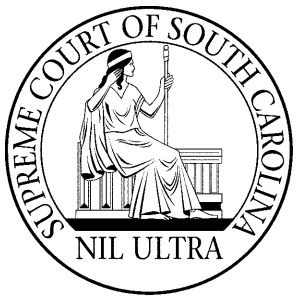

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41
November 3, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Ernest E. Yarborough, Respondent.

Opinion No. 26558
Heard September 18, 2008 – Filed November 3, 2008

DISBARRED

Attorney General Henry Dargan McMaster and Senior Assistant Attorney General James G. Bogle, Jr., both of Columbia, for Office of Disciplinary Counsel.

Ernest E. Yarborough, of Columbia, *pro se*.

PER CURIAM: This attorney disciplinary matter arises out of Respondent's conviction of obstruction of justice. Following a hearing, the Commission on Lawyer Conduct (the Commission) recommended that Respondent be retroactively disbarred. The Office for Disciplinary Counsel (ODC) objects to the Commission's recommendation and argues that the Court should disbar Respondent Ernest Yarborough effective from the date of the Court's opinion. We agree with the Commission and retroactively disbar Respondent from the date of his interim suspension.

FACTS

In 1996, Respondent was indicted for common law obstruction of justice and offering a witness money with the intent to influence testimony in violation of S.C. Code Ann. § 8-13-705 (Supp. 1998) in connection with his representation of a defendant who was charged with burglary.[1] The State presented evidence that Respondent offered the accuser money to drop the charges against the defendant and that he sent an investigator to pressure the accuser to drop the charges. The jury found Respondent guilty of obstruction of justice, but acquitted him on the statutory violation.

On April 3, 1997, following the conviction, this Court placed Respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR. Respondent exhausted his appeals from the conviction on August 15, 2006, and on December 8, 2006, ODC filed formal charges against him. Respondent failed to file an answer and was held in default. Subsequently, a hearing was held before the Commission to determine the appropriate sanction. The Commission recommended that Respondent be disbarred retroactively from the date of his interim suspension.

LAW/ANALYSIS

ODC argues that due to the gravity of the conviction and Respondent's disciplinary history, the Commission erred in recommending retroactive disbarment. We disagree.

Obstruction of justice is classified as a "serious crime" under the Rules for Lawyer Disciplinary Enforcement. *See* Rule 2(aa), RLDE, Rule 417, SCACR (providing that any crime that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer" or that "involves interference with the administration of justice" constitutes a

[1] The defendant was charged with burglary after police allegedly found him armed and hiding in his ex-girlfriend's bedroom closet.

serious offense). By his conduct, Respondent has violated the following Rules of Professional Conduct, Rule 407, SCACR, Rules 8.4(a), (b), (c), (d), and (e) (providing that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, commit a criminal act involving moral turpitude, engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or engage in conduct that is prejudicial to the administration of justice).

Respondent's misconduct constitutes grounds for discipline pursuant to Rules 7(a)(1), (4), (5), RLDE, Rule 413, SCACR, (providing that it is grounds for discipline for a lawyer to violate the Rules of Professional Conduct, be convicted of a crime of moral turpitude or a serious crime, or engage in conduct tending to pollute the administration of justice or to bring the legal profession into disrepute or conduct demonstrating an unfitness to practice law).

Accordingly, we find that disbarment is an appropriate sanction under these circumstances. However, we believe that Respondent's disbarment should be made retroactive from the date of his interim suspension. Considering the fact that Respondent has been on interim suspension for over ten years and also considering Respondent's prior disciplinary history, in our view, imposing a sanction of retroactive disbarment serves to adequately protect the public. *See In re Hoffmeyer*, 376 S.C. 221, 339, 656 S.E.2d 376, 380 (2008) (recognizing that the purpose of disciplinary proceedings is to protect the public and the integrity of the legal system).

CONCLUSION

For the foregoing reasons, we retroactively disbar Respondent to the date of his interim suspension. 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, Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Drury Development Corporation, Plaintiff,

v.

Foundation Insurance Company, Clarendon National Insurance Company, Tarheel Insurance Management Company, Tarheel Group, Steven M. Mariano, and Lucia Tompkins, Defendants.

CERTIFIED QUESTIONS

ON CERTIFICATION FROM
U.S. District Judge Joseph F. Anderson, Jr.
District of South Carolina

Opinion No. 26559
Heard September 16, 2008 – Filed November 3, 2008

CERTIFIED QUESTION ANSWERED

Allyson Torres Beckman, Gerald Michael Finkel, and Sean A. O'Connor, all of Finkel & Altman, of Charleston, for Plaintiff.

Geoffrey Ross Bonham, Jeffrey A. Jacobs, and Rachel Y. Harper, of Columbia, for Amicus Curiae South Carolina Department of Insurance.

Eileen R. Ridley and Michael A Naranjo, both of Foley & Lardner, of San Francisco; John Edward Cuttino, Michelle P. Clayton, and Steven Wayne Ouzts, all of Turner Padget Graham & Laney, of Columbia; and R. Scott Wallinger, Jr., of Clawson & Staubes, of Charleston, for Defendants.

CHIEF JUSTICE TOAL: We accepted two certified questions from the United States District Court for the District of South Carolina. In this case, the plaintiff seeks to pierce the corporate veil in order to hold a liquidated corporation's parents and shareholders liable for the corporation's obligations. The first question asks whether a judgment against the corporation is a prerequisite to an alter ego claim. In the event we answer the first question "yes," the second question asks whether a plaintiff is precluded from bringing an alter ego claim against shareholders and officers of a corporation if it fails to either obtain a judgment against the corporation prior to its liquidation or present its claim to the liquidator as a creditor of the corporation subject to liquidation pursuant to the South Carolina Insurers Rehabilitation and Liquidation Act, S.C. Code Ann. § 38-27-10, *et seq.* (2002) ("the Act"). We answer the first question "no," and therefore do not reach the second.

FACTUAL/PROCEDURAL BACKGROUND

Plaintiff Drury Development Corporation ("Plaintiff") entered into a risk-sharing agreement with Foundation Insurance Company ("Foundation"). The agreement conditioned the parties' obligation to pay on whether or not the loss was "favorable" to Plaintiff at the end of the agreement's term.

Plaintiff alleges that Foundation owed it $86,023.00 under the agreement when the agreement's term ended on April 20, 2005.

Soon after conclusion of the agreement's term, Foundation entered rehabilitation without having paid the alleged obligation. Rehabilitation was unsuccessful, and Foundation was declared insolvent and liquidated under the supervision of the South Carolina Department of Insurance ("DOI") in accordance with the terms of the Act. During liquidation, the liquidator for the DOI determined that Foundation's assets should be distributed in satisfaction of a single secured creditor's claims. The liquidator did not recognize any other general creditors, and Plaintiff did not present its creditor claim to the liquidator.

On April 28, 2006, Plaintiff filed this action in state court. The case was timely removed to federal court on the basis of diversity jurisdiction. Plaintiff asserts claims against Foundation, its corporate parent Tarheel Group ("Tarheel"), Tarheel subsidiary Tarheel Insurance Management Company ("TIMCO"), and Tarheel shareholders Steven Mariano and Lucia Tomkins (together "Defendants") for breach of contract, fraudulent inducement of contract, negligence, conversion, and unjust enrichment. Plaintiff seeks to pierce the corporate veil in order to hold Tarheel, TIMCO, Mariano, and Tomkins liable for Foundation's alleged obligation.

Defendants filed a motion to dismiss pursuant to Rule 12 (b)(6), FRCP, based on the theory that Plaintiff may not allege an alter ego claim without first obtaining a judgment against Foundation. On November 21, 2007, the Honorable Joseph F. Anderson, Jr., United States District Judge for the District of South Carolina, determined that Defendants' motion to dismiss raised unresolved questions of South Carolina law and certified the following questions to this Court:

(1) Is a judgment against the corporation a prerequisite to an alter ego claim?

(2) If yes to (1), then is a plaintiff precluded from bringing an alter ego claim against shareholders and officers of a

corporation if it fails to either obtain a judgment against the corporation prior to its liquidation, or present its claim to the liquidator as a creditor of the corporation subject to liquidation pursuant to the Act?

STANDARD OF REVIEW

In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right. *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 157, 268 S.E.2d 475, 477 (2006).

LAW/ANALYSIS

The first certified question asks whether a judgment against a corporation is a prerequisite to an alter ego claim under South Carolina law.[1] We answer "no."

In general, equitable principles govern the veil-piercing remedy, and "[i]t is settled authority that the doctrine of piercing the corporate veil is not to be applied without substantial reflection." *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984). "If any general rule can be laid down, it is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons." *Id.* The party seeking

[1] Although often used interchangeably, the terms "alter ego" and "piercing the corporate veil" are not one and the same. Whereas "alter ego" describes a theory of procedural relief, "piercing the corporate veil" refers to the relief itself. *See* 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10 (per. ed., rev. vol. 2006). In other words, "[t]he alter ego doctrine is merely a means of piercing the corporate veil." 18 C.J.S. *Corporations* § 23 (2008).

to pierce the corporate veil has the burden of proving that the doctrine should be applied. *Id.*

In *Sturkie*, the court of appeals adopted a two prong test for piercing the corporate veil. The first prong analyzes the shareholder's relationship to the corporation by evaluating eight factors. The second prong requires the plaintiff to demonstrate that "fundamental unfairness" would result from recognition of the corporate entity. "The essence of the fairness test is simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." *Dumas v. Infosafe Corp*., 320 S.C. 188, 192-193, 463 S.E.2d 641, 644 (Ct. App. 1995).

Defendants contend that a veil-piercing action is dependent upon first obtaining a judgment against the corporation. We disagree. In applying South Carolina's veil-piercing doctrine, as all forms of equitable relief, "the equities of both sides are to be considered, and each case must be decided on its own particular facts." *Carroll v. Page*, 264 S.C. 345, 349, 215 S.E.2d 203, 205, (1975). South Carolina courts have long observed that equity looks beneath rigid rules of law to seek substantial justice, and it is well-settled that equity will not require the doing of a futile task. *See State ex rel. Daniel v. Strong*, 185 S.C. 27, 192 S.E. 671, 680 (1937) ("Equity owes its birth to the desire to look beneath the rigid rules of the law – to seek substantial justice."); *see also Elliot v. Dew*, 264 S.C. 40, 212 S.E.2d 421 (1975) ("Equity will not require the doing of a futile task"), *Earle v. Webb*, 182 S.C. 175, 188 S.E. 798, 802 (1936) ("a court of equity does not invite litigation.").

Were we to adopt the rule urged by Defendants, creditors seeking to pierce the corporate veil of an insolvent or unresponsive corporate defendant would be required to file a *pro forma* action against the corporation before seeking to pierce the corporate veil in a subsequent action. While it is undoubtedly true that the corporate veil is often pierced post-judgment, it is also true that South Carolina courts frequently consider these issues in one bifurcated action. *See, e.g., Carolina Marine Handling v. Lasch et al.*, 363 S.C. 169, 176, 609 S.E.2d 548, 553 n.6 (recognizing that "an attempt to pierce the corporate veil often occurs post-judgment . . . ."); *see also Mid-*

South Mgmt. Co. Inc. v. Sherwood Dev. Corp., 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007) (in which the trial court allowed claims against a corporation and its parent companies to proceed to a bifurcated trial on issues of corporate liability and veil-piercing theories); *Hunting v. Elders*, 359 S.C. 217, 597 S.E.2d 803 (Ct. App. 2004) (in which the trial court allowed claims against a corporation and its shareholder to proceed to a bifurcated trial on issues of corporate liability and veil-piercing). In our view, a trial court need not dismiss an alleged alter ego defendant from a case on the grounds that the issue of corporate liability has not yet been resolved. *See Chase Manhattan Bank v. 264 Water St. Assoc.*, 174 A.D.2d 504, 505 (N.Y. App. Div. 1991) (holding that it is not necessary "that an unsatisfied judgment first be obtained to pierce the corporate veil."). We therefore decline to adopt a rule which would require South Carolina's trial courts to resolve in two separate actions what they now ably determine in one.[2]

Much of the authority relied upon by Defendants suggests that Defendants have erroneously conflated the concept of a claim with that of a judgment. *See, e.g., Hardy v. Brock*, 826 So.2d 71, 75-76 (Miss. 2002) (holding that "[a] claim against the corporation is a prerequisite for alter ego liability being placed on one shareholder."); *Radaszewski v. Telecom Corp.*, 981 F.2d 305 (8th Cir. 1992) (upholding dismissal of shareholder defendant because plaintiff failed to state a claim for shareholder liability); 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41.10 (per. ed., rev. vol. 2006) (explaining that an attempt

[2] Although we adopt a more limited holding, we note that at least one other court has gone so far as to hold that a judgment against an unresponsive corporate defendant must be set aside in a subsequent action to pierce the corporate veil if the shareholder defendant was not a party to the determination of corporate liability. In *Minton et al. v. Cavaney*, 364 P.2d 473 (1961), the California Supreme Court held that a shareholder defendant had the opportunity to relitigate the legitimacy of the underlying corporate obligation. Writing for the majority, Justice Traynor wrote that because the defendant was not a party to the action against the corporation, the defendant "cannot be held liable for debts of [the corporation] without an opportunity to relitigate these issues." *Id.* at 476.

to pierce the corporate veil is not itself a cause of action but rather a means of imposing liability on an underlying cause of action). Indeed, South Carolina law is clear that plaintiffs attempting to pierce the corporate veil must state a claim against the corporate entity in order to proceed on a veil piercing theory. *See Sturkie*, 280 S.C. at 459, 313 S.E.2d at 319 (adopting rule requiring plaintiffs to prove knowledge of a "claim" in order to prove fundamental unfairness and thereby pierce the corporate veil).

Accordingly, we hold that so long as the plaintiff has pled facts sufficient to survive a motion to dismiss as to the corporate liability claims and the alter ego claim, the trial court should move forward to determination of both matters. In so holding, we observe that our disposition as to the first certified question should not be construed to undermine the legislature's determination that "no action at law or equity may be brought against the insurer or liquidator" once an order of liquidation has been issued. S.C. Code Ann. § 38-27-430(a). Rather, we set forth the general rule that a judgment against a corporation is not a prerequisite to an alter ego claim.

CONCLUSION

For the foregoing reasons, we answer "no" to the first certified question, and therefore do not reach the second certified question.

CERTIFIED QUESTION ANSWERED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas E. Skinner, Respondent,

v.

Westinghouse Electric Corporation, Appellant.

Appeal From Hampton County
John C. Few, Circuit Court Judge

Opinion No. 26560
Heard September 16, 2008 – Filed November 3, 2008

REVERSED AND REMANDED

Donald L. Van Riper, of Collins & Lacy, of Greenville, for Appellant.

Jeffrey T. Eddy, of Charleston, for Respondent.

JUSTICE KITTREDGE: This appeal concerns the appellate jurisdiction of the circuit court in an appeal from the Workers' Compensation Commission. Appellant Westinghouse Electric Corporation filed its appeal

in the circuit court on August 2, 2006 and served its notice of appeal on the commission on October 16, 2006. Because service on the commission was not accomplished within thirty days of the filing of the appeal, the circuit court determined that it lacked subject matter jurisdiction. The circuit court dismissed the appeal. We reverse.[1]

I.

Respondent Thomas Skinner filed this workers' compensation claim on June 7, 2004, for pulmonary problems and related injuries allegedly caused by inhalation of asbestos dust and toxic fumes while employed with Westinghouse. A single commissioner awarded the claimant a lump sum of $119,159.66 and the full amount of causally-related medical bills, past and future. Westinghouse appealed to the commission. The commission affirmed the order and award of the single commissioner on July 18, 2006.

Westinghouse filed a notice of appeal with the circuit court on August 2, 2006. Westinghouse did not serve the commission until October 16, 2006, more than thirty days after the filing of the appeal in circuit court. The circuit court held the service on the commission was untimely and stripped the circuit court of subject matter jurisdiction to hear the appeal. The circuit court dismissed the appeal.

II.

We agree with Westinghouse that the dismissal of its appeal was in error.

We note initially that any perceived error did not impact the circuit court's subject matter jurisdiction. "Subject matter jurisdiction is 'the power

[1] Significantly, this appeal is not governed by current law. This case predated Act 111, 2007 S.C. Acts 111, which requires appeals from the Workers' Compensation Commission to go directly to the Court of Appeals if the injury occurred on or after July 1, 2007. The claimant brought this claim on June 7, 2004.

to hear and determine cases of the general class to which the proceedings in question belong.'" *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 472 A.2d 21, 22 (Conn. 1984)). In *Great Games, Inc. v. South Carolina Department of Revenue*, 339 S.C. 79, 83 n.5, 529 S.E.2d 6, 8 n.5 (2000), this Court observed that "[t]he failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of 'appellate' jurisdiction over the case, but it does not affect the court's subject matter jurisdiction." *See also State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004). As this case deals with the failure to serve the notice of appeal on the commission within thirty days and the circuit court heard this case in its appellate capacity, the circuit court erred in ruling it lacked subject matter jurisdiction.

The circuit court relied substantially on Rule 74, SCRCP, in determining that it lacked jurisdiction. The South Carolina Rules of Civil Procedure provide no guidance in determining the jurisdiction of the circuit court. Rule 82(a), SCRCP, states "[t]hese [civil procedure] rules shall not be construed to extend or limit the jurisdiction of any court of this State . . . ." Therefore, the thirty-day time period referenced in Rule 74 may not be construed as jurisdictional.[2] *See also* Rule 75, SCRCP, Notes. Our jurisprudence confirms that jurisdictional appealability issues are governed by statute, and not by the rules of civil procedure. *N.C. Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp.*, 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986) (rejecting an attempt to invoke a rule of civil procedure as a basis of the right to appeal and holding, "[t]he right of appeal arises from and is controlled by statutory law"). *See also* S.C. Code Ann. §14-3-330 (Supp. 2007) (primary statute addressing appellate jurisdiction).

[2] Rule 74 refers to controlling statutorily imposed time periods—"the notice of intention to appeal shall be filed with the . . . administrative agency . . . within the time provided by the statute, or by this rule when no time is fixed by the statute." The nonjurisdictional default time period imposed by Rule 74 is thirty days.

We now turn to the applicable statutes to determine if Westinghouse's service on the commission more than thirty days following the filing of the appeal divested the circuit court of appellate jurisdiction.

Under the Administrative Procedures Act, section 1-23-380(A)(1) of the South Carolina Code (2005) fails to supply a clear deadline to serve an agency when it states:[3]

> Proceedings for review are instituted by filing a petition in the circuit court within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the final decision thereon. Copies of the petition shall be served upon the agency and all parties of record.

To be sure, the commission must be served with a copy of the appeal petition, but the statute, from a jurisdictional standpoint, does not mandate such service within thirty days.[4] The reference to serving the agency is not associated with the filing deadline with the court.[5] *Cf. Canal Ins. Co. v.*

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[3] In 2006 the General Assembly passed Act No. 387, 2006 S.C. Acts 387, which altered the procedure for appealing the decision of state agencies; however, the General Assembly addressed Workers' Compensation law subsequently in Act No. 111, 2007 S.C. Acts 111. Act 111 comprehensively reformed Workers' Compensation law in 2007. By order of this Court, the Workers' Compensation reform applied to injuries on or after July 1, 2007. *Pee Dee Reg'l Transp. v. S.C. Second Injury Fund*, 375 S.C. 60, 62, 650 S.E.2d 464, 465 (2007). Therefore, the law of this case predated the appellate procedural changes to Workers' Compensation law.

[4] At the circuit court hearing, the able circuit judge appeared to concur in the lack of a statutory jurisdictional mandate: "Well, my first reaction is that the statute does not set a time frame for serving the agency, but the rule [74] appears to."

[5] We recognize that prejudice may result from a delay in the serving of the agency, but no prejudice is alleged here. Respondent's final brief alludes

Caldwell, 338 S.C. 1, 5-6, 524 S.E.2d 416, 418 (Ct. App. 1999) (holding failure to file the notice of appeal with the court within thirty days deprives the appellate court of jurisdiction).

Next, we look to section 42-17-60 of the South Carolina Code of Laws (Supp. 2006). Section 42-17-60 applies to workers' compensation cases and states, "either party to the dispute, *within thirty days* from the date of the award or within thirty days after receipt of notice to be sent by registered mail of the award, but not thereafter, may appeal from the decision of the commission to the court of common pleas . . . ." (emphasis added). Again, the deadline for filing the notice of appeal with the circuit court is provided, but no mention of a deadline to serve the agency is given.

For the benefit of the bench and bar, we note that the same result would not be reached under the current law. Under the current law, the thirty-day deadline applies to service on an agency and proof of such service is required when a party files the notice of appeal with the Court of Appeals. The current version of section 1-23-380(A)(1), which became effective on July 1, 2006, states:

> Proceedings for review are instituted by serving and filing notice of appeal as provided *in the South Carolina Appellate Court Rules* within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the decision is rendered. Copies of the notice of appeal must be served upon the agency, the Administrative Law Court, and all parties of record.

(emphasis added).

Section 1-23-380(A)(1) thus references the South Carolina Appellate Court Rules. The key jurisdictional provision of the appellate court rules is found in Rule 203, SCACR, which became effective on May 3, 2007. Rule

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only generally to the potential for prejudice. We, therefore, do not address the relationship between a nonjurisdictional procedural defect and resulting prejudice.

203, as it now reads, provides a jurisdictional requirement to serve the agency within thirty days. Rule 203(b)(6), SCACR, provides:

> When a statute allows a decision of the administrative law court or agency (administrative tribunal) to be appealed directly to the Supreme Court or the Court of Appeals, *the notice of appeal shall be served on the agency*, the administrative law court (if it has been involved in the case) and all parties of record *within thirty (30) days after receipt of the decision*.

(emphasis added). Rule 203(d)(2)(B), provides in part that "[t]he notice of appeal shall be filed with the clerk of the appellate court within the time required to serve the notice of appeal under Rule 203(b)(6) . . . accompanied by . . . [p]roof of service showing the notice has been served on the agency." *See also* Rule 234(b), SCACR, ("The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 207 may be extended or shortened by the appellate court.").

III.

A review of the applicable law in 2006 yields the conclusion the thirty-day deadline only existed for service on the appellate court and not on the agency. Therefore, the circuit court erred in holding that it lacked subject matter jurisdiction as a result of Westinghouse's failure to serve the commission within thirty days of the filing of the appeal. We reverse and remand to the circuit court for consideration of Westinghouse's appeal.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Eric U. Fowler and
Melissa W. Dawn Fowler, Appellants/Respondents,

v.

Sallie Hunter, Gynecologic
Oncology Associates,
Selective Insurance Company
of South Carolina, and
Insurance Associates, Inc., Defendants,

Of whom: Selective Insurance
Company of South Carolina is Respondent/Appellant,

and

Insurance Associates, Inc. is Respondent.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4422
Heard June 4, 2008 – Filed July 8, 2008
Withdrawn, Substituted and Refiled July 30, 3008
Withdrawn, Substituted and Refiled October 28, 2008

REVERSED

Rodney M. Brown, of Fountain Inn, for Appellant/Respondents.

Andrew F. Lindemann, of Columbia, for Respondent/Appellant.

E. Matlock Elliott and Joshua L. Howard, of Greenville, for Respondent.

KONDUROS, J.: Eric and Melissa Fowler ("the Fowlers") appeal the dismissal of their assigned cause of action for professional negligence against Insurance Associates, Inc. ("Insurance Associates"). Selective Insurance Company of South Carolina, Inc. ("Selective") appeals the dismissal of its cross-claim for equitable indemnification against Insurance Associates. We reverse.

FACTS

The Fowlers were seriously injured when the motorcycle they were riding was struck by a car driven by Sallie Hunter. The car was owned by Gynecologic Oncology Associates ("GOA") for use by Mrs. Hunter's husband, Dr. James Hunter. Auto-Owners Insurance Company insured the car under a business automobile policy with limits of one million dollars. At least two other policies potentially provided coverage. One was a commercial umbrella policy for four million dollars procured by GOA through Insurance Associates and issued by Selective. The other policy at issue was a personal catastrophic liability policy for two million dollars carried by the Hunters and also issued by Selective.

The Fowlers filed suit against Mrs. Hunter, and it was discovered that due to an inadvertent computer error by Insurance Associates, GOA's

umbrella policy did not provide automobile liability coverage. The Fowlers then filed a declaratory judgment action to see what coverage was available under the above-referenced policies. The Hunters and GOA answered and filed cross-claims against Selective for reformation and against Insurance Associates for professional negligence. Additionally, Selective filed a cross-claim against Insurance Associates for indemnity.

Eventually, the parties settled many of the claims in the two lawsuits. The Fowlers received one million dollars from GOA's automobile policy, two million dollars from the Hunter's personal umbrella policy, and an additional one and one-half million dollars from Selective. Additionally, the Hunters and GOA assigned their professional negligence claim against Insurance Associates to the Fowlers, and the Fowlers signed a covenant not to execute against the Hunters and GOA. The Hunters and GOA agreed to cooperate with the Fowlers in the prosecution of the professional negligence claim, and the Fowlers and Selective agreed to split equally any recovery from either the professional negligence or indemnification claim.

Insurance Associates filed a summary judgment motion seeking dismissal of the only remaining claims: the professional negligence claim assigned to the Fowlers and Selective's claim for indemnification. The circuit court granted these motions finding that because neither the Hunters, GOA, nor Selective could prove they were damaged by Insurance Associate's negligence, the claims failed. These appeals followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corrs., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). However, when a party has moved for summary judgment the opposing party may not

rest upon the mere allegations or denials of his pleading to defeat it. Rule 56(e), SCRCP. Rather, the non-moving party must set forth specific facts demonstrating to the court there is a genuine issue for trial. Id.

LAW/ANALYSIS

I. Professional Negligence

The Fowlers argue the circuit court erred in granting summary judgment to Insurance Associates as to their assigned claim for professional negligence. We agree.

The circuit court reasoned because the Hunters and GOA were insulated from execution of any judgment, the Fowlers, standing in the Hunter's shoes, could never prove damages flowing from the negligence of Insurance Associates. While this analysis is technically correct, the majority of courts having addressed this issue have elected to allow such an assigned claim to proceed. We are persuaded by the rationale set forth in those cases.

In Campione v. Wilson, 661 N.E.2d 658, 660-61 (Mass. 1996), an injured party settled with an insurer and insured for a stipulated amount of damages and a release of the insured. The Massachusetts Supreme Court determined that even though the settlement included a release, the injured party could proceed in prosecuting the insured's assigned negligence claim against the insurance brokers. Id. at 663. The court considered the competing policy considerations at play under these circumstances noting there is a risk of collusion between the settling parties even though there is benefit to allowing injured parties and tortfeasors to settle claims. Id. at 662-63. Nevertheless, the court rejected the "'somewhat metaphysical contention' that the legal basis for the claim against the insurer [and broker] disappeared when the insured became insulated from liability due to a release or a covenant not to execute." Id. at 662 (quoting Gray v. Grain Dealers Mut. Ins. Co., 871 F.2d 1128, 1132-33 (D.C. Cir. 1989)).

An examination of other jurisdictions reveals most courts are approving of settlement arrangements similar to the one in this case, so long as the risk of collusion is minimized. See Gray, 871 F.2d at 1133 (applying North

Carolina law and allowing injured party to pursue assigned bad faith claim against insurer even though insured was insulated from liability by release); Damron v. Sledge, 460 P.2d 997, 999 (Ariz. 1969) (holding an assignment of the insured's bad faith claim plus a covenant not to execute was not ipso facto collusive); United Servs. Auto. Ass'n v. Morris, 741 P.2d 246, 254 (Ariz. 1987) (holding settlement between insured and claimant in which insurer was to defend under reservation of rights did not violate policy's cooperation clause); Red Giant Oil Co. v. Lawlor, 528 N.W.2d 524, 532-33 (Iowa 1995) (holding insured could still suffer damages from agent's negligence when settlement was coupled with a covenant not to execute that did not extinguish liability as would a release; therefore, assigned claim for agent's negligence would be valid); Glenn v. Fleming, 799 P.2d 79, 92-93 (Kan. 1990) (approving of a settlement between insured and injured party coupled with an assignment of a prejudgment claim and covenant not to execute when the settlement is entered into in good faith and the settlement amount is shown to be reasonable).

South Carolina has shown a willingness to depart from the common law in order to promote reasonable settlements between tortfeasors and injured parties. In Bartholomew v. McCartha, 255 S.C. 489, 179 S.E.2d 912 (1971), our Supreme Court concluded the common-law rule regarding the release of one joint tortfeasor was not in the best interests of justice.

> Being untrammeled by the ancient rule which, in our view, tends to stifle settlements, defeat the intention of parties and extol technicality, we adopt the view that the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction.

Id. at 492, 179 S.E.2d at 914.

While acknowledging the inherent benefits of settlement, we also note South Carolina promotes the careful examination of settlement agreements to avoid the potential for complicity or wrongdoing.

> We are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law. In fact, this Court encourages such compromise agreements because they avoid costly litigation and delay to an injured party. However, these settlement agreements must be carefully scrutinized in order to determine their efficiency and impact upon the integrity of the judicial process.

Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App. 2007) (quoting Poston by Poston v. Barnes, 294 S.C. 261, 263-64, 363 S.E.2d 888, 889-90 (1987)).

In the instant case, there is no evidence of collusion between the settling parties. The injuries suffered in the case were extremely serious. Furthermore, the parties did not put a stipulated amount of damages in their agreement so as to reduce the appearance of collusion, and because they contemplated that the underlying tort claim would be tried to a conclusion.[1] The result of the settlement was the Fowlers were able to procure the three million dollars available under the other insurance policies in which coverage was not disputed, while litigation against a negligent party, Insurance Associates, was not foreclosed.[2] This was clearly the intent of the parties as shown by the express language of the settlement agreement and covenant not to execute. The catastrophic injuries suffered by the Fowlers begged a resolution that would give them the benefit of the uncontested proceeds promptly. In light of our State's willingness to place the interests of the

[1] The Fowlers and Selective argued to the circuit court if a judgment in excess of the policy limits was required prior to determining the summary judgment motions, the motion hearing should be stayed and the underlying tort claim tried. However, the circuit court elected to proceed with ruling on summary judgment motions.

[2] The overall settlement received was four and one-half million dollars. However, as discussed further below, Selective contends one and one-half million dollars of the settlement was not payment from any particular policy.

injured party above such a technical application of the law, we believe it was inappropriate for the claim to be dismissed at the summary judgment stage. We therefore reverse the circuit court's grant of summary judgment in favor of Insurance Associates.

II. Equitable Indemnification

Selective contends the circuit court erred in granting summary judgment in favor of Insurance Associates regarding Selective's cross-claim for equitable indemnification. We agree.

Under South Carolina law, a party seeking equitable indemnification must show three things: "(1) the indemnitor was liable for causing the Plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the Plaintiff's claims against it which were eventually proven to be the fault of the indemnitor." Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999).

Under the settlement, the Fowlers received one and one-half million dollars from Selective that was not directly traceable to any policy. The circuit court determined Selective admitted liability under the commercial umbrella policy by making this payment. If so, Selective actually benefitted from the negligence of Insurance Associates. Had the automobile liability not been inadvertently excluded under the policy, the defendants' potential exposure would have been the full amount of the policy limits amounting to four million dollars.

Selective offered an alternative explanation for the one and one-half million dollar payment. Selective contends the payment was made as part of a global settlement to avoid a professional negligence claim asserted by the Hunters and GOA. Insurance Associates admitted its negligence in failing to request automobile coverage on the umbrella policy. If Insurance Associates was acting as an agent for Selective, Selective could be vicariously liable for that negligence. Consequently, Selective argues it settled that claim for one and one-half million dollars, paid to the Fowlers, and decided to pursue indemnification from Insurance Associates. We find Selective's position

raises a question regarding the indemnification claim, but only if we can conclude Selective would not have issued the policy had the application been correctly submitted. In other words, if Selective would have issued the policy anyway, it was not damaged by Insurance Associates' negligence as it would have been exposed for the full four million dollars.

As the moving party, Insurance Associates relied upon the deposition testimony of Roy Phillips indicating that Selective would have definitely issued the policy had it been submitted correctly to include automobile coverage. Insurance Associates also submitted a set of guidelines related to the "one and done" computer software program that allowed "agents" to automatically secure policies if certain criteria are met. In response, Selective submitted guidelines produced by Insurance Associates during discovery showing that a policy would not automatically be secured unless the underlying policy was also issued by Selective. In this case, the underlying policy was not issued by Selective, but by Auto-Owners.

We conclude the competing sets of guidelines raise a genuine issue of material fact precluding summary judgment. Further inquiry into the facts may show Selective would not have issued the policy without the automobile exclusion. If so, Selective's claim for indemnification as to the one and one-half million dollar settlement may prove viable. If Selective cannot produce such evidence, the claim will likely fail. However, we find the issue presented was too uncertain at this stage for the grant of summary judgment to be appropriate.

Finally, Insurance Associates contends Selective failed to mitigate its damages, barring its indemnification claim, by entering into the global settlement and not litigating coverage under the commercial umbrella policy. We disagree.

While Selective may have a viable coverage defense as to the Hunter's professional negligence claim, that defense was not a certainty. Had they not settled, Selective could have been found responsible for the full four million dollars contemplated under the policy. By settling, Selective made a calculated decision to minimize its own risk. Furthermore, this mitigated the

potential damages Selective can seek via indemnification from Insurance Associates.

CONCLUSION

We are persuaded settlements like the one in this case are favorable, so long as the risk of collusion is minimized. Therefore, we conclude the grant of summary judgment in favor of Insurance Associates should be reversed. Furthermore, we believe the existence of the competing guidelines created a genuine issue of fact regarding Selective's claim for indemnification making the grant of summary judgment inappropriate. Consequently, the decision of the circuit court is

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jason Michael Dickey, Appellant.

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4451
Heard October 7, 2008 – Filed October 29, 2008

AFFIRMED

Laura C. Tesh, of Columbia and Lourie A. Salley, of Lexington, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Norman Mark Rapoport, Office of the Attorney General and

Solicitor Warren Blair Giese, all of Columbia, for Respondent.

WILLIAMS, J.: Jason Michael Dickey was convicted of voluntary manslaughter after he shot and killed Josh Boot on the sidewalk outside the apartment building where Dickey lived and worked as a security guard. Dickey makes several arguments on appeal. We affirm.

FACTS

In April 2004, Dickey was working as the night watchman at the Cornell Arms apartments in Columbia, where he also resided. Although not required by his employer for his duties, Dickey carried a loaded pistol, for which he held a valid permit.

On April 29, 2004, Boot and Alex Stroud (Stroud) were tailgating outside a Jimmy Buffett concert at the Colonial Center, a few blocks from the Cornell Arms apartments. According to Stroud, Boot consumed approximately twenty beers and several shots of liquor that evening. Stroud and Boot met two ladies outside the concert, Amanda McGariggle (McGariggle) and Tara West (West), both of whom resided at the Cornell Arms apartments. After a few hours of drinking together outside the Colonial Center, Boot and Stroud accompanied the two ladies back to their apartment. While West and Stroud adjourned to West's bedroom, Boot and McGariggle remained on the sofa in the living room of the apartment. As they sat on the sofa, apparently close to an open window, a neighbor from the sixth floor threw a water balloon[1] down into the ladies' apartment, splashing Boot. Boot became angry and stormed out of the apartment. He then went upstairs to the floors above and began randomly knocking on the doors of other tenants.

At this point, McGariggle went to the lobby and asked Dickey, who was the security guard on duty that night, to evict Boot from her apartment.

[1] The record indicates that the ladies and their neighbors were in the practice of tossing water balloons at each other's apartments as part of an ongoing "joke."

Dickey came to the apartment where he found Boot upset and intoxicated. Dickey told Boot to leave or else he would call the police. Boot was indignant, hurling obscenities and insults at Dickey and making physical threats to him as he slammed the door to the apartment. According to West and McGariggle, Dickey looked angry during the encounter but remained calm and did not try to threaten or grab Boot. As he stood outside the door, Dickey proceeded to call the police to report the disturbance.

Meanwhile, back in the apartment, Stroud calmed Boot down and convinced Boot they should leave. As the two exited the apartment, they passed Dickey in the hallway. According to Stroud, Dickey and Boot "stared each other down," but no words were exchanged. Boot and Stroud took the elevator down to the lobby while Dickey took the stairs down to meet them. As Boot and Stroud walked to the front door to exit, Dickey followed behind them. Again, no words were exchanged. Boot and Stroud exited the building. Dickey followed the two out the building, stood on the Cornell Arms front doormat, and watched them walk away. Boot then turned around and walked back in the direction of Dickey.

At this point, the testimony of the witnesses varies substantially. Stroud testified he was "right beside" Boot as Boot advanced towards Dickey and asked Dickey, "[W]hy the f__ was he following [them]?" Stroud then stated when Boot turned around to say something towards Dickey, Dickey shot Boot three times. Dickey, on the other hand, testified the two turned towards him and made threats they were going to "kick his a__," and called him a "fat f__" among other things. Dickey testified he told them, again, he just wanted them to leave. Dickey stated he was afraid and felt "[he] was outnumbered and [he] realized they were covering ground too fast for [him] to get back in the building." Dickey went on to say he reached into his pocket and exposed his pistol, causing both men to stop advancing temporarily. Dickey then claimed Boot said, "f__ it, let's do it," and reached under his shirt and stepped toward Dickey. Believing Boot to have a concealed weapon under his shirt, Dickey fired three shots, killing Boot.

Immediately, Dickey called 911. When the police arrived, Dickey told the officer about his pistol and that he had a concealed weapon permit.

Dickey told the officer he shot Boot after Boot had come at him with a bottle he had hidden under his shirt. Crime scene investigators found a broken liquor bottle near the scene of the shooting with a smear of Boot's blood on it.

Dickey was indicted for murder and tried before a jury in September 2006. At the close of the State's evidence, defense counsel moved for a directed verdict of acquittal on the ground of self-defense. The motion was denied. Defense counsel renewed the motion for directed verdict at the close of all evidence. Thereafter, the trial court instructed the jury on murder, voluntary manslaughter, and self-defense. After the trial court charged the jury, defense counsel argued the trial court did not adequately charge the jury on either the right to act on appearances or the duty to retreat and objected to the refusal to charge the requested instructions on curtilage. During the instruction on voluntary manslaughter, the trial judge stated to the jury:

> By way of illustration, and I would point out this is by illustration alone, that if an unjustifiable assault is made with violence with the circumstances of indignity upon a man's person and the party so assaulted kills the aggressor the crime will be reduced to manslaughter.

The jury returned a verdict of voluntary manslaughter. Dickey was sentenced to sixteen years imprisonment.

ISSUES

A. Whether the trial court erred in refusing to grant a directed verdict that Dickey acted in self defense as a matter of law?

B. Whether the trial court, in its instructions on self-defense, properly charged the jury on curtilage, the duty to retreat, and the right to act on appearances?

C. Whether the trial court erred in charging the jury on voluntary manslaughter in light of the evidence presented at trial?

D. Whether the trial court's "illustration" to the jury of voluntary manslaughter was an improper comment on the facts?

E. Whether the trial court erred in refusing to retroactively apply the "Stand Your Ground" law to this case?

STANDARD OF REVIEW

In criminal cases, this Court reviews errors of law only. State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007). Thus, we are bound by the trial court's factual findings unless they are clearly erroneous. Id.

LAW/ANALYSIS

A. Directed Verdict of Self-Defense as a Matter of Law

Dickey argues under State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), the trial court should have directed a verdict of acquittal because the State failed to provide evidence to negate his claim of self-defense as a matter of law. We disagree.

The basic definition of when a person is justified in using deadly force in self-defense is comprised of four elements:

> (1) That he was without fault in bringing on the difficulty, (2) That he actually believed he was in imminent danger of losing his life or of sustaining serious bodily injury [], or he actually was in imminent danger of losing his life or of sustaining serious bodily injury, (3) If his defense is based on his actual belief of imminent danger, that a reasonable prudent man of ordinary firmness and courage would have

> entertained the same belief [], or if his defense is based on his being in actual and imminent danger, that "the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm, or losing his own life, (4) That he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance.

Id. at 657-58, 244 S.E.2d at 505-06 (internal citations omitted).

At one time, self-defense was an affirmative defense in this State, and a defendant bore the burden of establishing it by a preponderance of the evidence. State v. McDowell, 272 S.C. 203, 207, 249 S.E.2d 916, 918 (1978). However, current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt. State v. Wiggins, 330 S.C. 538, 544, 500 S.E.2d 489, 492-493 (1998).

When this Court reviews the denial of a motion for a directed verdict, it views the evidence in the light most favorable to the non-moving party. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997). When ruling on a motion for directed verdict, the trial judge is concerned with the existence of evidence, not its weight. Id. If there is any direct or substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced, it is the trial court's duty to submit the case to the jury. Id. In other words, if the State provided evidence sufficient to negate Dickey's claim of self-defense, Dickey's motion for directed verdict was properly denied.

The State provided such evidence. First, the State provided evidence which, if believed, tended to show Dickey was not without fault in bringing on the difficulty. Any act of an accused that is reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars the right to assert self-defense. State v. Slater, 373 S.C. 66, 70, 644 S.E.2d 50, 52

(2007). Additionally, the plea of self-defense is not available to one who kills another in mutual combat. State v. Graham, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). In this case, a jury could have found that Dickey's decision to exit the building and brandish his loaded gun, after the confrontation between him and Boot inside the apartment had all but ended, was an act that was reasonably calculated to provoke a new altercation with Boot, and that Dickey intended to engage in mutual combat.

Second, the State provided evidence that, if believed, tended to show Dickey had other probable means of avoiding the danger than to act as he did (i.e., that Dickey had a duty to retreat). Under the Castle Doctrine, "one attacked, without fault on his own part, on his own premises, has the right in establishing his plea of self-defense, to claim immunity from the law of retreat, which ordinarily is an essential element of that defense." State v. Hewitt, 205 S.C. 207, 212, 31 S.E.2d 257, 258 (1944). In this case, Dickey was not immune from the duty to retreat under the Castle Doctrine. It is undisputed that Dickey was not inside the apartment building at the time he shot Boot, nor was he within the curtilage of the building.[2] Rather, he was standing on a **public** sidewalk outside the apartment building. He was, therefore, not immune as a matter of law under the Castle Doctrine.

B. Sufficiency of Jury Instructions on Self-Defense

A trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence. State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. State v. Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000). If the instructions given to the jury afford the proper test for determining the issues, the failure to give one side's requested instructions is not prejudicial. Id. at 452, 529 S.E.2d at 728.

[2] A discussion of curtilage follows.

i. Curtilage

Dickey argues the trial court erred in refusing to charge the jury on curtilage. We disagree.

A defendant has no duty to retreat when attacked in his home or at his place of business. Wiggins, 330 S.C. at 548 n.15, 500 S.E.2d at 494 n.15. This rule of immunity extends to the curtilage of the building as well. Id. Curtilage includes outbuildings, the yard around the dwelling, a garden of a dwelling, or the parking lot of a business. Id. The common denominator between these places that are considered curtilage is they are places where the property owner alone has the right to be, to the exclusion of the general public. See State v. McGee, 185 S.C. 184, 191, 193 S.E. 303, 306 (1937) (holding duty to retreat applies on a public highway, "where all men have equal rights"); State v. Rochester, 72 S.C. 194, 197, 51 S.E. 685, 686 (1905) ("A man on his own premises has a greater right there than anybody else."). They are not considered curtilage simply because they are close to the building or maintained by the owner. State v. Boyd, 126 S.C. 300, 302, 119 S.E. 839, 840 (1923) (holding one charged with assault and battery with intent to kill cannot defend on the ground that the Castle Doctrine extends to the middle of the street in front of the defendant's house).

In this case, it is undisputed Dickey was on the doormat outside the front door to the Cornell Arms apartments at the time he shot Boot. The doormat was placed away from the threshold of the entrance to the building, on the public sidewalk.[3] Although Dickey makes a colorable argument this portion of the sidewalk should be treated as curtilage of the apartment building,[4] the current law in this state does not include adjacent public

[3] At oral argument, counsel for Dickey argued the front mat was located in an "indentation," away from the sidewalk, such that the front edge of the doormat was flush with the front of the building and therefore not on the sidewalk. However, photos taken at the crime scene do not corroborate this.

[4] Dickey argues the shooting occurred on the curtilage of the apartment building because the sidewalk was covered by the building's awning; Dickey

sidewalks or public streets as curtilage such that the duty to retreat would be excused. See McGee, 185 S.C. at 184, 193 S.E. at 306 (rejecting defendant's argument he had no duty to retreat in his car on a public street). Other jurisdictions have similarly refused to hold there is no duty to retreat from a sidewalk in front of a business or residence. See, e.g., State v. Menser, 382 N.W.2d 18, 20 (Neb. 1986) (holding a sidewalk outside defendant's apartment house was not part of defendant's "dwelling" within the meaning of law of self-defense); State v. Provoid, 110 N.J. Super. 547, 554, 266 A.2d 307, 311 (1970) (noting the curtilage of one's residence does not extend to a public thoroughfare running along the boundary of one's property). Unlike an outbuilding, yard or parking lot next to a building, the sidewalk is public land from which Dickey would not have had "the right to eject his adversary." Rochester, 72 S.C. at 203, 51 S.E. at 688. Because the sidewalk was not within the curtilage of the apartment building, Dickey was not immune from the duty to retreat. Therefore, the trial court's refusal to instruct the jury on the law of curtilage was not error.

ii. Defendant's Right to Act on Appearances

Dickey next argues the trial court's instruction to the jury on the right to act on appearances was inadequate. We disagree.

A jury charge is correct if, when the charge is read as a whole, it is substantially correct and adequately covers the law. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996). Regarding the right to act on appearances, the Supreme Court has held:

> The test is not whether there was testimony of an intended attack but whether or not the appellant believed he was in imminent danger of death or serious bodily harm, and he is not required to show that such danger actually existed because he had a

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was on the front door mat when the shooting occurred; Cornell Arms owned both the doormat and the awning; and Cornell Arms maintained the flower beds and benches on the sidewalk.

> right to act upon such appearances as would cause a reasonable and prudent man of ordinary firmness and courage to entertain the same belief.

State v. Jackson, 227 S.C. 271, 279, 87 S.E.2d 681, 684 (1955).

In this case, the trial court instructed the jury on the second and third elements of self-defense as follows:

> In deciding whether the defendant was or believed that he was in imminent danger of death or serious bodily injury you should consider all of the facts and circumstances surrounding the offense including the physical condition and the characteristics of the defendant and the victim. . . [I]t does not have to appear that the defendant believed that he was actually in danger. It is enough that the defendant believed that he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. A defendant has the right to act on appearances even though the defendant's belief may have been mistaken.

Given the similarity between these two statements of the law, the trial court sufficiently instructed the jury on the right to act on appearances.

iii. Duty to Retreat

Although the trial court did instruct the jury on the duty to retreat, Dickey argues the charge was inadequate. We disagree.

Despite the fact that Dickey was not within the curtilage at the time of the shooting, one may still satisfy the fourth prong of self-defense if he had no other probable means of avoiding the danger than to act as he did in the situation. Hendrix, 270 S.C. at 658, 244 S.E.2d at 506. Here, Dickey

presented evidence that, if believed, could have supported a finding that retreat would have increased the danger to him. Had he retreated back into the apartment's first set of heavy front doors, he would have encountered the locked interior doors to the lobby. If his assailants had then followed him in, he could have been trapped in an enclosed space, thereby increasing his risk of peril from what it would have been had he stood his ground outside. Because this evidence, if believed, could have supported a finding of no duty to retreat, Dickey was entitled to a charge on the duty to retreat.

The trial court instructed the jury on the duty to retreat as follows:

> Regardless of whether a defendant is on personal premises or business premises, . . . a defendant has no duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase . . . [I]f both parties are where they have a right to be there is a duty to retreat unless retreating, in doing so the danger of being killed or suffering serious bodily injury would increase.

Because this charge, when read as a whole, was substantially correct and adequately covers the law, it was a proper instruction on the duty to retreat. Foust, 325 S.C. at 16, 479 S.E.2d at 52.

C. Voluntary Manslaughter Charge

i. Preservation of Error

The State argues the charge of voluntary manslaughter was not properly objected to by defense counsel and, therefore, the issue is not available for appellate review. We disagree.

If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996). A proper objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably

understood by the trial court. State v. Wigington, 375 S.C. 25, 35-36, 649 S.E.2d 185, 190 (Ct. App. 2007).

At the conclusion of the instructions to the jury, defense counsel stated his objection to the charge on voluntary manslaughter as, "We do not think [the instruction on voluntary manslaughter] was appropriate with the facts and circumstances in the case." The State argues this objection was not sufficiently specific to preserve the issue for appellate review. While defense counsel could have made a more specific objection, the objection made it sufficiently clear to the trial court that defense counsel did not believe the evidence supported a charge of voluntary manslaughter. Because the objection brought to the trial court's attention the precise nature of the alleged error, the issue is properly preserved for our review.

ii. Propriety of the Charge

Dickey argues the trial court erred in instructing the jury on voluntary manslaughter because no evidence was presented from which the jury could have reasonably concluded he acted "in the heat of passion." We disagree.

The law to be charged must be determined from the evidence presented at trial. State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). In determining whether the evidence requires a charge on voluntary manslaughter, this Court must view the facts in the light most favorable to the defendant. State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996). For a court to refuse to charge a jury on manslaughter, there must be no evidence in the record tending to reduce the crime from murder to manslaughter. State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993).

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v. Kornahrens, 290 S.C. 281, 285-86, 350 S.E.2d 180, 184 (1986). Evidence of acting in the heat of passion alone will not suffice to reduce murder to voluntary manslaughter. State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280,

281 (1996). Rather, both heat of passion and sufficient legal provocation must be present at the time of the killing. State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984). To mitigate a felonious killing to manslaughter, the sudden heat of passion "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." State v. Byrd, 323 S.C. 319, 322, 474 S.E.2d 430, 432 (1996) (internal quotations omitted).

Even assuming[5] adequate legal provocation by Boot, Dickey argues there was no evidence presented at trial from which the jury could have found he acted in the heat of passion at the time he shot Boot that would support the voluntary manslaughter charge. Dickey points to witness testimony indicating he "remained calm," "did not ever touch Boot," "did not mouth off in return," and "had no prior bad feelings or ill will [towards Boot]." In contrast, the heat of passion is an uncontrollable impulse to do violence, which renders the mind incapable of cool reflection. Byrd, 323 S.C. at 322, 474 S.E.2d at 432. Thus, Dickey argues he did in fact remain calm and in control, which necessarily means he was not acting in the heat of passion at the time of the shooting.

In essence, Dickey's position is that, in view of the evidence presented, the only emotion he was experiencing at the time he shot Boot was **fear**. Dickey correctly points out that fear for one's safety is a necessary prong of self-defense. Hendrix, 270 S.C. at 657-58, 244 S.E.2d at 505-506. Therefore, Dickey argues, if simply being afraid amounts to being in the heat of passion for purposes of voluntary manslaughter, the line separating it from self-defense would be blurred under such an interpretation. To reconcile this,

[5] In his brief, Appellant has phrased his argument as: "[M]anslaughter is not a valid verdict where Dickey was not acting in the heat of passion." He does not dispute the finding of adequate legal provocation. His argument on appeal is therefore limited to whether Dickey was in the heat of passion. An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal. Rule 208(b)(1)(D), SCACR; Jinks v. Richland County, 355 S.C. 341, 344 n.3, 585 S.E.2d 281, 283 n.3 (2003).

Dickey argues there must exist some legal difference between the type of reasonable fear that would support a self-defense claim on the one hand, and the type of fear that would support a verdict of voluntary manslaughter on the other. Dickey argues the latter type is "fear that causes a person to lose control of himself temporarily," and because the evidence did not support a finding of this latter type of fear, he was not acting in the heat of passion. Thus, the charge was improper.

However, it is well settled that self-defense and voluntary manslaughter are not mutually exclusive, and both issues should be submitted to the jury if supported by the evidence. Wiggins, 330 S.C. at 549 n.18, 500 S.E.2d at 495 n.18; State v. Nichols, 325 S.C. 111, 118, 481 S.E.2d 118, 122 (1997); State v. Gilliam, 296 S.C. 395, 396, 373 S.E.2d 596, 597 (1988). The rationale for this rule is that the jury may fail to find all the elements for self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter. Gilliam, 296 S.C. at 396-97, 373 S.E.2d at 597. Furthermore, contrary to Dickey's argument, fear can constitute a basis for heat of passion to support voluntary manslaughter. See Wiggins, 330 S.C. at 549, 500 S.E.2d at 495 (holding when evidence showed appellant was in a heated argument with the victim and was afraid for his life because victim physically threatened him, such evidence, if believed, would tend to show appellant acted in sudden heat of passion).

In this case, ample evidence was introduced that would support a finding of heat of passion. Dickey and Boot engaged in a heated argument before the shooting and Boot verbally threatened Dickey. Evidence of arguments and physical threats prior to a homicide can support a charge of manslaughter. See Lowry, 315 S.C. at 399, 434 S.E.2d at 274 (holding it was an error for trial court to refuse to charge on manslaughter when there was testimony which, if believed, tended to show that the decedent and the defendant were in a heated argument and that the decedent was about to initiate a physical encounter when the shooting occurred). Dickey also testified Boot came at him in a threatening manner, reaching under his shirt for what could have been a weapon, and said to Dickey, "F___ it, let's do it." Taken together, these could support a finding that Dickey was in the heat of passion. See Gilliam, 296 S.C. at 397, 373 S.E.2d at 597 ("Appellant's

testimony that the victim threatened him and then fired at him would support a finding of sufficient legal provocation and heat of passion.").

D. Trial Judge's "Illustration" of Voluntary Manslaughter

Dickey argues the trial court's illustration during his instructions to the jury on voluntary manslaughter was an improper comment on the facts of the case. We disagree.

Article V, § 21 of the South Carolina Constitution states: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." South Carolina law dictates a trial judge should refrain from any comment that tends to indicate to the jury his opinion on the credibility of witnesses, the weight of the evidence, or the guilt of the accused. State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). However, jury instructions must be considered in their entirety and, if in their entirety are free from error, any potentially misleading portions do not constitute reversible error. Id.

"Oftentimes juries can be made to understand the law of the case easier if they are given helpful illustrations." State v. Quick, 141 S.C. 442, 447, 140 S.E. 97, 99 (1927). A charge that states the legal conclusions that would result from the establishment of certain facts is not necessarily an improper charge on the facts, nor a mandate to the jury to assume the truth of the facts as stated. Williams v. Se. Life Ins. Co. 197 S.C. 171, 177, 14 S.E.2d 895, 897 (1941). The test is how a reasonable juror would have understood the charge. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 472 (2004).

Here, it is unlikely that a reasonable juror would have singled out the illustration portion of the charge and interpreted it as the court's opinion on the facts of this case or as an instruction on the weight to be given to the evidence. First, the jury was reminded numerous times of its role as arbiter of the facts. Second, the trial court prefaced its illustration by making clear it was just an illustration. Third, the trial court's illustration took on the form: "If X, Y and Z occur, that constitutes manslaughter." He did not say, "X, Y and Z occurred." See, e.g., State v. Smith, 288 S.C. 329, 330-31, 342 S.E.2d. 600, 601 (1986) (holding judge's instruction, "If the State proves [elements

one through four], then the results of the test can be admitted into evidence and the jury to consider. **You have heard such evidence**" was error because a reasonable juror could have construed that the trial judge felt the State had met its burden of proof on the required elements) (emphasis added). In this case, the trial court's illustration was an explanation, not commentary. Taken as a whole, the instructions were not erroneous.

E. Retroactive Application of "Stand Your Ground" Law

Dickey argues that the trial court should have applied the recently enacted Protection of Persons and Property Act (the Act) to his case. The Act has an effective date of June 9, 2006, and Dickey was charged with murder on April 29, 2004, and convicted of manslaughter on September 15, 2006.

i. Preservation of Error

The State argues Dickey did not properly assert this argument to the trial court, and so it is not preserved for appellate review. We disagree.

An issue not presented to the trial court is not preserved for appellate review. State v. Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996). See also State v. Tucker, 319 S.C. 425, 427-28, 462 S.E.2d 264, 264-65 (1995) (holding when defendant failed to object to a jury charge, issue is not preserved for consideration on appeal); State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985) (holding defendant's failure to object to charge as given, or to request an additional charge when the opportunity to do so has been afforded, waived the right to complain on appeal); State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004) (holding that to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court, raised by the appellant, raised in a timely manner, and raised to the trial court with sufficient specificity).

Defense counsel in this case argued before the trial court, on the record, that the trial court should apply the Act to this case. Thereafter, the trial court heard opposing argument from the State on this same issue. After hearing from both parties on the issue, the trial court ruled on the issue, stating: "I

think it was clearly the intent of the legislature, that . . . this [A]ct does not apply to pending criminal prosecution. For that reason that is the court's ruling." The issue was timely raised on the record and ruled upon by the trial court and is, therefore, preserved for review.

ii. Retroactive Application

Dickey argues the trial court erred in refusing to apply the Act to this case. We disagree.

The retrospective operation of a statute is not favored by the courts, and statutes are presumed to be prospective in effect. State v. Davis, 309 S.C. 326, 334, 422 S.E.2d 133, 139 (1992), overruled on other grounds by Brightman v. State, 336 S.C. 348, 352 n.2, 520 S.E.2d 614, 616 n.2 (1999). The Supreme Court has recognized that "[a] statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt." Am. Nat. Fire Ins. Co. v. Smith Grading & Paving, 317 S.C. 445, 449, 454 S.E.2d 897, 899 (1995). The exception to this rule of prospective operation is where the statute is remedial or procedural in nature. Hercules, Inc. v. S.C. Tax Comm'n, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980).

Dickey argues the Act should be applied retroactively because it is procedural in nature. We disagree.

The Act, by codifying the common law Castle Doctrine, creates substantive rights for citizens. The Act "extends the [Castle] doctrine to include an occupied vehicle and the person's place of business."[6] The Act also gives citizens the right "to protect themselves, their families and others from intruders and attackers without fear of prosecution or civil action."[7] Therefore, because the rights are substantive, the Act will only operate retroactively if there is a clear indication from the legislature that this was intended. Am. Nat. Fire, 317 S.C. at 449, 454 S.E.2d at 899. There is no such indication in the Act. The Act specifically states it was not effective

[6] S.C. Code Ann. § 16-11-420(A) (2006).
[7] S.C. Code Ann. § 16-11-420(B) (2006).

until approved by the Governor, which occurred on June 9, 2006. 2006 S.C. Act No. 379 § 6. This effective date was over two years after the shooting at the Cornell Arms Apartments. Additionally, section 4 of the Act provides the following savings clause:

> The repeal or amendment by this act of any law, whether temporary or permanent, civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties and forfeitures, and liabilities as they stood under the repealed or amended laws.

Here, the Legislature clearly manifested its intent that the Act be applied prospectively. As such, the fact that Dickey's prosecution was pending before the effective date of the Act precludes the application of the Act to this case.

CONCLUSION

Accordingly, the trial court's decision is

AFFIRMED.

ANDERSON and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Donald R. Feldman, Appellant/Respondent,

v.

Francine Feldman, Respondent/Appellant.

Appeal From Beaufort County
Robert S. Armstrong, Family Court Judge

Opinion No. 4452
Heard October 8, 2008 – Filed October 29, 2008

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

J. Mark Taylor, of West Columbia and Peggy McMillan Infinger, of Charleston, for Appellant/Respondent.

Beth Ann Gilleland, of Bluffton, for Respondent/Appellant.

WILLIAMS J.: In this family law action, Donald Feldman (Husband) appeals the family court's decision not to terminate his obligation to pay Francine Feldman's (Wife) alimony. Wife appeals the family court's decision not to award her attorney's fees. We affirm in part, reverse in part, and remand.

FACTS

Husband and Wife were divorced in June 2000. Husband was required to pay Wife permanent periodic alimony in the amount of $4,500 per month. In May 2004, Husband's obligation was reduced to $4,000 per month. In September 2005, Husband brought an action to have his alimony obligation terminated pursuant to the continued cohabitation provision of section 20-3-130(B)(1) of the South Carolina Code (Supp. 2007), claiming Wife and Frank Watson (Boyfriend) had engaged in a romantic relationship and resided together for a period of ninety or more consecutive days. Wife and Boyfriend did not deny the romantic relationship, but both disputed the claim of cohabitation.

Wife and Boyfriend became acquainted in the latter part of 2002. Wife characterized the nature of their relationship at that time as acquaintances. However, the two became romantically involved in August 2003. In October 2003, Wife invested approximately $50,000 in Boyfriend's business.[1] As security for her investment Wife received fifty percent of the stocks in this business. Subsequently, Wife became the sole owner of Decorative Concrete and Design as a result of additional investments.

Husband became suspicious of the relationship between Boyfriend and Wife and hired Randy Caulder (Caulder), a private investigator, in April 2005 to investigate the matter. Consequently, Caulder began surveillance of Wife's condominium. The surveillance entailed Caulder periodically checking to see what vehicles were at Wife's residence in the evenings and mornings. Wife's condominium complex had numbered parking slots

[1] Boyfriend's business is entitled Decorative Concrete and Design Incorporated, which specializes in concrete décor.

corresponding to each condominium. Wife, who resided in condominium number 302, was assigned two parking slots enumerated as 302 and 302 visitor.

Caulder testified that on multiple occasions he observed a BMW and a silver Chevrolet pickup in parking spaces 302 and 302 visitor, respectively. According to Caulder, the BMW belonged to Wife and the pickup belonged to Boyfriend. Caulder explained that in the evening Wife would park the BMW in spot 302 and enter her condominium. Shortly thereafter, Boyfriend would park his pickup in spot 302 visitor and go into Wife's condominium.

On a few occasions, Caulder arrived early in the morning at the condominium complex and observed Boyfriend exiting Wife's condominium, get in his pickup and leave. Thus, Caulder could at least place Boyfriend's vehicle at Wife's residence late at night and early in the morning. Additionally, Caulder interacted with Boyfriend at Wife's condominium on two occasions.

In the first instance, Caulder was commissioned by a law firm to serve papers on Boyfriend. As a result, Caulder went to Wife's condominium and found Boyfriend there. The second time, Caulder was instructed to serve papers on Wife. Once again, Caulder arrived at Wife's condominium and found Boyfriend there. Caulder left the papers with Boyfriend along with instructions that the papers were to be given to Wife when she arrived home.

Upon hearing all the evidence, the family court found Husband had failed to carry his burden of proof to show Wife and Boyfriend engaged in continued cohabitation for ninety or more consecutive days pursuant to section 20-3-130(B)(1). Based on this, the family court did not terminate Husband's obligation to pay Wife alimony. The family court further denied Wife's request for attorney's fees. Both parties appeal.

STANDARD OF REVIEW

In appeals from the family court, this Court may find facts in accordance with its own view of the preponderance of the evidence. Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 189-90, 612 S.E.2d 707, 711 (Ct. App. 2005). However, this broad scope of review does not require this Court to disregard the family court's findings. Id. Nor must we ignore the fact that the family court judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Id. However, our broad scope of review does not relieve the appellant of the burden of convincing this Court that the family court committed error. Id.

LAW/ANALYSIS

I. Husband's appeal

Husband argues the family court erred in failing to find Wife engaged in continued cohabitation with Boyfriend and, therefore, erred in not terminating alimony. Husband also contends the family court's final ruling is contradicted by its ruling at the directed verdict stage. We disagree.

Section 20-3-130(B)(1) allows for the termination of alimony upon "the remarriage or continued cohabitation of the supported spouse . . . ." The statute states:

> For purposes of this subsection and unless otherwise agreed to in writing by the parties, "continued cohabitation" means the supported spouse resides with another person in a romantic relationship for a period of ninety or more consecutive days. The court may determine that a continued cohabitation exists if there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than ninety days and the two periodically separate in order to circumvent the ninety-day requirement.

§ 20-3-130(B).

The continued cohabitation requirement necessitates the supported spouse reside with another person for ninety or more consecutive days. Id. The term "reside," as used in this context, has recently been explained to mean that "the supported spouse live under the same roof as the person with whom they are romantically involved for at least ninety consecutive days." Semken v. Semken, 379 S.C. 71, 76, 664 S.E.2d 493, 496 (Ct. App. 2008) (citing Strickland v. Strickland, 375 S.C. 76, 89, 650 S.E.2d 465, 472 (2007)).

In the case at hand, Husband relies heavily on the testimony of Caulder in arguing the family court's finding that Wife and Boyfriend did not engage in continued cohabitation should be reversed. Caulder was hired to perform surveillance on Wife's residence on April 2005. As noted above, Caulder testified that Boyfriend drove a Chevrolet pickup truck. Caulder performed surveillance on Wife's residence only twenty-one times.

Of these days, ten were before June 13, 2005. However, a bill of sale produced at trial showed Boyfriend purchased the pickup on June 13, 2005. This negated any possibility of Caulder observing Boyfriend driving, entering, or exiting the pickup prior to June 13, 2005. Such evidence falls well short of the ninety day requirement mandated by section 20-3-130(B)(1).

Caulder admitted he did not know whether Wife and Boyfriend lived together. Caulder also admitted he could not state if Boyfriend ever stayed the night at Wife's condominium. Additionally, Caulder conceded he did not know whether Boyfriend and Wife had stayed together for ninety or more days. Moreover, testimony produced at trial supported the conclusion that Husband failed to carry his burden of proof.

Both Boyfriend and Wife freely admitted the romantic nature of their relationship, but both denied that Boyfriend had stayed with Wife for ninety or more days. Such assertions may appear to be self-serving, but they were corroborated by testimony from individuals who visited or stayed with Wife in her residence.

For example, Wife's friend Marian Nalven, who characterized her relationship with Wife as that of mother and daughter, testified that Wife lived alone. Wife's friend Kathy Nalven, who characterized her relationship with Wife as that of sisters, also stated that Wife lived alone. Karin Gutierrez, who has known Wife all her life, testified that Wife did not live with anyone. Wife's former employee Lana Brantley stated that Wife lived alone. Wife's next door neighbor of two years testified Wife lived alone. Another of Wife's friends, Janice Malafronte, stated Wife was the sole occupant of her condominium. Wife and Husband's son, Paul Feldman, who characterized his relationship with his mother as excellent, testified Wife stayed alone.

Based on the foregoing, the family court did not err in determining Husband failed to carry his burden of proof to show Wife and Boyfriend engaged in continued cohabitation for ninety or more consecutive days pursuant to section 20-3-130(B)(1). See Nasser-Moghaddassi, 364 S.C. at 190-91, 612 S.E.2d at 711 (noting the family court judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony and the appellant bears the burden of convincing this Court that the family court committed error).

Husband also maintains the family court's decision not to terminate alimony should be reversed because Wife's and Boyfriend's relationship was tantamount to marriage. Husband's complaint listed two grounds for termination of alimony. First, pursuant to section 20-3-170 of the South Carolina Code (Supp. 2007) a family court may terminate an award of alimony when the circumstances of the parties have changed. Husband argued the change in circumstances is that Wife and Boyfriend's relationship is tantamount to marriage. Second, Husband relied on the continued cohabitation for ninety or more consecutive days pursuant to section 20-3-130(B)(1) to terminate alimony. In its order, the family court stated, "The [Husband] did not prove . . . [Wife] is co-habitating with [Boyfriend] as defined in [section 20-3-130] nor did . . . [Husband] provide any proof . . . [Wife] and [Boyfriend] were attempting to circumvent the ninety (90) day rule as contemplated by [section 20-3-130] . . . ." The family court never

ruled on whether Wife's and Boyfriend's relationship was tantamount to marriage. In South Carolina for an issue to be preserved for appellate review it must be raised to and ruled upon by the lower court. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding for an issue to be preserved for appeal it must have been raised to and ruled upon by the lower court). Thus, this issue is not preserved for our review.

Additionally, South Carolina case law clearly states "[a] party must file [a rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). In the present case Husband failed to make a Rule 59(e), SCRCP, motion when the family court did not rule on whether Boyfriend's and Wife's relationship was tantamount to marriage. Consequently, this issue is not preserved for review. Id.

Husband also argues the family court's final ruling is contradicted by its ruling at the directed verdict stage. At the conclusion of Husband's case-in-chief, Wife made a motion for a directed verdict. The family court denied this motion. In so doing, the family court held there was some evidence of cohabitation, presumably based on the testimony of Caulder. In its final ruling, the family court held Husband failed to provide "any proof" that Wife and Boyfriend were attempting to circumvent the ninety day requirement of section 20-3-130. Husband maintains these two rulings are contradictory. Because Husband fails to cite authority in support of his argument, we consider the argument abandoned. Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (holding statements made without supporting authority are deemed abandoned on appeal and are not presented for review).

II. Wife's Appeal

Wife argues the family court erred in failing to award her attorney's fees. As a result of this litigation, Wife has incurred attorney's fees in the amount of $22,038.05. We agree.

The family court has discretion in deciding whether to award attorney's fees, and its decision will not be overturned absent an abuse of discretion. Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). An abuse of discretion occurs when the decision is controlled by an error of law or is based on factual findings that are without evidentiary support. Degenhart v. Burriss, 360 S.C. 497, 500, 602 S.E.2d 96, 97 (Ct. App. 2004).

In deciding whether to award attorney's fees, the family court should consider the following: (1) each party's ability to pay his or her own fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). If an award of attorney's fees is appropriate, the reasonableness of the fees should be determined according to: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

In adjudicating Wife's claim for attorney's fees, the family court stated, "Under the fact enunciated in Glasscock v. Glasscock . . . each party should be responsible for their own attorney fees and costs as a result of this litigation." The family court failed to make any findings regarding whether Wife was entitled to attorney's fees under the factors set out in E.D.M. v. T.A.M. Rather, the family court considered the Glasscock factors which deal with determining the reasonableness of attorney's fees. Therefore, the issue of whether Wife is entitled to attorney's fees is remanded back to the family court so that it may consider the factors set out in E.D.M. v. T.A.M. If the family court determines Wife is entitled to attorney's fees, it should then consider the reasonableness of such fees based on the Glasscock factors.

The family court should comply with Rule 26(a), SCRFC, which states, "An order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision." Holcombe v. Hardee, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991) (reversing and remanding a case back to the family

court because the family court's order failed to comply with Rule 26(a), SCRFC, in that the family court listed the factors to be considered for child support and stated it had considered them but failed to make findings of facts concerning those factors).

CONCLUSION

Accordingly, the family court's decision is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

ANDERSON and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of
Social Services, Respondent,

v.

Lisa C., Frank C., Frank C., Sr.,
and Linda C.,

In the Interest of Minor Child I
and Minor Child II,

Of Whom Frank C. is Appellant.

Appeal From York County
Robert E. Guess, Family Court Judge

Opinion No. 4453
Heard September 16, 2008 – Filed October 30, 2008

REVERSED AND REMANDED

D. Bradley Jordan, of Rock Hill; and John D. Elliott, of Columbia, for Appellant.

David Simpson, of York, for Respondent.

KONDUROS, J.: Father appeals the family court's admission of various hearsay statements of Child during a Department of Social Services (DSS) intervention case. We reverse and remand for a new trial.[1]

FACTS

Mother and Father are parents of twin girls born in 1999. DSS filed an intervention action in 2006 pursuant to section 20-7-738 of the South Carolina Code contending Father posed a threat of abuse or neglect to Children. However, the trial focused primarily on allegations of sexual abuse by Father as to one Child. Mother and Father had been living separate and apart for approximately three years at the time of trial.

Child testified at trial, but did not reveal any sexual abuse by Father at that time. Father elected not to cross-examine Child. Dr. Deborah Reyes testified on behalf of DSS. Dr. Reyes testified she was the Director of Clinical Services for the Dickerson Center for Children, a non-profit child advocacy center. Her qualifications included a Master's degree and Ph.D. in clinical psychology as well as numerous courses in forensic interviewing. She became licensed by the state of South Carolina the Friday prior to the trial of this case. Dr. Reyes testified she conducted a forensic interview with Child after another Dickerson Center staff person reported a "problematic non-disclosure."[2]

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[1] Before we begin our analysis, we emphasize this case involves the interpretation of a very specific statute dealing with the introduction of a child's hearsay statements in the context of a DSS intervention action. Any conclusions should be strictly ascribed to the application of this statute and should not be extrapolated with respect to the admission or exclusion of hearsay statements in the criminal context.

[2] Dr. Reyes described a problematic non-disclosure as an interview in which a child may deny improper touching, but there are problems with the way the child answers the questions.

Dr. Reyes testified Child made the following disclosures in response to questioning:

> At this point, I asked her if anyone had touched her private. She said yes. When I asked her to tell me about that, she said, "My daddy." I asked her what did her daddy do and then she said . . . "that he put a card on there from the cow place[3] and that daddy use to bite us on the butt."

Dr. Reyes further testified Child told her Father had touched her with the card "on the inside and that it felt bad on her private part." Finally, Dr. Reyes indicated Child said Father had touched her "hinny" many times, and "Daddy put a car inside."

Father objected to Dr. Reyes' testifying about Child's hearsay statements during the interview. However, the family court allowed the statements relying on section 19-1-180 of the South Carolina Code, which makes hearsay statements by children in abuse and neglect cases admissible under certain circumstances.

Mother also testified concerning a prior hearsay statement by Child regarding alleged sexual abuse. Mother stated Child told her Father "had put his mouth on her private." Father objected to the admission of this testimony, but the family court determined section 19-1-180(G) did not prohibit the admission of such testimony as long as the hearsay statement was made prior to Mother and Father's separation.

Detective Cathryn Bell of the Chester County Sheriff's Office testified Child told her "Daddy rolled up a cow place card, and he put it in my hoochie." Detective Bell understood Child's reference to "hoochie" to mean Child's vaginal area. Detective Bell further testified, over Father's objection, there was probable cause to leave the criminal case against Father open.

[3] Testimony revealed Child referred to the restaurant Chick-Fil-A as the cow place.

Dr. Patricia Tonkawitz, Child's pediatrician, conducted a physical exam of Child, which yielded normal findings. Over Father's objection, Dr. Tonkawitz also testified about a portion of her report in which she indicated Mother's history regarding Child was "convincing."

The family court determined Children faced a threat of harm of sexual abuse from Father and ordered visitation between Father and Children be supervised by Father's parents. Furthermore, the court ordered Father to attend parenting classes and undergo mental health and sexual predator evaluations. The case was set for further review in three months. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, the appellate court has the authority to correct errors of law and to find facts in accordance with its own view of the preponderance of the evidence. However, this broad scope of review does not require this court to disregard the family court's findings." Mr. T v. Ms. T, 378 S.C. 127, 131-32, 662 S.E.2d 413, 415 (Ct. App. 2008) (citations omitted), cert. pending. "The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion." State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008). The trial court abuses its discretion when that decision is based upon an error of law or upon factual findings that are without evidentiary support. Id. at 206, 656 S.E.2d at 368.

LAW/ANALYSIS[4]

This appeal concerns the admission of testimonial evidence involving both matters of law and matters that were within the discretion of the family court judge. The controlling statute at issue is section 19-1-180 of the South Carolina Code (Supp. 2007). The statute considers how the court will address

[4] Father raises issues that apply to the testimony of several different witnesses. For the sake of organization we will address each witness' testimony in turn and each argument related thereto.

otherwise inadmissible out-of-court statements by children under twelve in a family court proceeding regarding allegations of abuse and neglect.

> An out-of-court statement may be admitted . . . if:
>
> > (1) the child testifies at the proceeding or testifies by means of videotaped deposition or closed-circuit television, and at the time of the testimony the child is subject to cross-examination about the statement or:
> >
> > (2)(a) the child is found by the court to be unavailable to testify on any of these grounds:
> >
> > (i) the child's death;
> >
> > (ii) the child's physical or mental disability;
> >
> > (iii) the existence of a privilege involving the child;
> >
> > (iv) the child's incompetency, including the child's inability to communicate about the offense because of fear;
> >
> > (v) substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television; and
> >
> > (b) the child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

§ 19-1-180(B). The statute also attempts to protect against the admission of a child's accusations that could be motivated by the malice of one parent for the other.

> If the parents of the child are separated or divorced, the hearsay statement shall be inadmissible if (1) one of the parents is the alleged perpetrator of the alleged abuse or neglect and (2) the allegation was made after the parties separated or divorced. Notwithstanding this subsection, a statement alleging abuse or neglect made by a child to a law enforcement official, an officer of the court, a licensed family counselor or therapist, a physician or other health care provider, a teacher, a school counselor, a Department of Social Services staff member, or to a child care worker in a regulated child care facility is admissible under this section.

§ 19-1-180(G).

I. Objections to Testimony

A. Dr. Reyes' Testimony

Father contends Dr. Reyes' testimony regarding Child's statements was not admissible under this statute, because Child's testimony was not found to be trustworthy by the family court. We disagree. The admission of Dr. Reyes' testimony appears to be proper under section 19-1-180(B)(1). Child testified at trial and was subject to cross-examination. Therefore, pursuant to section 19-1-180(B)(1), there was no requirement Child be found unavailable or the family court conduct an analysis of the trustworthiness of those statements. See Charleston County Dep't of Soc. Servs. v. Father, Stepmother & Mother, 317 S.C. 283, 289, 454 S.E.2d 307, 310 (1995) (approving admission of child's hearsay statements in absence of trustworthiness analysis when child testified at trial).

Father further argues if Dr. Reyes' testimony regarding Child's statements was admissible under part (B) of the statute, it was excluded under part (G) of the statute because she was not a licensed family counselor or

therapist at the time she interviewed Child. We agree. The family court considered this argument and determined Dr. Reyes fell with the ambit of persons covered by the statute as either a health care provider or a therapist. Furthermore, the family court relied upon Dr. Reyes' experience and qualifications and her subsequent licensure to establish the credibility and reliability of her testimony.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Here, the family court concluded the term therapist was not necessarily modified by licensed in the statute. We disagree with this finding. The intent of the overall statute is to aid in the protection of children from abuse and neglect by permitting the introduction of their hearsay statements. However, the purpose of part (G) is to protect a parent from potentially false accusations instigated by the other parent as part of a contentious divorce or custody battle. To conclude the legislature intended the testimony of unlicensed therapists to be admitted is inconsistent with the intent to limit the admission of hearsay statements.

Additionally, finding Dr. Reyes fell within the category of healthcare providers is again inconsistent with the statute. The legislature placed a licensure requirement on mental health professionals that cannot be disregarded by categorizing Dr. Reyes as both a therapist and a healthcare provider. While mental health is undoubtedly part of a child's overall well-being, the legislature separated the groups in the statute thereby making a distinction between the groups that we cannot ignore.

Even though we disagree with the family court's analysis of this issue, we may still affirm the admission of Child's statements through Dr. Reyes if there is another basis in the record for doing so. See Rule 220(c), SCACR. At trial, DSS also contended Dr. Reyes' testimony was admissible because she was licensed at the time of trial. We disagree.

If a statute's language is plain, unambiguous, and conveys a clear and definite meaning, rules of statutory interpretation are not necessary, and the court has no right to look for or impose another meaning. Hodges, 341 S.C.

at 85, 533 S.E.2d at 581. In this case, part (G) makes admissible hearsay statements "made by a child to . . . a licensed family counselor or therapist." (emphasis added). The plain language of the statute indicates licensure is required at the time the statement by the child is made. The record is clear Dr. Reyes was not licensed at the time she interviewed Child, although she was undergoing the licensing process. Consequently, Child's hearsay statements to Dr. Reyes were inadmissible.

Finally, Father contends Dr. Reyes improperly commented on Child's credibility by saying Child "had no apparent motivation . . . to have a false allegation," and Child gave a "consistent disclosure." For a psychologist to comment on the veracity of a child's accusations of sexual abuse is improper. State v. Dawkins, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); see also State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (finding therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child).

In the instant case, Father made no contemporaneous objection when Dr. Reyes testified Child had no reason to make a false allegation and Child did not appear to have been coached. Consequently, any error regarding those specific comments as to truthfulness is not preserved. See State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (holding a contemporaneous objection is required to preserve an issue for appellate review).

However, Father did object to Dr. Reyes' testifying Child gave a "consistent disclosure about her putting a card in her vaginal area bitting [sic] her butt and putting a car in her rectum." In the recent case of State v. Douglas, 367 S.C. 498, 505, 626 S.E.2d 59, 63 (2006) cert. granted, June 7, 2007, a witness, Herod, qualified as an expert in forensic interviewing of sexual assault victims, testified that after interviewing a child she recommended a medical exam. Douglas argued this testimony improperly bolstered the State's case as it would lead a jury to believe the expert considered child's accusations truthful. This court concluded: "Although the

jury could infer Herod thought the victim told her the truth about being molested, . . . Herod did not express her opinion as to whether or not the victim told her the truth during the interview." Id. at 522, 626 S.E.2d at 72. Consequently, Herod's testimony did not improperly comment on the child's credibility.

In contrast, in this case, Dr. Reyes indicated Child gave a consistent disclosure and that as a result of that conclusion she recommended therapy. Dr. Reyes' testimony seems fill the inferential gap that made Herod's testimony in Douglas admissible. There is little doubt Dr. Reyes found Child's testimony to be credible, and testimony to that effect is inadmissible.[5]

B. Mother's Testimony

Father contends the family court erred in allowing Mother to testify regarding Child's accusations against Father. The family court concluded part (G) of the statute did not prohibit the introduction of such statements because Child made them to Mother prior to Mother and Father's separation. Part (G) states the "hearsay statement shall be inadmissible if (1) one of the parents is the alleged perpetrator of the alleged abuse or neglect and (2) the allegation was made after the parties separated or divorced." (emphasis added). Because the statute is considering the hearsay statement by the child, allegation could refer to the statement by Child to Mother. However, allegation could also refer to the repetition of Child's hearsay statement by Mother at the hearing.

If a statute is susceptible to two reasonable interpretations, it is ambiguous. See Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 489, 636 S.E.2d 598, 617 (2006) (Toal, C.J., dissenting). When "a statute is ambiguous, the Court must construe the terms of the statute." Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586,588 (2002). As previously stated, the cardinal rule of statutory construction is to discern and

[5] We note Dr. Reyes was never actually qualified as an expert in either clinical psychology or forensic interviewing although such a motion was made and her experience and education were presented to the family court. Her status as an expert is not raised on appeal.

give effect to the intent of the legislature. Hodges, 341 S.C. at 85, 533 S.E.2d at 581. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000).

As discussed above, the purpose of part (G) of the statute is to protect a parent from potentially false accusations instigated by the other parent. In this case, to allow Mother to testify after the separation regarding statements made before the separation undermines the purpose of this part. In promoting false allegations, a parent could simply claim allegations were made by the child prior to separation simply to evade the purview of the statute. Part (G) protects against accusations potentially arising from the acrimony of separation; therefore, if the witness is testifying after the separation the danger for false allegations still exists. Consequently, we conclude the admission of Child's hearsay statement to Mother was error.

C. Detective Bell's Testimony

Father contends the family court erred in allowing Detective Bell to testify regarding Child's hearsay statements. We disagree. As discussed with regard to Dr. Reyes' testimony, Child was available to testify so that Child's hearsay statements were admissible under (B)(1). There is no argument that Detective Bell's testimony should have been excluded under part (G) as she clearly falls with the category of law enforcement official.

Father also appeals the admission of Detective Bell's testimony that the Sheriff's Department had "probable cause" to keep open its criminal investigation of Father. Father's objection at trial and on appeal is based on relevance. Rule 401 of the South Carolina Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In the instant case, Detective Bell's opinion the criminal case should remain open does not make any specific fact of consequence more or less probable.

Furthermore, even if Detective Bell's opinion was relevant, all relevant evidence is not admissible. "[T]he dictates of Rule 401 are subject to the balancing requirement of Rule 403, SCRE, which requires a court to exclude relevant evidence upon a showing that its admission would be more prejudicial than probative." Jamison v. Ford Motor Co., 373 S.C. 248, 269, 644 S.E.2d 755, 766 (Ct. App. 2007) (quoting Watson ex rel. Watson v. Chapman, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000)); see also Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

In the present case, nothing indicates the family court conducted a prejudicial versus probative analysis. Evidence is unfairly prejudicial in the context of Rule 403, if the evidence has an undue tendency to suggest a decision on an improper basis, such as an emotional one. State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001). In this case, Detective Bell's testimony suggests Father is guilty of sexual misconduct against Child and is highly prejudicial. For the fact-finder to make a determination based on the Detective's opinion of guilt would be improper. Therefore, we conclude the admission of this evidence was error.

D. Dr. Tonkawitz's Testimony

Father also claims the family court erred in admitting pediatrician Dr. Tonkawitz's testimony the history provided by Mother when Child was brought for examination was "convincing." We agree. As previously discussed, an expert is not to comment on the veracity of another witness's statements. Dawkins, 297 S.C. at 393-94, 377 S.E.2d at 302; Dempsey, 340 S.C. at 571, 532 S.E.2d at 309. Tonkawitz should not have been allowed to give her opinion as to Mother's truthfulness regarding Child's medical history. Such observation is reserved for the trier of fact, in this case, the family court. See S.C. Dep't of Soc. Servs. v. Forrester, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984) ("The credibility of testimony is a matter for the finder of fact to judge.").

II. Shifting of Burden of Proof

Father contends the family court shifted the burden of proof, requiring him to prove his innocence. In a DSS intervention case, DSS has the burden of proof by the preponderance of the evidence. Aiken County Dep't of Soc. Servs. v. Wilcox, 304 S.C. 90, 93, 403 S.E.2d 142, 143 (1991). The family court's order addresses the defense put forth by Father including the negative psychological testing for pedophilic tendencies and Child's negative physical examination. The family court concluded this evidence could not rule out the possibility of sexual abuse. This language is somewhat problematic, but viewing the order as a whole, the family court relied upon the evidence presented by DSS in reaching its conclusion. The order enumerates the testimony of the witnesses indicating Child made disclosures of abuse as well as considering Child's demeanor on the witness stand. Furthermore, the order cites to evidence showing Child was acting out sexually and was experiencing nightmares. Overall, it does not appear the family court impermissibly shifted the burden to Father. The order simply addresses all of the evidence put forth before it including Father's and Child's negative test results.

CONCLUSION

We conclude the admission of Child's hearsay statements through Dr. Reyes was erroneous in light of section 19-1-180(G). We find comments by Dr. Reyes regarding Child's credibility were likewise inadmissible. Furthermore, Mother's testimony regarding Child's hearsay statements was also inadmissible under section 19-1-180(G). Additionally, comments by Dr. Tonkawitz regarding Mother's credibility were inadmissible. Finally, the admission of Detective Bell's opinion as to probable cause in Father's criminal case was error. The sum of these errors warrants reversal of the family court's order. This case is therefore

REVERSED AND REMANDED.

ANDERSON AND WILLIAMS, J.J., concur.

The Supreme Court of South Carolina
P. O. Box 11330
Columbia, South Carolina 29211