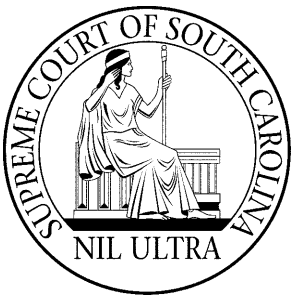

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 38

October 4, 2004

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

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Christopher Holroyd, Gillian Holroyd and American AVK Co., Respondents,

v.

Michael R. Requa, Appellant.

Appeal From Charleston County
John C. Hayes, III, Circuit Court Judge

Opinion No. 3852
Heard March 10, 2004 – Filed August 9, 2004
Withdrawn, Substituted and Refiled September 24, 2004

AFFIRMED

Eugene N. Zeigler, Hamilton Osborne, Jr. and James Y. Becker, all of Columbia, for Appellant.

Justin O'Toole Lucey and Mary L. Arnold, both of Mt. Pleasant, for Respondents.

CURETON, A.J.: Christopher Holroyd, Gillian Holroyd, and American AVK Company (collectively "Respondents") brought this action against their insurance agent, Michael Requa, alleging various causes of action for misrepresentation, fraud, and negligence stemming from Requa's solicitation and sale of a health insurance policy to Respondents. Requa denied these allegations and claimed Respondents' state law causes of action were preempted and barred by the federal Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 to -1461 (Supp. 2003) ("ERISA"). The jury rendered a verdict in favor of Respondents. The trial court subsequently denied Requa's post-trial motions for judgment notwithstanding the verdict and new trial. Requa now appeals. We affirm.

BACKGROUND

Requa was an insurance agent doing business in Moncks Corner, South Carolina. At the center of this case is a health insurance plan administered by Fidelity Group, Inc., that Requa marketed to American AVK Company for its employees. At issue was whether Requa was liable for Fidelity's failure to pay legitimate medical expense claims filed by Holroyd, one of American AVK's employees.

Fidelity's Health Insurance Plan

The program administered by Fidelity was not a typical insurance plan. Rather than being developed and sold by a traditional insurance company, the Fidelity plan was the product of an association of several distinct entities.

Around 1995, a purported employee union called the International Workers Guild (IWG) (also known as the International Workers Association) entered into a collective bargaining agreement with a purported employer's association, the National Association of Business Owners and Professionals (NABOP).[1] Under this agreement,

[1] Testimony from Respondents' witnesses indicated that the entities were not true employer or employee organizations under ERISA.

employees joining IWG would be provided healthcare benefits through a third-party-trust called the International Guild Health and Welfare Trust Fund (IWG Fund). The arrangement provided in part that employers would join the collectively bargained agreement prepared by the organizers of the arrangement with IWG and NABOP. Employees paid membership dues to IWG, and the employers made monthly contributions on behalf of their enrolled employees. The IWG Fund managed the plan, and Fidelity marketed it and administered claims.

Requa was recruited to market the Fidelity plan to his customers by John Branham and Marty Geitler, the exclusive general agents for the Plan. Over the course of two meetings, Branham and Geitler explained the structure and benefits of the Plan and provided Requa with marketing materials prepared by Fidelity. Several months later, Requa executed a marketing agreement to act as agent for the Fidelity Plan.

Requa's Solicitation of American AVK

In late 1996, Requa sent a letter to American AVK Company, a subsidiary of an international company with offices in California and South Carolina, soliciting interest in a group health insurance program from Fidelity Group, Inc.

The letter described the pricing, benefits, and network of care providers that were included in the Fidelity plan. Requa made various claims in the letter about the quality of the Fidelity plan. He wrote that it offered "great benefits with reasonable prices," had "[a] history of low rate increases and an A+ rate," was "#1 in benefits compared to other carriers," and was "[l]ocally strong with reciprocal access nationwide." In addition to these more subjective claims, Requa specifically noted that "[t]he Fidelity Group has an average annual rate increase of only 3.4% over the last 8 years." The letter further claimed Fidelity was reinsured through "Reliance [Reinsurance Company],

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However, the trial court did not make specific findings in this regard, and it is not necessary to our decision in this case.

rated A+ by A.M. Best."[2] The Fidelity plan was the only product promoted in the letter.

Shortly after receiving Requa's letter, American AVK decided to enroll in the Fidelity Plan. American AVK paid monthly premiums for the coverage and the participating employees made monthly contributions.

Failure of the Fidelity Plan

Within months of American AVK's enrollment in the Plan, Fidelity began having problems paying claims in a timely manner. No later than July 1997, Requa was aware Fidelity was experiencing problems—specifically advising one of his clients that "[t]he Fidelity Group has apparently experienced rapid growth—too soon—without the capacity to handle it."

Also in July 1997, Requa received a letter from the South Carolina Department of Insurance notifying him that the Fidelity Group's insurance plan and Requa's involvement in marketing that plan were the subject of an investigation as to whether Fidelity had complied with state law regulating the sale of insurance. The letter instructed Requa to immediately cease the marketing and sale of the Plan until the Department of Insurance was able to make a final determination.

It is undisputed that Requa did not advise American AVK or its employees of the difficulties experienced by the Fidelity Plan or the ongoing investigation when he learned of the problems. In May 1998, Requa claimed he sent a letter to all of his clients enrolled in the Fidelity Plan, including American AVK, advising them that "your health insurer, The Fidelity Group, has some serious problems and that it may be time to move to another, more competent carrier." Respondents, however, deny ever having received this letter.

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[2] A.M. Best Company rates insurance companies based on their financial ability to meet their ongoing obligations.

Holroyd's Unpaid Claims

This action arises from unpaid medical claims submitted to Fidelity by one of American AVK's enrolled employees, Christopher Holroyd. Holroyd suffered severe heart attacks in July and October 1998. He incurred approximately $65,000 in medical costs, which Fidelity did not pay. Because Requa failed to inform them of Fidelity's problems, Holroyd, his wife, Gillian, and American AVK filed the underlying action against Requa. The jury returned a verdict in favor of Respondents on the charges of negligence, negligent misrepresentation, and breach of fiduciary duty. Respondents were awarded $365,000 in actual damages and $180,000 in punitive damages.

Requa moved for judgment notwithstanding the verdict (JNOV), a new trial absolute, and a new trial nisi remittitur, which were denied. Requa appeals.

STANDARD OF REVIEW

"In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). The motions must be denied by the trial court when the evidence yields more than one inference or its inference is in doubt. Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 149 (1999). On appeal from the denial of a motion for a directed verdict or JNOV, this Court will reverse the trial court only where there is no evidence to support the ruling below. Id.; Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997).

"Further, a trial court's decision granting or denying a new trial will not be disturbed unless the decision is wholly unsupported by the

evidence or the court's conclusions of law have been controlled by an error of law." Sabb, 350 S.C. at 427, 567 S.E.2d at 236; Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 722 (Ct. App. 1996). In determining whether the judge erred in denying a motion for a new trial, we must look at the testimony and inferences raised therefrom in favor of the nonmoving party. Welch v. Epstein, 342 S.C. 279, 302-03, 536 S.E.2d 408, 420 (Ct. App. 2000).

LAW/ANALYSIS

I. Timeliness of Appeal

As a threshold matter, Respondents argue this Court lacks subject matter jurisdiction to consider this appeal because Requa's post-trial motions were not timely filed. We disagree.

Rule 59(b), SCRCP, provides that "[t]he motion for new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter." In the present case, the jury rendered its verdict on December 20, 2001. Requa filed his post-trial motions twenty-six days later on January 15, 2002. Respondents assert that Requa's failure to make his post-trial motion within the ten days prescribed by Rule 59(b) divests this Court of jurisdiction to review the case.

The jury's verdict in this case did not constitute an adjudication of all the claims in the case. The parties agreed that Respondents' claim brought under the Unfair Trade Practices Act (UTPA) would be submitted to the trial court. The trial court stated at the conclusion of trial that a written order on the UTPA claim would be issued at a later date. Respondents sent Requa a notice on January 8, 2002, that they intended to withdraw their UTPA claim. The UTPA claim, however, was formally withdrawn by Respondents on January 23, 2002.

Rule 54(b), SCRCP, provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The trial court had not ruled on all of the claims presented at the time the jury rendered its verdict. The trial court also made no "express determination" that there was no reason for delay in entering judgment on the claims that had been submitted to the jury. Accordingly, the time for filing post-trial motions did not begin to run until the time Respondents' UTPA claim had been withdrawn. Requa filed his post-trial motions within seven days of the informal notice of withdrawal and eight days prior to the formal withdrawal. Requa's post-trial motions were therefore timely under the rules.

Further, this Court generally only lacks jurisdiction over an appeal when the notice of appeal is untimely. The notice of appeal must be served in civil cases within thirty days after receipt of written notice of entry of final order. When a party makes a timely post-trial motion for judgment notwithstanding the verdict, to alter or amend the judgment, or for a new trial, "the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order

granting or denying such motion." Rule 203(b)(1), SCACR. The failure to timely serve a notice of appeal "divests this court of subject matter jurisdiction and results in dismissal of the appeal." Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999).

As previously discussed, Requa timely filed his post-trial motions after the UTPA claim was informally dismissed. The trial court issued his order denying Requa's post-trial motions on January 25, 2002. Requa filed and served his notice of appeal on the same day. Accordingly, Requa served his notice of appeal within the time prescribed by the rules, and this Court has jurisdiction to entertain this appeal.

II. ERISA Preemption

A primary component of Requa's defense in the present case was his argument that the state law claims Respondents asserted were preempted and barred by ERISA. The trial court denied Requa's motions for directed verdict and for JNOV based on ERISA preemption. Requa appeals these rulings.

Initially, Requa argues one of the trial court's rulings mandated a finding that Respondents' claims were preempted by ERISA. One way to come within the purview of ERISA is if a healthcare plan provided to employees is an "employee welfare benefit plan" (EWBP). Whether a plan is an EWBP is a question of fact. Int'l Ass'n of Entrepreneurs of Am. Benefit Trust v. Foster, 883 F.Supp. 1050, 1056 (E.D.Va. 1995). A plan can be established as an EWBP if: (1) it is established by a bona fide employer or employee group, and (2) the purpose is to provide the beneficiaries, through the purchase of insurance or otherwise, medical or other benefits. 29 U.S.C. § 1002 (1); Foster, 883 F. Supp. at 1056.

The trial court in the present case ruled in a pre-trial motion for summary judgment that the healthcare plan "sold by Requa to Plantiffs is and was at all relevant times insurance." At trial, Requa requested that he be permitted to refer to the plan during trial as a "group health insurance plan," and the trial court allowed him to do so. Therefore,

Requa argues the trial court determined the plan was a group health insurance plan which qualified as an Employee Welfare Benefit Plan, and thus, ERISA preempted Respondents' state law claims. Although the trial court permitted Requa to refer to the healthcare plan as a group health insurance plan, this does not amount to a legal finding that the plan fell within the purview of ERISA and it does not alter the prior order finding the plan was "insurance." Accordingly, this argument has no merit.

In any event, Congress imposed comprehensive federal oversight of employee benefit plans with the passage of ERISA. ERISA provides for express preemption of "any and all State laws insofar as they may now or hereafter relate to" employee benefit plans. 29 U.S.C. § 1144(a). "A state law claim 'relates to' an employee benefit plan if it has a connection with or reference to the plan." Heaitley v. Brittingham, Dial & Jeffcoat, 320 S.C. 466, 469, 465 S.E.2d 763, 765 (Ct. App. 1995) (citing Shaw v. Delta Air Lines Inc., 463 U.S. 85, 97 (1983)). Although ERISA's preemption language is broad, state law claims "which affect employee benefit plans in 'too tenuous, remote, or peripheral a manner' do not relate to the plan" and, thus, are not preempted by ERISA. Id.; Dist. of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992).

This Court has previously addressed whether certain state law claims for damages due to misrepresentation and professional negligence were preempted by ERISA. In Heaitley, a widow sought damages from her deceased husband's former partnership for continuing to accept his life insurance premiums during his lifetime despite deleting him from the policy. This Court held her state law claim was only "indirectly" related to ERISA in that she was not seeking to recover benefits under the policy. The widow was seeking damages for misrepresentation of coverage. Heaitley, 320 S.C. at 469-70, 465 S.E.2d at 765.

In Medical Park OB/GYN, P.A. v. Ragin, 321 S.C. 139, 467 S.E.2d 261 (Ct. App. 1996), a physician's office relied upon the faulty representations of Ragin in the creation of an employee benefit plan.

Because Ragin failed to inform Medical Park regarding mandatory contributions to the plan, the plan was severely underfunded and Medical Park was subject to substantial legal liability. Medical Park sued Ragin for negligent misrepresentation, breach of fiduciary duty, and professional negligence. Noting the purpose of ERISA was to protect the interest of participants in employee benefit plans, this court held that the "relationship between Medical Parks' claims and the regulation or administration of an ERISA plan is too tenuous, remote, or peripheral to trigger pre-emption." Medical Park, 321 S.C. at 145, 467 S.E.2d at 264-65. Because adjudication of Medical Park's state law claims would not "affect the rights of any plan participants or beneficiaries and [would] not threaten the uniform regulation or administration of employee benefit plans," this court held the state law claims did not fall within ERISA's preemptive scope. Id. at 146, 467 S.E.2d at 265.

The United States Court of Appeals for the Fourth Circuit has also decided that state law claims for professional malpractice were not preempted by ERISA. In Coyne & Delany Co. v. Selman, 98 F.3d 1457 (4th Cir. 1996), the Fourth Circuit considered whether an employer's professional malpractice claim it brought against an insurance agent was preempted by ERISA. In that case, as in the present case, the employer alleged it had been fraudulently induced by the insurance agent to purchase group health insurance for its employees. Id. at 1463-64. The Fourth Circuit held that fraudulent inducement claims against insurance agents were not preempted, finding that:

> We believe that [plaintiff's] malpractice claim against insurance professionals is a "traditional state-based law[ ] of general applicability [that does not] implicate the relations among the traditional ERISA plan entities," including the principals, the employer, the plan, the plan fiduciaries and the beneficiaries. There is no question that [plaintiff's] malpractice claim is rooted in a field of traditional state regulation.

> Common law professional malpractice, along with other forms of tort liability, has historically been a state concern. Moreover, a common law professional malpractice claim is "a generally applicable [law] that makes no reference to, or functions irrespective of, the existence of an ERISA plan." The state law at issue in this case imposes a duty of care on all professionals, including all insurance professionals. Common law imposes the duty of care regardless of whether the malpractice involves an ERISA plan or a run-of-the-mill automobile insurance policy. Thus, the duty of care does not depend on ERISA in any way. Finally, the state law malpractice claim does not affect relations among the principal ERISA entities. Defendants' malpractice, if any, occurred before the faulty plan went into effect and before defendants began to act as Plan Administrator and Plan Supervisor. Accordingly, the claim is asserted by [plaintiff], in its capacity as employer, against the defendants in their capacities as insurance professionals, not in their capacities as ERISA fiduciaries.

Id. at 1471 (internal citations omitted).

Turning to the instant case, we similarly find the state law claims are not preempted by ERISA. Respondents brought claims of misrepresentation, fraud, and negligence against Requa. Respondents sought damages from Requa for his professional malpractice in failing to adequately investigate the Fidelity plan and in failing to inform them when it became evident that the Fidelity plan had problems. The malpractice claims are rooted in the common law of tort liability. Like the malpractice claims in Heaitley and Medical Park, these common law claims do not impact—even in a tenuous fashion—employee

benefit structures or their administration, bind employers or plan administrators to particular choices, or preclude uniform administrative practice.

Furthermore, Respondents' claims are not aimed at obtaining ERISA benefits. Rather, they brought this action seeking damages proximately caused by Requa's misrepresentations in marketing the Fidelity Plan and his negligent failure to apprise Respondents of the Plan's financial and regulatory difficulties. If Respondents prevail on their claims, Requa will be liable in his individual capacity for his negligence as an insurance professional. Thus, the connection between the state law claims and the employee benefit plan is so tenuous such that ERISA does not preempt them.

For these reasons, we cannot say that the common law tort action at issue in this case "relate[s] to any employee benefit plan" within the meaning of 29 U.S.C. § 1144(a). Accordingly, we find there was evidence to support the trial court's denial of Requa's motions for directed verdict and JNOV.[3]

III. Contested Evidentiary Rulings

Requa next appeals several of the trial court's rulings on evidentiary matters raised at trial. We address each of these issues separately below.

The decision to admit or exclude evidence is within the trial court's sound discretion. Washington v. Whitaker, 317 S.C. 108, 118,

[3] We also note that Requa admits in his brief that it was his burden to prove the existence of a recognized ERISA plan before the trial court could determine whether state law claims were preempted. He also admits that the fact of whether the Fidelity plan was an ERISA plan was "a question of fact that has yet to be determined." Requa's admitted failure to provide any evidence at trial that the plan was an ERISA plan is an additional ground supporting the trial court's decision to deny his motions for directed verdict and JNOV.

451 S.E.2d 894, 900 (1994); Haselden v. Davis, 341 S.C. 486, 497, 534 S.E.2d 295, 301 (Ct. App. 2000). The judge's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law. Carlyle v. Tuomey Hosp., 305 S.C. 187, 192, 407 S.E.2d 630, 633 (1991). To warrant reversal, however, Requa "must show both the error of the ruling and the resulting prejudice." Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994).

A. Admission of Evidence as to Unpaid Medical Bills and Premiums Paid

Requa argues the trial court erred by admitting evidence of the amount of premiums paid and unpaid medical bills for Holroyd and other employees enrolled in the Plan. He essentially argues that the jury should not have considered evidence of the total amount of premiums paid by American AVK on behalf of all of its employees when the only employee joined in the lawsuit was Holroyd. We find no error.

At the start of the trial, Requa moved to exclude evidence of the amount of premiums paid and the amount of the unpaid claims under the Fidelity plan, arguing the evidence of both amounted to a claim for recission and would be confusing to the jury. The trial court denied the motion. However, Requa himself testified during the trial that the Holroyds had $65,000 in unpaid medical bills and that $15,000 in premiums had been paid to Fidelity. Requa later withdrew his objection to the presentation of the medical bills. The Holroyds testified, without objection, regarding the receipt and amount of unpaid medical bills. Although Requa moved for directed verdict at the end of Respondents' case, he argued the evidence of both the premiums and unpaid medical bills was not the proper measure of damages.

Requa also argued in his post-trial motion to alter or amend the judgment that the evidence of both medical bills and the premiums paid was not proper measures of damages, was irrelevant, or, if relevant, was more prejudicial than probative. The trial court ruled that both the

medical bills and the premiums paid were appropriate to be submitted on Respondents' claims. The court further noted that even if the jury inappropriately considered the total amount of premiums paid, it was impossible to determine that fact as the jury returned a general verdict.

There are preservation problems with Requa's issue on appeal. Although Requa opposed the introduction of the evidence of medical bills and premiums paid before the testimony, after the testimony, and in a post-trial motion, he did not object when the evidence was actually introduced during the trial. In fact, the evidence that Requa complains about in this appeal was also elicited from his own testimony without objection. Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal. See Doe v. S.B.M., 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997) (holding that a contemporaneous objection is "required to properly preserve an error for appellate review"); Cogdill v. Watson, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986) ("The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object."). Because Requa failed to object at the time the evidence was introduced, we do not believe this issue is preserved for appellate review.

B. Requa's Request to Cross-examine Respondents Regarding Allegations Made in the Original Complaint

Requa next argues the trial court erred by not allowing him to cross-examine Respondents regarding a statement in their original complaint.

One of the contested issues at trial was whether Requa informed American AVK that there were problems with Fidelity. Respondents' original complaint stated that they had received a letter from Requa in May 1998 informing them that their "health insurer, the Fidelity Group, has some serious problems and that it may be time to move to another more competent carrier." Respondents filed an amended complaint which did not include the assertion that Requa wrote them to inform them of the problems with Fidelity.

At trial, Requa sought to cross-examine Holroyd about the assertion in the original complaint. Respondents objected, claiming the statement was inadvertently copied from a complaint filed in a separate action. The trial court concluded the statement in the original complaint was the result of a scrivener's error and its inadvertent inclusion in the original complaint should not be allowed to prejudice Respondents. We find no error.

Our courts have corrected scriveners' errors when warranted. See Canal Ins. Co. v. Caldwell, 338 S.C. 1, 7, 524 S.E.2d 416, 419 (Ct. App. 1999) (finding that a party was not bound by a scrivener's error regarding commencement time on insurance policy). In this case, Requa understood the statement had been culled from another complaint and acknowledged this at trial. Furthermore, Requa did not object when Respondents amended their complaint to delete the statement. Because there was evidence to support the trial court's ruling on this matter, the judge did not err in denying Requa's motion for a new trial as to this issue.

C. Unpaid Medical Bills of Others

During cross-examination, Requa admitted that his policyholders have "a million dollars in unpaid claims." Requa's counsel objected, a bench conference was held, and Requa's cross-examination continued. During closing arguments, Respondents' counsel argued that "there's a million dollars in unpaid claims on Requa . . . ." Requa's general objection was sustained. However, without objection from Requa, the trial court had Requa's testimony regarding his policyholders' unpaid claims read to the jury prior to deliberations.

Requa failed to place the grounds for his first objection on the record, failed to request a curative instruction when the testimony was referred to during closing arguments, and failed to object when the trial court ordered the testimony read to the jury. Accordingly, this issue is not preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding that an objection must be

sufficiently specific to inform the trial court of the point being urged by the objector); State v. Patterson, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997) (holding that where a party objects to closing arguments and the objection is sustained, but counsel did not move to strike or request a curative instruction, the issue is not preserved for appellate review); see also Murray v. Bank of America, 354 S.C. 337, 347, 580 S.E.2d 194, 200 (Ct. App. 2003) (same); Doe v. S.B.M., 327 S.C. at 356, 488 S.E.2d at 880 (holding that a contemporaneous objection is "required to properly preserve an error for appellate review").

D. Evidence of Damage to Respondents' Credit Rating

Requa next argues the trial court erred by allowing testimony regarding damage to the Holroyds' credit rating. We disagree.

Requa testified at trial that unpaid medical bills could affect the Holroyds' credit rating. Without objection, Gillian Holroyd testified that because Holroyd's medical bills remained unpaid, they feared losing their home, and they were receiving distressing telephone calls from creditors. No evidence was admitted regarding the Holroyds' credit rating or any changes to the rating.

In his motion for a new trial, Requa complained about Gillian Holroyd's testimony, arguing he was denied access to the Holroyds' credit reports prior to trial. In denying the motion for a new trial on this issue, the trial court found Gillian's testimony was cumulative to Requa's own testimony and that Requa had failed to argue anything regarding denial of access to credit reports before the motion for a new trial.

We first note that the evidence submitted on this issue, without objection, only indicated that the Holroyds had outstanding bills and were receiving distressing telephone calls from creditors. There was no evidence with regard to the credit ratings of the Respondents. In his argument in support of this issue, Requa even admits that no evidence was submitted with regard to Gillian Holroyd's or American AVK's

credit ratings. Because no evidence of credit ratings was admitted at trial, Requa's argument has no merit.

Further, Gillian Holroyd's testimony was cumulative to Requa's testimony, and the evidence regarding the distressing phone calls was admitted without objection. As such, the issue is not preserved for appellate review. Doe v. S.B.M., 327 S.C. at 356, 488 S.E.2d at 880.

Because there is evidence to support the trial court's ruling, we find no error with the denial of the new trial motion based on the credit rating "evidence."

E. Evidence of Future Damages

Requa next argues that the trial court erred by admitting evidence of future damages in the form of increased premiums for health insurance Holroyd will be forced to pay, allegedly due to the Fidelity Plan's failure to pay Holroyd's legitimate medical expense claims. We find no error.

"Under current South Carolina law, the standard of admissibility for evidence of future damages is 'any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of the defendant's acts . . . if otherwise competent.'" Pearson v. Bridges, 344 S.C. 366, 372, 544 S.E.2d 617, 620 (2001) (quoting Martin v. Mobley, 253 S.C. 103, 109, 169 S.E.2d 278, 281-82 (1969)).

During Requa's testimony, he admitted that Holroyd's premiums would increase substantially due to his heart attack. Without objection, Holroyd's expert, John O'Brien, testified that Holroyd would have a difficult time getting health insurance and he would be plagued with "hefty" premiums because his heart condition would be considered a preexisting condition.

Respondents offered expert testimony that Holroyd's heart condition will be considered a preexisting condition when he signs on with a new insurance carrier. Because of the preexisting condition, he

will be required to pay a much higher rate for insurance coverage than he had in the past. Had the Fidelity Plan honored its commitment to pay the legitimate medical claims of its enrollees, the need for Holroyd to obtain new coverage would not have arisen. Instead, Holroyd was left without coverage and in the market for a new insurer at the time he was recovering from a catastrophic illness. If, as the jury found, Requa was negligent in his failure to investigate the adequacy of the Fidelity Plan and had represented the Plan accurately when marketing it to American AVK, the Holroyds may have never been subject to paying the higher premiums the expert projected. Allowing the jury to consider evidence of future damages is, therefore, wholly appropriate.

F. Use of Mortality Tables in Assessing Future Damages

Requa also argues the trial court erred in charging the jury on the mortality tables to quantify Holroyd's future damages. Here, too, we find no error.

The trial court must charge the current and correct law applicable to issues raised in the pleadings and supported by the evidence. Clark v. Cantrell, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). When reviewing a jury instruction for error, this court must consider the charge "'as a whole in light of the evidence and issues presented at trial.'" Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999).

The Legislature has provided life expectancy tables to be considered when it is necessary in civil actions to determine the life expectancy of any person. See S.C. Code Ann. § 19-1-150 (1985) ("When it is necessary, in any civil action or other mode of litigation, to establish the life expectancy of any person from any period in his life, whether he be living at the time or not, the table below shall be received in all courts and by all persons having power to determine litigation as evidence (along with other evidence as to his health, constitution and habits) of the life expectancy of such person.").[4]

[4] This statute was amended in April 2004. The amendment has no

During the charge conference, the parties debated whether the mortality tables should be charged to the jury. Requa argued that under ERISA, Holroyd would have "credible coverage that would have extended to any future coverage" such that future damages, and the mortality tables, were not an issue. Noting there was evidence in the record regarding future damages in the form of increased premiums, the trial court decided to give the charge concerning the mortality tables. The jury was instructed as follows:

> Now, at this time, Mr. Holroyd is 52 years of age. We have in this state a statute that has been established by way of actuarial study that states what one's life expectancy should be at a certain age. This is allowed into evidence at a trial. At this age, 52, Mr. Holroyd, has a life expectancy of 23.7 years. In determining how long one would live, you may consider life expectancy. You may also consider other evidence in the case which bears on his health, age, physical condition, or any other factors that you deem appropriate in determining whether or not you would – in determining how you would use that life expectancy.
>
> You would not use that life expectancy at all unless you determined that Mr. Holroyd would have some damages in the future. That has nothing to do with what has happened, has only to do with what may happen in the future.

Requa informed the trial court that he had no objections to the instructions. In his post-trial motions, however, Requa argued that charging the mortality tables was error because any increase in premiums was due to the heart attack, not Requa's actions and the future damages were in contravention of federal law. The trial court denied the motion, finding there was evidence to support the charge and Requa failed to object after the instruction was given.

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effect on the issue in this case.

Even assuming Requa properly preserved this argument for appellate review, we find no error with the instruction. There was evidence that Holroyd would suffer future damages due to increased premiums. The jury could properly consider the mortality tables to determine the amount of future damages. Because there was evidence to support the charge, the trial court correctly instructed the jury with regard to the mortality tables. The trial court did not err in denying Requa's post-trial motion with regard to this issue.

IV. Change of Venue

Requa next argues the trial court erred by failing to grant his motion for change of venue. We disagree. "A motion for a change of venue is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion." State v. Kelsey, 331 S.C. 50, 67, 502 S.E.2d 63, 71 (1998).

This action was filed in Charleston County in January 1999. Requa did not assert the defense of improper venue in his pleadings, and he did not file his motion for change of venue until April 2000. The matter did not ultimately come before the trial court for hearing until February 2001, at which time the case had already been placed on the trial roster and was subject to being called for trial at any time. Moreover, there is evidence that most of the discovery had been completed prior to the hearing.

Requa points out that the right of a defendant to be tried in the county of his residence is a substantial right and argues he did not waive that right. A defense of improper venue may be waived if not made by motion under Rule 12, SCRCP, or raised as an affirmative defense in a responsive pleading. Henley v. North Trident Reg'l Hosp., 275 S.C. 193, 195, 269 S.E.2d 328, 328 (1980) (holding that the right to be tried in the county of one's residence, "while it is a 'substantial and valuable right,' . . . relates only to the question of venue and can be waived").

In Henley, our supreme court held that the defendant's failure to challenge venue until five months after the complaint had been filed was unreasonable, and he had therefore waived his right to be tried in the county of his residence. We find the same result is warranted in the present case where it was fifteen months after the original complaint was filed before he challenged venue.

Accordingly, we find the trial court did not abuse its discretion in denying Requa's motion for change of venue.

V. Damages

Requa next argues the trial court erred in failing to grant his motion for a new trial or, in the alternative, a new trial nisi remittitur on the grounds the damages awarded by the jury were grossly disproportionate to the evidence. We disagree.

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice." Allstate Ins. Co. v. Durham, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993). The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. Vinson, 324 S.C. at 404, 477 S.E.2d at 723. In other words, to warrant a new trial absolute, the verdict reached must be so "grossly excessive" as to clearly indicate the influence of an improper motive on the jury. Rush v. Blanchard, 310 S.C. 375, 379-80, 426 S.E.2d 802, 805 (1993). Although the decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court, an abuse of discretion occurs if the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Krepps v. Ausen, 324 S.C. 597, 607, 479 S.E.2d 290, 295 (Ct. App. 1996).

Requa first claims the jury's award of $365,000 in actual damages is unsupported by the evidence because Respondents only presented evidence of $65,000 in unpaid medical bills. The evidence offered by Respondents not only included unpaid medical bills, but also included embarrassment, humiliation, credit problems, increased future insurance premiums, stress, premiums paid, and decreased coverage due to preexisting conditions in a new policy. We find no reason, therefore, to disturb the jury's verdict.

With respect to punitive damages, Requa argues the jury's award of $180,000 was clearly motivated by passion, caprice, and prejudice. Here, too, we see no reason to disturb the trial court's finding that the punitive damages award was supported by and not disproportionate to the evidence. The trial court separately listed and addressed the eight factors required in a post-trial review of punitive damages awards under our Supreme Court's ruling in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). Requa's culpability, knowledge, and ability to pay are amply supported by the evidence contained in the record.

In light of all the evidence presented, we find the trial court did not abuse its discretion in finding the actual and punitive damages were not disproportionate to the evidence.

CONCLUSION

For the reasons stated above, we find: that the Respondents' claims were not preempted by federal ERISA laws; that the trial court correctly ruled on Requa's evidentiary objections; that Requa's motion for a change of venue was correctly denied; and that the trial court did not abuse its discretion in denying Requa's motions for new trial. The judgment of the trial court is therefore

AFFIRMED.

HUFF and STILWELL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Katherine Burns, **Appellant,**

v.

Universal Health Services, Inc., **Respondent.**

Appeal From Aiken County
James R. Barber, III, Circuit Court Judge

Opinion No. 3869
Heard September 14, 2004 – Filed September 27, 2004

REVERSED and the JURY VERDICT is REINSTATED

V. M. Manning Smith, of Beaufort, for Appellant.

Richard J. Morgan and Robyn W. Madden, of Columbia, for Respondent.

ANDERSON, J.: Katherine Burns appeals the trial court's decision granting Universal Health Service's (Universal) motion for a

judgment notwithstanding the verdict (JNOV) on Burns' action for breach of the implied covenant of good faith and fair dealing. In addition, Burns argues the trial court erred in refusing to admit evidence of the deterioration and quality of patient care at the hospital after Universal purchased the hospital and took over the management thereof. We reverse and reinstate the jury verdict.

FACTUAL/PROCEDURAL BACKGROUND

This action arises out of Universal's termination of Burns' employment. The issue before this Court is Burns' contention that certain hospital policies and procedures created an employee contract which altered the at-will employment relationship.

Burns began her employment with Aiken Regional Medical Centers in February 1989. Universal purchased Aiken Regional Medical Centers from Hospital Corporation of America in July of 1995. For approximately eight years, Burns remained employed with the hospital as a nurse. On January 21, 1997, Universal terminated Burns' employment due to her "insubordinate refusal to meet with the Hospital to discuss a confidential patient care issue." Burns claims her termination was the result of tension between Universal and herself after she expressed concern regarding the quality of health care services being provided by the hospital after Universal purchased the hospital in July 1995.

Upon employment with the hospital in 1989, Burns received an employee handbook. On February 27, 1989, she signed an acknowledgment card indicating she read and understood the acknowledgment card and agreed to read the employee handbook. The acknowledgment card provided in part:

> I understand that the purpose of this Handbook is to provide employees of the Hospital with general information regarding the policies and procedures the Hospital attempts to follow in most cases but that **neither this handbook nor any provision of this handbook is an employment contract or any other type of contract. . . . .**

> I understand and agree that my employment at HCA Aiken Regional Medical Centers is for an indefinite term and is terminable at any time at the will of either myself or the Hospital for any reason.

(emphasis in original). Additionally, Burns signed a Confidentiality Statement in 1989 declaring she understood that violating patient confidentiality was grounds for immediate termination. In 1993, Burns signed another acknowledgment card and receipt for handbook, which stated in part:

> The purpose of this Handbook is to provide associates of the Hospital with general information regarding the personnel guidelines the Hospital attempts to follow in most cases, but NEITHER THIS HANDBOOK NOR ANY PROVISION OF THIS HANDBOOK IS AN EMPLOYMENT CONTRACT NOR ANY OTHER TYPE OF CONTRACT. . . . .
>
> All associates at Aiken Regional Medical Centers are employed for an indefinite term, and employment may be terminated, with or without cause, at any time, at the will of either the associate or the Hospital.

During her employment with Aiken Regional Medical Centers, Burns received Form Number HR116, which set forth the procedures for disciplinary actions. Universal adopted HR116 in July of 1995 and amended HR116 on August 3, 1997. Form Number HR116, as amended by Universal, is titled "DISCIPLINARY ACTIONS" and articulates:

> **I. PURPOSE**
>
> To establish definitive policies for the initiation of disciplinary and corrective actions and termination of employment.
>
> **II. POLICY**
>
> Disciplinary actions must be administered in accordance with established Human Resources policies, procedures and guidelines, and without regard to race, sex, age, religion, national

origin or disability.

Employment may only be terminated with the prior approval of the Director of Human Resources or authorized designee.

III. TYPES OF DISCIPLINARY ACTIONS

A. Aiken Regional Medical Centers has developed the following progressive disciplinary approach which may be utilized when violations of hospital policy or practice of Service Excellence standards occur. The following progressive steps should generally be followed when an associate has disciplinary problem(s):

1. Written counseling session.

2. Written warning (Win Win).

3. Final warning.

4. Discharge.

The attached document, Rules of Conduct, gives general guidelines for administering disciplinary actions for common infractions. These guidelines should be used whenever possible to ensure that associates receive fair and consistent treatment in performance and disciplinary related problems. Disciplinary problems which are not addressed in the Rules of Conduct, or those involving extenuating circumstances may be addressed with the Director of Human Resources or an authorized designee.

In any given case, the circumstances of the specific incident will dictate the severity of the disciplinary actions, and nothing in this policy should be construed, [sic] otherwise Aiken Regional Medical Centers reserves the right to administer disciplinary action up to and including termination as it deems appropriate.

All terminations must be reviewed and approved by the Director of Human Resources or authorized designee prior to termination.

Disciplinary actions should be recorded on an Associate Management Record form or in memo form, provided that all points are adequately explained.

B. For the documentation to be complete, the following points should be noted:

1. A specific date, time and location of incident(s).

2. A complete description of the negative performance or behavior exhibited by the associate—the problem. (Use additional paper as an attachment if necessary to adequately describe the problem.)

3. Consequences of that action or behavior on the associate's total work performance and/or operation of the associate's work unit.

4. Reference to prior discussion(s) with the associate.

5. Disciplinary action to be taken and specific improvement expected.

6. Consequences, if improvement is not made.

7. The associate's reaction to the disciplinary action, and an offer to submit a written rebuttal.

8. Note witnesses, if appropriate.

C. Warnings should be reviewed with associates within 24 hours of the infraction, or as soon after completion of an investigation as possible. If greater than 24 hours, document reason why action is delayed.

D. The associate should sign the document as an acknowledgment that the incident was reviewed with them. Associates are encouraged to write down their improvement action plan in the space provided.

E. All written and final disciplinary action documentation must be accompanied by an Action Plan for Problem Employee Management form (available in Human Resources) or a Win Win Partnership Agreement.

F. All official disciplinary action documents must be forwarded to Human Resources to be filed in the associate's file within three (3) working days following the counseling session. Failure to submit disciplinary action forms to Human Resources in a timely manner may limit our recourse in dealing with future disciplinary problems.

The "Rules of Conduct" form is bifurcated: (1) Category I (Causes for Immediate Termination); and (2) Category II (Cause for Counseling or Termination for Continuous Violations). Category I provides:

1. Patient abuse or neglect.
2. Discourteous behavior towards patients, visitors, physicians, management personnel, co-workers, or volunteers.
3. Two (2) consecutive scheduled days absence without notifying your immediate supervisor.
4. Removing any hospital property from the premises without express permission from a member of management.
5. Refusal to perform work assignments as directed by your supervisor or other members of management, including hospital-wide activities and programs.
6. Sexual harassment or harassment of another associate, patient or guest.
7. Possession, consumption, selling, offering for sale, or being under the influence of alcoholic beverages, intoxicants, narcotics or non-prescribed barbiturates on Aiken Regional Medical Centers premises. Associates must communicate to their supervisor prior to starting job assignments if they are taking

prescribed medications which could impair their mental or physical ability to perform job tasks.
8. Failure to submit to a drug screen based on our Drug Free Workplace policy.
9. Unauthorized possession or use of firearms, weapons, or explosives on hospital premises.
10. Immoral or indecent conduct on Aiken Regional Medical Centers premises or off the premises when an associate can be identified as being an associate with the hospital as a result of wearing a uniform, name badge, or other identifying attire.
11. Damage to hospital property.
12. Clocking in or out on another associate's timebadge, or asking another associate to clock in or out for you, falsifying or altering time, personnel records, or other hospital documents.
13. Sleeping during work hours.
14. Unauthorized access, release, or copying of hospital records, including patient medical charts or divulging any medical information to non-deserving personnel.
15. Failure to report, to your immediate supervisor, gifts or other items of value from patients, patient's relatives, or Aiken Regional Medical Centers' vendors. Acceptance of cash as a gift for any amount is prohibited.
16. Fighting, provocation that leads to fighting, or other forms of disorderly conduct.
17. Falsifying or misrepresentation of information on employment applications, resumes, or other hospital documents.

Burns filed this action on December 19, 1997, alleging wrongful termination, breach of the implied covenant of good faith and fair dealing, civil conspiracy, defamation, and intentional infliction of emotional distress. Universal filed a motion to dismiss, motion to strike, and a motion for a more definite statement in addition to an answer in response to Burns' amended complaint. Several of these motions were granted. Burns appealed from the trial court's order. The court of appeals, in Burns v. Universal Health Servs., Inc., 340 S.C. 509, 532 S.E.2d 6 (Ct. App. 2000), reversed the circuit court's order for sanctions and remanded.

Thereafter, Burns filed a Second Amended Complaint averring breach of the implied covenant of good faith and fair dealing, civil conspiracy, slander/defamation, and intentional infliction of emotional distress. Universal moved for summary judgment on the causes of action asserted in the Second Amended Complaint. Universal's motion for summary judgment was granted on the issue of intentional infliction of emotional distress. Burns withdrew her civil conspiracy claim.

Burns proceeded to trial on the claims for breach of the implied covenant of good faith and fair dealing and slander/defamation. The jury returned a verdict for Burns on her claim for breach of the implied covenant of good faith and fair dealing in the amount of $32,000 and a verdict for Universal on the slander/defamation claim. Universal filed a motion for JNOV. Approximately six weeks after the trial, the circuit judge granted the JNOV. In his order, the trial judge ruled:

> Based on this evidence the Court finds that the only inferences to be drawn from the trial evidence are: (1) that the hospital maintained and preserved the at-will employment relationship; (2) Plaintiff failed to identify any policy that she relied on that supports an exception to the employer's preservation of the at-will relationship; (3) that she was provided actual notice of the terms of the at-will relationship in conspicuous language; (4) at no time during her employment did the hospital ever have mandatory language in any document that would alter the at-will relationship; and (5) at no time during her employment at the hospital did the hospital relinquish the discretion to review any individual matter and take steps it believed appropriate to the circumstances.

STANDARD OF REVIEW

In ruling on a motion for JNOV, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993); Force v. Richland Mem'l Hosp., 322 S.C. 283, 471 S.E.2d 714 (Ct. App. 1996). In making this determination, the judge must

view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (2004); Small v. Pioneer Mach., Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997). The trial court must deny the motion when the evidence yields more than one inference or its inferences are in doubt. Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000); see also Force, 322 S.C. at 284, 471 S.E.2d at 715 (stating that if more than one reasonable inference exists, jury verdict must stand).

In deciding a motion for JNOV, the trial judge is concerned with the existence of evidence, not its weight. Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003). When considering a JNOV motion, neither an appellate court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. Id. at 320, 585 S.E.2d at 274; Reiland v. Southland Equip. Serv., Inc., 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998).

A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Gastineau v. Murphy, 331 S.C. 565, 503 S.E.2d 712 (1998); Welch, 342 S.C. at 300, 536 S.E.2d at 419. If more than one inference can be drawn from the evidence, the grant of a JNOV is improper and the case must be left to the jury's determination. Gastineau, 331 S.C. at 568, 503 S.E.2d at 713. The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict. Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994). The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law. Hinkle v. National Cas. Ins. Co., 354 S.C. 92, 579 S.E.2d 616 (2003); see also Strange v. South Carolina Dep't of Highways & Pub. Transp., 314 S.C. 427, 445 S.E.2d 439 (1994) (finding that trial court can only be reversed by this Court when there is no evidence to support the ruling below).

LAW/ANALYSIS

I. Existence of Employment Contract

Burns maintains the trial court erred in granting the JNOV and concluding there was no evidence in the record, no matter how slight, nor any inferences to be drawn therefrom on which the jury based its verdict for Burns. Specifically, Burns contends there is evidence in the record from which a jury could reasonably infer that certain written policies and procedures created an employment contract between Burns and Universal. We agree.

South Carolina recognizes the doctrine of employment at-will. Prescott v. Farmers Tel. Coop., Inc., 335 S.C. 330, 516 S.E.2d 923 (1999); Shealy v. Fowler, 182 S.C. 81, 188 S.E. 499 (1936). Under this doctrine, either party may terminate the employment contract at any time, for any reason, or no reason at all. Prescott, 335 S.C. at 334, 516 S.E.2d at 925; Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002).

South Carolina courts have carved out exceptions to the at-will employment doctrine. See Small v. Springs Indus., Inc., 300 S.C. 481, 388 S.E.2d 808 (1990) (Small II); Davis v. Orangeburg-Calhoun Law Enforcement Comm'n, 344 S.C. 240, 542 S.E.2d 755 (Ct. App. 2001). First, an employee has recourse against an employer for termination in violation of public policy. Small II, 300 S.C. at 484, 388 S.E.2d at 810; Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985). Second, an at-will employee may not be terminated for exercising constitutional rights. Prescott, 335 S.C. at 335 n.3, 516 S.E.2d at 925 n.3; Moshtaghi v. The Citadel, 314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994). Finally, an employee has a cause of action against an employer who contractually alters the at-will relationship and terminates the employee in violation of the contract. Davis, 344 S.C. at 246-47, 542 S.E.2d at 758. An employer and employee may contractually alter an at-will employment relationship, and as a result, limit the ability of either party to terminate the employment relationship without incurring liability. See Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987) (Small I); Baril, 352 S.C. at 281, 573 S.E.2d at 836; see also Culler v. Blue Ridge Elec. Coop., Inc., 309 S.C. 243, 422 S.E.2d 91 (1992) (emphasizing that the doctrine of employment at-will in its pure form

allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability). For example, an employee handbook[1] may create a contract altering an at-will arrangement. See Small II, 300 S.C. at 484, 388 S.E.2d at 810; Baril, 352 S.C. at 281, 573 S.E.2d at 836; see also Davis, 344 S.C. at 247, 542 S.E.2d at 758 (instructing that in certain situations, termination of at-will employee may give rise to cause of action where at-will status of employee is altered by terms of employee handbook).

While the doctrine of employment at-will is the law in this state, our supreme court has held that a jury can consider an employee handbook in deciding whether the employer and the employee had a limiting agreement on the employee's at-will employment status. See Small I, 292 S.C. at 486, 357 S.E.2d at 455. "Because an employee handbook may create an employment contract, the question of whether a contract exists is for a jury when its existence is questioned and the evidence is either conflicting or admits of more than one inference." Baril, 352 S.C. at 281, 573 S.E.2d at 836. The determination of whether an employee handbook alters an employee's at-will status is a question for the jury. Horton v. Darby Elec. Co., __S.C.__, 599 S.E.2d 456 (2004); Fleming v. Borden, Inc., 316 S.C. 452, 450 S.E.2d 589 (1994).

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[1] This Court notes the recent amendment to the Code of Laws of South Carolina regarding employee handbooks. However, this amendment is not applicable to the current action as it was enacted subsequent to the institution of this action. Section 41-1-110 of the South Carolina Code provides:

> It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.

Act No. 185, 2004 S.C. Acts 1841.

"The presence of promissory language and a disclaimer in the handbook make it ambiguous and subject to more than one interpretation." Baril, 352 S.C. at 281-82, 573 S.E.2d at 836; see also Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002) (concluding that summary judgment is inappropriate in most instances when handbook contains both a disclaimer and promises); Fleming, 316 S.C. at 463-64, 450 S.E.2d at 596 (explaining that an employee handbook containing both a disclaimer and promissory language should be viewed as inherently ambiguous). When an employee handbook contains promissory language and a disclaimer, a jury should interpret whether the handbook creates or alters an existing contractual relationship. Horton, __S.C. at __, 599 S.E.2d at 460.

In Conner v. City of Forest Acres, the South Carolina Supreme Court, in an excellent academic review of the law in regard to handbook language, edified:

> Relying primarily on Fleming [v. Borden, 316 S.C. 452, 450 S.E.2d 589 (1994)], the Court of Appeals in the instant case found that summary judgment was inappropriate. We agree. While the City argues that its handbook contained disclaimers which were effective as a matter of law and that Conner signed acknowledgments of her at-will status, the fact remains that the handbook outlines numerous procedures concerning progressive discipline, discharge, and subsequent grievance. The language in the handbook is mandatory in nature and therefore a genuine issue of material fact exists as to whether Conner's at-will status was modified by the policies in the handbook. See id. (summary judgment is not appropriate where disclaimers and mandatory promises are both found in handbook).

Id. at 464, 560 S.E.2d at 611 (footnote omitted).

Universal asserts the 1989 acknowledgment card and the 1993 acknowledgment card and receipt for handbook, both of which were signed by Burns, contained "language retaining the Hospital's at-will rights." Initially, we note these documents pre-date any legal nexus in regard to Burns and Universal because Universal did not purchase the hospital until 1995. The acknowledgment cards were prepared by Universal's predecessor in

interest, Hospital Corporation of America. Burns neither sued her former employer, nor did she have any relationship with her former employer at the time of her termination.

Universal's reason for immediate termination of Burns was "for her insubordinate refusal to meet with the Hospital to discuss a confidential patient care issue involving one of [Burns'] patients." We have reviewed Category I of the Rules of Conduct with exactitude and, indisputably, the reason articulated by Universal for immediate termination of Burns is **NOT** contained within the enumeration of Category I offenses.

Alternatively, even if the court gives some efficacy to the documents, there is ambiguity and confliction in language and verbiage contained in the handbook. Here, the employee handbook contains disclaimers in the acknowledgment cards that the handbook is not an employment contract. However, there are hospital policies that clearly promise specific procedures for disciplinary action will be followed. Form Number HR116 mandates certain procedures in addressing disciplinary problems and terminating employees. The use of the words "must" and "should" throughout HR116 provide mandatory disciplinary conditions precedent to termination. HR116 promises actions such as a written counseling session, a written warning within twenty-four hours of an infraction, a final warning, approval of termination by the director of human resources, and recordation of disciplinary actions. This type of promissory language creates an ambiguity and leads to more than one reasonable inference regarding the existence of an employment contract.

In addition, Universal's actions in handling Burns' termination inferentially demonstrate an employment contract. For example, after Burns was terminated, her superiors created a written warning in compliance with the handbook and placed it in her file. This raises an inference that Universal thought it was required to document the termination in compliance with its own policy.

Our supreme court, in Horton v. Darby Elec. Co., __S.C.__, 599 S.E.2d 456 (2004), recently affirmed the trial court's grant of summary judgment to an employer where there was no genuine issue of fact regarding the existence of an implied contract of employment based on the employer's policy

manual. The trial court found summary judgment was proper on the basis there was no contract altering the employee's at-will status. The Horton court held:

> Respondent's manual exemplifies the appropriate manner in which to give employees a guide regarding their employment without altering the at-will employment relationship. The manual contained conspicuous disclaimers and appellant understood those disclaimers. Further, the disciplinary procedure contained permissive language and did not provide for mandatory progressive discipline. Appellant, who himself had the responsibility of interpreting the manual, stated he interpreted the manual as not limiting his ability to terminate employees. Accordingly, the policy manual did not alter the employment at-will relationship between appellant and respondent.

Id. at __, 599 S.E.2d at 460-61 (footnote omitted). We note this case is distinguishable from Horton. In the instant case, the handbook's procedures concerning progressive discipline are couched in mandatory terms; where as, the disciplinary procedure in Horton contained permissive language and did not provide for mandatory progressive discipline. Moreover, the appellant in Horton, who was responsible for interpreting the manual, acknowledged he interpreted the manual as not limiting his ability to terminate employees.

In the case sub judice, the handbook's promissory language regarding disciplinary procedures, as well as Universal's actions in terminating Burns, give rise to more than one reasonable inference concerning the creation of an employment contract. See Gastineau v. Murphy, 331 S.C. 565, 503 S.E.2d 712 (1998) (ruling that if more than one inference can be drawn from the evidence, the grant of a JNOV is improper and the case must be left to the jury's determination). The jury in this case considered all the evidence and returned a verdict in Burns' favor. Luculently, all factual disputations in the evidentiary trial record must be resolved by the jury, not the court. After an extensive review of the record before us, we find there is evidence to sustain the factual findings implicit in the jury's verdict. See Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994).

The courts exercise great self-restraint in interfering with the constitutionally mandated process of jury decision. See Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987) (Small I). Erroneously and in direct contravention of the law as it relates to JNOV, the judge in the case at bar obstructed and usurped the duty imposed upon the jury to resolve all factual issues. The role of the trial judge is to deny the motion for JNOV if there is any evidence to sustain the factual findings implicit in the jury's verdict. Indisputably, this trial record encapsulates a plethora of evidence involving factual issues as to the existence of an employment contract. Consequently, the trial court erred in granting the JNOV on the issue of whether an employment contract existed between Burns and Universal.

II. Hospital's Actions in Terminating Burns' Employment

Burns argues her termination was the result of tension between Universal and herself after she complained about staffing issues and expressed concernment regarding the quality of health care services being provided by the hospital after Universal purchased the hospital in July 1995.

When an employment contract only permits termination for cause, the appropriate test on the issue of breach focuses on whether the employer had a "'reasonable good faith belief that sufficient cause existed for termination.'" Conner v. City of Forest Acres, 348 S.C. 454, 464, 560 S.E.2d 606, 611 (2002); Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 283, 573 S.E.2d 830, 837 (Ct. App. 2002). "[T]he fact finder must not focus on whether the employee actually committed misconduct; instead, the focus must be on whether the employer reasonably determined it had cause to terminate." Conner, 348 S.C. at 464-65, 560 S.E.2d at 611; Baril, 352 S.C. at 283, 573 S.E.2d at 837 (internal quotations omitted).

a. Reasonable Good Faith

The disciplinary procedure set out in the employee handbook provided for mandatory progressive discipline. Due to the presence of promissory language and disclaimers, the employee handbook in the present case is ambiguous and subject to more than one interpretation. See Baril, 352 S.C. at 281-82, 573 S.E.2d at 836. HR116 promises that certain procedures will be followed when dealing with disciplinary problems and prior to terminating

employees. Universal did not follow the specific procedures for disciplinary action mandated by HR116 in effectuating Burns' termination. Universal's reason for immediate termination of Burns was her "insubordinate refusal to meet with the Hospital to discuss a confidential patient care issue." A reading of Category I of the Rules of Conduct reveals that the reason espoused by Universal for immediate termination of Burns is **NOT** contained within the litany of Category I offenses. Moreover, the fact that Burns' superiors created a written warning in compliance with the handbook and placed it in her file after Burns was terminated implies that Universal thought it was required to document the termination in compliance with its own policy.

Viewing the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to Burns, we find the trial court erred in granting the motion for JNOV because the evidence yields more than one reasonable inference as to whether Universal acted with good faith in terminating Burns. See Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (finding trial court must deny JNOV motion when evidence yields more than one inference or its inferences are in doubt).

b. Sufficient Cause

Universal alleges it terminated Burns "for her insubordinate refusal to meet with the Hospital to discuss a confidential patient care issue involving one of [Burns'] patients." Universal contends it followed its policies and procedures in terminating Burns, specifically, the Confidentiality Statement, HR116, and the Rules of Conduct. Burns responds by arguing that any claim of insubordination on her part involving a failing to meet is rank subterfuge. The jury believed the testimony of Burns and rejected outright Universal's contention. The granting of the JNOV motion by the circuit judge is imbued with credibility determinations which fly in the face of JNOV responsibilities. See Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003) (stating that when considering a JNOV motion, neither an appellate court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence).

We note the Confidentiality Statement relied on by Universal was signed by Burns in 1989 and was prepared by her former employer, not

Universal. Viewing the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to Burns, we find the trial court erred in granting the motion for JNOV because the jury verdict resolved the reasonable inferences against Universal.

CONCLUSION

Accordingly, the trial court's decision to grant the JNOV is

REVERSED[2] and the JURY VERDICT is REINSTATED.

GOOLSBY and WILLIAMS, JJ., concur.

[2] Based on our decision that the trial court erred in granting the JNOV, we do not reach the remaining issue on appeal. See Futch v. McAllister Towing, 335 S.C. 598, 518 S.E.2d 591 (1999) (ruling appellate court need not address remaining issues when disposition of prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sharon Emery, **Respondent,**

v.

Ross J. Smith, **Appellant.**

Appeal From Charleston County
Judy C. Bridges, Family Court Judge

Opinion No. 3870
Heard September 14, 2004 – Filed September 27, 2004

AFFIRMED AS MODIFIED and REMANDED

W. Tracy Brown, of Charleston, for Appellant.

Gregory S. Forman, of Charleston, for Respondent.

ANDERSON, J.: Sharon Emery (Emery) initiated this action against Ross J. Smith (Smith), her ex-husband, to enforce her right to 25% of his military retirement benefits. The family court rejected Smith's laches

defense and ordered him to pay Emery 25% of the benefits received since his retirement in 1991. We affirm as modified and remand.

FACTUAL/PROCEDURAL BACKGROUND

Smith was in the United States Navy when he and Emery were married in 1973. The couple remained married for sixteen years and had one child, a son born in 1975. Smith and Emery were divorced on January 12, 1989. In connection with the divorce, the parties entered into a property settlement agreement on December 12, 1988. The settlement agreement provided: (1) that Smith would pay Emery $6,000 in $200 monthly installments, beginning January 1, 1989; (2) that Smith, the father, would have custody of their son; and (3) that Emery would pay $65 per month as child support. The agreement stated:

> Husband is on active duty with the United States Armed Forces and expects to retire after 20 years. Of this 20 year period, husband and wife have been married for approximately 15 years. Husband and Wife acknowledge and agree that they have reached a settlement as to the issue of an equitable division of his retirement income in that the wife shall receive, on a monthly basis, payable directly to the Wife, by direct payment from the applicable government agency, Twenty five (25%) percent of the Husband's total monthly retirement benefit at such time as retirement payments or benefits commence. Husband and Wife understand that this provision is contingent upon the Husband's retirement and receiving retirement benefits from the United States Armed Forces.

The divorce decree, signed January 12, 1989, approved the parties' agreement, adopted it, and merged the agreement into the decree. The decree contained the following mandate:

> That [Smith] **provide any and all information necessary** and sign any and all forms or documents necessary or convenient

> **to provide for [Emery] to receive by direct military allotment twenty five percent (25%) of the [Smith's] total military retirement (Pension)** that [Smith] subsequently receives due to retirement from the United States Armed Forces.

(Emphasis added).

After the divorce, Smith kept the marital home in Charleston, and Emery moved nearby to remain close to their son. The parties apparently maintained a civil relationship, but within a few months after the divorce, Emery stopped paying child support and Smith ceased paying the $200 per month to Emery. Smith retired from the military on June 30, 1991 and began receiving retirement benefits one month later. Emery, who remarried in December of 1991, did not receive any portion of the pension until shortly after the commencement of this litigation, in 2001, when she began receiving 25% of Smith's benefits directly from the government.

At trial, Smith admitted that he did not notify Emery of his retirement or tell her that he had begun receiving benefits:

> Q: And did you provide any and all information necessary and sign any and all forms or documents necessary pursuant to this order to her?
>
> A: No, Sir.
>
> Q: Never?
>
> A: No, Sir.

Furthermore, Emery testified that on at least one occasion she asked Smith about his retirement benefits but was provided no information:

> Q: Did you, at any time, ask [Smith] about his retirement and about the money?

A: Yes.

Q: And when, if you can tell us, was that?

. . . .

A: I think I probably asked him once or twice about it.

Q: But when was it?

A: (No response.)

Q: How far back?

A: Let me—nine years or so.

Q: So sometime nine years from this date back? So That's 1995, '94?

A: Yeah---

Q: Somewhere around there?

A: Somewhere in there.

Q: And what was his response, if any, to you?

A: I wasn't given any information about his retirement. The date or---

Emery averred that she suffers from a number of medical conditions, including Anasara (a swelling of the body), fibromyalgia, a large hiatal hernia, and depression. Although she was able to work as a nurse after the divorce, the depression was so debilitating that she mostly stayed at home in bed when she was not working. She claimed that due to the depression, she lacked the energy to pursue her claim. Emery attempted to discuss the

pension with Smith before she commenced this action, but she testified he became very angry, causing her to avoid the subject with him.

Due to increasing medical bills, Emery eventually sought the help of an attorney. She filed this action on November 21, 2001, seeking enforcement of her ownership interest, as agreed to by her and her ex-husband, in 25% of his military pension. The family court rejected Smith's defense of laches and ordered him to pay Emery 25% of his pension from the date of his first collection through the date of her first collection directly from the government. Smith's motion to reconsider was denied. This appeal follows.

STANDARD OF REVIEW

In appeals from the family court, the court of appeals has jurisdiction to find the facts in accordance with its view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992); Craig v. Craig, 358 S.C. 548, 595 S.E.2d 837 (Ct. App. 2004). This, however, does not require us to disregard the findings of the family court. Bowers v. Bowers, 349 S.C. 85, 561 S.E. 2d 610 (Ct. App. 2002). Neither are we 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. Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999) (citing Cherry v. Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981)).

LAW/ANALYSIS

I. Effect of the Merger of the Agreement into the Decree

In Smith and Emery's divorce decree, the family court judge found that "the parties have requested that this Court should approve this Agreement for enforcement purposes and that the Agreement should merge into any decree or Order of this Court so as to lose its contractual nature." Accordingly, the court's order proclaimed:

> That the annexed Agreement entered into by and between [Emery] and [Smith] dated December 12, 1988, be and hereby is, adopted by the Court as a part of this Decree and is merged into this Decree so as to lose its contractual nature. The parties are hereby directed and ordered to fully and completely comply with the terms and conditions thereof. It is further ordered that both parties shall be subject to the contempt powers and jurisdiction of this Court for enforcement purposes in the future.

By merging the agreement into the decree, the court transformed it from a contract between the parties into a decree of the court. Prior to Moseley v. Mosier, 279 S.C. 348, 306 S.E.2d 624 (1983), South Carolina law was unclear as to what specific language rendered an agreement enforceable by the court rather than being merely enforceable as a contract between the parties. The Moseley court noted, "Words of art such as 'ratified', 'adopted', 'approved', 'incorporated and []merged', and 'incorporated without merger' consistently have confused attorneys, judges and laymen in this state." Id. at 352, 306 S.E.2d at 626.

Moseley marked a change in the law. Since Moseley, our courts "assume that any settlement in a divorce decree is intended to be judicially decreed unless there is some explicit, clear and plain provision in the court approved separation agreement or the decree." Id. at 353, 306 S.E.2d at 627. The effect of an agreement becoming a judicial decree is not to be understated. "With the court's approval, the terms become a part of the decree and are binding on the parties and the court." Moseley at 353, 306 S.E.2d at 627; accord Croom v. Croom, 305 S.C. 158, 161, 406 S.E.2d 381, 383 (Ct. App. 1991). Thereafter, the agreement, as part of the court order, is fully subject to the family court's authority to interpret and enforce its own decrees. See, e.g., Terry v. Lee (Terry I), 308 S.C. 459, 419 S.E.2d 213 (1992) (stating that the family court has exclusive jurisdiction to determine the rights of the parties under an agreement incorporated into a family court decree). Indubitably, what had been a contract between Smith and Emery became appreciably more efficacious when the family court merged the parties' agreement into the court's decree.

II. Ownership of the Military Retirement Benefits

Military retirement benefits accrued during marriage constitute marital property. Martin v. Martin, 296 S.C. 463, 373 S.E.2d 706 (Ct. App. 1988); Curry v. Curry, 309 S.C. 539, 424 S.E.2d 552 (Ct. App. 1992). Consequently, 25% of all of the military retirement benefits Smith has received and will receive belong to Emery pursuant to the 1989 decree. She owns that portion by court order. Indeed, Emery has received her share of Smith's benefits since shortly after commencement of this action. Smith does not dispute her current entitlement to 25% of his pension.

III. Laches

Smith argues that the doctrine of laches should prevent Emery from collecting her 25% share of his benefits dating back to 1991. We disagree.

"Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Mid-State Trust, II v. Wright, 323 S.C. 303, 474 S.E.2d 421 (1996); Hallums v. Hallums, 296 S.C. 195, 371 S.E.2d 525 (1988); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). Laches is an equitable doctrine, which arises upon the failure to assert a known right. All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S.C., 253 S.C. 209, 235, 595 S.E.2d 253, 267 (Ct. App. 2004). Under the doctrine of laches, if a party, knowing his rights does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. Muir at 296, 519 S.E.2d at 599. The party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice. Hallums at 199, 371 S.E.2d at 528; All Saints at 235, 595 S.E.2d at 267.

"Importantly, delay alone in assertion of a right does not, in and of itself, constitute laches. Rather, so long as there is no knowledge of the wrong committed and no refusal to embrace an opportunity to ascertain facts, there can be no laches." Muir at 296, 519 S.E.2d at 599 (citations omitted); see Brown v. Butler 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001); compare Wall v. Huguenin 305 S.C. 199, 406 S.E.2d 347 (1991) (holding the failure to exercise an option to purchase land for thirteen years was not unreasonable and laches did not apply) with Chambers of S.C., Inc. v. County Council for Lee County, 315 S.C. 418, 434 S.E.2d 279 (1993) (finding contractor's six-month delay in taking action on its objection to a contract awarded by county to another contractor was barred by laches).

The inquiry into the applicability of laches is highly fact-specific and each case must be judged by its own merits. Muir at 297, 519 S.E.2d at 599. Thus, the determination of whether laches has been established is largely within the discretion of the trial court. Brown v. Butler, 347 S.C. at 265, 554 S.E.2d at 434 (Ct. App. 2001); Gibbs v. Kimbrell, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App 1993). The burden of proof is on the party asserting laches. Muir, 336 S.C. at 297, 519 S.E.2d at 599. Finally, laches is an affirmative defense and must be pled. Rule 8(c), SCRCP; Mack v. Edens, 306 S.C. 433, 412 S.E.2d 431 (Ct. App. 1991).

The doctrine of laches is well established in South Carolina's domestic relations jurisprudence. In Appeal of Brown, 288 S.C. 530, 343 S.E.2d 649 (Ct. App. 1986), this Court affirmed the trial court's decree that laches did not bar an ex-wife from asserting a nineteen-year-old claim to over $37,000 in child support arrearages, against her ex-husband's estate. There, ex-husband disappeared in 1963 and ex-wife testified that she was unable to locate him until 1972. Id. at 532, 343 S.E.2d at 650. Ex-husband died in 1982, at which time ex-wife filed her claim against his estate. Id. The order of the probate court, finding that ex-wife was not barred by laches, was affirmed by the circuit court's decree. 288 S.C. at 531, 343 S.E.2d at 650. Concluding that ex-wife "made some effort to secure support from her former husband," we held that ex-wife's actions were not consistent with an abandonment of her rights, and thus the probate court's findings were not manifestly erroneous. Id. at 535, 343 S.E.2d at 652.

Hallums involved a wife's claim to retroactive child support. In Hallums, husband and wife separated in 1968, and wife assumed custody of their daughter. 296 S.C. at 196, 371 S.E.2d at 526. Husband initiated divorce proceedings, and in his petition, he stated that he would pay $10 per week in child support. Id. However, wife did not respond, and the suit was never adjudicated. Id. Then, in 1987, husband again filed a petition for divorce, and wife counterclaimed for past-due child support. Id. Our supreme court, finding that laches applied, reversed the family court's award of retroactive child support. The court noted: "The mother never brought any formal adjudicatory proceeding against the father. Since the mother had sixteen years during which she could have enforced her right . . . , we hold that twenty-two years constituted a delay." Id. at 199, 371 S.E.2d at 528.

Jefferson Pilot Life Ins. Co. v. Gum is an especially edifying decision as it turned on the existence of a court-ordered obligation. 302 S.C. 8, 393 S.E.2d 180 (1990). In Gum, husband and wife were divorced in 1974. The divorce decree required ex-husband to retain his ex-wife as the beneficiary of an insurance policy that he currently held. Id. at 9, 393 S.E.2d at 181. In 1980, the parties were back in family court with ex-husband seeking a reduction in alimony. Ex-husband was not in compliance with the prior order and the judge again "ordered [ex-husband] to take steps immediately to make [ex-wife] the beneficiary on the Jefferson Pilot life insurance policy," but he still did not comply. Id.

Ex-husband died in 1987, and both ex-wife and second wife filed claims for the proceeds of the Jefferson Pilot insurance policy. Id. at 10, 393 S.E.2d at 181. The trial judge granted summary judgment in favor of second wife finding that "[ex-wife] had not acted with reasonable diligence when she failed to obtain a judicial determination . . . after she became aware that she was no longer the named beneficiary." Id. at 11, 393 S.E.2d at 182. The supreme court disagreed: "[Ex-husband] was under a judicial order to maintain [ex-wife] as the beneficiary of a life insurance policy . . . . In the absence of a modification of the order, . . . [ex-husband] was still under an obligation to designate [ex-wife] as the beneficiary of the policy." Id.

In Terry v. Lee (Terry II), ex-wife first initiated a claim in 1990 to partition her ex-husband's military retirement benefits based on a 1968 divorce. 314 S.C. 420, 445 S.E.2d 435 (1994). Our supreme court affirmed the family court's dismissal of the ex-wife's claim, partly on the basis of laches. Although federal law precluded ex-wife from asserting property rights in her ex-husband's retirement benefits in 1968, by 1983 Congress had passed legislation allowing a party to obtain property rights in an ex-spouse's military retirement benefits. The Terry II court stated:

> [Ex-husband] retired in 1973, a right to the retirement arguably arose in 1983, and now after at least ten more years of inaction, [ex-wife] is pursuing this claim on a twenty-seven year old divorce decree. Against these facts, it is clear to us that her delay is unreasonable and that the doctrine of *laches* is applicable to bar any further claim against [ex-husband's] military retirement.

Id. at 426-27, 445 S.E.2d at 438.

South Carolina Dep't of Social Serv. v. Holden, 319 S.C. 72, 459 S.E.2d 846 (1995), involved an action brought by an ex-wife to enforce a child support obligation imposed in a nineteen-year-old divorce decree. There, the South Carolina Supreme Court affirmed the family court's ruling that ex-husband repay over $32,000 in arrears at the rate of $25 per month. The court determined:

> Since the divorce she continually asked Father to pay child support, but he refused. She contacted the Attorney General's office and was advised that her chances of collecting from Father were "not very good" considering his sporadic work history. She again contacted the Attorney General's office when she discovered that Father was employed in Florida, but was told that it would cost $300 to file an action for support. Mother did not have sufficient funds to pursue the action.

Id. at 76, 459 S.E.2d at 848. Accordingly, the Holden court found that ex-wife was not unjustified in her delay. Id. Further, because ex-husband was

ordered to repay the arrearages at a mere $25 per month, he did not suffer prejudice. Id.

In Cannon v. Cannon, 321 S.C. 44, 467 S.E.2d 132 (Ct. App. 1996), this Court affirmed the family court's requirement that ex-husband repay $30,500 in temporary support based on a pendente lite order that was almost four years old before a divorce action was finally tried. In 1988, the family court ordered ex-husband to pay $500 per month as temporary support. Id. at 52, 467 S.E.2d at 136. In September of 1988, the divorce action was administratively terminated, and in March of 1989, ex-husband stopped paying the temporary support. Id. at 52, 467 S.E.2d at 137. However, the family court, in the 1992 action, found that the pendente lite order was still in effect. Id. We denied ex-husband's laches defense, concluding that he was not prejudiced by the delay and had not established laches as an affirmative defense. Id.

Turning to the case at bar, we find no unreasonable delay. Smith was under a duty to inform Emery of his retirement. He was to "provide any and all information necessary and sign any and all forms or documents necessary or convenient" in order for Emery to receive her share of his benefits. This he did not do. As in Gum, the duty imposed upon Smith emanates from the specific provision in the order of the family court. Emery's ten-year delay in enforcing her rights came as a result of Smith's own failure to comport with the court decree. Smith admitted that he did not inform his ex-wife of his retirement, and the family court found credible Emery's testimony that she did not know Smith had retired. Thus, it was Smith who acted unreasonably by failing to honor his duty to Emery. Accordingly, there is no failure to assert a known right by Emery, and Smith has not met the unreasonableness element of laches. See Muir, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999) ("The failure to assert a right does not come into existence until there is a reason or situation that demands assertion, for purposes of doctrine of laches.") (citation omitted). Laches cannot possibly act as a bar to Emery's receipt of the benefits when her delay was caused by Smith's failure to act according to the decree.

Smith seems to claim that since Emery was able to establish her current receipt of 25% of his benefits without any action on his part, the duty imposed by the decree was illusory. But this position ignores his obligation to inform Emery that he had retired and was receiving benefits. Otherwise, the provision of the decree imposing the duty upon Smith would be rendered meaningless.

Smith relies on Terry II, supra, as support for his laches defense. However, we find Terry II easily distinguishable. Terry II involved a wife's attempt to establish a right to her ex-husband's military retirement benefits some twenty-two years after the parties divorced. Here, **Emery seeks to enforce—not establish—her rights in Smith's retirement benefits**. Additionally, the former husband in Terry II was not bound by a court order to take the necessary steps to ensure his former wife would receive her portion of his military benefits.

Smith cites Henerson v. Puckett, 316 S.C. 171, 477 S.E.2d 871 (Ct. App. 1994) for support. Smith's reliance on this case is also misplaced because Henderson dealt with a contempt action against a father who had failed to pay child support. The language Smith cites comes from a footnote in the dissenting opinion, which mentions the trial court's criticism of the mother for delaying fourteen years in pursuing the claim. Id. at 176, n.2, 447 S.E.2d at 874 n.2. While the footnote briefly mentions the doctrine of laches, the issue was not discussed by the Henderson majority.

Finally, we note that as an equitable defense, the application of laches is a matter of discretion, not of right. Significantly, in Brown, Terry II, Holden, and Cannon, the trial court's decision regarding laches was affirmed. Of course, an appellate tribunal's deference to the trial court is not absolute, as demonstrated by the supreme court's reversal of the trial courts in Hallums and Gum. Nonetheless, we reiterate the fact-specific nature of the application of laches and give credence to the trial judge in affirming her decision.

IV. Smith's Unclean Hands

In addition to our finding that Emery acted reasonably, we agree with her and the trial court that in any event Smith is precluded from asserting laches due to his own unclean hands. Laches is a defense in equity, and one who comes to the court seeking equity must come with clean hands. See Precision Instrument Mfg. Co. v. Automotive Co., 324 U.S. 806, 814 (1945) ("He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief."); Wilson v. Landstrom, 281 S.C. 260, 315 S.E.2d 130 (Ct. App. 1984) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.") (quotations and citations omitted). We find Smith's hands are unclean because he failed to inform Emery that: (1) he was retired; (2) was receiving benefits; and (3) Emery was entitled to her 25% share.

V. Manner of Payment

The family court required full payment of the delinquency within sixty days of the entry of the order. We modify the requirement that Smith pay the full amount in lump sum and remand to the family court for the specific purpose of determining the amount of delinquency and to set a reasonable and proper schedule of repayment.

CONCLUSION

Based on the foregoing, we find the trial judge properly found that Emery was entitled to 25% of all retirement benefits due to her under the divorce decree. Accordingly, the judgment of the trial court is

AFFIRMED AS MODIFIED and REMANDED.

GOOLSBY and WILLIAMS, JJ., concur.