The Supreme Court of South Carolina

O R D E R

The South Carolina Commission on Continuing Legal Education and Specialization has furnished the attached list of magistrates and municipal judges who have not complied with the continuing legal education requirements of Rule 510, SCACR. These judges are hereby suspended from their judicial offices, without pay, until further Order of this Court.

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

Columbia, South Carolina

September 30, 2003

Michael D. Burrows
Charles B. Johnson
John D. Matthews
Deborah D. McCullough
Fred D. Stephens
Mildred S. Watson

The Supreme Court of South Carolina

RE: Criminal Domestic Violence Pro Bono Program

O R D E R

The Attorney General of South Carolina has initiated a program that will use pro bono lawyers to prosecute criminal domestic violence cases in magistrate and municipal courts. This program is being piloted in Kershaw and Orangeburg Counties. It is anticipated that a lawyer in this program will be trying multiple criminal domestic violence cases during a single day of court.

We find it appropriate to give these lawyers credit for this service under Rule 608, SCACR. Accordingly, an attorney who is appointed as a prosecutor under this program shall receive credit for one appointment for every month in which the lawyer tries cases under this program. The Attorney General shall notify the appropriate county clerk of court when a

lawyer is entitled to credit under this order.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

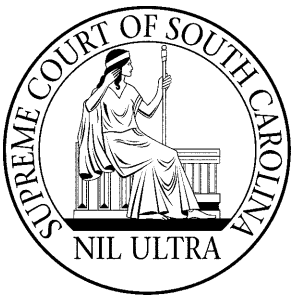
s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 9, 2003



OPINIONS
OF
THE SUPREME COURT
AND
COURT OF APPEALS
OF
SOUTH CAROLINA

FILED DURING THE WEEK ENDING

October 13, 2003

ADVANCE SHEET NO. 37

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

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Richard Dukes, Employee, Respondent,

v.

Rural Metro Corporation,
Employer, and Reliance National
Indemnity Co., Carrier, Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Colleton County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 25730
Heard May 13, 2003 - Filed October 13, 2003

REVERSED

Kirsten Leslie Barr, of Trask & Howell, of Mt. Pleasant, for Petitioners.

Daniel A. Beck and Etta K. Simons Collins, both of Asbill & Beck, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: This Court granted Rural Metro Corporation's ("Rural Metro") petition for certiorari to review whether its employee can recover Workers' Compensation benefits for an accidental gunshot wound that occurred while the employee was on a smoke break.

FACTUAL/PROCEDURAL BACKGROUND

While working as a paramedic for Rural Metro, Richard Dukes ("Dukes") and his co-worker took a smoke break. Dukes did not need to "clock-out" for such breaks and received compensation for the breaks. While on break, Dukes' co-worker went to her car and returned with the pistol she had recently acquired to bring back and show Dukes. She handed the pistol to Dukes, who examined it and gave it back to her. The gun then accidentally discharged, shooting Dukes in his upper thigh.

The Workers' Compensation Commissioner found that Dukes' injury did not arise out of his employment with Rural Metro and denied his claim for benefits. The Commission's appellate panel reversed, finding that Dukes suffered a compensable injury during "down time," which was part of his job. The Circuit Court affirmed the panel, holding that the gunshot accident arose out of Rural Metro's employment of Dukes, and the Court of Appeals affirmed. *Dukes v. Rural Metro Corp.*, 346 S.C. 369, 552 S.E.2d 39 (Ct. App. 2001). Rural Metro petitions the Court to review the following issue:

> Did the Court of Appeals err in finding that Dukes' injury was compensable?

LAW/ANALYSIS

This Court will not overturn a decision by the Workers' Compensation Commission unless the determination is unsupported by substantial evidence. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). "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, 354 S.E.2d 384 (1987).

An employee may recover worker's compensation benefits if he sustained an "injury by accident arising out of and in the course of employment." S.C. Code Ann. § 42-1-160 (1985). Rural Metro argues that the statute does not contemplate Dukes' injury. We agree.

This Court has held that an accidental injury that occurs during a routine break from work is compensable under the personal comfort doctrine. In *Mack v. Branch No. 12, Post Exchange*, *Fort Jackson*, 207 S.C. 258, 35 S.E.2d 838 (1945), this Court gave the following rationale about why the worker is covered for an injury that occurs during a routine personal break:

> Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. . . . That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. **Such dangers as attend them**, therefore, are incident dangers. At the same time **injuries occasioned by them** are accidents resulting from the employment.

Mack, 207 S.C. at 264-265, 35 S.E.2d at 840 (citation omitted) (emphasis added). In *Mack*, we held the employee was entitled to compensation resulting from injuries suffered during a smoke break, when his pant leg caught fire after cigarette lighter fluid spilled on it. Similarly, in *McCoy v. Easley Cotton Mills*, 218 S.C. 350, 62 S.E.2d 772 (1950), we held an employee on a smoke break who was injured after turning and accidentally walking into a piece of copper piping held by a co-employee was entitled to compensation. The copper piping was used in the air conditioning of the mill, and the employees had, immediately prior to the accident, been discussing using the piping in order to make a travis key, which was used by the claimant in his employment as a doffer.

Mack and *McCoy* are distinguishable from the instant case. In both of those cases, the injuries which occurred were occasioned by the dangers that attended to the smoke breaks, e.g., in *Mack*, the very fact of smoking was the attendant danger, and in *McCoy*, it was the copper piping used at the mill which caused the injury. Unlike those cases, Dukes was injured by a gun, which was not naturally found on his employer's premises, and was in no way connected to his employer's business. Accordingly, it was not such a danger as attended his employment. *Cf. Bright v. Orr Lyons Mills*, 285 S.C. 58, 59, 328 S.E.2d 68, 70 (1985) (employee shot while walking from the building where he worked toward his car was "in the course of his employment" but his injury did not arise out of his employment because the accident bore no "logical causal relation" thereto; to be compensable, accident "must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a logical consequence").

We find that Dukes' injury did not "arise out of" his employment with Rural Metro because there was no nexus connecting his job as a paramedic to his colleague's handgun that they were examining during a smoke break. *Osteen v. Greenville County School Dist.*, 333 S.C. 43, 50, 508 S.E.2d 21, 25 (1998) ("The injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury.").

Our decision is in accord with Professor Larson's view that the personal comfort doctrine does not cover Dukes' injury:

> The purpose of the personal comfort doctrine is to allow employees to attend to their biological personal requirements. People need to take breaks, go to the bathroom, even smoke a cigarette. Do employees need, however, to play with guns? Allowing an employee to go to the bathroom, to walk outside to clear his or her head, or to take other short breaks is good for the employer's business. Injuries sustained during those activities should be compensable. Injuries sustained while handling a

> privately owned pistol should not. Allowing the employment to be expanded so as to include the type of activity found in *Dukes* seems to go far beyond the original intent of the doctrine.

Arthur Larson, *Larson's Workers' Compensation Law*, § 21.08[4][a] (2002) (analyzing the Court of Appeals' *Dukes* decision).

CONCLUSION

Based on the reasoning above, we **REVERSE** the Court of Appeals and find that Dukes' injury did not "arise out of" his employment with Rural Metro.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ed Robinson Laundry and Dry Cleaning, Inc., et al., Appellants,

v.

South Carolina Department of Revenue and the State of South Carolina, Respondents.

ON WRIT OF CERTIORARI

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

Opinion No. 25731
Heard May 14, 2003 - Filed October 13, 2003

AFFIRMED

A. Camden Lewis and Thomas A. Pendarvis, both of Lewis, Babcock & Hawkins, of Columbia; Gary W. Poliakoff, of Poliakoff, Poole & Associates, of Spartanburg; R. Bryan Harwell, of Harwell, Ballenger, Barth & Hoefer, of Florence; and William J. Quirk, of the University of South Carolina School of Law, of Columbia, for Appellants.

Attorney General Henry Dargan McMaster, of Columbia; Harry T. Cooper, Ronald W. Urban, Milton G. Kimpson and Leonard P. Odom, all of South Carolina Department of Revenue and Taxation, of Columbia, for Respondents.

JUSTICE BURNETT: Ed Robinson Laundry and Dry Cleaning, Inc., ("Robinson") appeals the trial court's grant of summary judgment to the State. We affirm.

FACTS

Robinson, a provider of dry cleaning and laundering services, brings this action alleging portions of the Sales and Use Tax Act (the "Act"), S.C. Code Ann. § 12-36-910 (1976) et seq., violate the equal protection clauses of the United States and South Carolina Constitutions.[1]

ISSUES

I. Did the lower court err in holding the imposition of a sales tax on dry cleaning does not violate the equal protection clause?

II. Did the lower court err in holding the number and character of exemptions within the Act did not render the Act violative of the equal protection clause?

I

Imposition of the sales tax upon dry cleaners

Robinson argues the sales tax violates the equal protection clause because it is not imposed upon all service providers, only dry cleaners.

[1] U.S. Const. amend. XIV; S.C. Const. art. I, § 3.

Both parties agree this Court is charged with applying the rational basis test to determine whether the tax offends the equal protection clause. Under the test the Court is tasked with determining: 1) whether the law treats "similarly situated" entities different; 2) if so, whether the Legislature has a rational basis for the disparate treatment; and 3) whether the disparate treatment bears a rational relationship to a legitimate government purpose. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973); Bibco Corp. v. City of Sumter, 332 S.C. 45, 504 S.E.2d 112 (1998).

Robinson bears the burden of proving the tax is unconstitutional and it must overcome this Court's mandate to sustain a legislative enactment if there is "any reasonable hypothesis to support it." D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 482 S.E.2d 558 (1997).

The fundamental disagreement between Robinson and the State focuses on the first prong of the test. Specifically, each side views the composition of those "similarly situated" differently.

Robinson asserts those businesses "similarly situated" to it are all service-oriented businesses, while the State asserts "similarly situated" businesses are only dry cleaners. The State, therefore, defines the class in terms of a distinct trade as opposed to Robinson's formulation of a broad economic sector. A class may be constitutionally confined to a particular trade. See Armour Packing Co. v. Lacy, 200 U.S. 226, 26 S. Ct. 232, 50 L. Ed. 451 (1906); State v. Byrnes, 219 S.C. 485, 66 S.E.2d 33 (1951).

As Robinson does not claim the State taxes dry cleaners, i.e. those "similarly situated," differently it fails to prove a violation of the equal protection clause. See TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998).

Assuming, arguendo, Robinson's definition of "similarly situated" is correct, the argument fails because the State has a rational basis for treating dry cleaners differently. The State's rational basis for treating dry

cleaners differently from other service providers serves a legitimate government interest.

To find both the legitimate government interest and the rational basis for treating dry cleaners differently, we view the Act in its entirety. See South Carolina Coastal Council v. South Carolina State Ethics Com'n, 306 S.C. 41, 410 S.E.2d 245 (1991) (in interpreting a law a court must look to its language and its meaning in conjunction with the purpose of the whole statute and the policy of the law).

In reviewing the entire Act we note the code provides dry cleaners with a tax exemption for supplies and machinery used to perform their services. See S.C. Code Ann. § 12-36-2120 (24). As noted by the circuit court, "[u]nlike most service industries, dry cleaners have high startup costs as a result of expensive machinery and equipment . . . [b]y exempting machinery purchased by dry cleaners and, in turn, taxing their sales, the Legislature makes it less expensive for individuals to start this type of business."

The State's rational basis for treating dry cleaners differently from other trades in the service industry is to promote the legitimate governmental interests of fostering economic development in a particular segment of the economy. The Legislature achieves this goal by exempting dry cleaners from paying sales taxes on expensive machinery necessary to start the business in exchange for allowing the payment of sales taxes based on later-earned receipts.

Significantly, the State argued below the dry cleaning process involves the use of chemicals and other products posing a threat of environmental harm. The tax may be a method to defray the cost of such harm.

II

Exemptions

Robinson argues the sheer number and nature of the exemptions in § 12-46-2120 renders the Act special legislation and unconstitutional in its entirety.

Robinson asserts the Act, which has sixty exemptions,[2] violates equal protection because it treats some sectors of the service economy more beneficially than others. Robinson further asserts the nature of the categorical exemptions renders it arbitrary and special legislation.[3]

Robinson's argument that "[t]he sheer number of exemptions demonstrates the exemptions are arbitrary" is without merit. We are concerned not with size or volume but with content.

Robinson complains the exemptions' content is not natural or reasonable. For example, Robinson asserts that providing tax exemptions for dental prosthetic devices but not for wheelchairs may be arbitrary in the political sense. Robinson may be correct in noting such exemptions belie a misunderstanding of economics, and are therefore unwise in an economic sense. Robinson is not correct in asserting, however, that the exemptions are arbitrary in the constitutional sense. The fact a classification may result in an inequity or may be unwise in an economic sense does not render it

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[2] There are currently sixty-one exemptions. S.C. Code Ann. § 12-36-2120 (Supp. 2002).

[3] We note that even if we were to find the exemptions unconstitutional it would not render Robinson's tax burden unconstitutional. Robinson would still be compelled to pay the sales tax on all laundered goods. Thayer v. South Carolina Tax Commission, 307 S.C. 6, 413 S.E.2d 810 (1992).

unconstitutional. Davis v. County of Greenville, 313 S.C. 459, 443 S.E.2d 383 (1994)

Robinson's assertions notwithstanding, we must give great deference to the General Assembly's classification decisions because it presumably debated and weighed the advantages and disadvantages of the legislation at issue. Lee v. South Carolina Dep't of Natural Resources, 339 S.C. 463, 467, 530 S.E.2d 112, 114 (2000). We agree with the circuit court the State has identified major categories of exemptions and provided a rational basis for each; while Robinson has failed to carry its burden of showing the exemptions are unconstitutional.[4]

Accordingly, we **AFFIRM**.

MOORE and WALLER, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which Acting Justice Diane S. Goodstein, concurs.

[4] The State proffered the following categorical exemptions: 1) exemptions related to agriculture; 2) exemptions related to health or environmental concerns; 3) exemptions to promote economic development; 4) exemptions related to governmental or tax-exempt entities; 5) exemptions related to education; and 6) exemptions designed to prevent excise taxes. Each of the categories has previously been upheld as constitutional. See, e.g., Byrnes, supra; Robinson v. Richland County Council, 293 S.C. 27, 358 S.E.2d 392 (1987); Quirk v. Campbell, 302 S.C. 148, 394 S.E.2d 320 (1990).

Chief Justice Toal: I respectfully dissent because I disagree with the majority on both issues I and II. In my opinion, there is no rational basis for treating dry cleaning services differently from other services. I would also find that when viewed in the light most favorable to Robinson, a genuine issue of material fact exists as to whether the sixty-one exceptions to the sales tax are arbitrary and capricious and thus violate the Equal Protection Clause. *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002).

I

In my view, the sales tax violates the rational basis test and thus violates equal protection. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S. Ct. 1001, 35 L.Ed.2d 351 (1973); *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 504 S.E.2d 112 (1998). Because I believe that dry cleaning services are part of the same class as other service providers, I would hold that the statute treats "similarly situated" entities differently. Further, I would hold that there is no rational basis for singling out dry cleaners – to the exclusion of other services – for sales tax purposes. Finally, I am not persuaded by the assertion that since the sales tax statute exempts dry cleaners' start-up machinery and equipment costs, S.C. Code Ann. § 12-26-2120(24), dry cleaners are obligated to pay a sales tax on their services. While the trial judge's statement that the majority quoted, "[u]nlike most service industries, dry cleaners have high startup costs as a result of heavy machinery and equipment" may have been true in the 1950's,[5] it certainly is not the case in today's economy. *All* service industries incur significant startup costs, whether they come in the form of equipment, labor, rent, or other overhead costs. I find no reason today for singling out dry cleaners' startup costs as a justification for imposing a sales tax upon their services when all other services also are faced with high costs to enter the marketplace, yet a sales tax is not levied on their services. Therefore, in my view, segregating dry cleaning services from all other services does not rationally relate to a legitimate government purpose.

[5] The original statutes providing for the exemption for start-up supply and machinery costs and for the tax on dry cleaning services were enacted in the 1950's.

II

I would also find that Robinson raised a genuine issue of material fact as to whether the 61 exemptions found in S.C. Code Ann. § 12-46-2120, *in toto*, amount to an arbitrary classification of different entities for tax purposes that is unconstitutional. *See City of Laurens v. Anderson*, 75 S.C. 62, 64, 55 S.E. 136, 137 (1906) (for a law to be deemed constitutional, it "must possess two indispensable qualities: [f]irst, it must be framed as to so extend to and embrace equally all persons who are or may be in the like situation and circumstances; and secondly, the classification must be natural and reasonable, not arbitrary and capricious."). Although this Court ruled in 1951 that the then 19 exemptions to the sales tax were not a "tyrannical exercise of arbitrary power," it is my view that they would conclude that 61 exemptions would rise to that level. *State ex rel. Roddey v. Byrnes*, 219 S.C. 485, 515, 66 S.E.2d 33, 46 (1951).

The State attempted to pigeonhole 33 of the exemptions into six neat categories for tax classification purposes in an effort to illustrate that the exemptions are not arbitrary and capricious. In my opinion, the whimsical nature of the other 28 exemptions renders this legislation arbitrary and capricious. For example, broadcasting companies fare well under the statute, as "all supplies, technical equipment, machinery, and electricity sold to radio and television stations, and cable television systems, for use in producing, broadcasting, and distributing programs" are exempted from the sales tax. S.C. Code Ann. § 12-36-2120(26). The same purchases are tax-free for motion picture companies. S.C. Code Ann. § 12-36-2120(43). Vacation time-sharing plans are exempt. S.C. Code Ann. § 12-36-2120(31). Promotional direct mail advertising materials are also exempt. S.C. Code Ann. § 12-36-2120(58).

Based on the foregoing reasoning, I would hold that the legislature had no rational basis for singling out dry cleaners from other services for sales tax purposes, and I would reverse the trial judge's grant of summary judgment and remand the exemption issue to determine whether the entire retail tax exemption statute is unconstitutional based on its whimsical treatment of various entities for tax purposes.

Acting Justice Diane S. Goodstein, concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner/Respondent,

v.

Michael Dunbar, Respondent/Petitioner.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Lexington County
Rodney A. Peeples, Circuit Court Judge

Opinion No. 25732
Submitted September 16, 2003 - Filed October 13, 2003

VACATED IN PART AND REMANDED

Assistant Appellate Defender Tara S. Taggart, S.C. Office of Appellate Defense, of Columbia, for Respondent/Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Senior Assistant Attorney General Norman M. Rapoport, all of Columbia; and Solicitor Donald V. Myers, of Lexington; for Petitioner/Respondent.

PER CURIAM: This matter is before the Court on both parties' petitions for a writ of certiorari seeking review of the Court of Appeals' decision in State v. Dunbar, 354 S.C. 479, 581 S.E.2d 840 (2003). We deny respondent/petitioner's ("Dunbar") petition for certiorari and grant petitioner/respondent's ("State") petition for certiorari. We dispense with further briefing and vacate a portion of the Court of Appeals' opinion because they reached unpreserved grounds in addressing the search warrant obtained in this case.

FACTUAL/PROCEDURAL BACKGROUND

Investigators with the Lexington County Sheriff's Department set up a controlled buy with Dunbar and his co-defendant, Smalls, based on information received from a confidential informant. The informant, in the presence of Officer Rainwater, the lead investigator of the case, called the men at their hotel room to setup the buy for five ounces of powder cocaine. The informant told Rainwater he was to meet Dunbar and Smalls, black males, at a gas station that afternoon and they would be driving a blue Cadillac with wire rims.

With officers surrounding the scene, the informant waited at the gas station for Dunbar and Smalls to arrive. Dunbar and Smalls arrived at the gas station approximately 30 minutes after the phone conversation. They were driving a blue Cadillac with wire rims. The informant got into the back seat of the car and stayed about 15 seconds before getting back out of the vehicle; this was a pre-arranged visual signal to the officers there were drugs in the vehicle. The driver, Smalls, then fled the scene and was captured after a 100-yard chase. Dunbar, who remained in the front passenger seat of the vehicle, was arrested and removed from the vehicle. An open brown paper lunch bag was found sitting upright by Dunbar's left foot. After both Smalls and Dunbar were arrested, the vehicle was searched, and the officers found five ounces of powder cocaine inside the brown paper bag.

After retrieving the cocaine from the vehicle, Rainwater noticed a hotel room key on the key chain left in the car's ignition. The key was inscribed with a room number. Based on the informant's previous dealings with Dunbar, he knew Dunbar stayed at a hotel while in Columbia. The informant had alerted Rainwater to this fact and told him to look for a hotel key. When asked, Dunbar informed Rainwater he and Smalls were staying at the Ramada Inn in West Columbia.

Based on the seizure of the cocaine and the information concerning the hotel room, Rainwater sought a warrant to search the room. Rainwater telephoned the magistrate and discussed the probable cause to issue the search warrant. Rainwater did not, however, proceed to the magistrate's office to obtain the warrant, but instead sent another officer from his investigation team, O'Quinn. O'Quinn testified, "It was my duty to get [the search warrant] back to the agents on the scene in an expeditious manner so that hopefully if anybody was in the room that none of the evidence would be . . . destroyed." While O'Quinn went to retrieve the search warrant, the investigative team went to the hotel and waited for O'Quinn's arrival.

When O'Quinn arrived at the magistrate's office, the magistrate was on the telephone with Rainwater. O'Quinn testified the magistrate drafted the search warrant and affidavit based on information received over the telephone from Rainwater. O'Quinn was sworn by the magistrate,[1] reviewed the warrant and signed the affidavit accompanying the search warrant. Although O'Quinn did not see a majority of the events that took place, he was part of Rainwater's investigative team and had personal knowledge that a narcotics deal had occurred. O'Quinn also had knowledge of the facts contained in the affidavit from the information Rainwater told him in the course of the investigation.[2]

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[1] There is no testimony whether Rainwater was sworn by the magistrate. There is very limited testimony in the record revealing the contents of the conversation between Rainwater and the magistrate. Apparently, neither party thought this fact was an issue and thus did not address Rainwater's conversation.

[2] O'Quinn took the warrant directly to the hotel and, upon execution, the officers found a large quantity of powder and crack cocaine, a large sum of money, a gun, digital scales, receipts attributable to Dunbar and Smalls, and packaging material customarily used for narcotics transportation.

Dunbar made a pre-trial motion to suppress the evidence based on the Fourth Amendment of the United States Constitution and the South Carolina Constitution. During the in camera hearing to determine the admissibility of the evidence, Dunbar's search warrant argument centered on the fact that the issuing magistrate was not neutral and detached. He also argued the affidavit lacked probable cause because O'Quinn signed it without personal knowledge and the credibility of the informant was not stated. Dunbar cited Nathanson v. United States[3] as his sole authority for the affidavit argument. The trial court rejected Dunbar's arguments and allowed the evidence to be admitted. Using a totality of the circumstances approach, he found the informant's information was corroborated and exigent circumstances required the action taken. The Court of Appeals reversed the trial judge, finding the search warrant did not comply with the warrant statute.

The Court of Appeals addressed the search warrant, and its underlying affidavit, by analyzing the issue under S.C. Code Ann. §17-13-140 (2003), even though the statute was not argued during the trial. The State now contends the Court of Appeals erred by basing their decision to reverse the trial court on the warrant statute. We agree.

LAW/ANALYSIS

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001). A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). A party may not argue one ground at trial and an alternate ground on appeal. State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000)(argued one ground in support of circumstantial evidence charge at trial and another ground in support of the charge on appeal). No point will be

[3] 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933).

considered which is not set forth in the statement of issues on appeal. Rule 208(b)(1)(B), SCACR; State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000)(it is error for an appellate court to consider issues not raised to it); State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001). An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved. Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995).

During trial, Dunbar never made mention of the warrant statute. His written motion makes mention of the United States and South Carolina constitutions only. During the in camera hearing, Dunbar cited only one federal case in support of his affidavit argument. It is not clear whether Dunbar based his argument on federal or state grounds, but nowhere in the record does Dunbar cite or make reference to the warrant statute. The Court of Appeals addressed the warrant statute sua sponte and was incorrect to base its decision on the statute.

Accordingly, because the warrant statute argument was not raised to the trial court below for a ruling and, thus, is not preserved for appellate review, we vacate the Court of Appeals' opinion to the extent it addresses the search warrant and the underlying affidavit at issue.

CONCLUSION

For the foregoing reasons, we vacate the Court of Appeals' opinion reversing the trial court's decision to admit evidence obtained pursuant to the search warrant at issue and remand this issue to the Court of Appeals so it may address the United States and South Carolina constitutional issues Dunbar raised on appeal.

VACATED IN PART AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Marilyn Bray and Allan Bray, Petitioners/Respondents,

v.

Marathon Corporation, an Alabama Corporation, American Refuse Systems, Inc., a North Carolina Corporation, John Doe and Richard Roe, Defendants,

of whom Marathon Corporation, an Alabama Corporation, and American Refuse Systems, Inc., a North Carolina Corporation, are Respondents/Petitioners.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge

Opinion No. 25733
Heard April 1, 2003 - Filed October 13, 2003

AFFIRMED IN PART, REVERSED IN PART

Ray Pratt McClain, of Charleston, and Ronald J. Jebaily, of Jebaily, Glass & Meacham, of Florence, for petitioners/respondents.

Gray T. Culbreath and Ellen M. Adams, both of Collins & Lacy, of Columbia, for respondent/petitioner Marathon Corporation.

Saunders M. Bridges, of Aiken, Bridges, Nunn, Elliott & Tyler, of Florence, for respondent/petitioner American Refuse Systems, Inc.

JUSTICE MOORE: We granted this writ of certiorari to determine whether the Court of Appeals erred by affirming in part and reversing in part the trial court's decision granting summary judgment on petitioner/respondent Marilyn Bray's products liability claims. Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001). We affirm in part and reverse in part.

FACTS

Baron Blackmon was a maintenance mechanic at General Electric's manufacturing plant located in Florence, South Carolina. Bray and Blackmon had been co-workers for approximately fifteen years. On March 5, 1994, Blackmon was inside a Ram-Jet Trash Compactor[1] manufactured by respondent/petitioner Marathon and leased to General Electric by respondent/petitioner American Refuse Systems, Inc. (hereinafter collectively referred to as Marathon). When Bray approached the trash compactor to discard a bag of trash, Blackmon asked Bray to start the compactor. Because Blackmon was inside the compactor, Bray declined until Blackmon assured her it was safe to do so.

[1]Blackmon was allegedly inside the compactor for the purpose of repairing it.

Bray pressed the "start" button, which caused the ram to move toward Blackmon instead of away from him. Bray attempted to stop the compactor, but the ram would remain stopped only as long as she maintained continuous pressure on the "stop" button. Blackmon was pinned inside the compactor, so Bray released the button and ran for help. Upon her return, she found Blackmon blue and unconscious. Blackmon subsequently died from his injuries.[2]

Bray filed this products liability action against Marathon for breach of implied and express warranty, strict liability, and negligence.[3] She alleged she suffered serious and permanent physical injuries caused by the emotional trauma of witnessing her co-worker's death.

The trial court granted summary judgment to Marathon on all causes of action. The court found Bray was not in direct danger from the operation of the compactor and her alleged injuries were the result of observing Blackmon's injuries. The court noted that any claim Bray had would have to be analyzed under Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985).[4] However, the court found Bray could not recover as a bystander because Blackmon and Bray were not closely related.

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[2]A report by the Engineering Design & Testing Corporation indicated the machine malfunctioned due to a defect in the manufacture of the compactor and a defect in the compactor's design.

[3]Petitioner/respondent Allan Bray also filed a loss of consortium claim. However, because his claim is dependent on his wife's claims, only wife's claims will be discussed.

[4]The Kinard court found that a bystander may have a cause of action for negligent infliction of emotional distress. The court adopted the cause of action with the following elements: (1) the negligence of the defendant must cause death or serious physical injury to another; (2) the plaintiff bystander must be in close proximity to the accident; (3) the plaintiff and the victim must be closely related; (4) the plaintiff must contemporaneously perceive the accident; and (5) the emotional distress must both manifest itself by

The Court of Appeals affirmed the trial court's decision granting summary judgment on Bray's negligence claim and reversed the decision granting summary judgment on her strict liability claim. Further, the court found that because Bray did not present an argument regarding the warranty claims, that issue was deemed abandoned.

ISSUE I

Did the Court of Appeals err by reversing the trial court's decision granting summary judgment on Bray's strict liability claim?

DISCUSSION

The strict liability action for defective products was established by the Legislature in S.C. Code Ann. §§ 15-73-10 to -30 (1976). Section 15-73-10 (1) provides: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer . . ."

Bray was a user of the trash compactor because she operated the controls on the compactor in an effort to assist Blackmon. *See* Restatement (Second) of Torts § 402A, cmt. l (1965) ("user" includes those who are utilizing the product for purpose of doing work upon it);[5] Curcio v. Caterpillar, Inc., 344 S.C. 266, 543 S.E.2d 264 (Ct. App. 2001) (employee performing maintenance on equipment was "user" of product). Further, under Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958), Bray's alleged physical injuries arising from emotional trauma constitute physical harm.

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physical symptoms capable of objective diagnosis and be established by expert testimony.

[5]Section 15-73-30 provides that the comments to § 402A of the Restatement of Torts, Second, are incorporated as the legislative intent of the Defective Products Act.

A products liability plaintiff must prove the product defect was the proximate cause of the injury sustained. Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997) (citing Livingston v. Noland Corp., 293 S.C. 521, 362 S.E.2d 16 (1987) (proof must be sufficient to show defect was direct and efficient cause of plaintiff's injury)). Proximate cause requires proof of both causation in fact and legal cause, which is proved by establishing foreseeability. *Id.* Marathon contends the Court of Appeals erred by finding Bray's injuries were foreseeable given her strict liability claim arose from injuries to another.

We find the Court of Appeals properly concluded that the bystander analysis of Kinard does not apply to a strict liability cause of action. A user of a defective product is not a mere bystander but a primary and direct victim of the product defect. *Accord* Kately v. Wilkinson, 195 Cal. Rptr. 902 (Cal. Ct. App. 1983) (plaintiff, who was owner and driver of boat that killed daughter's friend, allowed to proceed on products liability claim as user of product); Gnirk v. Ford Motor Co., 572 F. Supp. 1201 (D.S.D. 1983) (manufacturer owed independent legal duty to plaintiff due to status as user of car involved in accident, rather than as bystander). Because § 15-73-10 limits liability to the user or consumer, there is no need for a limitation on foreseeable victims to avoid disproportionate liability as was found necessary in the bystander setting. It is not unreasonable to conclude the user of a defective product might suffer physical harm from emotional damage if the use of the product results in death or serious injury to a third person, irrespective of the relationship between the user and third person.[6]

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[6]In any event, we are without authority to graft the Kinard bystander analysis on § 15-73-10. Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute. Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162 (1989) (finding punitive damages are not recoverable under Defective Products Act); Schall v. Sturm, Ruger Co., Inc., 278 S.C. 646, 300 S.E.2d 735 (1983) (absent clear legislative direction, strict liability cause of action under § 15-73-10 does not exist in South Carolina where product entered stream of commerce prior to enactment of statute and is alleged to have

We find there is a genuine issue of fact regarding whether the event in which Bray's co-worker lost his life was the proximate cause of Bray's physical harm. *See* Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002) (summary judgment appropriate only if no genuine issue of material fact). Therefore, we affirm the Court of Appeals' reversal of the trial court's decision granting summary judgment on Bray's strict liability claim.

ISSUE II

Did the Court of Appeals err by affirming the trial court's decision granting summary judgment on Bray's negligence claim?

DISCUSSION

Bray asserts a products liability claim for negligence under Padgett v. Colonial Wholesale Distrib. Co., *supra*. The Padgett court held that a plaintiff may recover for a physical or bodily injury that results from mental and emotional trauma in the absence of physical impact. *See also* Spaugh v. Atlantic Coast Line R. Co., 158 S.C. 25, 155 S.E. 145 (1930) (suffering from nervous breakdown, as result of defendant's negligence, would support verdict for plaintiff); Mack v. South-Bound R. Co., 52 S.C. 323, 29 S.E. 905 (1898) (defendant liable for injuries sustained as result of mere fright and mental disturbance caused by its negligence). Because Padgett allows recovery for injuries sustained as a consequence of shock, fright, and emotional upset, Bray may be able to recover for her alleged injuries that arose from the sudden fright she felt when the machine she was operating crushed her co-worker.

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caused injury thereafter). If the Act is to be amended so as to provide for the requirement of a close relationship in the context of a strict liability cause of action, this must be accomplished by the legislature, not the court.

Bray further argues the Court of Appeals erred by finding her strict liability claim could survive a summary judgment motion but her negligence claim could not on the element of proximate cause. She argues that, under either claim, she was a foreseeable victim. While proceeding on one theory of recovery under products liability and not proceeding on another is permissible, *see* Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (Ct. App. 1995), if a person is considered a "direct victim" for the purposes of one products liability cause of action, this person must be a direct victim for all causes of action. It is too fine a distinction to say Bray is a user and therefore a foreseeable plaintiff under a strict liability theory, but that she is not a "direct victim" and not a foreseeable plaintiff under a negligence cause of action. Therefore, the trial court improperly granted Marathon's summary judgment motion on Bray's negligence claim and the Court of Appeals is reversed on this issue.

CONCLUSION

We affirm the Court of Appeals' decision regarding Bray's strict liability claim and reverse the decision regarding her negligence claim. We further affirm the court's ruling that Bray abandoned her breach of warranty claims. *See* First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) (issue not argued in brief deemed abandoned and precludes consideration on appeal).

AFFIRMED IN PART, REVERSED IN PART.

TOAL, C.J., WALLER and BURNETT, JJ., concurs.
PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: I concur in part and dissent in part, and would affirm the decision of the Court of Appeals as written.

I agree with the majority that a bystander who is the user of the allegedly defective product, and who suffers physical harm from directly witnessing injury to another, may maintain a strict liability claim. See S.C. Code Ann. § 15-73-10 (1) (1976); see e.g., Gnirk v. Ford Motor Co., 572 F. Supp. 1201 (D.S.D 1983). Accordingly, I agree that we should affirm the Court of Appeals' decision reversing the trial court's grant of summary judgment on Bray's strict liability claim.

I disagree, however, with the majority's decision to reinstate Bray's negligence claim. Fundamentally, I disagree with the majority's holding that if a plaintiff is considered a "direct victim for the purposes of one products liability cause of action, [then the plaintiff] must be a direct victim for all [products liability] causes of action." When pursuing a products claim under a negligence theory, the plaintiff is subject to all the requirements and defenses of an ordinary negligence claim. See Hubbard and Felix, *The South Carolina Law of Torts* 245-246 (2nd ed. 1997). Where, as here, the negligence claim is predicated on bystander liability, then I would hold, as did the Court of Appeals, that the plaintiff must satisfy the foreseeability requirements set forth in Kinard v. Augusta Sash and Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985). Bray seeks to recover for the injury she suffered from witnessing the death of another: this claim brings her squarely within Kinard. She does not claim, as did the plaintiff in Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E. 265 (1958), that her injuries resulted directly from the defendant's negligence. Bray cannot satisfy the Kinard requirements and is therefore not a foreseeable victim. The trial court properly granted summary judgment on this theory, and the Court of Appeals correctly affirmed that decision.

As the majority points out, the legislature has defined the class of plaintiffs entitled to bring a strict liability products claim and we are bound by the terms used in that statute. When, however, the defective product claim is predicated on negligence, and the plaintiff is merely a bystander, then "there is…need for a limitation on foreseeable victims to avoid

disproportionate liability…." Policy requires that we limit foreseeable victims where the defective product claim sounds in negligence.

For the reasons given above, I would affirm the decision of the Court of Appeals.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Robert Paul Foster, Respondent.

Opinion No. 25734
Submitted September 30, 2003 - Filed October 13, 2003

PUBLIC REPRIMAND

Henry B. Richardson, Jr., and Michael S. Pauley, both of Columbia, for the Office of Disciplinary Counsel.

R. Davis Howser, of Columbia, for Respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the agreement, respondent admits misconduct and consents to the imposition of any of the sanctions set forth in Rule 7(b), RLDE. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

Facts

Respondent permitted a non-lawyer employee to perform real estate closings in his absence and without his supervision, and he tacitly allowed her to sign his name to the applicable real estate documents in each

of the transactions. As a result of respondent's failure to supervise the non-lawyer employee, he was not aware of inaccuracies in HUD-1 Settlement Statements prepared in a number of the closings. The HUD-1 Settlement Statements in these matters did not reflect the complete transaction, nor did they accurately reflect the disbursements being made in conjunction with the transactions. Respondent recognizes that the HUD-1 Settlement Statement is required by the Federal Truth in Lending Act and that the incorrect information provided by the non-lawyer employee was at variance with the purposes of the Act.

Respondent also allowed the non-lawyer employee to be responsible for reconciliation of the real estate escrow account for respondent's law firm. Respondent failed to properly maintain or supervise the reconciliation of the account in accordance with Rule 417, SCACR, for over a year.

Respondent represents that no client funds were misappropriated as a result of the HUD-1 inaccuracies or his failure to reconcile the real estate trust account. In fact, respondent sought an independent audit of his law firm's real estate escrow account which verified that no client funds were missing from the account.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (a lawyer shall provide competent representation to a client); Rule 1.2(a)(a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued); Rule 5.3(a)(a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.3(b)(a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer); Rule 5.5(b)(a lawyer shall not assist a person who

is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law); and Rule 8.4(a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct).

Respondent also admits that he has violated the following provisions of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct) and Rule 7(a)(5) (it shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or to engage in conduct demonstrating an unfitness to practice law).

Conclusion

Respondent has cooperated fully in the investigation of this matter.[1] Respondent represents that he has implemented procedures and safeguards within his law firm to prevent not only mistakes of this nature from happening again, but also to prevent future violations of any of the Rules of Professional Conduct, particularly as they relate to supervision of non-lawyer staff and account reconciliation, including the institution of appropriate checks and balances. Finally, respondent's firm no longer handles real estate closings.

After considering these mitigating circumstances, we find a public reprimand is the appropriate sanction in this matter. See In re Lester, 353 S.C. 246, 578 S.E.2d 7 (2001). Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his actions.

PUBLIC REPRIMAND.

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

[1] Respondent and his partner in his law firm self-reported these violations after discovering irregularities in HUD-1 Settlement Statements in several files.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Charles Edward Davis, Petitioner,

v.

Mary Lu Davis, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Aiken County
Peter R. Nuessle, Family Court Judge

Opinion No. 25735
Heard May 29, 2003 - Filed October 13, 2003

REVERSED

Douglas Kosta Kotti, of Columbia, and Timothy S. Mirshak, of Augusta, Georgia, for Petitioner.

C. Dixon Lee, III, of McLaren & Lee, of Columbia, and Vicki Johnson Snelgrove, of Johnson, Johnson, Whittle & Snelgrove, of Aiken, for Respondent.

James L. Verenes, of Fox & Verenes, of Aiken, for Guardian Ad Litem.

JUSTICE BURNETT: Charles Edward Davis ("Father") appeals the decision of the court below awarding custody of Child to Mary Lu Davis ("Mother"). Davis v. Davis, Op. No. 2001-UP-360 (Ct. App. filed July 12, 2001). We reverse.

FACTS

Father and Mother were married in December 1992. Child was born in March 1995. During the first 26 months of Child's life, Father and Mother mutually agreed Mother would remain home as Child's primary caregiver. Father continued work outside of the home, but remained actively involved in Child's life. Father assumed a greater caregiver role upon Mother's returning to work outside the home.

Father and Mother separated in October 1997. Mother retained temporary custody of Child while Father had visitation rights including custody of the Child every other weekend. Additionally, Mother worked amicably with Father to ensure he could see his son during the week.

At the final custody hearing, Mother stated she intended to move to Beaufort if she won custody to be nearer to relatives. She testified she would not move if Father were awarded custody.

The Child has lived in Aiken since birth; attended the same day care for several years; had a network of regular friends with whom he played; and his doctors were in the Aiken area.

Both the court-appointed psychologist and the guardian ad litem testified the decision to award custody was an extremely close question. Ultimately each concluded the Mother should be granted custody of Child, provided she remain in Aiken. If she returned to Beaufort, both determined it would be in Child's best interest that custody be granted to Father. The psychologist noted moving to Beaufort would not be in Child's best interest

because it would limit contact with Father, resulting in a negative impact on their relationship and, thus, a negative impact on Child.

The family court awarded custody to Father, and granted liberal visitation rights, telephone access, and records access to Mother. The Court of Appeals reversed.

ISSUE

Did the Court of Appeals err in reversing the family court's grant of custody to Father because it relied on Mother's testimony that she would move out of the area if granted custody?

DISCUSSION

While child custody cases are always difficult, the process is often further eroded by the actions of the parents who seek to place their own interests over those of their child. This is not so with the case before us. With few exceptions this case has been noted for its lack of acrimony between Father and Mother, with each parent striving to do what is in their son's best interests. The parents present this Court with the rare case where we can be assured that either parent is capable of providing a safe, stable, and loving home for the child.

We are guided by several principles in reviewing a custody order. First, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992).

Second, the appellate court need not disregard the findings of the family court or ignore the fact the family court judge, who observed the witnesses, was in a better position to judge their credibility and assign comparative weight to the testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981). This degree of deference is "especially true

in cases involving the welfare and best interests of children." Dixon v. Dixon, 336 S.C. 260, 262-63, 519 S.E.2d 357, 358-59 (Ct. App. 1999).

Third, "[t]he welfare of the child and what is in his/her best interest is the primary, paramount and controlling consideration of the court in all child custody controversies." Cook v. Cobb, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978); cf. South Carolina Dep't of Soc. Servs. v. Vanderhorst, 287 S.C. 554, 340 S.E.2d 149 (1986).

The Court of Appeals concluded the family court erred in awarding custody to Father because Mother was the primary caregiver of their son. The Court of Appeals also relied on the psychologist's and guardian ad litem's testimony that Mother should be the custodial parent.

Importantly, the court agreed with Mother that the family court penalized her for her stated desire to move to Beaufort if she were awarded custody of the Child. The Court of Appeals wrote:

> We find it troublesome that Mother, who was [Child's] primary caregiver for all four years of his life until the time of the final hearing, was recommended to be the custodial parent by both the guardian and the court-appointed psychologist, yet she was denied custody based on a contingency, i.e., a move that has never occurred. Mother has never moved to Beaufort and has continued to live in Aiken to be near her son since the final custody hearing.
>
> . . . .
>
> We find . . . that it would be unjust under the circumstances to penalize Mother based on a contingency that has not transpired and that Mother should have been awarded custody.

Davis, supra at 5-6.

Initially we note this is not a case where a custodial parent requests a modification of a custody order to move the child from a particular area. See, e.g., McAlister v. Patterson, 278 S.C. 481, 299 S.E.2d 322 (1982); Rice v. Rice, 335 S.C. 449, 517 S.E.2d 220 (Ct. App. 1999); Eckstein v. Eckstein, 306 S.C. 167, 410 S.E.2d 578 (Ct. App. 1991); Cf. S.C. Code Ann. § 20-7-420(30) (Supp. 2000). Rather this case presents us the novel question whether a parent's avowed desire to move if awarded custody may be a factor in determining custody. We believe it may be.

Mother's stated desire to move if granted custody becomes one of many factors the family court must consider when determining whether it is in the Child's best interest to be in the custody of Mother or Father. Her desire to move is simply one factor in a constellation of relevant factors that a family court judge must consider when making the paramount determination of the best interest of the child.

In cases where custody is a close question, as here, it may become the deciding factor. That it may be the deciding factor causes no more of a constitutional infirmity than if the deciding factor is based upon one parent having been the child's primary caregiver.

Both the court-appointed psychologist and guardian ad litem testified it would be in Child's best interest to be with Mother. However, their recommendations changed when they considered Mother's desire to move to an area several hours away.[1] Under such a scenario both recommended Father receive primary custody of Child.

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[1] The Court of Appeals opinion improperly relies on the fact that Mother had not moved to Beaufort. The court's reliance on this matter is improper for two reasons. First, the fact is outside of the record and therefore should not be considered. Rule 210(h), SCACR. Second, Mother testified that she would stay in Aiken if Father were granted custody. Since the family court awarded custody to Father, Mother's presence in Aiken is neither surprising nor relevant to the issue of whether Mother would move to Beaufort if granted custody of the Child.

Each expressed concern that moving Child away from Father would impair the critical father-son bond which was strongly present in the two. In other words, such a move would not be in the child's best interest.[2]

A court's paramount concern in determining which parent shall have custody is to protect the best interest of the child. The preponderance of the evidence demonstrates that it is in Child's best interest to be with Father in Aiken.

We **REVERSE**.

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

[2] A host of other factors further supported the family court in determining Child's best interests was served by remaining in the Aiken area. Child had lived in the area his entire life. He had a network of friends as well as an excellent day care facility that he attended.

JUSTICE MOORE: I respectfully dissent. Mother should not be penalized for her intention to move. As provided in S.C. Code Ann. § 20-7-420(30) (Supp. 2002), a custodial parent cannot be prohibited from moving absent a compelling reason:

> [T]he court may not issue an order which prohibits a custodial parent from moving his residence to a location within the State unless the court finds a compelling reason or unless the parties have agreed to such a prohibition.

The custody decision here essentially turned on the single factor of Mother's expressed intention to move. Rather than prohibit the move, the family court simply denied custody, a decision that in my opinion violates the spirit of § 20-7-420(30).

The preponderance of the evidence does not indicate a compelling reason to deny Mother custody because of her intent to move. Accordingly, I would affirm the Court of Appeals and award Mother custody.

PLEICONES, J., concurs.

The Supreme Court of South Carolina

RE: Amendment to Rule 510, SCACR

ORDER

Pursuant to Article V, Section 4, of the South Carolina Constitution, the following amendments are made to Rule 510, SCACR:

(1) The first sentence in section (b)(2) is amended to read:

> During each reporting year, which begins on July 1 and ends on June 30, all municipal judges shall be required to attend at least 12 hours of accredited continuing legal education pertaining to criminal law issues, and practice and procedure in municipal courts, and at least two of the twelve hours shall be devoted to ethical issues.

(2) The first sentence in section (c) is amended to read:

> The Board of Magistrate and Municipal Court Certification (Board) or its designee shall determine whether a course is appropriate for credit pursuant to this Rule and if so, the credit it should be assigned.

(3) The following paragraph is inserted after the first paragraph in section (c):

> When accrediting a course, the Board shall determine what portion of a course is devoted to civil law, criminal law, or ethics, and designate the course appropriately. When making this designation, if the Board determines that the content of a course is inseparably composed of both civil and criminal

elements, the Board shall designate those hours as civil/criminal. Magistrates and municipal judges may utilize such courses to fulfill their civil or criminal requirements, as described in subsections (b)(1) and (b)(2) above.

These amendments shall be effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

October 10, 2003

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Donald K. Yates, Respondent,

v.

Linda C. Yates, Appellant.

Appeal From Horry County
H. T. Abbott, III, Family Court Judge

Opinion No. 3681
Submitted September 8, 2003 – Filed October 13, 2003

AFFIRMED

Kevin M. Hughes, of North Myrtle Beach; for Appellant.

Frederick L. Harris, of Myrtle Beach; for Respondent.

PER CURIAM: Linda C. Yates (Wife) appeals from the family court order granting Donald K. Yates (Husband) a divorce on the grounds of Wife's habitual use of alcohol. We affirm.

FACTS

Husband and Wife married for the second time in April 1989. In March 1999, Wife remained in South Carolina when Husband moved to Puerto Rico to supervise a construction company. While he returned to South Carolina approximately every four months thereafter, Husband testified that he did not resume cohabitation with Wife. However, Husband sent home part of his earnings in order for Wife to pay marital bills.[1]

From December 1999 to January 2000, Wife was institutionalized for approximately six weeks for alcohol abuse. Husband returned from Puerto Rico after Wife came home from the alcohol treatment center in January 2000. At this point, Husband discovered Wife had disposed of a large portion of marital funds and had removed most of the couple's personal property from the marital home. Wife had also amassed a large amount of debt and was overdue on paying several marital bills. Further, a portion of the $11,600 that Husband sent home to pay marital bills was spent on Wife's addictions to alcohol and gambling.

Husband filed for divorce in March 2000, alleging one year's continuous separation. Wife counterclaimed for divorce on the grounds of adultery and habitual drunkenness.

After a temporary hearing, the family court issued an order specifying that the parties had a "continuing obligation to supplement the list of witnesses and exhibits up to the time of the trial [and that] failure to supplement may result in the exclusion of the exhibit of the witness." The record reveals that Wife consistently failed to respond to discovery, disregarding the court order and multiple pleas for production of her witness

[1] Wife testified that she had been injured at work and had not been employed since 1999; however, she testified that she had once earned as much as $63,800 per year.

list. Husband advised the trial court that Wife had not replied to any of his discovery requests. As the trial began, Wife, through counsel, produced discovery.

At trial Wife testified extensively about her alcohol abuse problem. Husband then moved to amend his complaint to conform "to the evidence and request a divorce on the grounds of habitual drunkenness." The family court allowed the amendment. The family court awarded Husband a divorce on the grounds of Wife's habitual drunkenness.

ISSUES

I. Did the family court abuse its discretion by allowing Husband to amend his complaint?

II. Did the family court err in finding Husband was entitled to a divorce on the grounds of the habitual use of alcohol?

III. Did the family court abuse its discretion by declining to let the parties' child testify on Wife's behalf?

IV. Is there evidence in the record that the final divorce order resulted from an ex parte communication between Husband's counsel and the family court judge?

STANDARD OF REVIEW

In appeals from the family court, this court has the authority to find the facts in accordance with its view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not, however, require this court to disregard

the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Neither is the court required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

LAW/ANALYSIS

I. Amended Complaint

Wife argues the family court erred by allowing Husband to amend his complaint to include habitual drunkenness as grounds for divorce.

At trial, Wife testified freely about her alcohol abuse problem and subsequent treatment for her addiction. After Wife's testimony, the family court granted Husband's motion to amend his complaint to request a divorce on the grounds of habitual drunkenness. "The decision whether to allow the amendment of pleadings to conform to the evidence is left to the sound discretion of the trial court." Dunbar v. Carlson, 341 S.C. 261, 267, 533 S.E.2d 913, 916 (Ct. App. 2000). "Amendments should be allowed if no prejudice occurs to the opposing party." Id.; see also Rule 15(b), SCRCP.

Wife's challenge to the amendment is limited to a claim of prejudice and the assertion that the evidence was insufficient to warrant the granting of the divorce. The prejudice claim must be examined in light of Wife's longstanding refusal to cooperate with the discovery order and requests. We discern no legal prejudice to Wife and find no abuse of discretion in permitting the amendment. Accordingly, the family court did not err in allowing Husband to amend his complaint to conform to the evidence presented at trial.

II. Habitual Drunkeness

Wife argues the family court erred in granting Husband a divorce on the grounds of habitual drunkenness. We disagree.

In order to prove habitual drunkenness, there must be a showing that the abuse of alcohol or drugs caused the breakdown of the marriage and that such abuse existed at or near the time of filing for divorce. Epperly v. Epperly, 312 S.C. 411, 414, 440 S.E.2d 884, 885 (1994); see also S.C. Code Ann.§ 20-3-10 (1985). Here, the record provides ample evidence that Wife's alcoholism eventually led to the breakdown of the marriage. Wife and Husband both testified that Wife's alcohol abuse was so severe that she spent enormous sums of money on alcohol and was eventually institutionalized for alcohol abuse. The apex of Wife's alcohol problem – her stint at an alcohol treatment center – occurred approximately three months before Husband filed for divorce. Husband specifically testified that Wife's drinking problem – and the financial problems associated with Wife's alcoholism – led to the breakdown of the marriage.

Accordingly, there was substantial evidence to support the family court's decision to grant Husband a divorce on the ground of Wife's habitual use of alcohol.

III. Son's Testimony

Wife argues the family court erred in declining to allow the parties' son to testify on her behalf. We disagree.

In the order issued after the temporary hearing, the family court advised the parties that a witness would not be permitted to testify if the parties' witness lists were not updated. However, at trial, Wife attempted to present the parties' son as a witness without having included him on her witness list. The family court declined to allow the son's testimony.

Wife argues that Husband was "constructive[ly]" apprised of the potential witness's testimony because the witness provided an affidavit at the temporary hearing. The fact remains that the witness was not included on Wife's witness list. As such, Husband's attorney did not have adequate time to prepare for cross-examination of this surprise witness. Under these

circumstances, it was not an abuse of discretion for the family court to refuse to allow the parties' son to testify. See Hilton Head Beach & Tennis Resort v. Sea Cabin Corp., 305 S.C. 517, 520, 409 S.E.2d 434, 436 (Ct. App. 1991) ("Exclusion of testimonial or documentary evidence offered by a party is a remedy available to a trial court for the party's failure to comply with discovery.").

Accordingly, we find the family court acted within his discretion by not allowing the parties' son to testify. Regardless, we are unable to determine the prejudice, if any, to Wife, for she failed to make an offer of proof of the son's proposed testimony as required by S.C.R.E. 103(a)(2).

IV. Ex Parte Communications

Wife argues that, as the written divorce order differed from the oral findings of the family court, the court's final order was the product of "communication between [Husband]'s counsel and [the] family court judge." We disagree.

Wife has not presented any evidence to support her claim of an ex parte communication between the family court and Husband's counsel. Wife bases her argument on the fact that, in the final order, the family court judge found Wife owed Husband $18,425.72 though, in the original post-trial conference, the amount was to be $6,794.31. However, the family court was not bound by the original ruling. See Corbin v. Kohler Co., 351 S.C. 613, 621, 571 S.E.2d 92, 97 (Ct. App. 2002) ("It is well settled that a judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling."). Further, a letter from Husband's counsel indicates both parties met with the family judge between the original conference and the submission of the proposed order. Accordingly, we find this issue manifestly without merit.

Moreover, this issue was not raised to the family court, in the form of a motion under Rule 59(e), S.C.R.C.P., or otherwise. Thus, the issue is not preserved for review by this court. See Wilder Corp. v. Wilke, 330 S.C. 71,

77, 497 S.E.2d 731, 734 (1998) (holding an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review).

CONCLUSION

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

AFFIRMED.

STILWELL, HOWARD, and KITTREDGE, JJ., concur.