. King, Judge of the Circuit Court for the Third Judicial Circuit, Seat 2, upon Judge King's retirement on June 30, 2006.

The term of the office currently held by the Honorable J. Michael Baxley, Judge of the Circuit Court for the Fourth Judicial Circuit, Seat 2, will expire on June 30, 2006.

The term of the office currently held by the Honorable L. Casey Manning, Judge of the Circuit Court for the Fifth Judicial Circuit, Seat 2, will expire on June 30, 2006.

The term of the office currently held by the Honorable Roger L. Couch, Judge of the Circuit Court for the Seventh Judicial Circuit, Seat 2, will expire on June 30, 2006.

The term of the office currently held by the Honorable James W. Johnson, Jr., Judge of the Circuit Court for the Eighth Judicial Circuit, Seat 2, will expire on June 30, 2006.

The term of the office currently held by the Honorable Daniel F. Pieper, Judge of the Circuit Court for the Ninth Judicial Circuit, Seat 2, will expire on June 30, 2006.

The term of the office currently held by the Honorable Alexander S. Macaulay, Judge of the Circuit Court for the Tenth Judicial Circuit, Seat 2, will expire on June 30, 2006.

The term of the office currently held by the Honorable W. Paul Keesley, Judge of the Circuit Court for the Eleventh Judicial Circuit, Seat 1, will expire on June 30, 2006.

The term of the office currently held by the Honorable Marc H. Westbrook, Judge of the Circuit Court for the Eleventh Judicial Circuit, Seat 2, will expire on June 30, 2006.

The term of the office currently held by the Honorable John C. Few, Judge of the Circuit Court for the Thirteenth Judicial Circuit, Seat 2, will expire on June 30, 2006.

The term of the office currently held by the Honorable Perry M. Buckner, Judge of the Circuit Court for the Fourteenth Judicial Circuit, Seat 1, will expire on June 30, 2006.

A vacancy will exist in the office currently held by the Honorable Jackson V. Gregory, Judge of the Circuit Court for the Fourteenth Judicial Circuit, Seat 2, upon Judge Gregory's retirement on July 10, 2006. The successor will fill the unexpired term of that office which will expire on June 30, 2009.

A vacancy will exist in the office currently held by the Honorable Stephen S. Bartlett, Judge of the Family Court for the Thirteenth Judicial Circuit, Seat 1, upon Judge Bartlett's retirement on or before December 31, 2006. The successor will fill the unexpired term of that office which will expire on June 30, 2007, and the subsequent full term which will expire on June 30, 2013.

A vacancy will exist in the office currently held by the Honorable Clyde N. Davis, Jr., Master-in-Equity for Lexington County, upon Judge Davis' retirement on January 1, 2007.

The term of the office currently held by the Honorable Ralph K. Anderson, III, Judge of the Administrative Law Court, Seat 6, will expire on June 30, 2006.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

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Judicial Merit Selection Commission

Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6092

M E D I A R E L E A S E

September 12, 2005

The Judicial Merit Selection Commission is currently accepting applications for the judicial office listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing that he/she intends to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Jane O. Shuler, Senate Counsel
Post Office Box 142
Columbia, South Carolina 29202
(803) 212-6629

The Commission will not accept applications after 12:00 noon on Tuesday, October 11, 2005.

A vacancy will exist in the office currently held by the Honorable Thomas W. Cooper, Jr., Judge of the Circuit Court for the Third Judicial Circuit, Seat 1, upon Judge Cooper's retirement on or before September 30, 2006. The successor will fill the unexpired term of that office which will expire on June 30, 2010.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

*** * ***

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 35

September 12, 2005

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

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Octavia Jackson, Appellant,

v.

Swordfish Investments, L.L.C., Respondent.

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 26037
Heard June 2, 2005 - Filed September 6, 2005

AFFIRMED

Carl L. Solomon, of Gergel, Nickles & Solomon, P.A. and Tony Dessausure, of The Dessausure Law Firm, both of Columbia, for Appellant.

J. R. Murphy and Adam J. Neil, both of Murphy & Grantland, P.A., of Columbia, for Respondent.

JUSTICE BURNETT: This is a negligence action against a commercial landlord arising out of a shooting which occurred inside the leased premises. The trial court granted the landlord's motion for summary judgment. We certified the case from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Ronald O. Swinson, Jr. and his wife each own a fifty-percent share of Swordfish Investments, LLC ("Swordfish"), a limited liability company which Swinson set up to own real estate. Swinson is employed by C.B. Richard Ellis, a commercial real estate and brokerage firm.[1] C.B. Richard Ellis is the leasing agent for properties owned by Swordfish.

Swordfish owns the Columbia East Shopping Center in Columbia. Uptop Management , Inc. ("Uptop"), a South Carolina corporation, leased a portion of the shopping center for use as a nightclub. The lease dated December 21, 2000, was signed by Swinson on behalf of Swordfish and by Pearl Ingram on behalf of Uptop. Swinson testified he believed Uptop subsequently entered into a management agreement with Dance, Inc. ("Dance") over its portion of the shopping center during the term of Uptop's lease. When operated by Dance, Uptop's nightclub was known by various names, including Club Voodoos.

During the operation of the various nightclub establishments in Uptop's leased portion of the shopping center, numerous crimes, including narcotics violations, assaults, and various instances of disorderly conduct, were committed on the premises. Ingram requested security be provided by either Swordfish or C.B. Richard Ellis on Swordfish's behalf. Swordfish agreed to provide security in the common areas, first by employing off-duty deputies and later employing a private security company.

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[1] Swinson is a partner in C.B. Richard Ellis and is employed to run the overall operations of the company. He is not a commercial real estate broker.

Larry Capall, director of property management for C.B. Richard Ellis, testified Swordfish switched from the off-duty officers to the private security company because the club owners complained about the cost to employ the off-duty deputies. Although Swordfish arranged for the security in the common areas, it charged the tenants for the cost of maintaining the security. Swordfish considered security "additional rents" under the lease to be paid by the tenant. Prior to November 3, 2001, Swordfish, because of the failure of payment by Uptop, discontinued the security in the common areas.

On November 3, 2001, Octavia M. Jackson (Appellant) and several friends entered Club Voodoos. While Appellant was in the club, two altercations occurred. One involved a male patron who was escorted from the club. Soon thereafter Appellant and her party decided to leave and began exiting the club. At that time, the male patron re-entered the club with a gun and began shooting in the air and indiscriminately into the crowd. Appellant was shot multiple times.

Appellant argues Swordfish had a duty to protect her from the criminal activity in the club by providing adequate security on or in the vicinity of the property where Appellant was shot. The trial court granted Swordfish's motion for summary judgment.

ISSUE

Did the trial court err in granting Swordfish's motion for summary judgment?

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Café Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). Further, summary judgment should not be granted even when there is no dispute as to

the evidentiary facts, if there is a dispute as to the conclusion to be drawn therefrom. MacFarlane v. Manly, 274 S.C. 392, 264 S.E.2d 838 (1980). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

LAW/ANALYSIS

In a negligence action, a plaintiff must show the (1) defendant owed a duty of care to the plaintiff (2) defendant breached the duty by a negligent act or omission (3) defendant's breach was the actual and proximate cause of the plaintiff's injury and (4) the plaintiff suffered injury or damages. Dorrell v. South Carolina Dept. of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004). Whether the law recognizes a particular duty is an issue of law to be determined by the court. Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996).

Appellant argues the trial court erred in concluding Swordfish had no duty to protect her from the criminal acts of her assailant inside the leased premises. We disagree.

In Cramer v. Balcor Property Management, Inc., 312 S.C. 440, 441 S.E.2d 317 (1994), we concluded, on a certified question from the federal district court, that residential landlords do not owe a general duty to protect tenants from criminal activity of third parties. We agreed with the federal district court opinion in Cooke v. Allstate Management Corp., 741 F.Supp. 1205 (D.S.C. 1990), which found the residential landlord/tenant relationship to be fundamentally different from the relationships for which South Carolina law will impose a duty to protect against criminal activity.

In the present case, Appellant argues that as the sub-lessee's invitee, Swordfish had a common law duty to protect her from the criminal acts of a third party. Appellant's status as an invitee does not, under the facts of this case, create a duty on the part of Swordfish to protect her from the

criminal acts of third parties inside the leased premises, an area which Swordfish did not control or possess.[2]

In Cramer, we explained that even though South Carolina law does not impose a duty on a landlord to protect a tenant from the criminal acts of third parties, a plaintiff is not precluded from asserting a general negligence principle. A duty may arise under the particular circumstances of an individual case based upon a showing of negligence constituting the proximate cause of the loss, even though the law does not impose a general duty on landlords to protect tenants or their guests from the criminal acts of third parties. Cramer, 312 S.C. at 443, 441 S.E.2d at 319.

Appellant argues the applicability of two exceptions to the traditional rule of non-liability of landlords. The exceptions are the "affirmative acts" exception and the "common areas" exception. We conclude neither exception is applicable in this case.

Under the common law, even where there is no duty to act but the defendant voluntarily undertakes the act, the defendant assumes a duty to use due care. Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991). Appellant argues that once Swordfish acted to provide security, it was obligated to maintain adequate security.

Although Swordfish agreed to arrange for security in the common areas at the tenant's expense, there is no evidence in the record Swordfish ever agreed to provide security inside the club. Swordfish had neither possession nor control over the activities inside the club when Appellant was shot. Therefore, no duty arose, under the affirmative acts

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[2] Appellant argues Cramer is inapposite because Swordfish is a commercial landlord and Cramer addressed a landlord's duty only in the residential setting. We decline to address the issue of a commercial landlord's duty under the facts of this case, in which the crime occurred inside leased premises not under the landlord's control, and Appellant presented no evidence of any alleged criminal or suspicious activity occurring in areas under the landlord's control.

exception, on the part of Swordfish to protect its tenants or their patrons from the criminal acts of third parties occurring inside the club.

Appellant next argues Swordfish, as owner of the property, had a duty to maintain common areas in a safe and secure manner. Because Appellant's assailant was able to re-enter the club, Appellant argues Swordfish breached its duty under the common areas exception.

In a case presenting different facts, we might well agree with the dissent that a commercial landlord has a duty to reasonably protect invitees from foreseeable criminal acts in areas under the commercial landlord's control. Assuming, without deciding, Swordfish had a duty under the lease to provide security in the common areas, Appellant has failed to present any evidence demonstrating a breach of this duty. Appellant has presented no evidence of any alleged criminal or suspicious activity occurring outside the club before Appellant's assailant re-entered the club. There simply is no evidence in the record suggesting the assailant's activities outside the club would have alerted security personnel in the common areas of the assailant's impending criminal conduct inside the club.

Finally, our resolution of this issue is dispositive and we need not address Appellants' remaining issues regarding proximate causation. Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issue when resolution of prior issue is dispositive).

AFFIRMED.

MOORE and WALLER, JJ., concur. PLEICONES, J., dissents in a separate opinion in which TOAL, C.J., concurs.

JUSTICE PLEICONES: I respectfully dissent. In my opinion, Swordfish had a duty to reasonably secure the common areas of the premises, and there are genuine issues of material fact concerning breach and causation.

By emphasizing the fact that Appellant was injured inside the club, an area over which Swordfish purportedly had no control, the majority avoids Appellant's argument that Swordfish had a duty to provide reasonable security measures in the common areas outside the nightclub, which were under Swordfish's control, and that the failure to do so allowed the assailant to return to the club and injure Appellant. That Appellant was shot inside the club relates to causation, which in my opinion, is not here a proper element of negligence on which to base summary judgment.

I agree with Appellant that a commercial landlord, under circumstances here appearing, has a duty to reasonably protect invitees from foreseeable criminal acts in areas under the landlord's control. Compare Cramer v. Balcor Prop. Mgmt., Inc., 312 S.C. 440, 441 S.E.2d 317 (1994) (holding that a residential landlord has no duty to protect invitees from foreseeable criminal acts), with Bullard v. Ehrhardt, 283 S.C. 557, 559, 324 S.E.2d 61, 62 (1984) (holding that a store owner has a duty to protect invitees from foreseeable criminal acts), and Munn v. Hardee's Food Sys., Inc., 274 S.C. 529, 531, 266 S.E.2d 414, 414-15 (1980) (same), and Shipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 484, 238 S.E.2d 167, 169 (1977) (same).

Swordfish is a commercial landlord which expects members of the general public to utilize the common areas as patrons of Swordfish's tenants. If a landlord like Swordfish should reasonably anticipate that the paying public will be exposed to society's criminal element, then it is appropriate that the landlord be expected to take measures to protect the patrons. As the party in control of the common areas, the landlord is in the best position to bear the burden with respect to those areas. See Cramer, 312 S.C. at 442-43, 441 S.E.2d at 318-319 (distinguishing store owners, who invite the general public to their premises, from residential landlords, who do not invite the general public to their premises) (relying on Cooke v. Allstate Mgmt. Corp., 741 F. Supp. 1205 (D.S.C. 1990)).

The question, then, is whether Swordfish should have foreseen criminal behavior taking place in the common areas of its property. The evidence in the record is overwhelming that long before Appellant was shot, drug use, violence, and other criminal behavior were rampant in the common areas surrounding the nightclub. Swordfish was fully aware of the situation, and I would therefore hold that a duty to reasonably secure the common areas arose prior to the shooting at issue.

A jury[3] must determine whether Swordfish breached its duty after considering evidence relating to what security measures, if taken, would have fulfilled that duty. I find summary judgment not properly based on this element of negligence.

Likewise, there remain for further factual development matters relating to causation. Assuming a breach of Swordfish's duty in the common areas, it remains to be determined whether such breach was a proximate cause of the assailant's access to the club while armed.

Further, I disagree with the circuit court that proximate cause is absent as a matter of law. The circuit court held that there was no question but that the shooting was an unforeseeable, intervening act that broke the causal link between any breach by Swordfish and Appellant's injury. This determination is irreconcilable with Swordfish's duty arising from the foreseeability of criminal conduct. Like the presence of cause in fact, the presence of proximate cause would depend on the jury's decision on breach. It is impossible at this point to determine as a matter of law that a breach by Swordfish did not cause Appellant's injury.

On these grounds, the grant of summary judgment to Swordfish should be reversed, and the case remanded for trial.

In addition, and notwithstanding the previous discussion, the case must be remanded for a determination whether Swordfish had a contractual duty to

[3] In her complaint, Appellant requested a jury trial.

secure the common areas. Appellant argued to the circuit court and this Court that Swordfish assumed such a duty in its lease with Up-Top. The circuit court did not interpret the lease, however, because the court held that Appellant's "negligence claim [could not] lie if it [were] based on a breach of contract between Swordfish and Up-Top in the absence of a duty independent of the contract." This was error. Even when a duty to the plaintiff does not otherwise exist, a duty may arise out of the alleged tortfeasor's contract with a third party. Andrade v. Johnson, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003). Accordingly, the grant of summary judgment should be reversed and the case remanded so that the circuit court can interpret the lease. Were the court to find that the lease imposed a duty on Swordfish, then breach and causation would depend on the nature and extent of that contractual duty, which could differ from the common-law duty discussed above.

For the reasons I have stated, I would reverse the grant of summary judgment and remand the case for trial.

TOAL, C.J., concurs

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph Mark Clark, Sr., Respondent,

v.

Aiken County Government & South Carolina Property and Casualty Insurance Guaranty Association, formerly Legion Insurance Company, Appellants.

Appeal from Aiken County
James R. Barber, Circuit Court Judge

Opinion No. 4023
Heard June 7, 2005 – Filed September 12, 2005

AFFIRMED

Mark D. Cauthen and R. Daniel Addison, both of Columbia, and David A. Wilson and Michael Allen Farry, both of Greenvile, for Appellants.

Franklin D. Beattie, Jr., of Georgetown, for Respondent.

CURETON, A.J.: This is a workers' compensation case involving an award based on change of condition. The Workers' Compensation Commission found that Joseph Mark Clark, Sr. sustained a change of physical condition resulting in permanent and total disability, and the circuit court affirmed. We affirm as well.

FACTS

The parties stipulated that Clark sustained an injury on July 12, 1999 in an accident arising out of and in the course of his employment with Aiken County. Clark twisted his lower back while attempting to unhook a trailer from a vehicle. The parties also stipulated to an average weekly wage and compensation rate.

In the original proceeding, the single commissioner found Clark reached MMI on January 20, 2000 and that he had sustained a 30% permanent partial disability as a result of the accident. He awarded benefits accordingly. Clark then appealed to the full commission. In his brief to the full commission, he requested, inter alia, that Dr. Martin Greenberg be designated his treating physician "to provide alternative medical treatment."

While the case was pending before the full commission, Clark's pain increased. Clark was seen by Dr. John Downey who, along with Clark's attorney, referred him to Dr. Greenberg. Dr. Greenberg recommended surgery to Clark's back and performed the surgery on July 27, 2001. Clark did not get permission from the County for Dr. Greenberg to treat him or perform the surgery.

On August 10, 2001 the County tendered and Clark in turn accepted payment of the monetary benefits awarded by the single commissioner.

On October 9, 2001, the full commission affirmed the single commissioner's order, adopting verbatim his findings of fact and conclusions of law. The full commission did not address the issue of whether Clark's condition had changed since he reached MMI, nor did the full commission

address the request in Clark's brief that Greenberg be appointed his treating physician.

The surgery successfully alleviated Clark's pain for about four to six months. Then the pain returned, although it was not as severe. After examining Clark again, Dr. Greenberg determined that Clark was permanently vocationally disabled. Clark has not worked since March of 2000 when the County retired him based on disability.

In January 2002, Clark filed a Form 50 claiming a substantial change of condition. The single commissioner concluded that Clark sustained a worsening of his condition and had an impairment of more than 51% to his back. The single commissioner further concluded that the change in physical condition occurred after August 14, 2001. Accordingly, he awarded Clark benefits for total and permanent disability. The single commissioner also specifically found that the treatment by Dr. Greenberg was "necessary, reasonable and was an attempt to lessen [Clark's] disability." He ordered the County to pay for all past and continuing treatment provided to him.

The County appealed to the full commission, which again affirmed, adopting the findings and conclusions of the single commissioner. The circuit court also affirmed. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of a decision of an administrative agency. S.C. Code Ann. §§ 1-23-310 to 400 (Supp. 2004). Section 1-23-380(A)(6) establishes the substantial evidence rule as the standard of review. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981). Under this standard, a reviewing court may reverse or modify an agency decision based on errors of law, but may only reverse or modify an agency's findings of fact if they are clearly erroneous. S.C. Code Ann. § 1-23-380(A)(6)(d) and (e).

Accordingly, a reviewing court may not substitute its judgment for that of the full commission as to the weight of the evidence on questions of fact.

Stephens v. Avins Constr. Co., 324 S.C. 334, 337, 478 S.E.2d 74, 76 (Ct. App. 1996). Instead, review of issues of fact is limited to determining whether the findings are supported by substantial evidence in the record. Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004). "On appeal, this court must affirm an award of the Workers' Compensation Commission in which the circuit court concurred if substantial evidence supports the findings." Solomon v. W.B. Easton, Inc., 307 S.C. 518, 520, 415 S.E.2d 841, 843 (Ct. App. 1992). "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action." Howell v. Pacific Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987).

LAW/ANALYSIS

I. Change of Condition

The County's first contention on appeal is that Clark failed to prove a change of condition entitling him to additional compensation. Specifically, the County argues that because the change of condition asserted by Clark occurred before the full commission issued its order in the initial proceeding, the change could not have occurred subsequent to the first award. We disagree.

Initially, Clark argues that the County failed to preserve this argument for appeal. In its request for review by the full commission, the County stated as grounds for appeal, in relevant part, that the single commissioner erred in finding as a fact and concluding as a matter of law that Clark sustained a change of condition for the worse. Clark argues that this assignment of error is not specific enough to preserve the argument for appeal.

An issue not raised in the application for review is not preserved for the full commission's consideration. Creech v. Ducane Co., 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct. App. 1995). General exceptions that fail to specifically assign the grounds for error are insufficient to preserve an issue.

Bogart v. First Citizens Bank & Trust Co., 273 S.C. 179, 180, 255 S.E.2d 449, 450 (1979). However, rules of appellate procedure should not be interpreted to create a trap for the unwary. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004). Although we find preservation tenuous at best, we nevertheless proceed to the merits.

The Workers' Compensation Act provides a mechanism for reopening an award if there has been a change in condition. Creech, 320 S.C. at 564, 467 S.E.2d at 117; S.C. Code Ann. § 42-17-90 (1985). The purpose of this section is to enable the full commission to change the amount of compensation, including increasing compensation when circumstances indicate a change of condition for the worse. Cromer v. Newberry Cotton Mills, 201 S.C. 349, 354-55, 23 S.E.2d 19, 21 (1942). Accordingly, the full commission has continuing jurisdiction over its awards for the period set forth in section 42-17-90. Id.

Under section 42-17-90, a change of condition must occur after the first award for a claimant to be eligible for a review of that award. Cromer, 201 S.C. at 357, 23 S.E.2d at 21. "The issue before the Commission is sharply restricted to the question of extent of improvement or worsening of the injury on which the original award was based." Gattis v. Murrells Inlet VFW # £10420, 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct. App. 2003) (quoting Krell v. S.C. State Hwy. Dep't, 237 S.C. 584, 118 S.E.2d 322 (1961)); 5 Arthur Larson, Larson's Workers' Compensation Law § 131.03 (2004).

The County's argument appears to resemble a species of claim preclusion, though the County does not refer to it as such. Basically, the County argues that because an award by a single commissioner is not a final adjudication unless neither party appeals to the full commission, the change of condition must occur after review of the initial award by the full commission is completed. See Riddle v. Fairforest Finishing Co., 198 S.C. 419, 424, 18 S.E.2d 341, 343 (1942) (holding that because the single commissioner's award is not a final adjudication, a party may not appeal directly to the circuit court). In other words, under principles of res judicata, Clark is precluded from asserting a change of condition following the full

commission's order because he could have asserted it before the full commission in the original claim.

The doctrine of res judicata ordinarily acts to preclude relitigation of issues or claims actually litigated or which might have been litigated in the first action. Estridge v. Joslyn Clark Controls, Inc., 325 S.C. 532, 540, 482 S.E.2d 577, 581 (Ct. App. 1997). Nevertheless, a final judgment or award is not res judicata of issues neither asserted nor required to be asserted "or which could not properly be asserted." 101 C.J.S. Workers' Compensation § 1499 (2000) (emphasis added).

Our supreme court, citing Restatement (Second) of Judgments, section 20(2) (1982), has held that res judicata is not always an ironclad bar to a later claim:

> A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or after the precondition has been satisfied, unless a second action is precluded by operation of the substantive law.

Likewise, this court stated in Estridge that a symptom which is "present and causally connected, but found not to impact upon the claimant's condition at the time of the original award, may later manifest in full bloom and thereby worsen his or her condition. Such an occurrence is within the reasons for the code section involving a change of condition." 325 S.C. at 540, 482 S.E.2d at 581.

Dr. Greenberg made the determination that Clark needed back surgery to ease his back pain and performed the surgery prior to the full commission's order in the initial proceeding. Clark had no way of knowing if the surgery would improve his condition, and, therefore, the degree of change in condition was not yet ripe for review by the full commission. Furthermore, inasmuch as the surgery's aim was to lessen Clark's degree of

disability, the County was not prejudiced by having to wait for the natural and expected improvement of his physical condition following surgery.

In Gattis, a claimant sought to introduce evidence not included in the record before the single commissioner. 353 S.C. at 105, 576 S.E.2d at 193. The full commission refused to admit the evidence, holding that it would be appropriate for a change of condition proceeding instead. Id. The claimant subsequently requested review of the initial award based on change of condition, and the full commission found a change of condition based on the evidence sought to be introduced in the initial proceeding before it. Id. at 106, 576 S.E.2d at 194. The circuit court and this court on appeal affirmed the full commission's decision. This court held that because the full commission limited its initial order to a determination of the claimant's condition prior to the advent of the evidence in question, the evidence was appropriate for the change of condition proceeding. Id. at 109, 576 S.E.2d at 195-96.

Furthermore, it is undisputed that the full commission did not address any change of Clark's condition at the time of its decision. The fact that Clark requested in his brief to the full commission that Dr. Greenberg be designated as treating physician, does not lead to the conclusion that the request was actually considered and denied. The full commission's order made no ruling on the issue and merely adopted the findings and conclusions of the single commissioner. Because the onset of Clark's change of condition began before the full commission made its decision, the County argues that Clark could have moved to admit newly discovered evidence under 25A S.C. Code Ann. Regs. 67-707 (Supp. 2004). However, because Clark did not know the degree, if any, the surgery would relieve his disability, we conclude his claim should not be barred under the unique facts of this case.

"The determination of whether a claimant experiences a change of condition is a question for the fact finder." Gattis, 353 S.C. at 107, 576 S.E.2d at 194. We must therefore affirm if substantial evidence supports the full commission's finding. See Solomon v. W.B. Easton, Inc., 307 S.C. 518, 520, 415 S.E.2d 841, 843 (Ct. App. 1992).

Upon his examination of Clark in July 2001, Dr. Greenberg testified that based on MRI results there had been a worsening of his condition since Dr. Epstein saw him in March of 2000. The MRI showed severe progressive narrowing of the spine, a marked worsening of Clark's previous condition, leading Dr. Greenberg to recommend urgent surgery. Likewise, Dr. Gero Kragh testified that a comparison of Clark's MRIs indicated a change of condition after June of 2000. He opined that the surgery was medically necessary in an effort to lessen Clark's disability. Additionally, Clark testified to increased pain in his legs and back after February 2001 and the lessening of that pain after the surgery. He testified also that some of the pain returned several months after the surgery, but not to the extent it persisted before the surgery. Therefore, substantial evidence exists in the record to support the finding that Clark sustained a change of condition subsequent to the prior award.

II. Designation of Dr. Greenberg as Authorized Treating Physician

The County next argues that because Dr. Greenberg was not Clark's designated medical provider at the time he recommended and performed the surgery, the full commission erred in ordering it to pay for the treatment. We disagree.

After Clark's back injury, the County referred him to Dr. Gary T. Fishbach, who referred him to Dr. Franklin M. Epstein. Dr. Epstein opined that Clark was not a suitable candidate for surgery because he was obese and smoked.[1] Dr. Epstein therefore referred Clark to Dr. John Downey for pain management in the fall of 2000.

[1] In the original proceeding, the single commissioner noted the wide discrepancy between the conclusions of the experts and ordered an independent evaluation. The parties sparred over which physician would perform the evaluation, and it was finally performed by Dr. James F. Bethea. The original order considered Dr. Bethea's opinion, as well as that of Dr. Epstein and Dr. James K. Aymond.

Clark's pain continued, however, and he sought a second opinion. Clark spoke to his wife, who had worked with Dr. Greenberg. Dr. Downey referred Clark to Dr. Greenberg for an evaluation for surgery, noting that the referral was made at Clark's attorney's request. Dr. Greenberg testified that Clark's wife made the referral along with Dr. Downey. Clark testified he asked Dr. Downey for the referral because of the persistent pain.

During that period a conflict arose among the physicians. Drs. Epstein, Downey, and Greenberg were originally in practice together at the Southern Neurologic Institute. The practice split apart in the fall of 2001. Dr. Greenberg left Dr. Epstein and joined Dr. Downey in October of 2001. The breakup resulted in ill will between Dr. Epstein and Dr. Greenberg. In Dr. Greenberg's affidavit, he testified Clark advised him the treatment he had received from Dr. Epstein was unsatisfactory, and Dr. Epstein refused to provide Dr. Greenberg with Clark's records.

After Dr. Greenberg performed the surgery and Clark filed a claim for change of condition, the County demanded another evaluation by Dr. Epstein. When Clark refused to attend the appointment, the County filed a motion to compel his participation. Clark moved to disqualify Dr. Epstein, alleging that Dr. Epstein's former relationship and contacts with Dr. Greenberg prevented him from performing a fair and impartial medical examination. Dr. Greenberg also provided an affidavit stating that Dr. Epstein had refused to provide him with records.

After a hearing, the single commissioner granted the County's motion to compel and denied Clark's motion to disqualify. The single commissioner found no evidence of bias or prejudice on Dr. Epstein's part.

Clark attended the scheduled evaluation with Dr. Epstein in August 2002. Clark's wife and a friend, both nurses, accompanied Clark during the evaluation. They observed that Dr. Epstein failed to perform a complete examination. Dr. Epstein reported the surgery performed by Dr. Greenberg was not medically necessary.

In response to Dr. Epstein's report, Dr. Gero S. Kragh, a medical consultant, also evaluated Clark. Dr. Kragh confirmed the medical necessity of the surgery, although he said that a pharmacological approach should have been tried first. Dr. Kragh called Dr. Epstein's report into question and agreed that Clark had suffered a change of condition.

The single commissioner found the demeanor and testimony of Clark, his wife, and her friend credible and consistent. The single commissioner also drew inferences consistent with the opinions of Dr. Greenberg and Dr. Kragh and considered the conflict with Dr. Epstein and its origin.

The Worker's Compensation Act provides that the employer retains the right to name the authorized treating physician once a case has been accepted. S.C. Code Ann. § 42-15-60 (1985). Refusal by the claimant to accept treatment generally bars further compensation. Id. However, the full commission, when it deems it necessary, may override the employer's choice of providers and order a change in the medical or hospital service provided. Gattis v. Murrells Inlet VFW # £10420, 353 S.C. 100, 114, 576 S.E.2d 191, 198 (Ct. App. 2003). The full commission is further empowered to order payment of medical bills in such cases. Id. at 111, 576 S.E.2d 196-97.

Generally, a claimant may obtain compensation only by accepting services from the employer's choice of providers. However, a claimant is not required to sacrifice much-needed treatment merely to comply with an employer's choice of physicians. See Risinger v. Knight Textiles, 353 S.C. 69, 73, 577 S.E.2d 222, 224-25 (2002) (holding that "the language of S.C. Code Ann. § 42-15-60 does not allow an employer to dictate the medical treatment of injured employees."). The full commission is empowered to order further medical care when controversies arise between a claimant and the employer. S.C. Code Ann. § 42-15-60.

In Ford v. Allied Chemical Corp., 252 S.C. 561, 564, 167 S.E.2d 564, 565 (1969), a claimant who had seriously injured his neck was put under the care of the company doctor. The company doctor referred the claimant to an orthopedic surgeon who was not impressed with the claimant's symptoms and discharged him. The claimant's symptoms continued to worsen, and he contacted a family physician who examined the claimant and concluded he

was disabled. Id. at 565, 167 S.E.2d at 566. The supreme court upheld the full commission's finding that because the claimant had related his condition to the orthopedic surgeon, and received no assistance, the claimant was justified in refusing further care from that physician and in seeking treatment elsewhere. Id. at 567, 167 S.E.2d at 167.

In this case, Dr. Epstein indicated Clark was not a suitable candidate for treatment and referred him for pain management.[2] That treatment was unsuccessful, however. Because Clark related the continuing symptoms to the treating physicians and was unable to obtain relief, he was justified in seeking treatment elsewhere. Although the more appropriate procedure would have been for Clark to seek an order from the full commission before engaging Dr. Greenberg for treatment and surgery, we find that under Ford the full commission was not outside its discretion in ordering the County to pay for the surgery and continuing treatment, once it determined the treatment was medically necessary. See Gattis, 353 S.C. at 111, 576 S.E.2d at 197 (holding that the Workers' Compensation Act is to be liberally construed and reasonable doubts as to construction are to be resolved in favor of coverage).

We find no merit to the County's argument that the full commission allowed Clark to "shop around" indefinitely until he found a favorable opinion. In Risinger, the court held this state's workers' compensation statute does not allow an employer to "doctor shop" for a favorable opinion while sacrificing much-needed treatment for the claimant. 353 S.C. at 73, 577 S.E.2d at 224. The evidence in the record indicates Clark sought treatment from Greenberg solely for the purpose of obtaining relief from his pain. Furthermore, both Dr. Greenberg and Dr. Kragh testified that Clark's condition had worsened after the closing of evidence in the original proceeding. The pain management treatment was insufficient to meet Clark's needs. Finally, evidence of bias on the part of Dr. Epstein lends support to

[2] In fact, Dr. Epstein indicated surgery would be a viable course of action if Clark lost weight and stopped smoking. Clark testified he lost some weight and stopped smoking prior to the surgery.

the full commission's finding that Clark was in need of alternative treatment. We therefore affirm the full commission's order in this regard.

III. Total and Permanent Disability

The County's final argument is that the full commission erred in determining Clark was totally and permanently disabled. We disagree.

The full commission found that Clark sustained an impairment of greater than 51% to his back and concluded he was totally and permanently disabled. To qualify for total and permanent disability, a claimant must suffer a 50% or greater loss of use of his back. S.C. Code Ann. § 42-9-30(19) (Supp. 2004). The full commission's finding as to the degree of impairment is a question of fact. Lyles v. Quantum Chemical Co. (Emery), 315 S.C. 440, 445, 434 S.E.2d 292, 294-295 (Ct. App. 1993). Accordingly, we must affirm if the full commission's findings are supported by substantial evidence. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981).

In the original proceeding, the full commission rated Clark's impairment at 30%. Thus, the question in this change of condition proceeding is whether evidence indicates that since that time, Clark's impairment has increased to 50%.

Dr. Greenberg testified that Clark is permanently vocationally disabled. He testified that Clark's back pain is caused by severe degenerative arthritis with spinal stenosis, which has become incapacitating. Clark will need lifelong medication and follow-up treatment. Dr. Kragh rated Clark's impairment in the range of 30% whole body, 40% spinal based on cauda equine syndrome, lateral recess syndrome, S-1 radiculopathy, and possibly myelopathy.

Clark's wife testified that she has been the sole financial provider for the family since July of 1999. Clark's physical activity level has grown progressively worse since that time. He sleeps only a few hours at a time. He also requires assistance in dressing and using the lavatory. She testified

that after the surgery Clark was pain-free for four to six months, but his condition has since deteriorated.

Clark testified his condition is somewhat better now than it was before the surgery. However, he still has pain. He can no longer enjoy hunting, camping, and fishing, his former hobbies. The County has retired him on disability, and he has not worked since March of 2000. Accordingly, we find substantial evidence in the record to support a finding of total and permanent disability.

CONCLUSION

We hold that the full commission correctly concluded that Clark has sustained a change of condition occurring after the prior award, which has rendered him totally and permanently disabled. We further find no error in the full commission ordering the County to pay for the surgery and continuing treatment by Dr. Greenberg. Accordingly, the order of the full commission is hereby

AFFIRMED.

HEARN, C.J., and BEATTY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Thomas Henry Stinecipher and Hipolita Viego Stinecipher, Appellants,

v.

Thomas Ray Ballington and Christopher Austin Ballington, a minor under the age of ten (10) years, Respondents.

Appeal From Lexington County
C. David Sawyer, Jr., Family Court Judge

Opinion No. 4024
Heard June 15, 2005 – Filed September 12, 2005

REVERSED AND REMANDED

M. Gwyn DuBose-Schmitt, of Lexington and Thomas M. Neal, of Columbia, for Appellants.

James B. Richardson, Jr., of Columbia, for Respondents.

George W. Branstiter, of Lexington, for Guardian ad Litem.

PER CURIAM: This is an appeal from a family court order declining to terminate Thomas Ray Ballington's parental rights to his minor son, Christopher Austin Ballington (Austin). Austin's maternal grandparents, the Stineciphers, appeal, arguing the family court erred in failing to find Ballington, who is serving a life sentence for murdering Austin's mother, wilfully failed to support or wilfully failed to visit Austin. The Stineciphers further argue the family court erred in finding termination was not in Austin's best interest. We reverse and remand.

FACTS

Austin was born to Ballington and his wife, Edna, in 1995 and was three years old when the Ballingtons separated in June of 1998. After the separation, Edna brought Austin to live with her parents, the Stineciphers. Three months later, Ballington murdered Edna.[1]

After Ballington was arrested for the murder, the Stineciphers took physical custody of Austin and were granted temporary legal custody by an *ex parte* court order. In October 1998, the trial court issued a temporary order, granting the Stineciphers custody and prohibiting any visitation between Austin and Ballington's extended family.

Three months after Edna's murder, Ballington wrote his sister from jail and asked her to purchase several Christmas gifts for Austin. According to Mr. Stinecipher, Ballington's brother insisted on personally delivering the

[1] This court affirmed Ballington's conviction for murder in State v. Ballington, 346 S.C. 262, 551 S.E.2d 280 (Ct. App. 2001). According to the facts set forth in that opinion, which was part of the family court's record, Ballington gave a statement to police confessing to murdering Edna after she told him she was planning to seek full custody of Austin. Id. at 266-67, 551 S.E.2d at 282-83.

gifts to Austin. Such a delivery would have contravened the temporary order, which restrained visitation between Austin and Ballington's extended family, and Mr. Stinecipher refused to accept such a delivery. Ballington's brother testified that Mr. Stinecipher emphatically refused to receive any gifts from Ballington.

In June of 1999, Ballington petitioned the family court for visitation of Austin. The family court issued an order appointing a guardian *ad litem*. No further hearing on the matter was ever requested. However, throughout his incarceration, Ballington wrote letters to Austin. Initially, he sent Austin's letters to the Stineciphers, but when he found out they did not accept delivery of the Christmas presents, Ballington began sending the letters to his sister. Ballington also wrote separately to his sister, repeatedly asking about establishing visitation with Austin.

At the termination of parental rights ("TPR") hearing, Mr. Stinecipher testified that in the three-and-a-half years he and his wife had custody of Austin, Ballington never sent any money for Austin's support. In fact, although Edna's estate was worth $500,000, those funds were not available for Austin's benefit because Ballington refused to forfeit his interest in Edna's property and life insurance proceeds, and therefore, Edna's estate had not yet closed.[2] Ballington admitted he had never sent money to the Stineciphers, but testified that he believed Austin's support was being paid through rents collected from three properties he and Edna owned jointly. Later in his testimony, however, Ballington admitted that Mr. Stinecipher was "not supposed to" use money from the three rental houses to support Austin.

The family court refused to terminate Ballington's parental rights, finding no ground for termination was proved by clear and convincing evidence.[3] The court further ruled that there was "no way" to find

[2] Shortly before the TPR hearing, Ballington had finally forfeited his interest in the estate after refusing to do so for three-and-a-half years.

[3] When the Stineciphers initially filed suit against Ballington in October 2000, South Carolina's TPR statute did not yet have a ground related to the

termination was in Austin's best interest because no expert testimony was offered. Because it refused to terminate Ballington's parental rights, the family court dismissed the Stineciphers' petition to adopt Austin. This appeal followed.

STANDARD OF REVIEW

"[I]n a TPR case, the appellate court has jurisdiction to examine the entire record to determine facts in accordance with its own view of the evidence." Doe v. Baby Boy Roe, 353 S.C. 576, 579-80, 578 S.E.2d 733, 735 (Ct. App. 2003) (citing Richland County Dep't of Soc. Servs. v. Earles, 330 S.C. 24, 32, 496 S.E.2d 864, 866 (1998)). In this examination and in our determination, the best interest of the child is our paramount consideration. Id. at 579, 578 S.E.2d at 735. In addition, the grounds for TPR must be proved by clear and convincing evidence. Id. Thus, this court may review the record and make its own findings as to whether clear and convincing evidence supports the TPR. Id. (citing S.C. Dep't of Soc. Servs. v. Parker, 336 S.C. 248, 254, 519 S.E.2d 351, 354 (Ct. App. 1999)). However, this broad scope of review does not require us to disregard the findings of the trial court or to ignore the fact that the court was in a better position to assess the credibility of witnesses. Id. at 580, 578 S.E.2d at 735 (citing Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996)).

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murder of the child's other parent. On March 5, 2004, the TPR statute was amended to add the following ground for termination: "A parent of the child pleads guilty or nolo contendere to or is convicted of the murder of the child's other parent." S.C. Code Ann. § 20-7-1572(10) (Supp. 2004). However, the Stineciphers do not argue we should apply this statute retroactively, but rather ask us to reverse based only on Ballington's willful failure to support and willful failure to visit.

LAW/ANALYSIS

The Stineciphers argue the family court erred by not finding Ballington wilfully failed to support Austin. We agree.

Parental rights may be terminated if the child has lived outside the home of either parent for six months and, during that time, "the parent has wilfully failed to support the child." S.C. Code Ann. § 20-7-1572(4) (Supp. 2004). According to section 20-7-1572(4):

> Failure to support means that the parent has failed to make a material contribution to the child's care. A material contribution consists of either financial contributions according to the parent's means or contributions of food, clothing, shelter, or other necessities for the care of the child according to the parent's means. The court may consider all relevant circumstances in determining whether or not the parent has wilfully failed to support the child, including requests for support by the custodian and the ability of the parent to provide support.

Whether the failure to support is wilful is a question of intent to be determined by the facts and circumstances of each case. S.C. Dep't of Soc. Servs. v. Wilson, 344 S.C. 332, 335, 542 S.E.2d 580, 582 (Ct. App. 2001). Wilfulness is conduct that "'evinces a settled purpose to forego parental duties . . . because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent.'" Id. (quoting S.C. Dep't of Soc. Servs. v. Broome, 307 S.C. 48, 53, 413 S.E.2d 835, 839 (1992)).

In declining to find Ballington had wilfully failed to support Austin, the family court noted that Mr. Stinecipher controlled money from rents in which Ballington had an interest, the Stineciphers never sought support, and Austin had an estate valued at $500,000. However, none of these reasons convince

us that Ballington provided for Austin, nor does Ballington's testimony indicate his failure to support Austin was unwilful.

It is true, as the family court noted, that Mr. Stinecipher had "control" over the rents collected from the houses Ballington and Edna jointly owned. However, this control stemmed from his being the personal representative of Edna's estate and only allowed him to collect the rents and to make repairs to the properties as necessary. Although Ballington testified at one point that he believed he was supporting Austin through the excess rents, he later admitted that Mr. Stinecipher was obligated to account for all the money collected on the houses and could only use the rent money collected to maintain the properties. Thus, Ballington's assertion that he assumed the rent money was being used to support Austin is not credible.

As for the $500,000 in Edna's estate, that money was not available for Austin's benefit because the estate had not yet closed, and it was Ballington's refusal to forfeit his interest in the estate that caused this delay.[4] Moreover, even if the $500,000 were available, that would not obviate Ballington's responsibility to make a material contribution to Austin's care according to Ballington's means. See S.C. Code Ann. §20-7-1572(4) (requiring parents to make a contribution to their child's care based on the parents' means, not the child's need). Although Ballington maintained he could not support Austin because he generated no income while incarcerated, the record reflects Ballington had significant amounts of money at his disposal. While incarcerated, Ballington inherited $30,000, all of which he used to pay his criminal defense attorney. Even after spending this money on himself, he still had $4,400 in his checking account at the time of the TPR hearing, but admitted he never directed his brother, who had power of attorney, to write a check for Austin's support.[5] Cf. S.C. Dep't of Soc. Servs. v. Wilson, 344

[4] Ballington did not forfeit his interest in Edna's property and insurance until three-and-a-half years after he murdered her.

[5] During oral argument, Ballington's attorney argued that sending a check to the Stineciphers would have been futile because they would not have accepted it. Such a conclusion is purely speculation, especially when letters Ballington sent to Austin via the Stineciphers were never returned to him.

S.C. 332, 543 S.E.2d 580 (Ct. App. 2001) (finding family court should not have terminated parental rights of incarcerated father on ground of his wilful failure to support where prison policies prevented him from earning any income and he had no other source of income); see also S.C. Dep't of Soc. Servs. v. Phillips, 301 S.C. 308, 310, 391 S.E.2d 584, 585 (Ct. App. 1990) (explaining that incarceration of the parent does not relieve a parent from the duty to support the child).

Finally, although the family court noted that the Stineciphers never sought support, this factor is not determinative. Prior to 1992, parental rights could not be terminated on the ground of failure to support unless the child's custodian requested support from the parent. However, the legislature amended section 20-7-1572(4) in 1992 so that a custodian's request was not required, though the lack of a request could be considered along with all other relevant circumstances. S.C. Code Ann. § 20-7-1572(4) ("The court may consider all relevant circumstances in determining whether or not the parent has wilfully failed to support the child, including requests for support by the custodian and the ability of the parent to provide support."); see also S.C. Dep't of Soc. Servs. v. Cummings, 345 S.C. 288, 296, 547 S.E.2d 506, 510 (Ct. App. 2001) (noting that nothing requires a parent be notified of his duty to support his child before failure to discharge this duty may serve as grounds for termination of parental rights). Thus, Ballington was not relieved of his duty to support Austin merely because the Stineciphers never requested support.

We therefore find clear and convincing evidence that Ballington not only failed to send any money to aid in Austin's support, but that he actually prevented Austin from deriving the benefits of Edna's estate. Were it only a failure to send money to Austin, we might be inclined to defer to the trial

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Although Mr. Stinecipher admitted he refused to allow Ballington's brother to personally deliver Christmas presents to Austin three months after Edna's murder, this alone does not dictate how Mr. Stinecipher would have reacted to receiving a check in the mail. Furthermore, when Ballington testified at the hearing, he never claimed that his failure to send a check was because he believed such an act would be futile.

court's determination that such a failure was not wilful; however, considering Ballington's actions which actually impeded Austin from receiving money from his mother's estate, we are compelled to find Ballington's failure to provide for Austin was wilful. Finding the Stineciphers proved a ground for termination of parental rights by clear and convincing evidence, we move on to determine whether termination would be in Austin's best interest.[6]

The Stineciphers assert that the trial court erred in failing to find TPR and adoption were in Austin's best interest and in concluding that expert testimony was necessary to make such a finding. We agree.

If the trial court finds a proven statutory ground for TPR, it must also find the best interest of the child would be served by TPR.[7] See Doe v. Baby Boy Roe, 353 S.C. 576, 581, 578 S.E.2d 733, 736 (Ct. App. 2003). If the child's interests and the parent's interests conflict, the interests of the child shall prevail. S.C. Code Ann. § 20-7-1578 (Supp. 2004); see also S.C. Dep't of Soc. Servs. v. Vanderhorst, 287 S.C. 554, 561, 340 S.E.2d 149, 153 (1986). While the appointment of a guardian *ad litem* is required in TPR cases, there is no such requirement for expert testimony. S.C. Code Ann. § 20-7-1570(B) (Supp. 2004). Family court judges often determine whether TPR is in a child's best interest without the aid of an expert.

We find persuasive evidence in the record indicating that termination of Ballington's rights to Austin would be in Austin's best interest. Austin was only three-and-a-half years old when Ballington was incarcerated for the murder of Austin's mother, and Austin has since had no contact with Ballington. Because Ballington is serving a sentence of life without parole,[8]

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[6] Because we find Ballington wilfully failed to support Austin, we need not address whether the Stineciphers proved any other ground for termination.

[7] By contrast, a family court need not reach best interest when no ground for termination exists. Despite this, the family court in this case ruled on best interest even though it found no ground for TPR was proved.

[8] Though Ballington testified that he believed he would one day be freed from prison, the Lexington County Solicitor, Donnie Myers, testified that Ballington was serving a sentence of life without the possibility of parole.

there is no possibility that Austin would ever be able to have a normal father-son relationship with Ballington. Moreover, as numerous witnesses testified, including the guardian, Austin has bonded with the Stineciphers and has thrived in their care.

CONCLUSION

Based on Ballington's wilful failure to support and because it is in Austin's best interest to do so, the parental rights of Ballington in and to Austin should be terminated. Accordingly, the order of the trial court is reversed and the petition for adoption is remanded.

REVERSED and REMANDED.

HEARN, C.J., and BEATTY and SHORT, JJ., concur.