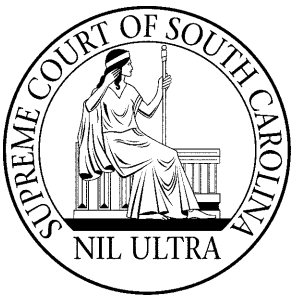

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39
October 1, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jennifer Brown, Petitioner,

v.

Baby Girl Harper, a minor under the age of seven, and Holly Lawrence, Respondents.

Appellate Case No. 2014-001746

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Ronald R. Norton, Family Court Judge

Opinion No. 27448
Heard September 23, 2014 – Filed September 29, 2014

AFFIRMED

John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, and Shannon Phillips Jones, of Shannon Jones, Attorney at Law, LLC, of Charleston, for Petitioner.

Allison Boyd Bullard, of Harling & West, LLC, of Lexington, and James Fletcher Thompson, of James Fletcher Thompson, LLC, of Spartanburg, for Respondent.

CHIEF JUSTICE TOAL: Petitioner Jennifer Brown (Adoptive Mother) appeals the court of appeals' decision affirming the family court order finding Respondent Holly Lawrence's (Birth Mother) consent to adoption was invalid and requiring immediate return of Baby Girl Harper (Baby Girl) to Birth Mother. We affirm.

FACTS/PROCEDURAL BACKGROUND

Birth Mother, a resident of Charlotte, North Carolina, gave birth to Baby Girl on October 27, 2013, in Pineville, North Carolina. On October 30, 2013, Birth Mother signed a Consent to Adoption form (the Consent) in Charleston, South Carolina, in which she consented to Adoptive Mother's adoption of Baby Girl.

Birth Mother was twenty-three years old when she learned that she was pregnant very late in the pregnancy. She received no prenatal care. She did not tell her parents she was pregnant, even though she lived with them. She gave birth alone after presenting to the emergency room when she went into labor with Baby Girl. Shortly after the birth, Birth Mother mentioned to hospital staff that she might be interested in placing Baby Girl for adoption. The hospital social worker advised her that, under North Carolina law, she could not make any decision regarding adoption for twenty-four hours following the birth. Other hospital workers were aware that Birth Mother was considering adoption, including the nurse midwife who delivered Baby Girl. The nurse midwife told Birth Mother that the nurse midwife's cousin in South Carolina, Adoptive Mother, was considering adoption, and gave her Adoptive Mother's telephone number.[1]

On October 28, Birth Mother and Adoptive Mother spoke via telephone about a potential adoption, and Adoptive Mother indicated that she would contact a lawyer. Birth Mother and Adoptive Mother also verbally agreed that the adoption

[1] Adoptive Mother is a 41-year-old divorcée with no other children. She testified she had thought about adoption in the past, but was not actively seeking to adopt a child when her cousin, the nurse midwife, contacted her about Baby Girl.

would be an "open" adoption, which would mean Birth Mother could have visitation, send cards, and otherwise be a part of Baby Girl's life. At some point that same day, Birth Mother was informed that after inquiring with several attorneys, Adoptive Mother could not afford to adopt Baby Girl.

Birth Mother was discharged from the hospital on October 28 prior to Baby Girl's release. On October 29, the nurse midwife called Birth Mother to inform her that Adoptive Mother found a lawyer to assist her with the adoption. From that point, it appears from the Record that attempts were made to conceal the pending adoption. For example, in one text message exchange between Birth Mother and Adoptive Mother, Adoptive Mother stated, "[D]on't tell anyone you are coming here." Furthermore, the nurse midwife hid her vehicle behind bushes at the hospital so that her colleagues could not see her collecting Birth Mother and Baby Girl to transport them to South Carolina.

The nurse midwife bought a car seat and drove Birth Mother and Baby Girl to Columbia. There, they met Adoptive Mother's sister, who drove them the rest of the way to Charleston. The sister paid for Birth Mother and Baby Girl to stay in a local hotel overnight. The next morning, Birth Mother and Baby Girl went to Adoptive Mother's lawyer's office to execute the Consent and related documents. This was the first time that Birth Mother and Adoptive Mother met. Upon meeting, Adoptive Mother testified that they hugged and cried. Birth Mother assured Adoptive Mother she was not going to change her mind. Adoptive Mother felt that Birth Mother was certain about going forward with the adoption.

Adoptive Mother's lawyer rented office space in an executive suite shared by other law firms, including the law firm where the attorney-witness worked.[2] On the morning of the adoption, Adoptive Mother's lawyer asked the attorney-witness to act as a witness to the execution of the Consent. In addition, Adoptive Mother's lawyer asked a legal assistant from another law firm that also shared the office suite to be the second witness to the adoption.[3]

---

[2] The attorney-witness has been admitted to practice law in South Carolina since 2006 and generally does not practice in the area of family law, although she has been appointed to handle child abuse and neglect cases.

[3] That witness testified: "I was just walking by and [Adoptive Mother's lawyer] grabbed me and asked me to come in." Like the attorney-witness, the second

Birth Mother's signature appears on the Consent and other relevant forms, and she stipulated at the hearing that she signed the Consent voluntarily.

The legal assistant was present when Birth Mother signed the Consent, but did not see her initial the remainder of the document. She understood her role to be that of a witness to Birth Mother's signature. Adoptive Mother's lawyer notarized Birth Mother's signature.

However, the attorney-witness did not enter the room until after Birth Mother signed the Consent, although she had the impression that Birth Mother had signed the Consent shortly before she entered the room.[4] Neither witness was present for any discussions between Adoptive Mother's lawyer and Birth Mother regarding the Consent. The attorney-witness testified that she believed that Adoptive Mother's lawyer had explained the Consent to Birth Mother outside of her presence. Once the witnesses were in the room, Adoptive Mother's lawyer restated his prior conversation with Birth Mother in summary fashion. The witnesses signed the Consent, and the attorney-witness's law clerk notarized their signatures.[5] The entire transaction lasted approximately ten minutes.

Birth Mother left the office with Adoptive Mother's mother, who drove Birth Mother back to the local hotel where she had spent the previous night. Birth Mother spent time alone with Baby Girl there, and then relinquished Baby Girl to Adoptive Mother. However, Birth Mother explained that she "felt immediately

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witness had never been involved in an adoption case or witnessed a relinquishment prior to this instance.

[4] The attorney-witness believed that if Birth Mother acknowledged her signature in her presence, notarial standards applied, and she could act as a witness and sign. She explained: "[Birth Mother] understood . . . what was there. She acknowledge[d] to me that she understood it before she acknowledged her signature."

[5] Birth Mother believed that everyone inside the conference room worked for Adoptive Mother's lawyer. However, she signed a form stating that she understood that Adoptive Mother's lawyer represented Adoptive Mother; that Adoptive Mother was willing to pay for her to obtain legal counsel; and that she was entitled to counseling at no expense to her.

that something was not right with the process." Birth Mother remained at the hotel alone until a friend of Adoptive Mother retrieved her and drove her back to Charlotte.

Five days later, on November 5, 2013, Birth Mother sent a registered letter to Adoptive Mother's lawyer formally revoking her consent. Adoptive Mother's action for court approval of this adoption is still pending.

On April 24, 2014, the family court issued an order in a bifurcated hearing finding the Consent was invalid and requiring Baby Girl's immediate return to Birth Mother. In its order, the family court noted the only issue presented to the court was "whether the consent document was properly executed and, based on that ruling, whether Birth Mother's request for emergency transfer of legal and physical custody of the minor be granted." The court held that the relevant statutory provisions were clear and mandatory, such that strict compliance was required. The court further held "the absence of the attorney[-]witness, a witness required by statute, renders the document invalid." The court stated that "since the attorney[-] witness acknowledges she was not present when the document was signed . . . she cannot certify that the provisions of the document were discussed with [Birth] Mother prior to signing." The family court added that each of the alleged defects on their own would render the Consent invalid, "but when combined strengthens further this [c]ourt's ruling that the Consent is invalid."

On August 4, 2014, the court of appeals affirmed the family court, finding (1) that the order was immediately appealable; (2) that the execution of a consent to adopt document must strictly adhere to section 63-9-340 of the South Carolina Code; and (3) that the Consent was invalid because the attorney-witness was not present when Birth Mother signed the document, and neither witness undertook to discuss the provisions of the Consent with Birth Mother prior to her signature. *Brown v. Harper*, ___ S.C. ___, 761 S.E.2d 779, 779 (Ct. App. 2014).

On August 20, 2014, this Court granted Adoptive Mother's petition for a writ of certiorari to review the court of appeals' decision and expedited oral arguments.

ANALYSIS

I. Consent

"Consent lies at the foundation of the adoption process," and therefore, "[i]n order for the court to issue a valid adoption decree, it must appear that the parent has consented or otherwise forfeited his or her parental rights." *Gardner v. Baby Edward*, 288 S.C. 332, 333, 342 S.E.2d 601, 602 (1986) (citing *D'Augustine v. Bush*, 269 S.C. 342, 237 S.E.2d 384 (1977)).

Adoptions are conducted pursuant to the South Carolina Adoption Act (the Adoption Act). *See* S.C. Code Ann. §§ 63-9-10 to -2290 (2010 & Supp. 2013). Under the Adoption Act, "[c]onsent or relinquishment for the purpose of adoption is required of the following persons: . . . . the mother of a child born when the mother was not married . . . ." S.C. Code Ann. § 63-9-310(A)(3). To effect this consent, section 63-9-330(A) requires that consent be made by a sworn document signed by the person giving consent and specifies the contents of such document. To formally execute a consent,

> [t]he sworn document provided for in Section 63-9-330, which gives consent or relinquishment for the purpose of adoption, *must be signed in the presence of two witnesses one of whom must be one of the following*:
>
> (1) a judge of any family court in this State;
>
> (2) *an attorney licensed to practice law in South Carolina who does not represent the prospective adoption petitioners*;
>
> (3) a person certified by the State Department of Social Services, pursuant to Section 63-9-360, to obtain consents or relinquishments.

S.C. Code Ann. § 63-9-340(A) (emphasis added). In addition, witnesses:

> *shall attach* to the document *written certification* signed by each witness *that before the signing of the document, the provisions of the document were discussed with the person giving consent or*

> *relinquishment, and that based on this discussion,* it is each witness' opinion that consent or relinquishment is being given voluntarily and that it is not being obtained under duress or through coercion.

Id. § 63-9-340(B) (emphasis added).

Once consent is given, it cannot be withdrawn "except by order of the court after notice and opportunity to be heard is given to all persons concerned, and except when the court finds that the withdrawal is in the best interests of the child and that the consent or relinquishment was not given voluntarily or was obtained under duress or through coercion." *Id.* § 63-9-350. Consequently, South Carolina has a long history of strict construction of adoption statutes:

> It is stated in many cases that adoption statutes providing for a procedure or method by which one person may be adopted as the child of another are in derogation of the common law and, therefore, to be strictly construed in favor of the parent and the preservation of the relationship of parent and child. The rationale of this rule is apparent when we consider that when a final decree of adoption is entered, the natural parents of the adopted child, unless they are the adoptive parents, are relieved of all parental responsibilities for the child and have no rights over such adopted child.

Goff v. Benedict, 252 S.C. 83, 86–87, 165 S.E.2d 269, 271 (1969) (internal citations omitted), *overruled on other grounds by Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 536 S.E.2d 372 (2000); *see also Hucks v. Dolan*, 288 S.C. 468, 470, 343 S.E.2d 613, 614 (1986) ("Adoption exists in this state only by virtue of statutory authority which expressly prescribes the conditions under which an adoption may legally be effected. Since the right of adoption in South Carolina is not a natural right but wholly statutory, it must be strictly construed." (citation omitted)).

Here, the parties agree that there were two statutory violations concerning the *execution*: (1) Birth Mother did not sign the Consent in the presence of two witnesses, *see* section 63-9-340(A); and (2) although the witnesses believed a discussion of the Consent occurred, the witnesses were not present for the lawyer's discussion with Birth Mother, and therefore could not certify that the provisions of the Consent were discussed with Birth Mother before she signed the document and that her consent was given voluntarily, *see* S.C. Code Ann. § 63-9-340(B). Thus,

Adoptive Mother can prevail only if we use the concept of substantial compliance[6] to find the execution of the Consent valid under the Adoption Act. Here, we hold that substantial compliance cannot cure the failure to comply with the relevant requirements for formal execution of the consent.[7]

First, the plain, mandatory language of section 63-9-340 weighs against adopting a substantial compliance paradigm with respect to the formalities of execution of a consent to adoption. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." (citation omitted)); *see also State v. Morgan*, 352 S.C. 359, 367, 574 S.E.2d 203, 207 (Ct. App. 2002) ("The statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." (citation omitted)).

Moreover, a finding of substantial compliance here would not further the purposes of the Adoption Act. *See* S.C. Code Ann. § 63-9-20 ("The purpose of this article is to establish fair and reasonable procedures for the adoption of children . . . ."); *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005) (citations omitted) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." (citations omitted)).

We agree with the court of appeals that "[t]he legislature intended that strict compliance with the procedures set forth in section 63-9-340 be required in order to reduce litigation, promote finality, and ensure consent documents are voluntary." *Brown*, ___ S.C. at ___, 761 S.E.2d at 780. Furthermore,

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[6] Substantial compliance has been defined as "compliance in respect to the essential matters necessary to assure every reasonable objective of the statute." *Orr v. Heiman*, 12 P.3d 387, 389 (Kan. 2000).

[7] We make clear that our decision is narrow and fact-based, and we are not precluding the use of substantial compliance in future cases where technical defects in the consent, such as a scrivener's error, may be at stake. We reach our decision here because the defects in *execution* were material and egregious.

> The main reason [a consent form] is so crucial is because, under South Carolina law, there simply is no waiting period before a relinquishment of parental rights becomes effective. It is the Legislature, not this Court, that has made this pronouncement. The legal rules on the timing of consents are ultimately a compromise between the interest in protecting biological mothers from making hasty or ill-informed decisions at a time of great physical and emotional stress, and the interest in expediting the adoption process for newborns.
>
> The Legislature has chosen to safeguard this difficult decision-making process with certain requirements regarding both the form and content of a consent or relinquishment form and the process employed at the actual signing of the form.

McCann v. Doe, 377 S.C. 373, 393–94, 660 S.E.2d 500, 511–12 (2008) (Waller, J., dissenting) (footnotes omitted) (citations omitted) (quotation marks omitted)). Thus, the statutory formalities have heightened relevance and importance under South Carolina law, as the formalities are the only clear line separating a biological parent's rights with respect to the child prior to the adoption, from the finality and irrevocability resulting from the execution of the formalities.

Accordingly, we hold that the Consent is invalid.

II. Best Interests of the Child

In *McCann*, this Court noted, "The best interest of the child remains, always, the paramount consideration in every adoption." 377 S.C. at 389, 660 S.E.2d at 509 (citation omitted) (quoting *Dunn v. Dunn*, 298 S.C. 365, 367, 380 S.E.2d 836, 837 (1989); *Doe v. Roe*, 369 S.C. 351, 371, 631 S.E.2d 317, 328 (Ct.App.2006)). The Court stated further:

> Because a challenge to the consent for relinquishment may only occur prior to an adoption, the dispute concerns a custody determination and the normal best interest analysis in custody disputes should be employed.

Id.; *see also* S.C. Code Ann, §§ 63-9-330(A)(7), -350.

Because we have declared the Consent to be invalid, then the law presumes that it is in a child's best interests to be in the custody of her biological parent. *McCann*, 377 S.C. at 389, 660 S.E.2d at 509 ("The state . . . recognizes a rebuttable presumption in custody matters that it is the best interest for the child to be placed with a biological parent over a third party.") (citing *Moore v. Moore*, 300 S.C. 75, 78, 386 S.E.2d 456, 458 (1989)). Nothing in the Record conclusively rebuts this presumption. Accordingly, we find the transfer of custody is in Baby Girl's best interests.[8]

CONCLUSION

Although we note with sadness that Adoptive Mother is a loving mother to Baby Girl, for the foregoing reasons, we affirm the court of appeals. Because we declare the Consent invalid, we order the transfer of Baby Girl to Birth Mother. *See* S.C. Code Ann. § 63-17-20(B) ("The custody of an illegitimate child is solely in the natural mother unless the mother has relinquished her rights to the child."). The transfer should occur as soon as any petition for rehearing has been acted upon by the Court, unless the Court grants rehearing. We direct that a petition for rehearing, if any, be received by the Court within five days after the filing of this opinion and direct a response to such petition be received within three days of the filing of the petition for rehearing.

AFFIRMED.

PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

[8] As these issues are dispositive, we decline to reach the issue of ratification. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). With respect to Adoptive Mother's request for attorneys' fees, because Adoptive Mother was not the prevailing party on appeal, an award of attorneys' fees would be inappropriate.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Goose Creek Municipal Court Judge Shirley Lydia Johnson, Respondent.

Appellate Case No. 2014-000816

Opinion No. 27449
Submitted September 10, 2014 – Filed October 1, 2014

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, of Columbia, for Office of Disciplinary Counsel.

Grover C. Seaton, III, Esquire, of Seaton Law Firm, LLC of Moncks Corner, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Judicial Disciplinary Enforcement (RJDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a public reprimand. We accept the Agreement and issue a public reprimand. The facts, as set forth in the Agreement, are as follows.

Facts

Respondent's grandson was charged with Driving under Suspension, 1st offense. The matter was pending before a magistrate. Respondent contacted the magistrate's office and identified herself as a judge in the telephone conversation.

Respondent did not place the call in an attempt to get the charge dismissed but to facilitate her grandson's plea as he was currently incarcerated on other matters. Respondent submits she identified herself as a judge to let the magistrate's office know that she knew the law and not in an attempt to use her position for her grandson's advantage.

Thereafter, respondent wrote to the magistrate and said she was writing on behalf of her grandson. She forwarded a money order for the fine and a letter in which the grandson requested to plead guilty in his absence for time served. In the letter, respondent identified herself as a judge and told the magistrate that she found her staff rude.

The magistrate returned the money to respondent with a letter explaining that since respondent said in a telephone conversation that her grandson was represented by counsel, the plea needed to be handled by the grandson's attorney. In response, respondent sent a second letter resending the money order and stating the attorney only represented the grandson in General Sessions Court and that respondent was handling her grandson's affairs while he was in prison.[1] Respondent again asked that her grandson be tried in his absence and fined.

Respondent asserts she never intended to use her position as a judge to help her grandson and that she was just trying to enable him to plead guilty to the charge. Respondent submits she did not identify herself as a judge in the second letter and that she did not write either letter on court stationery or letterhead.

Respondent since hired a lawyer to represent her grandson and the Driving under Suspension charge was resolved with a plea. Respondent is aware that she should not have used her title in speaking to the magistrate's office and regrets her conduct. Respondent submits she will not repeat her conduct in the future.

Law

Respondent admits that by her conduct she has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge shall uphold integrity and independence of judiciary); Section 1A of Canon 1 (judge should participate in establishing, maintaining and enforcing high standards of conduct,

[1] Respondent is not a lawyer.

and shall personally observe those standards so that integrity and independence of judiciary will be preserved); Canon 2 (judge shall avoid impropriety and appearance of impropriety in all judge's activities); Section 2A of Canon 2(judge shall respect and comply with the law and shall act at all times in manner that promotes public confidence in integrity and impartiality of judiciary); and Section 2B of Canon 2 (judge shall not allow family to influence judge's judicial conduct or judgment; judge shall not lend prestige of judicial office to advance private interests of judge or others).

Respondent also admits she has violated the following Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rules 7(a)(1)(it shall be ground for discipline for judge to violate Code of Judicial Conduct) and Rule 7(a)(9) (it shall be ground for sanction for judge to violate Judge's Oath of Office contained in Rule 502.1, SCACR).

Conclusion

We find respondent's misconduct warrants a public reprimand.[2] Accordingly, we accept the Agreement and publicly reprimand respondent for her misconduct.

PUBLIC REPRIMAND.

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

[2] Respondent's disciplinary history includes a public reprimand. In the Matter of Johnson, 341 S.C. 30, 532 S.E.2d 883 (2000).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

D. R. Horton, Inc., Plaintiff,

v.

Wescott Land Company, LLC, Defendant,

Thomas R. Hawkins and Wescott Land Company, LLC, Petitioners,

v.

D. R. Horton, Inc., Respondent.

Appellate Case No. 2012-212895

Appeal From Dorchester County
The Honorable James C. Williams, Jr., Circuit Court Judge

Opinion No. 27450
Submitted September 10, 2014 – Filed October 1, 2014

AFFIRMED AS MODIFIED AND VACATED IN PART

M. Dawes Cooke, Jr. and Kenneth Michael Barfield, both of Barnwell Whaley Patterson & Helms, LLC, of Charleston, for Petitioners.

Charles E. Carpenter, Jr., of Carpenter Appeals & Trial Support, LLC, of Columbia and Neil S. Haldrup, of Wall Templeton & Haldrup, PA, of Charleston, for Respondent.

PER CURIAM: This matter is before the Court by way of a petition for a writ of certiorari to review the Court of Appeals' decision in D.R. Horton, Inc. v. Wescott Land Co., 398 S.C. 528, 730 S.E.2d 340 (Ct. App. 2012). We deny the petition as to petitioners' questions A and B. We grant the petition as to petitioners' question C, dispense with further briefing, vacate a portion of the Court of Appeals' opinion, and affirm the Court of Appeals' opinion as modified.

The trial court granted respondent's motion for summary judgment as to slander of title based on the court's finding that the filing of a lis pendens is entitled to absolute privilege. The Court of Appeals affirmed solely on this ground. However, the trial court also found that even if the lis pendens at issue was not entitled to absolute privilege, petitioners failed to establish any facts that would satisfy any of the prima facie elements of slander of title. This ruling was not challenged before the Court of Appeals and, therefore, is the law of the case. See Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (2010) ("An unappealed ruling is the law of the case and requires affirmance."). Accordingly, it was not necessary for the Court of Appeals to reach the novel issue of whether a lis pendens that is filed but does not comply with the time requirements of S.C. Code Ann. § 15-11-10 (2005), is entitled to absolute privilege when alleging slander of title. We therefore vacate the portion of the Court of Appeals' opinion regarding petitioners' slander of title claim and affirm the trial court's grant of summary judgment as to the slander of title claim based on the law of the case finding set forth above.

AFFIRMED AS MODIFIED AND VACATED IN PART.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Eric Reed Martin, Respondent

Appellate Case No. 2014-001411

Opinion No. 27451
Heard September 10, 2014 – Filed October 1, 2014

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and William C. Campbell, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Eric Reed Martin, of Columbia, pro se.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of any sanction set forth in Rule (7)(b), RLDE. Respondent further agrees to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the imposition of discipline and to complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School within six (6) months of reinstatement. We accept the Agreement and suspend respondent from the practice of law in this state for six (6) months. We further order respondent to pay the costs incurred by ODC and the Commission in the investigation and prosecution of this matter within thirty (30) days, and, in the event he is reinstated to the practice of law, that he complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School

within six (6) months of reinstatement. In addition, should respondent seek reinstatement, his Petition for Reinstatement shall be submitted to the Committee on Character and Fitness for consideration and submission of a Report and Recommendation. The facts, as set forth in the Agreement, are as follows.

Facts

In 2006, Complainants purchased a home relying on the representations of the loan officer that they could refinance the loan after five months to obtain lower monthly payments. Complainants found that they were unable to refinance the loan at five months and would have to wait until the loan was a year old. When Complainants attempted to refinance the home after the year passed, they learned the home would not appraise at an amount that would permit the refinance. Complainants could not afford to continue to make the current mortgage payments and became delinquent. Complainants retained respondent in January 2008 to bring an action on their claims regarding the representations of the loan officer concerning Complainants' ability to refinance the loan.

In May 2008, foreclosure proceedings were initiated against Complainants and respondent gave notice to the mortgage company regarding modification of the mortgage in September 2008. Complainants understood respondent was to defend them in the foreclosure action. Respondent was to file an answer with counterclaims and a third party complaint based on the representations of the loan officer that they would be able to refinance the loan to a lower payment.

Respondent agreed to handle the case on a contingency fee basis. Respondent acknowledges he did not comply with Rule 1.5, RPC, Rule 407, SCACR, in that he did not have a written fee agreement for his representation.

Respondent states he initially communicated with Complainants regarding actions such as a deed in lieu of foreclosure or a short sale to deal with the property. Respondent prepared an answer, counterclaims, and a third party complaint which were served on counsel for the foreclosing plaintiff. Respondent admits he did not effectuate correct service of the third party complaint on the defendant. He further admits that he failed to properly file the answer with the associated counterclaims and third party complaint with the Clerk of Court. Respondent admits that as the direct result of his failure to properly file and serve the answer, counterclaims, and third party complaint, Complainants did not have a pending legal action.

Complainants were able to resolve the foreclosure portion of the case by selling the property at a short sale in 2010. After the sale of the property, the foreclosure case was dismissed with prejudice.

Respondent did not keep in contact with Complainants and, ultimately, forgot about Complainants. Respondent admits it was not until Complainants contacted him the fall of 2011 that he realized that they believed they still had an active case and respondent was still working on their case. Respondent admits he was not honest with Complainants and, instead, told them he was still working on the case. Respondent admits he deliberately misled Complainants as to the status of their case.

In late 2013, respondent finally admitted to Complainants that he failed to file the counterclaims and correctly file and serve the third party complaint, and therefore, the Complainants did not have a pending case. Respondent admitted to Complainants that he had been lying to them since 2010. Respondent returned the case file to Complainants and told them he would make good on the claims he failed to file knowing full well that he was unable to obtain funds to settle their claims. Respondent does not maintain professional liability insurance against which Complainants could file a claim. The amount of loss Complainants have suffered, if any, is yet to be determined.

Law

Respondent admits that by his conduct he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing client); Rule 1.4 (lawyer shall keep client reasonably informed about status of matter); Rule 1.5 (contingent fee agreement shall be in writing signed by client and shall state method by which fee is to be determined); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with interests of client); Rule 8.4(a) (it is professional misconduct for lawyer to violate Rules of Professional Conduct); Rule 8.4(d) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to administration of justice).

Respondent also admits he has violated the following Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR: Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

Conclusion

The Court finds a six (6) month suspension from the practice of law is the appropriate sanction for respondent's misconduct and suspends respondent accordingly.[1] Respondent shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission no later than thirty (30) days from the date of this opinion. Further, any Petition for Reinstatement shall be submitted to the Committee on Character and Fitness for its consideration and submission of a Report and Recommendation. Should respondent be reinstated to the practice of law, he shall complete the Legal Ethics and Practice Program Ethics School, Trust Account School, and Advertising School within six (6) months of reinstatement and shall provide proof of completion to the Commission no later than ten (10) days after the conclusion of the programs. Within fifteen (15) days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30 of Rule 413, SCACR.

DEFINITE SUSPENSION.

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

[1] Respondent's disciplinary history includes a public reprimand, In the Matter of Martin, 289 S.C. 467, 699 S.E.2d 695 (2010), an admonition in 2003 and 2011, and a deferred discipline agreement involving similar misconduct in 2007.

The Supreme Court of South Carolina

In the Matter of William Isaac Diggs, Respondent

Appellate Case No. 2014-002015
Appellate Case No. 2014-002016

ORDER

The Office of Disciplinary Counsel petitions this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Peyre T. Lumpkin, pursuant to Rule 31, RLDE. Respondent consents to the issuance of an order of interim suspension and to the appointment of the Receiver.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Mr. Lumpkin is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C.J.

Columbia, South Carolina

September 23, 2014

The Supreme Court of South Carolina

In the Matter of Justin John Trapp, Respondent.

Appellate Case No. 2014-001892

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(c) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR).

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

s/ Jean H. Toal C.J.

Columbia, South Carolina

September 25, 2014

The Supreme Court of South Carolina

RE: Amendments to Appendix A, Part IV, SCACR, Rules of the Board of Law Examiners
Appellate Case No. 2014-001607

ORDER

The Board of Law Examiners requests the Court approve its proposed amendments to the Rules of the Board of Law Examiners found at Appendix A to Part IV of the South Carolina Appellate Court Rules. Pursuant to Article V, § 4 of the South Carolina Constitution, the Court approves the Board of Law Examiners' proposed amendments to the Rules of the Board of Law Examiners. Appendix A to Part IV, SCACR, shall state as follows:

Appendix A (A)(3):

3. Questions requiring essay type answers will be given on Monday and Tuesday of each examination. The essay portion of the examination may cover any of the following subjects: Corporations, Agency and Partnership, State and Federal Civil Practice and Procedure, Uniform Commercial Code - Articles 2, 3, 4 and 9, Equity, Legal Writing and Research, Wills, Trusts and Estates, Trial Advocacy, Domestic Relations, and Insurance. An applicant should be familiar with principles of law which prevail in this State with respect to the foregoing subjects and any aspects of the law which are peculiar to this State. An applicant shall be expected to know and apply the current case law and statutory law. The grade an applicant receives will be based both upon the candidate's knowledge of the applicable law as well as the candidate's ability to analyze and apply the law to the facts set forth in the questions.

Appendix (A)(A)(4):

4. All answers to the essay questions will be legibly written in examination booklets or prepared on laptop computers using the software approved by the Board of Law Examiners. Booklets and pens will be provided by the

Clerk of the Supreme Court. Applicants who choose to use laptop computers shall provide their own laptop computers.

Appendix A (A)(5):

5. The Multistate Bar Examination as provided by the National Conference of Bar Examiners will be given on Wednesday of each examination. The Multistate Bar Examination, which is a multiple choice type examination, will cover the following subjects: Constitution Law, Contracts, Torts, Real Property, Evidence, Criminal Law and Procedure, and (Federal) Civil Procedure. Information about the Multistate Bar Examination may be found on the National Conference of Bar Examiners' website. The Clerk of the Supreme Court will provide pencils for this portion of the examination.

Appendix A (A)(6):

6. In instances of inclement weather or other exigent circumstances where it is necessary to promptly communicate with bar applicants, the Board will post the communication on the Supreme Court's website, www.sccourts.org.

These amendments shall take effect ninety (90) days from the date of this order. See Rule 402(a)(3), SCACR.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

September 29, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Coleen G. Mick-Skaggs, Appellant,

v.

William B. Skaggs, Respondent.

Appellate Case No. 2011-195268

Appeal From Horry County
Wylie H. Caldwell, Jr., Family Court Judge

Opinion No. 5229
Heard January 6, 2014 – Filed May 14, 2014
Withdrawn, Substituted and Refiled August 1, 2014
Withdrawn, Substituted and Refiled October 1, 2014

AFFIRMED

Nicole Nicolette Mace, of the Mace Law Firm, of Myrtle Beach, for Appellant.

William B. Skaggs, pro se, for Respondent.

WILLIAMS, J.: On appeal, Coleen Mick-Skaggs (Wife) claims the family court erred in (1) denying Wife's request for a divorce on the grounds of William Skaggs' (Husband) adultery; (2) denying her request for alimony when Husband failed to prove she committed adultery; (3) improperly admitting certain photographs into evidence; and (4) improperly requiring Wife to pay her own attorney's fees. We affirm.

FACTS/PROCEDURAL HISTORY

Husband and Wife married on February 9, 1991. After approximately eighteen years of marriage, the parties separated in October 2009. Wife then filed for divorce in December 2009 on the grounds of Husband's adultery. Husband timely answered and counterclaimed. Husband subsequently amended his pleadings to request a divorce based on one year's continuous separation. At the time of the parties' divorce, Wife was forty-seven years old and Husband was forty-nine years old.

Prior to the final hearing, the family court issued a temporary order requiring Husband to maintain health insurance for Wife and to pay Wife $1,500 in alimony per month. By the date of the final hearing, the parties reached an agreement on the equitable division of marital property and the division of marital debt. The primary issues to be decided at the final hearing were adultery and alimony.

Regarding alimony, Wife claimed she requested alimony because she only received $982 per month for her Social Security disability, but her prescriptions were at least $1,000 per month. Wife stated she and Husband both worked their entire marriage until Wife was forced to retire from her position as a paralegal in September 2008 due to her deteriorating physical condition. Specifically, she testified she suffers from an inoperable spinal tumor, fibromyalgia, degenerative disc disease, chronic pulmonary disease, rheumatoid arthritis, depression, anxiety, peripheral nerve damage, and severe eye damage resulting from a stroke.

Husband questioned the extent of Wife's disability. He highlighted how she continued to ride horses and compete in horse shows after quitting work and applying for disability benefits. Husband presented Wife with certain photographs of her at local horse shows. Wife responded almost all of the pictures were prior to receiving disability benefits, and she continued to be involved in riding and caring for horses because she was "trying to hold on to hope" when dealing with her deteriorating physical condition.

To support his adultery claim, Husband introduced certain text messages sent from Wife's phone. Husband read the following text, which Wife asserted was sent by one of her friends from her phone as a joke. It read:

> I'm at Aynor Bar now. . . . I'm dancing with about half a dozen and French kissing them all down to the floor, and they don't kiss like small-mouth brim. They actually know how to kiss. LOL. Got a couple off-duty P.D.

> officers here, too. Gonna let me (sic) strip search my ass if they want to. . . . I love being single and free. Leaving for Texas for cutting horse congress, and I'm gonna have so much fun roping me a cowboy who knows what a real man is all about. 6-2, thirty-five years old. . . .

Husband also called William Russo, a co-worker and friend of Husband, to support his allegations of Wife's adultery. Russo stated that on the night of Wife's birthday, he arrived at the Cattle Company bar around midnight. Upon walking into the bar, he claimed he saw Wife with a couple and another male. Upon Husband's request, Russo stated he stayed outside the bar for approximately an hour and a half until the bar closed at 1:30 a.m. At that time, Russo observed Wife exit the bar with the same male. Russo stated, "At one point, she had her head in his lap asleep or whatever and, you know, there was certainly some hanging on each other while they were on the front porch. Some affection."

Russo testified Wife eventually took a cab home, and the male followed the cab in his separate vehicle. Russo observed the male enter Wife's home. Russo stated he waited outside Wife's house for approximately twenty-five or thirty minutes, and the male did not leave while Russo was there. Husband corroborated Russo's testimony and stated that on the morning after Wife's birthday, he drove by Wife's home at 5:30 a.m., and an unoccupied car was still parked outside Wife's home.

At the conclusion of Russo's testimony, Husband sought to introduce into evidence several photographs taken by Russo that evening. Wife's counsel objected to the pictures on the grounds they were poor quality and unfairly depicted the scene. The family court admitted the photographs over Wife's objection, ruling, "I think it's admissible, I honestly can't tell what it is, you know. He says what it is, and I'm not -- I'll overrule the objection. [Russo] took the picture. That's what it -- it is what it is."

Mary Katherine Fisher, who boards horses at the parties' barn, corroborated Russo's testimony. She testified she observed Wife kissing the same male outside the Cattle Company bar on the night of Wife's birthday. In an effort to discredit Fisher's testimony, Wife cross-examined Fisher, who admitted to filing two actions against Wife, which were ultimately dismissed, prior to the final hearing.

Husband testified regarding the allegations of his adultery made by Wife. Husband denied cheating on Wife, claiming Wife accused him of having an affair with at

least seventeen different women. However, when questioned by Wife's counsel, Husband acknowledged he had feelings for another woman, Destiny Athey, and even stated, "Yeah, the lady I had an affair with . . . ."

In response to Husband's allegations of adultery, Wife recounted the night of her birthday. Wife testified she went to Applebee's Neighborhood Bar and Grill with some friends for dinner and then went to the Cattle Company bar for drinks. She confirmed she "started off with red wine . . . had a couple of beers, and then when [her] other friends got there, they bought [her] a couple of shots." Wife claimed that at the end of the night, she called a cab and went home by herself. She denied the male at the bar stayed at her home that evening.

In support of Wife's allegations against Husband, Wife called Katherine Bujarski, another person who boards horses at Husband and Wife's barn, to testify. Bujarski stated she observed Husband and Debbie Scott (Scott) sitting together at a horse show within the last year. Bujarski testified Husband was rubbing Scott's lower back underneath her shirt. Tamara Tindal, a private investigator, also testified at the final hearing regarding her observations of Husband and Scott. Tindal was hired by a third party, Larry Scott, to conduct surveillance on his wife. Tindal stated she observed Scott and Husband alone on at least five occasions at Husband's barn within the two weeks prior to trial. All of these occurrences were in the evening, with two of these meetings occurring from 11:30 p.m. until 12:59 a.m. and 12:05 a.m. until 12:40 a.m. Tindal stated Husband and Scott were inside the barn[1] during her surveillance, so she did not know whether Husband committed adultery during those times.

At the conclusion of all the testimony, the family court approved the parties' settlement agreement. The court granted the parties a divorce based on one year's continuous separation and stated,

> I'm doing it on these grounds because as I see the evidence, we have evidence of adultery, at least inclination and opportunity on both sides of the case . . . which means that we have, as I see it, uncorroborated evidence of adultery on both sides. For a divorce to be

[1] Wife's daughter confirmed that Husband's living quarters were inside the barn.

> granted on the grounds of adultery, as I understand the law, it needs to be corroborated.

In denying Wife's claim to alimony, the court held, "I don't think adultery as a bar to alimony had to be corroborated as does adultery as a ground for divorce." The court then recounted Russo's testimony and found it to be credible proof that Wife committed adultery and should be barred from receiving alimony. After the family court issued a written order confirming its oral ruling, Wife timely appealed. Husband did not submit a Respondent's brief.

STANDARD OF REVIEW

"In appeals from the family court, [appellate courts] review[] factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "[W]hile retaining the authority to make our own findings of fact, we recognize the superior position of the family court judge in making credibility determinations." *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011) (footnote omitted). The burden is upon the appellant to convince the appellate court that the preponderance of the evidence is against the family court's findings. *Id.* "Stated differently, de novo review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the family court." *Id.* at 388-89, 709 S.E.2d at 654 (italics omitted).

ISSUES ON APPEAL

1. Did the family court err in denying Wife's request for a divorce on the grounds of Husband's adultery?

2. Did the family court err in finding Wife committed adultery, and thus, in barring Wife from receiving alimony?

3. Did the family court err in admitting certain photographs into evidence?

4. Did the family court err in requiring Wife to pay her own attorney's fees?

LAW/ANALYSIS

1. Grounds for Divorce

Wife claims the family court erred in granting the parties a no-fault divorce because she presented sufficient evidence that Husband committed adultery. We agree Wife presented sufficient evidence to establish Husband's adultery, but we find the family court acted within its discretion in awarding the parties a no-fault divorce.

In its final order, the family court held Husband and Wife were entitled to a divorce on the ground of one year's continuous separation. Neither party claims the one year's separation was an improper ground for divorce on appeal; rather, Wife argues the family court should have granted her a divorce based on Husband's adultery. Although Husband and Wife presented evidence at trial that each spouse engaged in extramarital conduct during the course of their marriage, the family court heard this evidence and chose to instead grant the parties a no-fault divorce. Aware of our de novo review, we find the family court was in the best position to assess the parties' and witnesses' testimony as well as the evidence presented in determining which ground for divorce was most appropriate under the circumstances. *See Lewis*, 392 S.C. at 389, 709 S.E.2d at 654 ("[D]e novo review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the family court."); *see also Lucas v. Lucas*, 279 S.C. 121, 123, 302 S.E.2d 863, 864 (1983) (finding it was within the family court's discretion to deny a divorce on one ground and grant it on another ground).

Further, because the granting of a divorce to Wife on the ground of adultery would not have dissolved the marriage any more completely, we need not alter the family court's decision on this issue. *See Griffith v. Griffith*, 332 S.C. 630, 642, 506 S.E.2d 526, 532 (Ct. App. 1998) (choosing not to modify family court's decision to grant parties a no-fault divorce despite each party's claim of adultery against the other when modifying the basis for the divorce would not dissolve the marriage any more completely); *Smith v. Smith*, 294 S.C. 194, 197, 363 S.E.2d 404, 406 (Ct. App. 1987) (noting husband never contested family court's decision to grant wife a divorce on the ground of one year's separation and upholding family court's denial of husband's counterclaim for a divorce based on wife's adultery when granting the divorce on adultery would not have dissolved marriage any more completely).

2. Wife's entitlement to alimony

Next, Wife contends the family court erred in denying her request for alimony because Husband did not sufficiently demonstrate she committed adultery. We disagree.

In support of its decision to deny Wife alimony, the family court cited to the testimony of Wife, Russo, and Fisher as evidence of Wife's adultery. The family court then held, "The uncorroborated testimony of adultery is sufficient to bar [Wife] from receiving alimony, although insufficient to grant a divorce on the grounds of adultery." Although we agree with the family court's denial of alimony to Wife, we disagree with the family court's statement of the law. Further, we find there is sufficient corroborating testimony.

Corroboration is typically required in divorce actions, but this rule may be relaxed when it is evident that collusion does not exist. *See McLaughlin v. McLaughlin*, 244 S.C. 265, 270, 136 S.E.2d 537, 539 (1964) (stating corroboration is typically necessary in divorce actions but may be relaxed when it is evident that collusion does not exist); *Harvley v. Harvley*, 279 S.C. 572, 574, 310 S.E.2d 161, 162 (Ct. App. 1983) (holding corroboration of testimony is normally required to sustain a ground for divorce, although the requirement can be relaxed when the possibility of collusion is not apparent). In this instance, there was no collusion between the parties as evidenced by the contested nature of the divorce. *See McLaughlin*, 244 S.C. at 271, 136 S.E.2d at 540 (acknowledging some states' adoption of a rule that permits courts to grant a divorce based on the plaintiff's uncorroborated testimony in contested cases and stating that only slight corroboration is necessary in certain contested cases in our state).

Based on our review of the record, we find Husband presented sufficient corroborating testimony. *See RGM v. DEM*, 306 S.C. 145, 149-50, 410 S.E.2d 564, 567 (1991) (finding wife committed adultery for purposes of barring alimony despite family court's finding that each party was entitled to a divorce based on one year's continuous separation). Although we decline to modify the grounds for divorce, we concur with the family court's conclusion that Husband presented a clear preponderance of evidence of Wife's adultery to bar Wife from receiving alimony. We find that based upon the testimony of Russo, Husband, and others that Wife committed adultery on the night of her birthday. While Wife would only admit she went to the bar and consumed a substantial amount of alcohol that evening, several witnesses observed Wife being affectionate with a man throughout the course of that evening. The evidence shows this same man

followed Wife home in the early morning hours, and after being invited inside by Wife, entered Wife's house. We also find Wife's subsequent text messages are circumstantial evidence that indicate a continued disposition to commit adultery. *See Perry v. Perry*, 301 S.C. 147, 150, 390 S.E.2d 480, 481-82 (Ct. App. 1990) (finding circumstantial evidence over an extended period of time indicating wife's infidelity was sufficient to prove wife was disposed to commit adultery because the adultery could be inferred from the circumstances). We hold the foregoing testimony shows inclination and opportunity and is "sufficiently definite to identify the time and place of offense and the circumstances under which it was committed." *See Loftis v. Loftis*, 284 S.C. 216, 218, 325 S.E.2d 73, 74 (Ct. App. 1985).

Accordingly, we affirm the family court's decision to deny Wife alimony. We also affirm the family court's order as it pertains to reimbursement for temporary alimony. *See Griffith*, 332 S.C. at 642, 506 S.E.2d at 532 (holding the establishment of adultery as a defense to alimony is a bar to all alimony and requires the reimbursement of court-ordered temporary alimony).

3. Admission of Photographs

Wife also claims the family court erred in permitting Husband to introduce certain photographs into evidence because they were poor quality and did not accurately portray the scene.[2] We disagree.

To justify reversal based on the admission or exclusion of evidence, the complaining party must establish both error and resulting prejudice. *Divine v. Robbins*, 385 S.C. 23, 37, 683 S.E.2d 286, 293 (Ct. App. 2009).

We find these photographs were relevant to Husband's claim of adultery against Wife. *See* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the

[2] Wife also argues on appeal the photographs were not properly authenticated pursuant to Rule 901, SCRE, nor were they admissible duplicates as envisioned by Rules 1001 and 1003, SCRE. Wife never raised these grounds to the family court; thus, to the extent she raises these grounds in her brief, we decline to address them on appeal. *See Bodkin v. Bodkin*, 388 S.C. 203, 227, 694 S.E.2d 230, 243 (Ct. App. 2010) (holding an issue may not be raised for the first time on appeal but must be raised to and ruled upon by the family court to be preserved for appeal).

determination of the action more probable or less probable than it would be without the evidence."). Although Wife claims these photographs were unfairly prejudicial in violation of Rule 403, SCRE, we find the statements of Wife's counsel and the family court prove otherwise. Russo, the witness who took these photographs, Wife's counsel, and the family court all acknowledged the quality of the photographs was poor, and it was impossible to discern what the photographs actually depicted. As a result, we fail to see how Wife was prejudiced by the admission of these photographs. Furthermore, this was an action in equity and there was no jury. The likelihood that the family court, as the sole factfinder, was improperly persuaded by the admission of these photographs is negligible. Accordingly, we affirm the family court on this issue.

4. Attorney's Fees

Last, Wife claims the family court erred when it ordered Wife to pay all of her attorney's fees. Wife contends Husband's financial condition was far superior to hers, and as a result, the family court should have ordered Husband to pay her attorney's fees. We disagree.

The family court should first consider the following factors as set forth in *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992), in deciding whether to award attorney's fees and costs: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) effect of the attorney's fee on each party's standard of living." *Fitzwater v. Fitzwater*, 396 S.C. 361, 370, 721 S.E.2d 7, 12 (Ct. App. 2011). In so doing, the family court should set forth specific findings of fact on the record about each of the required factors from *E.D.M*. *See Griffith*, 332 S.C. at 646, 506 S.E.2d at 534-35 (citing Rule 26(a), SCRFC, and highlighting requirement of family court to make specific findings of fact on the record about each of the required factors from *E.D.M.*, but noting the appellate court may make its own findings of fact in accordance with the preponderance of the evidence if the record is sufficient).

Although the family court failed to set forth findings of fact in support of its decision, we find the family court acted within its discretion in requiring the parties to pay their own attorney's fees. The family court found both parties were entitled to a divorce based on one year's continuous separation. This ruling neither benefits nor harms either party. The family court found Wife was not entitled to alimony, which we affirm on appeal. Further, because Wife failed to include her attorney's

fees affidavit or either party's financial declarations in the record on appeal, we are unable to discern exactly how much she incurred in attorney's fees or how those fees will impact her standard of living or her current financial condition. *See Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (finding it impossible to evaluate the merits of certain issues because the appellant failed to include the relevant material in the record on appeal); *See Perry v. Perry*, 301 S.C. 147, 151, 390 S.E.2d 480, 482 (Ct. App. 1990) (stating the appellant must provide "a sufficient record on appeal from which this [c]ourt can make an intelligent review"). We are aware of Wife's claim that she only receives disability, and she has very few assets from which to pay her attorney's fees. However, without further proof that the family court acted improperly in requiring the parties to pay their own attorney's fees, we affirm the family court's decision on this issue.

CONCLUSION

Based on the foregoing, we affirm the family court's order finding Husband and Wife are entitled to a divorce on the ground of one year's continuous separation. We also affirm the family court's decision to deny Wife's request for alimony, its admission of certain photographs into evidence, and its ruling on each party's entitlement to attorney's fees. Accordingly, the family court's decision is

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jane Roe, as parent and natural guardian of Judy Roe, James Roe, and Joyce Roe, Minor Children Under the Age of Eighteen, Appellants,

v.

Daniel Bibby Sr. and Michelle Bibby, Defendants,

Of whom Michelle Bibby is the Respondent.

Appellate Case No. 2012-213350

Appeal From Berkeley County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5273
Heard June 11, 2014 – Filed October 1, 2014

AFFIRMED

Eric Marc Poulin, of Anastopoulo Law Firm, LLC, of North Charleston, for Appellants.

Eugene P. Corrigan, III, and J. W. Nelson Chandler, both of Corrigan & Chandler, LLC, of Charleston, for Respondent.

LOCKEMY, J.: Jane Roe, as parent and natural guardian of Judy Roe, James Roe, and Joyce Roe, minor children under the age of eighteen (minor Appellants), (collectively with Roe, Appellants) argues the circuit court erred in granting Michelle Bibby's (Respondent) motion for summary judgment. Appellants argue

Respondent had a duty to warn them under the special relationship exception and a premises liability theory. We affirm.

FACTS/PROCEDURAL BACKGROUND

This case involves allegations by the minor Appellants of sexual molestation by their neighbor, Daniel Bibby, Sr. The molestation allegedly occurred in a home owned by Mr. Bibby and his wife, Respondent.

Respondent and Mr. Bibby were married in 1969 and had three children. In 1995, the Bibbys' sixteen-year-old daughter disclosed that her father had sexually molested her when she was younger. Respondent confronted her husband about the allegations and Mr. Bibby admitted he had touched their daughter inappropriately. The molestation was reported to the South Carolina Department of Social Services (SCDSS) and Mr. Bibby was removed from the home and placed in counseling. Sometime thereafter, Mr. Bibby was permitted to return to the home.

In 2008, Roe, her husband, and the minor Appellants moved into a home across the street from the Bibbys. At the time, one of the Bibby's adult children was living with the Bibbys along with two of the Bibbys' grandchildren. The Bibby grandchildren and the minor Appellants became friends and often played together and visited each other's homes. Respondent was working outside the home at this time and was not always present when the minor Appellants were visiting. Respondent never informed Appellants of Mr. Bibby's prior acts of sexual abuse.

In April 2009, Mr. Bibby admitted to a counselor that he had been molesting his granddaughter. Upon learning of this admitted molestation, Roe questioned her children about any possible abuse. Minor Appellant Joyce confirmed that Mr. Bibby had touched her chest and threatened to kill her if she told anyone. Minor Appellant Judy also revealed similar accusations. Roe called the police and the minor Appellants were referred to the Dorchester Children's Center, where Judy was forensically interviewed. During her interview, Judy stated Mr. Bibby held her in a room with his granddaughter and took his clothes off and forced the children to take their clothes off as well. According to Judy, Mr. Bibby touched her breasts and vagina with his hands and made Judy touch the granddaughter as well. Judy also stated she was exposed to pornography in the Bibby household.

According to Roe, she had no knowledge of Mr. Bibby's prior sexual abuse of his daughter and she had no reason to suspect it was unsafe for her children to play at

the Bibbys' home. Roe further testified she never would have allowed her children to visit the Bibby household had she been warned of Mr. Bibby's sexual propensities. Mr. Bibby denied touching the minor Appellants. He was convicted of molesting his granddaughter, but he was not prosecuted for any actions involving the minor Appellants.

On October 15, 2010, Appellants filed suit asserting causes of action against Mr. Bibby for assault, battery, false imprisonment, and intentional infliction of emotional distress. Appellants alleged Mr. Bibby sexually assaulted Judy and attempted to sexually assault Joyce. Appellants also alleged Joyce and minor Appellant James witnessed the sexual assault of Judy. Appellants asserted causes of action against Respondent for negligence and wrongful infliction of emotional distress on a bystander.

Mr. Bibby failed to file a responsive pleading and Appellants obtained a default judgment against him. Respondent answered the complaint and denied Appellants' allegations. Thereafter, in April 2012, Respondent filed a motion for summary judgment alleging she did not owe a duty to Appellants. Respondent's summary judgment motion was heard on July 10, 2012, and the court took the matter under advisement. Subsequently, on October 12, 2012, the circuit court granted Respondent's motion for summary judgment and dismissed Appellants' claims with prejudice. This appeal followed.

STANDARD OF REVIEW

When reviewing an order granting summary judgment, an appellate court employs "the same standard applied by the trial court under Rule 56, SCRCP." *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013) (internal quotation marks omitted). Rule 56 provides the trial court shall grant summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (internal quotation marks omitted).

LAW/ANALYSIS

Appellants argue the circuit court erred in granting Respondent's summary judgment motion because Respondent had a duty to warn Appellants under the special relationship exception and a premises liability theory.

In order to establish a claim for negligence, a plaintiff must show "(1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual or proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages." *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). "Without a duty, there is no actionable negligence." *Id.* "The existence of a duty owed is a question of law for the courts." *Washington v. Lexington Cty. Jail*, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999).

"'Under South Carolina law, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger.'" *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 246, 711 S.E.2d 908, 911 (2011) (quoting *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002)). Our courts recognize five exceptions to this rule: "1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant." *Id.* at 246-47, 711 S.E.2d at 911-12.

Although Appellants note the issue of whether a homeowner has a duty to warn visitors of his or her spouse's admitted prior sexual abuse is a novel issue in this state, they ask this court to impose a duty to warn under the special relationship exception and a premises liability theory.

A. Special Relationship Exception

Appellants assert Respondent had a special relationship with the minor Appellants that required her to act based upon her knowledge of Mr. Bibby's prior misconduct.

"The defendant may have a common law duty to warn potential victims under the 'special relationship' exception when the defendant 'has the ability to monitor, supervise and control an individual's conduct' and when 'the individual has made a specific threat of harm directed at a specific individual.'" *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007) (quoting *Bishop*, 331 S.C. at 86, 502 S.E.2d

at 81). It is not necessary for the injuring party to have made a threat while under the defendant's control or custody. *Bishop*, 331 S.C. at 88, 502 S.E.2d at 82. All that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person. *Id.*

The circuit court found Respondent did not have a special relationship with Appellants because she did not have the ability to monitor, supervise, and control Mr. Bibby. Additionally, the court found Respondent had no knowledge of a specific threat to the minor Appellants.

Appellants argue that although the facts of this case present a novel issue, the issue was considered by this court in *Doe v. Batson*, 338 S.C. 291, 525 S.E.2d 909 (Ct. App. 2000) (*Batson I*), *affirmed in part, vacated in part*, 345 S.C. 316, 548 S.E.2d 854 (2001). In *Batson I*, a number of minors were sexually assaulted by a 27-year-old man who lived with his mother (Batson). The minors brought suit against Batson, alleging (1) the molestations occurred in her home, (2) she knew her son had young boys in his bedroom, and (3) she was negligent for failing to warn or act. *Batson I*, 338 S.C. at 295, 525 S.E.2d at 911. This court reversed the trial court's grant of summary judgment to Batson, finding discovery was not complete. *Id.* at 304, 525 S.E.2d at 916. In reviewing the trial court's grant of summary judgment, this court considered the special relationship test and noted, "case law from other jurisdictions lends credence to [the minor's] assertion that Batson had a duty to warn in this case." *Id.* at 301, 525 S.E.2d at 914.

The supreme court affirmed this court's finding in *Batson I* that summary judgment was improper because discovery had not yet been completed; however, the court explicitly vacated the portions of this court's opinion discussing liability. *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 323, 548 S.E.2d 854, 858 (2001) (*Batson II*). In vacating those portions of the opinion, the supreme court noted, "[t]he paucity of the record makes it impossible for us to determine the merits of Doe's argument. Whether Batson had a cognizable duty will be determined after the record has been more fully developed." *Id.*

Appellants argue that "although *Batson I* is not strictly precedential, the opinion of the [c]ourt of [a]ppeals nonetheless sheds valuable and well-reasoned light on the issue." Appellants assert this case contains evidence of a specific threat (previous instances of molestation and more recent instances of viewing child pornography[1])

[1] Judy stated in her interview she was exposed to pornography in the Bibby home. Additionally, the Bibby's adult son, Daniel Bibby, Jr., told police he witnessed his

and a readily identifiable victim (a minor child roughly the same age as Mr. Bibby's prior victim who was invited into the home by Respondent).

We find the record contains no evidence Respondent had a special relationship akin to those special relationships recognized by our courts. *See, e.g.*, *Marion*, 373 S.C. 390, 645 S.E.2d 245 (assuming special relationship between psychiatrist and patient/injurer); *Faile*, 350 S.C. 315, 566 S.E.2d 536 (finding special relationship between Department of Juvenile Justice and dangerous juvenile/injurer over whom it had custody per court order); *Bishop*, 331 S.C. at 86, 502 S.E.2d at 81 (finding special relationship between Department of Mental Health and involuntarily-committed patient/injurer in its custody); *Rogers v. S.C. Dep't of Parole & Cmty. Corr., et al.*, 320 S.C. 253, 464 S.E.2d 330 (1995) (assuming special relationship between state agencies charged with prisoner parole and prisoner/injurer who was being released from custody (but finding no specific threat)); *Ballou v. Sigma Nu Gen. Fraternity*, 291 S.C. 140, 352 S.E.2d 488 (1986) (finding a fraternal organization had a duty to an initiate who had become helplessly drunken from alcohol furnished to him by the fraternity). We note this case does not involve a commercial child care situation or other commercial arrangement. Furthermore, Appellants presented no evidence Respondent had the ability to monitor, supervise, or control the conduct of Mr. Bibby. Respondent worked full-time outside the home and was not always present when the minor Appellants were visiting.

Finally, we find the record contains no evidence Respondent had knowledge of a specific threat of harm to a specific individual. *See Marion*, 373 S.C. at 401, 645 S.E.2d at 251 ("'[I]t is not simply foreseeability of the victim which gives rise to a person's liability for failure to warn; rather, it is the person's awareness of a distinct, specific, overt threat of harm which the individual makes towards a particular victim.'" (quoting *Gilmer v. Martin*, 323 S.C. 154, 157, 473 S.E.2d 812, 814 (Ct. App. 1996)). There is no evidence Mr. Bibby made a distinct, specific, and overt threat of harm towards the minor Appellants. Accordingly, the circuit court did not err in finding Respondent did not have a special relationship with Appellants.

B. Premises Liability

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father watching child pornography in the two years leading up to the alleged molestation of the minor Appellants. According to Jane Roe, Daniel Bibby, Jr. told her he had informed Respondent on several occasions that Mr. Bibby was watching pornography.

Appellants argue that even assuming Respondent did not owe Appellants a duty to warn by way of their special relationship, she is still liable under a premises liability theory.

"To establish negligence in a premises liability action, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." *Singleton v. Sherer*, 377 S.C. 185, 200, 659 S.E.2d 196, 204 (Ct. App. 2008). "The nature and scope of duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury." *Id.* South Carolina recognizes four general classifications of persons present on the property of another: adult trespassers, invitees, licensees, and children. *Id.*

Appellants contend they were licensees on Respondent's property. "Under South Carolina jurisprudence, 'a landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities.'" *Id.* at 201, 659 S.E.2d at 204 (quoting *Landry v. Hilton Head Plantation Prop. Owners Ass'n*, 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct. App. 1994)). "The duty owed to a licensee differs from the duty owed to an invitee 'in that the [landowner] has no duty to search out and discover dangers or defects in the land or to otherwise make the premises safe for a licensee.'" *Id.* (quoting 18 S.C. Jur. *Negligence* § 44 (2007)).

Appellants note the issue of whether a homeowner has a duty to warn a licensee with regard to an alleged criminal act committed by a third-party is a novel issue. However, they assert Respondent had a duty to warn Appellants because she knew from Mr. Bibby's past actions there was a likelihood of conduct dangerous to the safety of the minor Appellants.

Initially, Appellants cite *Burns v. South Carolina Commission for the Blind*, 323 S.C. 77, 448 S.E.2d 589 (Ct. App. 1994), for the proposition that our courts "have already held that a victim of a sexual assault may bring suit under a premises liability theory." While this statement is correct, *Burns* is distinguishable from the present case. First, *Burns* involved an alleged duty to protect a resident of a treatment facility instead of an alleged duty to warn a third-party of an alleged threat in a residence. *Id.* at 79-80, 448 S.E.2d at 591. Second, this court classified the plaintiff in *Burns* as an invitee and not a licensee, thus implicating a higher duty of care. *Id.* at 80, 448 S.E.2d at 591. Third, the *Burns* court determined a

special relationship existed between the plaintiff-victim and the defendant-residential treatment facility. *Id.*

We find Respondent did not owe Appellants a duty to warn under a premises liability theory. We note no South Carolina cases recognize a duty to warn a licensee with regard to prior criminal acts committed by a third-party residing on the premises. Additionally, Mr. Bibby was not found to be a continuing danger by State, and there is no evidence Respondent knew Mr. Bibby was a dangerous condition in their home or that he was abusing the minor Appellants. Respondent testified she believed the minor Appellants were untruthful regarding the alleged molestation and she did not believe Mr. Bibby molested any of the minor Appellants. Furthermore, Respondent, a lay person untrained in the recidivism of pedophilia, testified she believed Mr. Bibby was "cured" following his 1995 confession and release from treatment. Finally, a finding that Respondent had a duty to warn under a premises liability theory in this case could potentially subject homeowners to liability for failure to warn licensees of prior bad conduct, including conduct of a criminal nature, of any persons on the premises.

CONCLUSION

Based on the foregoing, we find the circuit court did not err in granting Respondent's motion for summary judgment.

AFFIRMED.

KONDUROS, J., concurs. WILLIAMS, J., dissents in a separate opinion.

WILLIAMS, J.: I respectfully dissent. I believe a homeowner has a duty to warn minor children of potential sexual abuse that could occur on the homeowner's premises under the special relationship exception and a premises liability theory. Whether Respondent breached a duty to warn Appellants of Mr. Bibby's sexual propensities in this context is an issue best decided by the jury. *See Miller v. City of Camden*, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994) (stating negligence is a mixed question of law and fact with the existence and scope of a duty being questions of law and a breach of duty being a question for the jury). As a result, I would reverse the circuit court's grant of summary judgment and remand for further proceedings.

As noted by the majority, under the special relationship exception, "[t]he defendant may have a common law duty to warn potential victims . . . when the defendant

'has the ability to monitor, supervise and control an individual's conduct' and when 'the individual has made a specific threat of harm directed at a specific individual.'" *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007) (quoting *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998)). It is not necessary for the injuring party to have made a threat while under the defendant's control or custody. *Bishop*, 331 S.C. at 87-88, 502 S.E.2d at 82. All that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person. *Id.* at 88, 502 S.E.2d at 82.

I believe this court's rationale from *Doe v. Batson*, 338 S.C. 291, 525 S.E.2d 909 (Ct. App. 2000), is persuasive on the issue of whether Respondent had a special relationship with Appellants. Although the supreme court ultimately vacated the portion of *Batson* wherein this court found the mother could potentially be liable for her son's sexual abuse of minor boys in her home under a special relationship exception and a premises liability theory, the supreme court did not expressly disavow this court's reliance on either of those theories. *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 323, 548 S.E.2d 854, 858 (2001). Rather, at issue in *Batson* was whether it was too early to dismiss the case based on the lack of discovery. *Id.* at 321, 548 S.E.2d at 857. Because relevant and crucial depositions had yet to occur, the supreme court ruled it was improper for this court to suggest sources of liability as "the paucity of the record ma[de] it impossible … to determine the merits of [the victims'] argument." *Id.* at 323, 548 S.E.2d at 858.

Unlike *Batson*, several significant witnesses, including Respondent, minor Appellants, and Roe, have already been deposed. Testimony elicited during those depositions created at least a mere scintilla of evidence as it relates to whether Respondent either knew or should have known that Mr. Bibby posed a specific threat of harm to the children that Respondent invited into her home. *See Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011) (citing *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)) ("In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment."); *Bishop*, 331 S.C. at 88, 502 S.E.2d at 82 (holding all that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person).

Although the circuit court placed emphasis on the time lapse since Mr. Bibby had molested their daughter, the passage of time alone should not negate the possibility that Respondent knew or should have known of Mr. Bibby's sexually deviant

proclivities. Respondent knew minor Appellants were coming over to their house to play and minor Appellants' presence in their home was a result of her own invitation. Further, Respondent admitted she was aware of Mr. Bibby's prior propensities for pedophilia, as she acknowledged Mr. Bibby sexually abused their daughter in the past. Even after Mr. Bibby was removed from their home and placed in counseling, Respondent clearly appreciated the possibility of Mr. Bibby abusing their daughter again. Specifically, she testified she placed a lock on their daughter's door after Mr. Bibby returned and hid the key from him.

The majority cites to cases in which our courts have found a special relationship existed but concludes this case is distinguishable because the abuse occurred inside Respondent's home as opposed to a commercial setting. I believe the location is not dispositive for purposes of creating a special relationship. Rather, I would find Wife's act of voluntarily inviting minor Appellants into her home while knowing of Husband's prior sexual abuse and continuing sexually deviant propensities is sufficient to impose a duty in this instance. *See, e.g.*, *Pamela L. v. Farmer*, 112 Cal. App. 3d 206 (Cal. Ct. App. 1980) (holding that a wife who invited and encouraged children to visit her premises, even though she knew that husband had molested women and children in the past and might do so again, could be held liable in negligence); *J.S. v. R.T.H.*, 714 A.2d 924 (N.J. 1998) (holding that a wife could be held liable for the negligent failure to prevent or warn the victims about her husband's sexually abusive behavior when the wife had actual knowledge or special reason to know that the husband was likely to abuse a particular person or persons); *Doe v. Franklin*, 930 S.W.2d 921 (Tex. Ct. App. 1996) (holding that a grandmother could be held liable for failure to protect her granddaughter from a known risk of sexual abuse by the grandfather).

I would find the testimony of Respondent's son, Daniel Bibby, Jr., is further evidence to support the conclusion that Respondent knew of Mr. Bibby's sexually deviant behavior toward children and that she knew he posed a risk to them. In a written statement to police, Daniel recounted that he had caught his father looking at child pornography on the Internet for at least two years leading up to the alleged molestations. Daniel also told police that Mr. Bibby discarded his computer for fear that either Daniel or Daniel's children would disclose that Mr. Bibby was using his computer for pornographic purposes. I would find the foregoing evidence regarding Mr. Bibby's apparent addiction to child pornography is particularly relevant to whether Mr. Bibby posed a specific threat of harm to minor Appellants.

I believe a jury could find Respondent liable under a premises liability theory. In coming to this conclusion, I do not intend to suggest that a homeowner could be subject to liability for failure to warn licensees of the criminal history of any person who happens upon the homeowner's premises. Nor do I urge the adoption of a rule that would impose a general duty to warn others in the surrounding vicinity of the dangerous propensities of one residing therein. Rather, I would find a homeowner owes a duty to take reasonable measures to protect children invited into his or her home from potential sexual assault when the homeowner knows or should know of the assailant's propensities.

Both parties agree minor Appellants were licensees in Respondent's home. As it relates to a licensee, a landowner has a duty

> [t]o use reasonable care to warn [the licensee] of any *concealed dangerous conditions* or activities which are known to the possessor, or of any changes in the condition of the premises which may be dangerous to him, and which he may reasonably be expected to discover.

Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986) (internal citation omitted). Although negligence actions under a premises liability theory typically pertain to dangerous conditions or activities on one's land, our courts have permitted a sexual assault victim to bring suit for injuries inflicted by a third party under a premises liability theory. *See Burns v. S.C. Comm'n for the Blind*, 323 S.C. 77, 448 S.E.2d 589 (Ct. App. 1994); *see also* 62 Am. Jur. 2d *Premises Liability* § 409 (2014) ("Generally, owners or occupiers of land have no duty to protect visitors to their property from the deliberate criminal conduct of third parties[.] . . . However, an exception exists if the . . . landowner either knows or has reason to know from past experience that there is a likelihood of conduct dangerous to the safety of the visitor."). The majority finds *Burns* distinguishable because the plaintiff in *Burns* was an invitee in a treatment facility as opposed to a licensee in one's home, but, as children of tender years, I would hold that Respondent owed a heightened duty of care to minor Appellants similar to that imposed in *Burns*. *See Lynch v. Motel Enter., Inc.*, 248 S.C. 490, 494, 151 S.E.2d 435, 436 (1966) (finding owner or occupier of land may be liable for injuries to children of tender years, whether licensees or trespassers, if children are likely to come into contact with an obvious danger that could be reasonably anticipated and prevented by owner or occupier); F. Patrick Hubbard and Robert L. Felix, *The South Carolina Law of Torts*, 132-33 (4th ed. 2011) ("Special rules apply to

children because they often lack the capacity to know and appreciate the danger and to understand the culpable wrongful entry on another's premises. Where the premises contain a condition unreasonably dangerous to children, the owner/occupier owes a child a duty of care even if the child is a trespasser or a licensee.").

Under the particular facts of this case, I would find Appellants presented at least a mere scintilla of evidence from which a jury could find Respondent breached a duty of care to minor Appellants. Accordingly, I would reverse the circuit court's decision to grant summary judgment and remand this case for further proceedings.