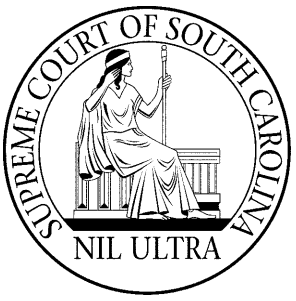

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 42
November 2, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Roosevelt Simmons, Petitioner,

v.

Berkeley Electric Cooperative, Inc. and St. John's Water Company, Inc., Respondents.

Appellate Case No. 2013-001477

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 27674
Heard October 20, 2015 – Filed November 2, 2016

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Edward A. Bertele, of Charleston, for Petitioner.

John B. Williams and J. Jay Hulst, both of Williams & Hulst, L.L.C., of Moncks Corner; Gaines W. Smith and Jeffrey C. Moore, both of Legare, Hare & Smith, of Charleston, all for Respondents.

ACTING CHIEF JUSTICE BEATTY: In this property dispute concerning utility easements, we granted Roosevelt Simmons' petition for a writ of certiorari to review the Court of Appeals' decision in *Simmons v. Berkeley Electric Cooperative*, 404 S.C. 172, 744 S.E.2d 580 (Ct. App. 2013). Simmons asserts the Court of Appeals erred in affirming the master-in-equity's grant of summary judgment in favor of St. John's Water Company, Inc. ("St. John's Water") on the basis that it had established a prescriptive easement. Simmons further asserts the Court of Appeals erred in affirming the master's grant of summary judgment in favor of Berkeley Electric Cooperative, Inc. ("Berkeley Electric") on the grounds that it had been granted an express easement and that it had established a prescriptive easement to maintain the power lines in their current configuration. We affirm in part, reverse in part, and remand.

I. Factual/Procedural History

In 2003, Simmons acquired title to two parcels of land, TMS # 283-00-00-498 ("Tract 498") and TMS # 282-00-00-135 ("Tract 135"). Both parcels are undeveloped, wooded, and located along Kitford Road on Johns Island. The parcels are separated by an abandoned railroad right-of-way and were previously part of a larger tract owned by two of Simmons' predecessors-in-title, Edward Heyward and E.C. Brown. In 1956, Heyward granted an easement to Berkeley Electric to construct and maintain transmission lines over what is now Tract 498 and Tract 135. In 1972, Brown granted an easement to Berkeley Electric to construct and maintain distribution lines over Tract 498.

In 1977, Charleston County issued an encroachment permit authorizing St. John's Water to install a water main along Kitford Road pursuant to an accompanying map that illustrated the water main's approved location. St. John's Water finished construction on the water main in 1978. In 2005, Simmons discovered a water meter under bushes on Tract 135. Simmons subsequently contacted St. John's Water, which informed Simmons that it would not move the water main because it believed it had an easement giving it the right to use the property. St. John's Water based its belief on the encroachment permit and its understanding that the water main had been in its current location for more than twenty years. Pursuant to a request by Simmons, St. John's Water "blue-flagged"

the property. The blue flags showed the water main crossing both Tract 135 and Tract 498.[1]

In 2008, Simmons commenced this action against Berkeley Electric and St. John's Water alleging trespass and unjust enrichment. Specifically, Simmons alleged Berkeley Electric and St. John's Water trespassed on his property by constructing, placing, and maintaining unauthorized power and water lines. In doing so, Simmons claimed Berkeley Electric and St. John's Water had been "furnished with a non-gratuitous and valuable benefit without paying for its reasonable value." Simmons also sought a declaration that neither utility company had property interests or rights to his property.

Both Berkeley Electric and St. John's Water moved for summary judgment. After presiding over the summary judgment hearings, the master granted both motions for summary judgment. With respect to Berkeley Electric, the master determined any transmission and distribution lines over Simmons' property were permitted under the 1956 and 1972 easements. To the extent the lines were not within the scope of the express easements, the master found Berkeley Electric established a prescriptive easement to the lines in their current configuration. As to St. John's Water, the master determined the encroachment permit served as an express easement granting St. John's Water the right to use Simmons' property to construct the water main. To the extent that the water main was not covered under the express easement, the master held St. John's Water established a prescriptive easement to maintain the water main in its current configuration. Simmons appealed.

The Court of Appeals affirmed the master's grant of summary judgment in favor of Berkeley Electric, finding Berkeley Electric did not exceed the scope of the express easements. *Simmons*, 404 S.C. at 179-80, 744 S.E.2d at 584-85. In addition, the Court of Appeals affirmed the master's finding that Berkeley Electric established a prescriptive easement for the power lines in their current configuration. *Id*. at 181-82, 744 S.E.2d at 585-86. As to St. John's Water, the Court of Appeals affirmed the master's grant of summary judgment in favor of St. John's Water on the basis that it established a prescriptive easement, but reversed the master's finding that it had an express easement after determining Charleston

[1] The blue flags also showed the water main was not located along Kitford Road, but north of Kitford Road across Simmons' property.

County lacked the authority to grant a right to use property owned by another. *Id.* at 183-85, 744 S.E.2d at 586-87. The Court of Appeals remanded the action to the master for a determination of whether there are additional water lines under Simmons' property. *Id.* at 185, 744 S.E.2d at 587. We granted Simmons' petition for a writ of certiorari following the Court of Appeals' denial of his petition for rehearing.

II. Standard of Review

When reviewing the grant of a summary judgment motion, this Court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860.

III. Discussion

A. St. John's Water

Simmons asserts the Court of Appeals erred in affirming the master's grant of summary judgment in favor of St. John's Water. We agree.

"An easement is a right given to a person to use the land of another for a specific purpose." *Bundy v. Shirley*, 412 S.C. 292, 304, 772 S.E.2d 163, 169 (2015). "A prescriptive easement is not implied by law but is established by the conduct of the dominant tenement owner." *Boyd v. BellSouth Tel. Tel. Co.*, 369 S.C. 410, 419, 633 S.E.2d 136, 141 (2006). To establish a prescriptive easement, the claimant must prove by clear and convincing evidence: "(1) the continued and uninterrupted use or enjoyment of the right for a period of 20 years; (2) the identity of the thing enjoyed; and (3) the use [was] adverse under claim of right." *Darlington Cnty. v. Perkins*, 269 S.C. 572, 576, 239 S.E.2d 69, 71 (1977). "[W]hen it appears that claimant has enjoyed an easement openly, notoriously, continuously, and uninterruptedly, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse." *Williamson v.*

Abbott, 107 S.C. 397, 400, 93 S.E. 15, 16 (1917). "[A] party claiming a prescriptive easement has the burden of proving all elements by clear and convincing evidence." *Bundy*, 412 S.C. at 306, 772 S.E.2d at 170.

In *Horry County v. Laychur*, this Court articulated the third element of a prescriptive easement as requiring the claimant's use to be "adverse or under a claim of right." 315 S.C. 364, 367, 434 S.E.2d 259, 261 (1993). In relying on this language, the Court of Appeals has recognized two methods of proving the third element: one established through "adverse use" and one through a "claim of right."[2] According to the Court of Appeals, "[t]o establish an easement by prescription, one need only establish *either* a justifiable claim of right *or* adverse and hostile use." *Jones v. Daley*, 363 S.C. 310, 316, 609 S.E.2d 597, 600 (Ct. App. 2005) (emphasis added). Therefore, if a claimant cannot prove the elements of adverse use, then, under the Court of Appeals' approach, the claimant could establish a prescriptive easement under a claim of right. "[I]n order for a party to earn a prescriptive easement under claim of right he must demonstrate a substantial belief that he had the right to **use** the [property] based upon the totality of circumstances surrounding his use." *Hartley v. John Wesley United Methodist Church of Johns Island*, 355 S.C. 145, 151, 584 S.E.2d 386, 389 (Ct. App. 2003).

Here, the Court of Appeals determined "St. John's Water established the water main was installed under a claim of right." *Simmons*, 404 S.C. at 184, 744 S.E.2d at 587. To support its determination, the Court of Appeals relied on an affidavit of Hugh S. Miley, an engineer involved in the design, permitting, and construction of the water main. *Id.* In his affidavit, Miley attested that: Charleston County issued an encroachment permit for the water main; construction on the water main began in 1977 and was completed in 1978; and that, to the best of his knowledge, the water main has been used continuously and uninterruptedly for more than twenty years. The Court of Appeals found "Miley's affidavit demonstrates his belief that the encroachment permits obtained from Charleston County covered the installation of the water main as illustrated on the map." *Id.*

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[2] *See*, *e.g.*, *Loftis v. S.C. Elec. & Gas Co.*, 361 S.C. 434, 440-41, 604 S.E.2d 714, 717 (Ct. App. 2004) (finding respondent established a prescriptive easement under claim of right because it believed it had the right to use the property for the power lines); *Revis v. Barrett*, 321 S.C. 206, 210, 467 S.E.2d 460, 462 (Ct. App. 1996) (determining plaintiff established a prescriptive easement to the use of an old road under claim of right based on her belief that she had the right to use the road).

The Court of Appeals continued, stating "[t]he fact the claim may have been based on a mistake does not negate the claim of right required to establish a prescriptive easement." *Id.*

As a threshold matter, we hold the Court of Appeals erred in recognizing two methods of proving the third element of a prescriptive easement. We acknowledge that this Court's decisions have helped give rise to this error and now take this opportunity to clarify the third element of a prescriptive easement.

While this Court has recently articulated the third element of a prescriptive easement as requiring the claimant's use be "adverse or under a claim of right," this Court has not always articulated the third element this way. In 1823, the Constitutional Court of Appeals of South Carolina determined three things are necessary to establish a right by prescription: (1) use and occupation or enjoyment; (2) the identity of the thing enjoyed; and (3) that it is adverse to the right of some other person. *Lawton v. Rivers*, 13 S.C.L. 445, 451 (2 McCord) (1823). In 1917, this Court relied on *Lawton* and determined: "To establish a right by prescription, it is necessary to prove three things: (1) The continued and uninterrupted use or enjoyment of the right for the full period of 20 years; (2) the identity of the thing enjoyed; (3) that the use or enjoyment was *adverse, or under claim of right.*" *Williamson*, 107 S.C. at 400, 93 S.E. at 15-16 (emphasis added). By placing a "comma" after the term "adverse," this Court intended to modify the term "adverse," not create another method to establish a claim.[3] Accordingly, the

[3] *Williamson* is not the only case in which this comma appears after the term "adverse." For example, in *Brasington v. Williams*, 143 S.C. 223, 261, 141 S.E. 375, 387 (1927) (Watts, C.J., dissenting), *Poole v. Edwards*, 197 S.C. 280, 283, 15 S.E.2d 349, 350 (1941), and *Sanitary & Aseptic Package Co. v. Shealy*, 205 S.C. 198, 203, 31 S.E.2d 253, 255 (1944), this Court cited the *Williamson* test, with the comma, verbatim. Approximately eight months before *Sanitary*, however, this Court cited the *Williamson* test, but, for the first time, without the comma behind the term "adverse." *See Steele v. Williams*, 204 S.C. 124, 133, 28 S.E.2d 644, 648 (1944) ("Three things are necessary to establish a right by prescription: . . . (3) that the use or enjoyment was adverse or under claim of right."). The Court offered no explanation for dropping the comma. While the comma reappeared after the term "adverse" in *Sanitary* eight months after *Steele*, it is around this time when this Court moved away from articulating the third element with a comma following the term "adverse." *See*, *e.g.*, *Babb v. Harrison*, 220 S.C. 20, 24-25, 66 S.E.2d 457,

third element of a prescriptive easement should be interpreted as requiring the claimant's use be adverse or, in other words, under a claim of right contrary to the rights of the true property owner. A brief review of additional authority on this issue is instructive.

First, the terms "adverse use" and "claim of right" are, in effect, quite similar. For example, Black's Law Dictionary defines "adverse use" as "a use without license or permission." *Black's Law Dictionary* 1681 (9th ed. 2009). "Claim of right" is defined as: (1) The possession of a piece of property with the intention of claiming it in hostility to the true owner; or (2) A party's manifest intention to take over land, regardless of title or right. *Black's Law Dictionary* 283 (9th ed. 2009). *American Jurisprudence* also recognizes that "[u]nder the law of prescriptive easements, the essence of a 'hostile' use, which has been referred to interchangeably in the case law as 'adverse,' 'hostile,' 'nonpermissive,' or 'under a claim of right,' is a lack of permission from the true owner." 68 Am. Jur. *Proof of Facts* 3d 239 § 15, at 287 (2002). *American Jurisprudence* further states: "Many courts have phrased the issue of adverse use in terms of a claim of right. Although some have phrased the elements of prescription to include both adverse or hostile use and a claim of right, in practice, proof of adverse use and of a claim of right merge." 2 Am. Jur. *Proof of Facts* 3d 125 § 5, at 144 (1988).

Secondly, it "is well-established that evidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse." *Bundy*, 412 S.C. at 310, 772 S.E.2d at 173; *see* 2 Am. Jur. *Proof of Facts* 3d 197 § 6, at 218 (1988) ("Any use of property which is not hostile or adverse to the interests or title of the property owner cannot ripen into a prescriptive right."). Therefore, to the extent that there is a difference between the two terms, there still could not be a legitimate claim of right without adverse use.

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458 (1951) ("It has long been recognized that the requirements necessary to establishing a right by prescription are: . . . (3) that the use or enjoyment was adverse or under claim of right." (citing *Lawton*, *Williamson*, *Poole*, *Steele*, and *Sanitary & Aseptic Package Co.*)). Because this Court offered no explanation for dropping the comma, and because, in later cases, this Court relies on decisions in which the comma appears, we believe the failure to cite the third element with the comma behind "adverse" was unintentional.

Accordingly, we hold adverse use and claim of right cannot exist as separate methods of proving the third element of a prescriptive easement as the two terms are, in effect, one and the same. Thus, we overrule those decisions that express a contrary conclusion of law. We also take the opportunity to emphasize that a claimant's belief regarding the permissiveness of his use of property is irrelevant when determining the existence of a prescriptive easement. Instead, courts in this state should only determine whether the claimant's use was indeed adverse.

In sum, we conclude that when analyzing the third element of a prescriptive easement, courts in this state should apply the test for adverse use. *See Williamson*, 107 S.C. at 400, 93 S.E. at 16 ("[W]hen it appears that claimant has enjoyed an easement openly, notoriously, continuously, and uninterruptedly, in derogation of another's rights, for the full period of 20 years, the use will be presumed to have been adverse."). However, because the "continuous" and "uninterrupted" elements for adverse use are already required to establish a prescriptive easement, the subtest for "adverse use" only further requires the claimant's use be "open" and "notorious." Thus, we believe the test for a prescriptive easement can be simplified as follows:

> In order to establish a prescriptive easement, the claimant must identify the thing enjoyed, and show his use has been open, notorious, continuous, uninterrupted, and contrary to the true property owner's rights for a period of twenty years.

Applying this test to the case at hand, as will be discussed, we find there is a genuine issue of material fact as to whether St. John's Water can prove the "open" and "notorious" elements of a prescriptive easement; therefore, we conclude the Court of Appeals erred in affirming the master's grant of summary judgment in favor of St. John's Water.

1. Open

"'Open' generally means that the use is not made in secret or stealthily. It may also mean that it is visible or apparent." Restatement (Third) of Property (Servitudes) § 2.17(h) (2000). Here, the water main is located underground. Both Tract 498 and Tract 135 are heavily wooded and undeveloped. According to Simmons, the water meter was hidden under bushes when he first discovered it. The water main also had not been "blue-flagged" at that time. Considering these

conditions, we find there is a genuine issue of material fact as to whether St. John's Water's use was open. While this finding is sufficient to warrant a reversal of the Court of Appeals' decision to uphold the master's grant of summary judgment in favor of St. John's Water, we proceed to address the "notorious" element of a prescriptive easement for the benefit of the parties on remand.

2. Notorious

"'Notorious' generally means that the use is actually known to the owner, or is widely known in the neighborhood." Restatement (Third) of Property (Servitudes) § 2.17(h) (2000). Simmons claims he was unaware of the water main because he lived on another parcel located further up Kitford Road, which used well water. Nevertheless, the master determined that because a majority of the area's residents are getting their water out of a spigot, the fact that there is a water main being used to supply the water is widely known, or "notorious." We disagree with this determination because Simmons' water also came from a spigot, but was supplied by a water well. Further, even if it is widely known that a majority of the neighborhood's water comes from a water main that does not necessarily mean the location of the water main is widely known. Or, in other words, it does not necessarily mean it is widely known that St. John's Water is using Simmons' property for the use of the water main.

Consequently, we hold there is a genuine issue of material fact as to whether St. John's Water has established each element of a prescriptive easement by clear and convincing evidence.[4] Thus, we reverse the portion of the Court of Appeals'

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[4] Our holding is consistent with other jurisdictions that have considered this issue. As articulated in American Law Reports:

> Where the pipes or other conduits as to which easements have been claimed were buried underground and their presence was not physically apparent throughout the prescriptive period, the courts have generally concluded that there was insufficient notoriety of the user to permit prescription to run against the servient estate. This result has often been reached where there was an absence of substantial evidence that the servient parties had any notice or information of the existence of the facility and its user.

decision affirming the master's grant of summary judgment in favor of St. John's Water and remand this matter for additional proceedings consistent with the test for a prescriptive easement as articulated in this opinion.

B. Berkeley Electric

1. Express Easements

Simmons next contends the Court of Appeals erred in determining Berkeley Electric did not exceed the scope of the express easements. To support his contention, Simmons relies on language from this Court's opinion in *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 28 S.E.2d 545 (1943). In *Hill*, we stated, "a grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated." *Hill*, 204 S.C. at 96, 28 S.E.2d at 549. While Simmons recognizes that the 1972 easement permits Berkeley Electric to maintain distribution lines over Tract 498, Simmons asserts Berkeley Electric exceeded the scope of the easement by unreasonably extending distribution lines over a portion of Tract 498. Specifically, Simmons argues Berkeley Electric could have placed its distribution lines in a way that would have been less burdensome to the use and enjoyment of his property. We decline to reach the merits of this argument. Because Simmons failed to raise this issue in his petition for rehearing before the Court of Appeals, we find it unpreserved for our review. *See Sloan v. S.C. Dep't of Transp.*, 365 S.C. 299, 307-08, 618 S.E.2d 876,

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J. H. Crabb, Annotation, *Easement by prescription in artificial drains, pipes, or sewers*, 55 A.L.R.2d 1144, 1167 (1957 & Supp. 2015); *see City of Montgomery v. Couturier*, 373 So. 2d 625, 628 (Ala. 1979) (affirming the trial court's finding that the City of Montgomery did not establish a prescriptive easement to an underground pipe because the pipe was hidden under a large hedgerow and because water flowed through the pipe only during heavy rains); *Holman v. Richardson*, 76 So. 136, 138 (Miss. 1917) (holding a prescriptive easement was not established over underground drain tiles since they were unknown to the property owner until three years prior to the start of the litigation and their existence was not open and notorious); *Maricle v. Hines,* 247 S.W.2d 611, 613 (Tex. Civ. App. 1952) (determining claimant did not establish a prescriptive easement to the use of an underground sewer line because he failed to prove his use was "open, notorious and adverse").

880 (2005) (providing that in order for an issue to be preserved for the Supreme Court's review, the issue must have been raised in a petition for rehearing before the Court of Appeals).

2. Prescriptive Easement

Finally, Simmons asserts the Court of Appeals erred in affirming the master's grant of summary judgment in favor of Berkeley Electric because Berkeley Electric failed to prove each element of a prescriptive easement by clear and convincing evidence. In addition, Simmons argues he presented more than a scintilla of evidence to survive Berkeley Electric's summary judgment motion. Simmons believes that, in finding otherwise, the Court of Appeals improperly weighed the evidence instead of deciding whether there was a material dispute of fact. We disagree.

"[T]he determination of the existence of an easement is a question of fact in a law action." *Jowers v. Hornsby*, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987). This Court reviews the trier of fact's determination of whether an easement exists as an action at law. *Id.* Therefore, our scope of review is limited to the correction of errors of law, and we will not disturb the master's factual findings that have some evidentiary support. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 87, 221 S.E.2d 773, 776 (1976).

Simmons contends, and Berkeley Electric agrees, that Berkeley Electric must show that any distribution lines crossing Tract 135 are covered under a prescriptive easement since neither the 1956 easement nor the 1972 easement grants Berkeley Electric the right to run distribution lines over Tract 135. To support Berkeley Electric's position that any distribution lines crossing Tract 135 were acquired under a prescriptive easement, Berkeley Electric submitted affidavits from Thomas Seeney and Richard Frank, one current and one former supervisor over Berkeley Electric's operations in the Johns Island District. Both Seeney and Frank worked for Berkeley Electric since the late 1970's. Both stated: they were familiar with the age, configuration, and characteristics of the distribution line located at 3507 Kitford Road; the line is clearly visible from Kitford Road; to the best of their recollections, the line had never been moved; the power poles for the line have birthmarks of 1984 and 1986; and that they believed the line has been in its current configuration since at least 1980. Based on this testimony, both the master and Court of Appeals determined Berkeley Electric

established a prescriptive easement to the distribution line in its current configuration.

We decline to overrule the portion of the Court of Appeals' decision affirming the master's grant of summary judgment on this issue. Both Seeney and Frank were able to identify the power line, both attested the line had been in its current location for at least twenty years without interruption, and that the line was visible from Kitford Road. Thus, we conclude Berkeley Electric has presented evidence to prove each element of a prescriptive easement.

Simmons contends he presented enough evidence to contradict the two affidavits and survive Berkeley Electric's motion for summary judgment. To support his contention, Simmons relies on two plats, two system maps, and an affidavit. The plats Simmons relies on are of neighboring properties. A portion of Simmons' property, however, is illustrated on the plats. That portion does not show all of the power lines Simmons contends run across his property. According to Simmons, this discrepancy is enough to create a material dispute of fact. Viewing the evidence in a light most favorable to Simmons, we disagree. As discussed, the plats were not created to show Simmons' property, nor do they purport to illustrate all of the power lines encumbering the area. Thus, we find these plats do not create a dispute of material fact.

Simmons next relies on two system maps Berkeley Electric produced during discovery. According to Simmons, these maps show the distribution line in two different locations which creates a dispute of material fact as to whether the distribution line has been in the same location for over twenty years. We disagree. The system maps are not drawn to scale, nor do they identify any property lines. Without additional testimony as to what these maps depict, we find these maps do not create a dispute of material fact.

Finally, Simmons relies on his affidavit, which he contends contradicts Frank's and Seeney's affidavits by stating he had personal knowledge the distribution line was not in the same location in 1980. While Simmons did attest that he had personal knowledge the distribution line in question has not been in its current location for over twenty years, in support of that statement he references and relies on one of the plats discussed above. He does not state how he personally was aware of the power line's location over the years. Therefore, we conclude Simmons has not presented evidence which gives rise to a dispute of material fact.

Consequently, we hold the Court of Appeals properly affirmed the master's grant of summary judgment in favor of Berkeley Electric.

IV. Conclusion

In conclusion, we affirm the portion of the Court of Appeals' decision that upheld the master's grant of summary judgment in favor of Berkeley Electric. We reverse the portion of the Court of Appeals' decision that upheld the master's grant of summary judgment in favor of St. John's Water and remand for additional proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KITTREDGE and HEARN, JJ., concur. Acting Justices Jean H. Toal and James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Nathaniel Witherspoon, Petitioner.

Appellate Case No. 2016-000306

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
The Honorable Deadra L. Jefferson, Circuit Court Judge,

Opinion No. 27675
Submitted October 4, 2016 – Filed November 2, 2016

REVERSED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari to review the Court of Appeals' opinion in *State v. Witherspoon*, Op. No. 2015-UP-556 (S.C. Ct. App. filed Dec. 16, 2015). We grant the petition, dispense with further briefing, and reverse the Court of Appeals' decision.

At petitioner's trial for first-degree criminal sexual conduct (CSC) and first-degree burglary, the trial judge instructed the jury on section 16-3-657 of the South Carolina Code, which provides that testimony of the victim need not be corroborated in prosecutions for CSC.[1] Defense counsel objected to the charge as an improper comment on the facts, but was overruled. Petitioner was convicted of both charges and sentenced to eighteen years' imprisonment for each conviction, to be served concurrently. The Court of Appeals affirmed.

After the Court of Appeals issued its opinion in *Witherspoon*, this Court held, in *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016), that a jury charge including the language of section 16-3-657 was confusing and an unconstitutional comment on the facts.[2] This Court explained that, "[b]y addressing the veracity of a victim's testimony in its instructions, the trial court emphasizes the weight of that evidence in the eyes of the jury." *Id.* The opinion explicitly overruled precedent condoning the use of section 16-3-657 as a jury charge, and provided that the ruling would be effective for all cases pending on direct appeal. *Id.*

Moreover, given the centrality of the issue of credibility in this case, and the absence of other overwhelming evidence of petitioner's guilt, we find the erroneous charge instructing the jury that the victim's testimony need not be corroborated was prejudicial.

[1] S.C. Code Ann. § 16-3-657 (2015).

[2] *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *State v. Jackson*, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989) ("Under South Carolina law, it is a general rule that a trial judge should refrain from all comment which tends to indicate to the jury his opinion on the credibility of the witnesses, the weight of the evidence, or the guilt of the accused.").

REVERSED.

PLEICONES, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur. FEW, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Estate of Marion M. Kay

Edward D. Sullivan, as Personal Representative of the Estate of Marion M. Kay, Appellant-Respondent,

v.

Martha Brown and Mary Moses, Respondents-Appellants.

Appellate Case No. 2013-002319

Appeal From Laurens County
Donald B. Hocker, Probate Court Judge
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5414
Heard June 3, 2015 – Filed June 15, 2016
Withdrawn, Substituted and Refiled November 2, 2016

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Daryl G. Hawkins, of the Law Office of Daryl G. Hawkins, LLC, of Columbia, for Appellant.

John R. Ferguson, of Cox, Ferguson, & Wham, LLC, of Laurens, for Respondents.

WILLIAMS, J.: In this cross-appeal, Edward D. Sullivan (Appellant), the personal representative of Marion Milam Kay's estate (the Estate), contests the circuit court's decision to affirm the probate court's order[1] reducing Appellant's compensation as well as denying Appellant's request for reimbursement of certain fees and expenses in connection with the settlement of the Estate. Martha Milam Brown and Mary Leona Milam Moses (collectively "Respondents"), two beneficiaries of the Estate, cross-appeal, arguing the probate court improperly (1) awarded Appellant a fee equivalent to 10% of the Estate when Appellant acted in bad faith; (2) failed to require Appellant to pay all costs and attorney's fees associated with the settling of the Estate; (3) failed to rule on certain beneficiaries' prospective entitlement to additional proceeds from the Estate should Respondents prevail on appeal; (4) limited Respondents' counsel's request for attorney's fees; and (5) granted Appellant equitable relief when Appellant acted with unclean hands. We affirm in part, reverse in part, and remand.

FACTS

This appeal arises out of Appellant's administration of the Estate of Marion Milam Kay who passed away on May 3, 2007. In her last will and testament, Kay appointed Appellant to serve as her personal representative (PR). As PR for the Estate, Appellant was charged with the responsibility of distributing Kay's assets, and in turn, Kay's will granted Appellant "reasonable compensation for the services rendered and reimbursement for reasonable expenses." Pursuant to the terms of Kay's will, her assets were distributed as follows: Lisbon Presbyterian Church received 25%; the Lisbon Presbyterian Cemetery Fund received 25%; the Presbyterian Home of South Carolina received 10%; her two step-grandchildren, Bart and Martha Heard, each received 10%; and Respondents each received 10%. Kay's will also granted her neighbor, Charles Copeland, an eight-month option to purchase a one-half undivided interest in an adjoining 330-acre parcel (the Farm)

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[1] Pursuant to section 62-1-308(a) of the South Carolina Code (Supp. 2014), the probate court's order was appealed to the circuit court, which affirmed the probate court in a Form 4 order. *See* § 62-1-308(a) ("A person interested in a final order, sentence, or decree of a probate court may appeal to the circuit court in the same county, subject to the provisions of Section 62-1-303."). Because Appellant and Respondents essentially take issue with the rulings of the probate court, we frame their arguments accordingly, acknowledging the procedural posture of this case.

at fair market value. The Estate, valued at $513,491, consisted primarily of Kay's home (the Home) and the ten acres[2] on which the Home was situated, as well as the Farm.

Prior to Appellant submitting a petition for settlement to the probate court, several issues arose in the administration of the Estate. Appellant stated Respondents, who owned the other one-half interest in the 330-acre parcel, were "bitterly disappointed" upon learning they did not inherit Kay's entire one-half interest in the Farm. Respondents claimed Brown was entitled to an additional five acres—as promised prior to Kay's death—and Kay did not have the right to devise her interest to anyone other than the heirs of W.H. Milam.[3] Respondents' claim to a portion of the Farm was at odds with the option to purchase afforded to Copeland in Kay's will. Further, Appellant discovered that the owners of the Farm granted to each other a "right of first refusal" in 1972, which created a potential conflict with Copeland's option to purchase the Farm.

Because Kay bequeathed the Estate to numerous entities with varying interests, Appellant stated he had to determine the most equitable means of accommodating each beneficiary. According to Appellant, three of the residual beneficiaries, whose interests totaled 70% of the Estate, desired to receive their share of the Estate in cash rather than an interest in real estate. In an effort to sort out the competing claims, Appellant hired a surveyor and an appraiser and met several times with Copeland about exercising his option to purchase.

On May 2, 2008, approximately one year after Kay's death, Appellant submitted a proposal to Respondents and Copeland, subject to the approval of all the beneficiaries and the probate court. In the proposal, Appellant recommended conveying five acres to Brown at no cost, conveying the 46.85 acres that adjoined Copeland's land to Copeland at its appraised value, and offering the remainder of the Farm to Respondents at the appraised value. Appellant testified neither Brown nor Moses ever responded to this proposal. After a meeting with all the beneficiaries later that summer, Appellant drafted a second proposal and presented

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[2] The Home and 6.238 acres are separated from the remaining 3.762 acres (the Lot) by a public roadway.

[3] Brown and Moses were W.H. Milam's daughters.

it to Respondents. Appellant stated Respondents again failed to respond or offer a counter-proposal, and at that time, Respondents retained counsel.

After twenty months passed, and without a resolution of the Estate, Appellant filed a partition and declaratory judgment action in circuit court on January 1, 2009. Appellant stated the purpose of filing this action was to determine the rights of the parties—arising out of Copeland's option to purchase, the 1972 right of first refusal, and other claims made by Respondents—and to generally clear title to the property so the Estate could be settled. Appellant amended the complaint on March 4, 2009, at which time Respondents filed a counterclaim asserting a right to five acres. Litigation ensued, and the parties engaged in discovery. After fifteen months, the parties retained a mediator in an attempt to resolve the dispute.

Just prior to mediation, Appellant reached an agreement with Rowland Milam, a relative of Respondents, to purchase the Estate's one-half undivided interest in the Farm, the Home, and the Lot. The Estate was not responsible for any repairs or rollback taxes, and the property was sold using a quitclaim deed. The final purchase price was $367,000, approximately 94% of the 2007–2008 appraised value. All parties consented to the sale of the property. Appellant then made the final distribution of Kay's personal effects and filed the proposal for distribution with the probate court on November 12, 2010.

Respondents requested a hearing, which took place on February 2, 2011, and February 21, 2011. At the hearings, the probate court received testimony and evidence from the parties but disallowed the introduction of an affidavit prepared by Appellant detailing his administration of the Estate and an affidavit from R. David Massey, Esquire, in support of Appellant's request for compensation.

The court subsequently issued an order, finding Appellant "unnecessarily complicated the Estate by insisting on filing a partition action." The court ruled Appellant should not have filed a partition/declaratory judgment action, but rather should have deeded out the Estate to the beneficiaries by a deed of distribution because it found "no necessity for a sale of the real estate." Further, the probate court stated Appellant "unnecessarily complicated the Estate by converting an eight-month option to purchase the Estate's one-half interest in its real estate into an indefinite right to purchase and by giving the option holder the right to buy only a portion of the property contrary to the Will."

The probate court then ruled on Appellant's entitlement to fees and commissions, finding Appellant's claims for commissions were not adequately documented because he "had no method or formula for determining the amount for the four draws he gave himself other than by pulling a figure out of the air." Appellant's total draws from the Estate on the date of the hearing amounted to $93,775, or 18.3% of the Estate's value, which the court found to be far greater than the statutory presumption of 5%. As a result, the court held "the commissions sought by [Appellant] [we]re clearly excessive," particularly when Appellant offered no alternative for valuing his services. The court acknowledged Appellant "did an excellent job in securing the sales price for the real estate" and had "exemplary credentials and good standing in the Bar," but this alone did not automatically justify the relief requested. In addition, the probate court found Appellant did not act in bad faith.

The probate court approved a prior payment to Appellant's law firm, Collins & Lacy, P.C., for $13,499.58 and found the firm was entitled to an additional $12,306.80. However, the court questioned the necessity of 204.6 hours of paralegal work. The probate court disallowed Appellant's request for attorney's fees for Appellant's counsel, noting that—although counsel represented Appellant well—it did not believe the Estate should pay these attorney's fees. Further, the probate court denied Appellant's request for costs pertaining to the petition for settlement and Appellant's expert witness fees. The court did, however, award attorney's fees to Respondent's counsel in the amount of $19,860, to be paid from the Estate.

Based on the probate court's findings, it concluded Appellant had a right to retain $51,300, or approximately 10% of the Estate's value. As a result, Appellant was required to refund the Estate—within thirty days of the order—all additional commissions, totaling $42,475.[4] After the probate court denied Appellant's Rule 59(e), SCRCP, motion to reconsider, Appellant and Respondents appealed to the circuit court. Following a hearing on July 19, 2013, the circuit court issued a Form 4 order in which it affirmed the order of the probate court and required all parties to bear the costs of appeal to the circuit court. Appellant and Respondents then appealed to this court.

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[4] The probate court held if Appellant completed the winding up of the Estate, then he would be entitled to an additional compensation of $2,500 that could be deducted from the amount owed to the Estate.

STANDARD OF REVIEW

On appeal from a final order of the probate court, the circuit court must apply the same standard of review that an appellate court would apply on appeal. *In re Howard*, 315 S.C. 356, 361, 434 S.E.2d 254, 257 (1993). The standard of review applicable to cases originating in the probate court depends upon whether the underlying cause of action is at law or in equity. *In re Estate of Hyman*, 362 S.C. 20, 25, 606 S.E.2d 205, 207 (Ct. App. 2004); *In re Thames*, 344 S.C. 564, 568, 544 S.E.2d 854, 856 (Ct. App. 2001).

This appeal stemmed from Appellant's petition for settlement of the Estate, including a determination of Appellant's entitlement to commissions, expenses, and costs; each party's entitlement to attorney's fees; and Respondents' motion to remove Appellant as PR of the Estate. Both parties concede—and we agree—that the affirmative relief sought by the parties lies in equity. *See Morris v. Tidewater Land & Timber, Inc.*, 388 S.C. 317, 324, 696 S.E.2d 599, 603 (Ct. App. 2010) ("An action for an accounting sounds in equity."); *Dean v. Kilgore*, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (1993) (finding action to remove a personal representative of estate was an equitable action). If a matter is decided by the probate court and affirmed by the circuit court, this court applies the two-judge rule. *Dean*, 313 S.C. at 259–60, 437 S.E.2d at 155–56. When the circuit court concurs with the probate court in an equity case, the standard of review for this court is whether any evidence reasonably supports the findings of the court below. *Id.* at 260, 437 S.E.2d at 155–56.

LAW/ANALYSIS

I. Appellant's Appeal

Appellant raises the following issues on appeal, arguing the circuit court erred in affirming the probate court because the probate court improperly (1) required Appellant to refund a portion of his compensation when Appellant acted reasonably, his compensation was substantiated by the evidence, and a refund would unjustly enrich certain beneficiaries; (2) unjustly enriched one or more beneficiaries by returning Appellant's compensation; (3) denied Appellant his due process rights because Respondents did not properly request that the probate court review his compensation; (4) denied Appellant's request for fees and expenses in connection with the hearing to settle the Estate; (5) improperly awarded

Respondents' counsel attorney's fees; and (6) denied Appellant's Rule 59(e), SCRCP, motion to reconsider. We agree in part.

A. Appellant's Fee

Appellant first claims the probate court improperly reduced his compensation for administering and settling the Estate because he acted reasonably and his actions were substantiated by the evidence. We disagree.

Pursuant to section 62-3-719(a) of the South Carolina Code (Supp. 2014),

> Unless otherwise approved by the court for extraordinary services, a personal representative shall receive for his care in the execution of his duties a sum from the probate estate funds not to exceed five percent of the appraised value of the personal property of the probate estate plus the sales proceeds of real property of the probate estate received on sales directed or authorized by will or by proper court order, except upon sales to the personal representative as purchaser.

However, "[t]he provisions of this section do not apply in a case where there is a contract providing for the compensation to be paid for such services, or *where the will otherwise directs*, or where the personal representative qualified to act before June 28, 1984." S.C. Code Ann. § 62-3-719(c) (Supp. 2014) (emphasis added). Item V(3) of Kay's will addressed the PR fee schedule and stated, "For its services as personal representative, the individual personal representative shall receive reasonable compensation for the services rendered and reimbursement for reasonable expenses."

In Appellant's petition for settlement to the probate court, he requested $93,775 for commissions already paid and $13,447.05 for additional commissions yet to be paid. The probate court concluded compensating Appellant for the amounts requested would total 21% of the Estate's value, which was far beyond the statutorily mandated 5% pursuant to section 62-3-719(a). Because Appellant failed to provide a legitimate basis for his fees, the probate court concluded a reduction of $42,475 was warranted, bringing Appellant's commission to 10% of the Estate's value.

On appeal, Appellant has included all of the invoices, time sheets, affidavits, and correspondence in support of his claim that he is entitled to the compensation he requested from the probate court. Appellant also cites to Item VII of Kay's will to support his administrative decisions underpinning his fees. Item VII authorizes the PR

> to exercise all powers in the management of [the] Estate . . . upon such terms and conditions as to [Kay's] personal representative may seem best, and to execute and deliver any and all instruments and to do all acts which [her] personal representative may deem proper or necessary to carry out the purposes of this [] will.

We recognize that Appellant encountered difficulties in administering certain assets of the Estate and made efforts to rectify these interests. While we do not take issue with Appellant's belief that he acted reasonably and in the best interests of the Estate, we also do not believe the probate court's decision to decrease Appellant's compensation based on the value of the Estate and the court's view of the evidence is without support. Accordingly, we find the probate court acted properly in establishing a reasonable compensation for Appellant's services as PR and affirm the circuit court's decision to uphold the probate court's award of compensation to Appellant in the amount of $51,300.

B. Unjust Enrichment

Next, Appellant argues the circuit court's decision to require him to return a portion of his compensation unjustly enriches certain beneficiaries who requested cash from the Estate and have benefitted from the services of Appellant. We disagree.

Appellant states "a majority in interest of the residuary beneficiaries (70%) desired that the PR liquidate the real estate so that they could receive a cash distribution rather than an undivided interest in real estate. Accordingly[,] the [p]robate [c]ourt's ruling unjustly enriches these beneficiaries." As discussed in Respondents' cross-appeal, we do not believe requiring Appellant to return a portion of his fees to the Estate would unjustly enrich these beneficiaries because these funds are properly part of the Estate's assets. *See Dema v. Tenet Physician Servs.–Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009) ("A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another."). Therefore, Appellant's theory of restitution

is inapplicable to the case at hand. *See Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14–15 (Ct. App. 1988) ("Unjust enrichment is usually a prerequisite for enforcement of the doctrine of restitution; if there is no basis for unjust enrichment, there is no basis for restitution."). In addition, we find it would be inequitable to punish these beneficiaries under the doctrine of unjust enrichment based upon their desire to have cash—which they are rightfully entitled to and which Appellant consented to—as opposed to a share in the real estate. Consistent with Kay's will, a return of these monies would be divided among these beneficiaries in accordance with the distribution scheme provided in her will. Accordingly, we affirm the circuit court's ruling to affirm the probate court on this issue.

C. Due Process

Appellant contends the probate court erred in requiring him to return a portion of his compensation because Respondents failed to comply with the proper procedure for contesting Appellant's entitlement to his compensation, thereby depriving him of reasonable notice and an opportunity to be heard. We disagree.

Section 62-3-721(a) of the South Carolina Code (Supp. 2014) outlines the proper procedure for contesting a PR's compensation:

> After notice to all interested persons, on petition of an interested person or on appropriate motion if administration is under Part 5 [sections 62-3-501 et seq.], . . . the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

Appellant contends Respondents failed to file a formal petition in violation of section 62-3-721. Although our review of the record uncovers no formal petition, we conclude the parties were aware of the issues that would be brought before the probate court at the petition for settlement, including Respondents' disagreement with Appellant's compensation. *See Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) ("Procedural due process mandates that a litigant be placed on notice of the issues which the court is to consider."). The following

dialogue between the probate court and the parties affirms our conclusion on this issue:

> Court: Who's the moving party in this [case]?
>
> Appellant's Counsel: As I understand it, Ms. Moses and Ms. Brown have requested the hearing, your Honor.
>
> . . . .
>
> Court: Apparently closing documents were sent out and as per statutory right, interested parties have the right to demand [a] hearing concerning the closing of the Estate. And evidently, [Respondents' counsel], that's what you've done?
>
> Respondents' Counsel: Yes, sir.
>
> . . . .
>
> Court: Okay . . . Let me ask you, [Appellant's counsel]. Were all of the beneficiaries under the will noticed of today's hearing?
>
> Appellant's Counsel: Yes they were, your honor.
>
> . . . .
>
> Court: [W]hen I've done these hearings when there's been a demand, it typically in most cases just makes a little more sense, and I think the process goes a little smoother, is if the -- because typically, it is a complaint about something the PR's done or not done. So typically it runs a little smoother if we start the case off as if you [Appellant] are the moving party. So, if there's not a big hang-up with that, that's how I would like to do it.

Based on the foregoing, we hold any purported defects in notice were waived at the hearing when the parties acknowledged the issues before the court and proceeded with the hearing. *See Strickland v. Consol. Energy Prods. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980) ("A general appearance constitutes a voluntary

submission to the jurisdiction of the court and waives any defects and irregularities in the service of process."); *Connell v. Connell*, 249 S.C. 162, 166–67, 153 S.E.2d 396, 398–99 (1967) (stating if a defendant, by his appearance, "asks any relief which can only be granted on the hypothesis that the court has jurisdiction of his person, then he has made a general appearance . . . and waives any defect in the jurisdiction arising either from the want of service on the defendant or from a defect therein"). Further, based on the length of the hearing, as well as the exhibits and documentation submitted to the probate court, we find Appellant had ample notice and an opportunity to be heard and, thus, affirm the circuit court's decision on this issue. *See Blanton*, 351 S.C. at 542, 570 S.E.2d at 569 ("Procedural due process contemplates notice, a reasonable opportunity to be heard, and a fair hearing before a legally constituted impartial tribunal.").

D. Appellant's Counsel's Attorney's Fees and Expenses

Appellant claims the circuit court erroneously denied his request for his counsel's attorney's fees, expert witness fees, and certain costs for time and preparation on the petition for settlement. We disagree.

In support of his claim for attorney's fees and expenses, Appellant cites section 62-3-720 of the South Carolina Code (Supp. 2014), which states, "If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred."

While we agree that section 62-3-720 affords a PR reimbursement for costs and attorney's fees in connection with the administration and protection of the Estate, we find the probate court properly determined which fees and costs would be borne by the Estate and which would be borne by Appellant. We concur with the probate court's finding that Appellant's counsel's fees primarily stemmed from the contest between Appellant and Respondents over the amount of his compensation and, thus, were properly assessed against Appellant in his individual capacity. Further, we conclude this statute was intended to cover attorney's fees and expenses in connection with prosecuting and defending claims against the Estate, as opposed to the situation before the probate court. *See* S.C. Code Ann. § 62-3-715(20) (Supp. 2014) (providing a PR, "acting reasonably for the benefit of the interested persons, may properly . . . prosecute or defend claims, or proceedings in any jurisdiction for

the protection of the estate and of the personal representative in the performance of his duties").

To that end, we find the probate court properly approved the attorney's fees already paid to Collins and Lacy in the amount of $13,499.58 and approved of an additional $12,306.80 to Collins and Lacy for attorney's fees and costs that were incurred as part of Appellant's administration of the Estate. We agree with the probate court that those fees and costs were properly borne by the Estate and find that award reasonable given the circumstances and the overall value of the Estate. We also note that—unlike sections 62-3-715(20) and -720—section 62-3-721 makes no provision for the payment of a PR's attorney's fees or expenses connected with a proceeding to review the PR's compensation. *See* S.C. Code Ann. § 62-3-721(a) (Supp. 2014) ("After notice to all interested persons, . . . the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.").

We also find the probate court properly considered the nature of the testimony and the role of other witnesses in choosing which fees to assess against the Estate and against Appellant. The probate court denied Appellant's request for expert witness fees for an appraiser and consultant, both of whom testified at the hearing. While the probate court required Appellant to pay for the appraiser's and the forestry consultant's expert witness fees connected with the hearing, it also required the Estate to pay $5,000 for the appraisal of Kay's property and $750 for the forestry consultant's work valuing the timber on Kay's property. We agree the appraisal and consultant work were costs directly connected with the valuation of the Estate, and as such, were legitimate expenses properly paid out of the Estate's assets. We further concur with the probate court's decision to assess the expert fees against Appellant as their work product and valuations were not contested issues at the hearing. Based on the foregoing, we uphold the circuit court's decision to affirm the probate court on this issue.

E. Respondents' Counsel's Attorney's Fees

Appellant contests the probate court's decision to award Respondents' counsel attorney's fees based on the common fund doctrine. We agree.

"The common fund doctrine allows a court in its equitable jurisdiction to award reasonable attorney's fees to a party who, at his own expense, successfully maintains a suit for the creation, recovery, preservation, or increase of a common fund or common property." *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329 (2008) (citing *Johnson v. Williams*, 196 S.C. 528, 531, 14 S.E.2d 21, 23 (1941)). "Attorneys' fees awarded pursuant to the common fund doctrine come directly out of the common fund created or preserved." *Id.* (citation omitted). The rationale for awarding attorneys' fees in this manner is based on the principle that "one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses." *Id.* (citation omitted).

However, the allowance of attorney's fees out of a common fund is subject to abuse and is only permitted in exceptional cases when required to promote justice. *Johnson*, 196 S.C. at 532, 14 S.E.2d at 23. Although the attorney's services might have benefitted all parties, fees cannot be awarded when the interests of the parties are adverse. *Bedford v. Citizens & S. Nat'l Bank of S.C.*, 203 S.C. 507, 515, 28 S.E.2d 405, 407 (1943). Before an attorney may be compensated out of a common fund, a contract of employment must exist, whether express or implied in law, between the attorney and all parties with an interest in the fund. *Johnson*, 196 S.C. at 532–33, 14 S.E.2d at 23.

Citing to the common fund doctrine, the probate court awarded Respondents attorney's fees and held, "Equity requires that all heirs pay for the work of Defendants' attorney[] because his work preserved and protected a common fund[] not just for the benefit of Defendants, but for all heirs." We find the probate court improperly applied this doctrine.

Respondents' decision to hire counsel was based upon their disagreement with the division of the Estate and the amount of Appellant's compensation. Because the common fund doctrine requires all interested parties to have the same interests, we do not believe the probate court should have required the Estate to pay for

Respondents' attorney's fees. Several beneficiaries were in favor of selling the real estate as opposed to an in-kind distribution. Specifically, Penelope Arnold, the director of the Presbyterian Home of South Carolina's charitable foundation, testified "[the Presbyterian Home] do[es] not have the wherewithal financially to pay property taxes, to keep the land up, which we would be responsible for doing or paying someone to do that. And so the preference is always to sell real estate and receive the proceeds." Arnold further stated that, at a prior meeting with all the beneficiaries to resolve issues with the Estate's division, she and Reverend Hunter, of Lisbon Presbyterian Church, were not well-received by Respondents based on their preferences over the Estate's division. Lisbon Presbyterian Church also preferred to receive its 25% share of the Estate in cash.

In addition, neither of these beneficiaries took issue with Appellant's compensation as did Respondents. Furthermore, while Respondents' counsel's efforts resulted in monies being returned to the Estate, which arguably was for the benefit of all the beneficiaries, we find there was no "contract of employment, whether express or implied in law, between the attorney and all parties with an interest in the fund." *Peppertree Resorts, Ltd. v. Cabana Ltd. P'ship*, 315 S.C. 36, 41, 431 S.E.2d 598, 601 (Ct. App. 1993). If all the beneficiaries agreed on the distribution plan and took issue with Appellant's compensation, then the common fund doctrine would clearly apply. However, based on the foregoing evidence, we conclude Respondents—not the Estate—should have borne the cost of Respondents' representation. As a result, we reverse the circuit court's decision to uphold the award of Respondents' counsel's attorney's fees pursuant to the common fund doctrine.

F. Rule 59(e) motion

Last, Appellant claims the circuit court erred in affirming the probate court's denial of Appellant's Rule 59(e), SCRCP, motion. We find this argument to be without merit.

In the circuit court's order, it did not rule on whether the probate court properly denied Appellant's post-trial Rule 59(e) motion. Rather, the circuit court—as the court of next review—properly addressed the issues that the parties raised to the probate court. As a result, we find Appellant's attempt to raise this as legal error to be misplaced and without merit. *See* S.C. Code Ann. § 14-8-250 (Supp. 2014) (noting "the [c]ourt need not address a point which is manifestly without merit");

Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit.").

II. Respondents' Cross-Appeal

Respondents raise the following issues on cross-appeal, claiming the circuit court erred in affirming the probate court because the probate court (1) improperly awarded Appellant a fee equivalent to 10% of the Estate when Appellant acted in bad faith; (2) failed to require Appellant to pay all costs and attorney's fees associated with the settling of the Estate; (3) failed to rule on certain beneficiaries' prospective entitlement to additional proceeds from the Estate should Respondents prevail on appeal; (4) limited Respondents' counsel's request for attorney's fees; and (5) granted Appellant equitable relief when Appellant acted with unclean hands. We disagree and address each argument in turn.

A. Appellant's Fee & Bad Faith

Respondents first claim the probate court erred in awarding Appellant a 10% commission because Appellant acted in bad faith. We disagree.

As stated above, we find the probate court properly considered the requisite factors and statutory considerations in its decision to award Appellant a fee equivalent to 10% of the Estate's value. While we recognize section 62-3-719(a) limits a PR's fee to 5% of the Estate, we believe the specific circumstances and competing interests that otherwise prolonged the settling of "a fairly basic" estate merited an imposition of a higher fee. Further, we find a 10% fee was "reasonable compensation" for Appellant's services as stated in Kay's will.

Although Respondents contend Appellant acted in bad faith in the administration of the Estate, we find these allegations to be unsubstantiated and a mischaracterization by Respondents regarding Appellant's efforts as PR. Respondents claim Appellant acted in "violation of his fiduciary duty," "boost[ed] his commission," "bilk[ed] the Estate," "loot[ed] the Estate," and generally incurred "shocking charges . . . against the Estate." Although Appellant likely could have settled the Estate in a timelier and less costly manner, Appellant presented substantiated evidence that he worked diligently over a course of three years to accommodate all interested parties. Further, as noted by the probate court in its order and affirmed by the circuit court on appeal, Appellant has "exemplary credentials and good standing in the Bar." Respondents' contentions that Appellant

acted in bad faith and violated his fiduciary duty to the Estate are not well-founded, particularly when Appellant submitted evidence he consulted with legal counsel on the proper courses of action in administering the Estate; Appellant attempted to meet with all the beneficiaries and create a compromise prior to filing a partition action; and Appellant "did an excellent job in securing the sales price for the real estate."

Based on the foregoing, we find Appellant did not improperly exercise his power in connection with the Estate and presented sufficient evidence to demonstrate he did not breach his duty to the Estate and its beneficiaries. *See* S.C. Code Ann. § 62-3-703(a) (Supp. 2014) (stating a PR has the "duty to settle and distribute the estate . . . as expeditiously and efficiently as is consistent with the best interests of the estate" and the "successors to the estate"). Accordingly, we affirm the circuit court's decision to uphold the probate court's findings on this issue.

B. PR's Court Costs, Attorney's Fees, and Post-Judgment Interest

Next, Respondents contend the probate court erred in failing to require Appellant to pay all costs associated with the proceedings before the probate court, including attorney's fees, court costs, and post-judgment interest. We find this argument unpreserved for our review.

Respondents' argument on this alleged ground of error is conclusory, only stating it would be "grossly unfair for the heirs to pay for the PR's attempts to increase his compensation and further obscure his wrongdoing," and "[i]f the PR chooses to violate his duties and maximize his own interests at the expense of the Estate by filing an appeal, the heirs, who gain nothing by the appeal, should not suffer because of that." We find these two sentences are insufficient to assert legal error and decline to address Respondents' argument on this ground. *See Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (noting when an appellant fails to cite any supporting authority for a position and makes conclusory arguments, the appellant abandons the issue on appeal); Rule 208(b), SCACR (stating that, for appellate review of an issue to occur, the issue must be set forth in a statement of issues and argument).

C. Limitation of Recovery

Respondents argue the probate court erred in failing to rule on certain beneficiaries' prospective entitlement to additional proceeds from the Estate should Respondents prevail on appeal. We find this issue is not properly before this court.

Respondents did not raise this issue either to the probate court or to the circuit court. Accordingly, we find it is unpreserved for review on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review." (citation omitted)). Further, Respondents cite no legal authority to support their position, instead relying on a brief factual argument, which we find insufficient as a matter of law. *See Mulherin–Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593–94 (Ct. App. 2005) (finding party abandoned an issue on appeal by failing to cite any supporting authority and making only conclusory arguments).

D. Respondents' Attorney's Fees

Next, Respondents claim the probate court improperly limited their attorney's post-trial request for additional attorney's fees, citing to the common fund doctrine. Because we reverse the probate court's award of attorney's fees to Respondents' counsel, we decline to address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts need not address remaining issues when the resolution of a prior issue is dispositive).

E. Unclean Hands

Last, Respondents claim the probate court erred in granting Appellant equitable relief because Appellant acted with unclean hands. We find this argument is unpreserved for our review.

Neither the probate court nor the circuit court ruled on whether Appellant acted with unclean hands. Respondents' failure to raise this issue to either court precludes this court's review on appeal. *See Wilke*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for

appellate review." (citation omitted)); *Rock Hill Nat'l Bank v. Honeycutt*, 289 S.C. 98, 104, 344 S.E.2d 875, 879 (Ct. App. 1986) (stating because the theory of unclean hands was not pled or raised to the trial judge, it could not be raised on appeal).

CONCLUSION

Accordingly, we **AFFIRM** the circuit court's decision upholding the probate court's order as to all issues except Respondent's counsel's attorney's fees. Because the common fund doctrine does not apply under these facts, we **REVERSE** the award of attorney's fees to Respondents' counsel. Based on our conclusion that Respondents—not the Estate—must pay for Respondent's counsel's attorney's fees, we **REMAND** the issue of each beneficiary's share of the Estate to the probate court for a determination consistent with this court's opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HUFF, J., concurs.

FEW, A.J., concurring in part and dissenting in part: I concur with the result reached by the majority in all but two respects. First, I would reverse the decision to deny Sullivan's request for attorney's fees and expenses for the petition for settlement. In my view, the probate judge's denial of Sullivan's request for fees and expenses was driven by his disagreement with Sullivan's decision to file a partition action and ultimately sell the estate's interest in the real estate. Sullivan had the right to partition the land pursuant to Kay's will and the probate code and, thus, it was within his discretion to do so. Additionally, as the probate court found in its order and the majority explains in Part II. A of its opinion, Sullivan did not act in bad faith during his administration of the estate.

Moreover, the probate code required Sullivan to file a petition for settlement. *See* S.C. Code Ann. § 62-3-1001(a)(3) (Supp. 2015) (requiring a personal representative to file "an application for settlement of the estate to consider the final accounting or approve an accounting and distribution and adjudicate the final settlement and distribution of the estate"). Moses and Brown requested the hearing on Sullivan's petition for settlement, and at the hearing, Sullivan defended his decision to seek a partition and sell the real estate. Because the probate code provides a personal representative who "defends or prosecutes any proceeding in good faith" is "entitled to receive from the estate his necessary expenses and

disbursements including reasonable attorneys' fees incurred," S.C. Code Ann. § 62-3-720 (Supp. 2015), and Sullivan filed the petition for settlement and appeared at the hearing in good faith, I would find he is entitled to reasonable attorney's fees and expenses.

Second, I question whether the standard of review in an appeal from an equity case is any different simply because two judges have made the same factual determination. The first time the phrase "two-judge rule" was used in this State was in *Nienow v. Nienow*, 268 S.C. 161, 172, 232 S.E.2d 504, 510 (1977). Describing the substance of the rule, the *Nienow* Court stated "concurrent findings of fact by the trial judge and master are binding on this Court unless they are without evidentiary support or against the clear preponderance of the evidence." 268 S.C. at 170, 232 S.E.2d at 509. That description differs from the ordinary standard of reviewing equity cases only by the use of the word "clear." *See Lewis v. Lewis*, 392 S.C. 381, 390-91, 709 S.E.2d 650, 654-55 (2011) (explaining that in equity appeals there is "a burden on an appellant to satisfy the appellate court that the preponderance of the evidence is against the finding of the trial court"). The use of the word "clear" in *Nienow* does not distinguish the rule recited there from the rule applied in *Lewis*. As former Chief Justice Toal noted in her concurrence in *Lewis*, "our standard of review in a particular case depends on the nature of the underlying action and has little to do with the semantics concerning the method by which the case reaches the Court." 392 S.C. at 398, 709 S.E.2d at 658 (Toal, C.J., concurring). I would apply the standard of review from *Lewis*, and I would reach the same result as the majority on all issues except Sullivan's request for attorney's fees and expenses for the petition for settlement.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tzvetelina Miteva, Appellant,

v.

Nicholas Robinson, Respondent.

Appellate Case No. 2014-002484

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

Unpublished Opinion No. 5450
Heard June 16, 2016 – Filed November 2, 2016

AFFIRMED AS MODIFIED

John S. Nichols, of Bluestein Nichols Thompson & Delgado, LLC, of Columbia, for Appellant.

Thomas Franklin McDow, IV and Erin K. Urquhart, of McDow and Urquhart, LLC, and Jennifer M. Creech, of the Law Office of Jennifer M. Creech, LLC, all of Rock Hill, for Respondent.

WILLIAMS, J.: Tzvetelina Miteva (Wife) appeals the family court's divorce decree, arguing the family court erred in: (1) denying her request for a divorce on the ground of Nicholas Robinson's (Husband) habitual drunkenness; (2) identifying

and apportioning the marital estate on a fifty-fifty basis; and (3) requiring her to pay Husband's attorney's fees. We affirm as modified.

FACTS

Wife and Husband married on November 25, 2007. After almost four years of marriage, Wife filed for divorce on August 30, 2011. The parties had no children during the marriage, but Wife had a minor child and Husband had two adult children from their respective prior marriages. In Wife's complaint, she sought a divorce on the ground of Husband's habitual drunkenness and requested equitable division of the marital assets and attorney's fees. Husband answered and counterclaimed, denying Wife's allegations and seeking equitable division of the marital estate and attorney's fees.

The family court held a final hearing on May 8 and 9, 2013. At the final hearing, Husband and Wife submitted evidence and testimony to substantiate their claims to the family court, specifically addressing each party's claim to several properties that were bought, improved, and sold during their marriage. The family court subsequently issued its final order and denied Wife a divorce on the ground of habitual drunkenness. Because Wife failed to prove by a preponderance of the evidence that she was entitled to a divorce on this ground, the family court granted both parties a divorce on the ground of one-year's separation.

The family court also held the following: (1) the parties transmuted certain properties that were bought and sold during the marriage; (2) Husband's retirement account and mobile homes were nonmarital property; and (3) the family court did not have jurisdiction to divide real property that was not titled in the name of either party. The family court concluded Wife's removal of $115,521 from marital funds was financial misconduct and assigned that amount to Wife. After considering the factors for apportioning marital property as required by section 20-3-620(B) of the South Carolina Code (2014), the family court apportioned 50% of the marital estate to Wife and 50% to Husband. Finally, the family court required Wife to pay all of Husband's attorney's fees, which totaled $27,561.29. Wife submitted a motion to alter or amend the family court's ruling, which the family court denied. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, this [c]ourt reviews factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "[T]his [c]ourt has jurisdiction to find facts in accordance with its view of the preponderance of the evidence." *Epperly v. Epperly*, 312 S.C. 411, 414, 440 S.E.2d 884, 885 (1994). Although the appellate court retains the authority to make its own findings of fact, "we recognize the superior position of the family court . . . in making credibility determinations." *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). Therefore, the appellant bears the burden of convincing this court that the family court committed error or the preponderance of evidence is against the court's findings. *Id.*

I. HABITUAL DRUNKENESS

Wife argues the family court erred in denying her request for a divorce on the ground of habitual drunkenness. We disagree.

"Section 20-3-10(4) of the South Carolina Code . . . provides that habitual drunkenness is grounds for divorce. Habitual drunkenness is the fixed habit of frequently getting drunk; it does not necessarily imply continual drunkenness." *Lee v. Lee*, 282 S.C. 76, 78–79, 316 S.E.2d 435, 437 (Ct. App. 1984). "In order to prove habitual drunkenness, there must be a showing that the abuse of alcohol caused the breakdown of the marriage and that such abuse existed at or near the time of filing for divorce." *Epperly*, 312 S.C. at 414, 440 S.E.2d at 885.

Wife testified Husband was unemployed for half of the marriage. Moreover, Wife claimed, while Husband was unemployed, he would get drunk every day and abuse prescription medication. Wife testified Husband's alcohol consumption and drug use worsened throughout the marriage and caused the marriage to deteriorate.

Wife introduced four police reports to support her testimony. A police report dated April 17, 2010, indicated Wife called police but reported everything was "10-4." On December 5, 2010, Wife again called police and said "Husband ha[d] gone crazy," but she then stated she did not need help. On April 9, 2011, police responded to a call from Wife, but when they arrived, Wife claimed she was fine and would not provide a reason for calling. At the hearing, Wife stated Husband hid in the basement and instructed her to tell police everything was okay. In the

final police report, dated October 21, 2012, Wife reported Husband walked around their house naked in front of her daughter. However, on cross-examination, Wife acknowledged she separated from Husband in 2011, but she waited until October 2012 to file the final police report. Wife claimed she did not know the process for making an allegation, but she then conceded she had contacted police on prior occasions. Additionally, Wife admitted that, on April 30, 2009, she wrote a note indicating if something happened to her, she would like her daughter to stay with Husband.

Zlatka Miteva, Wife's mother, testified she lived in Bulgaria, but stayed with the parties for a few months every year. She stated Husband had a problem with alcohol before the parties married. Zlatka claimed Husband got drunk every day and took prescription medication, which caused him to shake and become aggressive.

Several other witnesses testified regarding Husband's alcohol consumption. Husband's ex-wife, Nasrin Robinson, and one of Husband's daughters, Sophie Robinson, testified they had observed Husband consume alcohol, but they had never seen him drunk. Additionally, both claimed they had never seen Husband become angry when drinking. Nasrin admitted she only saw Husband several times a year. Nasrin and Sophie both acknowledged Husband paid for Sophie's undergraduate and graduate school tuition. Don Pierman, Husband's friend, testified he had known Husband for twenty-five years, but he had never seen him drunk. However, Pierman admitted he had only seen Husband once a year during the past few years.

Husband also testified at the final hearing about his alcohol consumption. Husband admitted he drank alcohol but denied drinking in excess or using drugs. Moreover, Husband asserted he was not intoxicated when police came to the parties' home. Husband testified he was employed as a system auditor when the parties married, and he sometimes worked from home during the marriage. He claimed he was laid off because of a change in management. According to Husband, Wife's daughter saw him naked once when walking from his bedroom to his bathroom; however, he stated he was not expecting to see her.

After considering the foregoing testimony, the family court concluded Wife failed to prove by a preponderance of the evidence that she was entitled to a divorce on the ground of Husband's habitual drunkenness. The family court stated Nasrin and

Sophie might not be disinterested witnesses because of Husband's support obligations but found Pierman's testimony should be given more weight. Additionally, the family court found Husband's appearance and professional accomplishments suggested he was a person of considerable self-control. The family court noted there was no mention of alcohol in any of the police reports and determined the incident report regarding nudity in the presence of Wife's daughter was generated after the separation to create corroboration for the grounds for divorce when no other significant corroboration existed. Furthermore, the family court ascertained Wife's letter, stating she wished for her daughter to stay with Husband, was written half-way through the marriage and occurred during Husband's unemployment when, according to Wife and Zaltka, Husband's drinking was the most evident.

Aware of our de novo standard of review, we concur with the family court's decision on this issue. Because the parties presented conflicting evidence about the nature of Husband's drinking, we find the family court was in the best position to determine the credibility of the witnesses. *See Bodkin v. Bodkin* 388 S.C. 203, 214, 694 S.E.2d 230, 236 (Ct. App. 2010) (affirming the family court's finding that husband failed to establish wife's habitual drunkenness when parties presented conflicting evidence as to how much wife drank and whether it was a problem because "the family court was in the better position to see the witnesses and judge their credibility"). The family court found Pierman's testimony that Husband did not drink in excess was credible. Similarly, it found Husband's appearance and professional accomplishments were indicative of self-control. Based upon these findings as well as the fact that none of the police reports mentioned alcohol, we affirm the family court's finding that Wife did not meet her burden of proof. Furthermore, because the granting of a divorce to Wife on the ground of habitual drunkenness would not have dissolved the marriage any more completely, we find Wife suffered no prejudice by the family court's ruling. *See Mick-Skaggs v. Skaggs*, 411 S.C. 94, 101–02, 766 S.E.2d 870, 873–74 (Ct. App. 2014) (finding the family court acted within its discretion in awarding parties a no-fault divorce, even though wife presented sufficient evidence to establish a fault-based ground for divorce). Thus, we affirm the family court's decision on this issue.

II. IDENTIFICATION AND APPORTIONMENT OF THE MARITAL ESTATE

Wife argues the family court erred in its identification and apportionment of the marital estate. We disagree.

A. Identification of the Marital Estate

Marital property consists of "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation as provided in [s]ection 20-3-620 regardless of how legal title is held . . . ." S.C. Code Ann. § 20-3-630(A) (2014). Property acquired prior to the marriage and property acquired by inheritance, devise, bequest, or gift from a party other than the spouse is nonmarital property. *Id.* "The [family] court does not have jurisdiction or authority to apportion nonmarital property." S.C. Code Ann. § 20-3-630(B) (2014).

> Property that is nonmarital when acquired may be transmuted into marital property if it becomes so commingled with marital property that it is no longer traceable, is titled jointly, or is used by the parties in support of the marriage or in some other way that establishes the parties' intent to make it marital property.

Wilburn v. Wilburn, 403 S.C. 372, 384, 743 S.E.2d 734, 740 (2013). "The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." *Jenkins v. Jenkins*, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001). "As a general rule, transmutation is a matter of intent to be gleaned from the facts of each case." *Johnson v. Johnson*, 296 S.C. 289, 295, 372 S.E.2d 107, 110 (Ct. App. 1988).

1. Mobile Homes

Wife first contends the family court erred in classifying several mobile homes as nonmarital property. We disagree.

In support of her position, Wife claimed she gave Husband $50,000 in cash and $52,500 in checks to pay off credit card debt he incurred prior to the marriage when he purchased several mobile homes. However, when questioned, Wife acknowledged the checks paid to Husband during the marriage only totaled $21,000. Conversely, Husband asserted he purchased the mobile homes in 2006 with money from stocks and did not have any outstanding credit card debt when the parties married. The family court determined the mobile homes were purchased by Husband prior to the marriage with cash from the sale of stock, and there was no indication that Husband intended to transmute them into marital property. The family court noted Wife did not provide credit card statements or payments made directly to pay off credit cards to support her allegation.

We agree with the family court and find Wife failed to prove the parties intended to transmute the mobile homes into marital property. After reviewing the record, we conclude Wife did not present any evidence specifically proving she paid off Husband's credit card debt associated with the mobile homes and did not prove the parties regarded the mobile homes as common properties of the marriage. *See Jenkins*, 345 S.C. at 98, 545 S.E.2d at 537 ("The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage."); *see also Murray v. Murray*, 312 S.C. 154, 158, 439 S.E.2d 312, 315 (Ct. App. 1993) (finding wife failed to produce objective evidence showing that real estate purchased by husband prior to the marriage was regarded by the parties as common property during the marriage). Accordingly, we affirm the family court's decision on this issue.

2. Ferguson Meadow and Montibello Drive

Wife also claims the family court erred in concluding Ferguson Meadow and Montibello Drive were marital properties. We disagree.

Wife stated she purchased all the properties that were bought and sold during the marriage with money she received from her family in Bulgaria and $200,000 Husband repaid her by taking out a home equity line of credit (HELOC). Wife asserted she loaned Husband over $200,000 during the marriage to pay off his credit card debt; to pay the mortgage on the home he purchased before the parties' marriage; and to fulfill obligations he owed from his previous separation agreement. Wife claimed she initially purchased a home on Ferguson Meadow in

York, South Carolina (Ferguson Meadow), and another property located in Rock Hill, South Carolina. Wife stated she sold the property located in Rock Hill and used the proceeds to remodel another property she purchased in Lake Wylie, South Carolina, which she subsequently sold. Wife claimed she continued to buy and sell various properties in South Carolina and North Carolina using proceeds from prior sales, including a home on Montibello Drive in Charlotte, North Carolina (Montibello Drive).

According to Wife, Husband had no involvement with the purchased properties; however, she conceded: (1) Husband's name was listed as the purchaser on the Lake Wylie property settlement statement; (2) Husband and Wife's names were listed as the purchasers on the settlement statement of Ferguson Meadow; and (3) Husband's name was listed as the landlord on the lease for Ferguson Meadow. When Husband emailed Wife to inquire about the location of the HELOC money, Wife acknowledged responding that "the $200K [was] in Montibell[o]."

William Brice—the closing attorney for four of the properties—testified Wife told him the money for the properties came from her family and specified the properties were investments for her daughter. Brice said most of the properties were purchased in Wife's name, but one might have been titled in Husband's name.

Conversely, Husband testified he and Wife began jointly investing in real estate for their mutual benefit. Husband claimed Nadejda and Pavel Bolt worked with the parties to buy, renovate, and resell the acquired properties. In this venture, Husband stated he researched properties; Nadejda acted as their real estate agent; he and Wife financed the purchases; and then he and Pavel renovated the properties. Husband introduced emails to substantiate their professional relationship. Husband also introduced his email correspondence with York County Planning and Development Services regarding property inspections and permits.

Husband claimed he found the first property, and Wife financed the purchase price. He testified he had the first property painted; installed a refrigerator, microwave, and range; and "[brought] it up to spec[]." Husband also stated he found a tenant and managed the first property before it was sold. According to Husband, he then found Ferguson Meadow, and Wife also financed this purchase price. Husband explained he rented and managed Ferguson Meadow, and in support of his claim, he introduced a lease on which he was listed as the landlord. Husband testified he then found the Lake Wylie property and financed the $216,000 purchase price by

taking out a HELOC. Husband claimed he and Pavel performed extensive remodeling before selling this property. He recalled Nadejda found the next property in Fort Mill. According to Husband, the parties sold the Fort Mill property, and the proceeds went to purchase another property in Waxhaw, North Carolina. Husband admitted he did not perform any physical labor on the Waxhaw property. The parties used the proceeds of the Waxhaw property to purchase Montibello Drive, which Wife managed and rented before residing there.

The family court found Ferguson Meadow was transmuted into marital property because it was purchased by the parties in the joint enterprise of buying and selling distressed properties. Additionally, the family court concluded Montibello Drive was marital property because it was financed with the proceeds generated from a number of real estate sales by Husband and Wife and by Husband's HELOC.

We agree that Montibello Drive was marital property and Ferguson Meadow was transmuted into marital property. Along with Husband's testimony that he and Wife jointly invested in real estate for their mutual benefit, Husband also introduced the following: (1) emails sent between him and York County Planning and Development Services regarding housing inspections and permits; (2) emails demonstrating a work relationship between Husband, Wife, Pavel, and Nadejda; and (3) a Ferguson Meadow lease with Husband's name listed as the landlord. Husband also introduced multiple emails demanding Wife tell him the location of the money from his HELOC, and Wife's response that "the 200K are in Montibello." We find Husband's persistent inquiries and Wife's response tend to establish that the HELOC was not meant to repay Wife, but was a source of capital for the parties' real estate investments. Although the parties agree that Wife financed Ferguson Meadow, we find Husband put forth evidence that he and Wife regarded the purchased real estate as common property of the marriage. *See Jenkins*, 345 S.C. at 98, 545 S.E.2d at 537 ("The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage."). Accordingly, we affirm the family court's finding that Ferguson Meadow and Montibello Drive were marital property.

B. Apportionment of the Marital Estate

Next, Wife asserts the family court failed to consider the evidence and appropriately apply the equitable apportionment factors when it divided the marital

estate. Specifically, Wife asserts: (1) she contributed significantly more to the acquisition of property; (2) Husband's income was higher; (3) she did not commit financial misconduct; (4) Husband received significant nonmarital property; (5) Husband had a vested retirement account while Wife had none; and (6) the parties were not awarded homes of equal value. We disagree.

"The apportionment of marital property is within the discretion of the family court and will not be disturbed on appeal absent an abuse of discretion." *Wooten v. Wooten*, 364 S.C. 532, 542, 615 S.E.2d 98, 103 (2005). Section 20-3-620(B) of the South Carolina Code (2014) provides fifteen factors the family court must consider in apportioning marital property and affords the family court the discretion to weigh each factor as it finds appropriate. "On appeal, this court looks to the overall fairness of the apportionment, and it is irrelevant that this court might have weighed specific factors differently than the family court." *Doe v. Doe*, 370 S.C. 206, 213–14, 634 S.E.2d 51, 55 (Ct. App. 2006).

Wife testified at the hearing regarding the parties' assets at the time of the marriage. She indicated she had $38,230.76 in the bank; $50,000 or $60,000 in cash from family in Bulgaria; and additional money wired from her mother in Bulgaria. Wife testified Husband did not have any liquid assets, but he owned a house on Messina Road in Clover, South Carolina (Messina Road), which had a mortgage of over $200,000. Additionally, Wife contended Husband was unemployed for half of the marriage, and she paid Messina Road's mortgage when he was unemployed.

According to Wife, over the course of the parties' marriage, she gave Husband over $200,000. She stated she regularly received money from her family in Bulgaria, claiming she received around $50,000 prior to the marriage and over $200,000 during the marriage. According to Wife, the funds came from her parents, rental income from Wife's investment properties, and her daughter's father. Wife claimed family and friends visiting from Bulgaria would bring money into the United States in $10,000 increments. She stated she expected Husband to repay her the money she gave him during their marriage, but she could not provide the exact amount of money he owed her. Wife also admitted that when she responded to an interrogatory asking her to list any loans, gifts, advances, or subsidies from family members that she had received in the past five years, she only listed $57,000. Zlatka also testified she gave Wife around $230,000 during the marriage.

Wife claimed she invested over $100,000 in a solar panel company in June 2011, but she lost the money because the business was unsuccessful. She stated one of the partners in the solar panel company previously performed work on Montibello Drive. According to Wife, the partner in the solar panel company forgave $50,000 or $60,000 that was owed to him for his work on Montibello Drive after she lost her investment.

Husband claimed he and Wife kept their finances separate because they had preexisting properties and obligations. He testified Wife never paid Messina Road's mortgage. Husband stated he was terminated from his job in January 2009 because of a change in management, and he received $1,200 per month in unemployment benefits for the next fourteen months. During this time, he became an independent consultant and also began researching the real estate market. According to Husband, he used savings and rental income from his mobile homes to financially support his daughter and pay Messina Road's mortgage, taxes, and utilities.

In response to Wife's claim that she invested $100,000 in a solar panel company in June 2011, Husband testified he believed Wife withdrew $115,000 and gave the money to Pavel to purchase a home on Caldwell Rush Circle in Cornelius, North Carolina (Caldwell Rush) under the trade name, Powerhightech. He stated Wife told him about another property prior to June 2011, and he expressed concerns about whether the investment would be profitable. Husband introduced a deed dated June 22, 2011, indicating: (1) Powerhightech was the purchaser of Caldwell Rush; (2) Pavel signed the deed as President of Powerhightech, Inc.; and (3) the purchase price was $114,486. He stated Wife began excluding him from transactions and decision-making, and he introduced emails he sent to Wife, Nadejda, and Pavel expressing his frustration and asking where his HELOC money was located. Husband claimed he had not seen any of the proceeds from the properties.

The family court noted that as of the final hearing, Husband's gross monthly income was $15,450 and Wife's gross monthly income was $11,000. After receiving the foregoing evidence and testimony, the family court considered all the applicable factors provided in section 20-3-620(B) and determined the marital property should be divided evenly between Wife and Husband.

After reviewing the record, we find the family court's apportionment was fair, and it did not abuse its discretion by apportioning 50% of the marital estate to Wife and 50% to Husband. *See Wooten*, 364 S.C. at 542, 615 S.E.2d at 103 ("The apportionment of marital property is within the discretion of the family court and will not be disturbed on appeal absent an abuse of discretion."). In response to Wife's allegation of error, we find Wife failed to provide satisfactory evidence that she contributed $200,000 of her own funds toward the acquisition of marital property. Wife did not present any bank statements to verify the source of her funds, with the exception of two withdrawals of $56,149 and $55,342, which were used to purchase the parties' two initial properties. Because we concur with the family court's finding that these two properties were transmuted into marital property, we find the funds used to purchase those properties also to be marital. Additionally, we find the family court's conclusion that Wife was in a better financial position than Husband was not an abuse of discretion. Although Husband's income was higher than Wife's on the date of the final hearing, we concur with the family court's finding that Wife had no debt, possessed significant nonmarital properties, and had more time before retirement to acquire assets.

As to the family court's finding that Wife committed marital misconduct regarding the parties' finances, we, too, question whether Wife invested $115,000—almost the exact amount invested to acquire Caldwell Rush—in a solar panel company owned by the same person who worked for her flipping properties. We hold the family court thoroughly considered the parties' nonmarital assets, including Husband's 401K retirement account, and available evidence on the income from the parties' nonmarital properties. Finally, as to Wife's argument that the houses awarded to each party were not of equal value, we find the family court's equitable apportionment worksheet accounted for the differing home values in its fifty-fifty division of the marital assets. Therefore, we find the fifty-fifty division as a whole was fair. *Doe*, 370 S.C. at 213–14, 634 S.E.2d at 55 ("On appeal, this court looks to the overall fairness of the apportionment, and it is irrelevant that this court might have weighed specific factors differently than the family court."). Accordingly, we affirm the family court's decision on this issue.

III. ATTORNEY'S FEES

Last, Wife argues the family court erred in requiring her to pay all of Husband's attorney's fees. We agree and accordingly modify the family court's order.

"The award of attorney's fees in a domestic action rests within the sound discretion of the family court." *Reiss v. Reiss*, 392 S.C. 198, 210, 708 S.E.2d 799, 805 (Ct. App. 2011). When deciding whether to award attorney's fees, the family court must consider: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) [the] effect of the attorney's 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). After finding an award is appropriate, the family court should next consider the amount of attorney's fees to award. *Farmer v. Farmer*, 388 S.C. 50, 57, 694 S.E.2d 47, 51 (Ct. App. 2010). In determining reasonable attorney's fees, the family court should consider: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). "Ordinarily, unless otherwise provided for by contract or statute, the responsibility of paying attorney['s] fees falls upon the party contracting for the services." *Anderson v. Tolbert*, 322 S.C. 543, 545, 473 S.E.2d 456, 457 (Ct. App. 1996).

In its final order, the family court found Husband was entitled to recover his attorney's fees from Wife. Citing to *E.D.M.*, the family court determined: (1) both parties had the ability to pay their own attorney's fees, but Husband's debt "may" limit his ability; (2) Husband's attorney obtained more beneficial results, and Wife's position toward equitable division was unreasonable; (3) the parties would be in relatively equal financial conditions after the equitable division; and (4) Wife's standard of living would not be significantly affected by her payment of Husband's fee, but Husband's standard of living "could be" reduced if he had to pay his own fees. The family court then reviewed the *Glasscock* factors and determined Wife should pay all $27,561.29 of Husband's attorney's fees.

Reviewing the record de novo, we find a modification of the attorney's fees award is warranted. Although we are mindful of the family court's discretion in awarding attorney's fees, we conclude a more equitable apportionment is to require Wife to pay a portion—as opposed to the entirety—of Husband's attorney's fees. In modifying the family court's order, we emphasize that three of the four *E.D.M.* factors to consider in whether to award attorney's fees pertain to the financial

positions of the parties.[1] *See E.D.M.*, 307 S.C. at 476–77, 415 S.E.2d at 816 ("In determining whether an attorney's fee should be awarded, the following factors should be considered: (1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) effect of the attorney's fee on each party's standard of living.") Taking this into consideration, we note the financial equities between the parties. Husband and Wife both have the ability to pay their own attorney's fees, are in relatively equal financial positions following the family court's equitable distribution award, and can maintain their current standard of living if held responsible for their own attorney's fees. Further, although Husband was unemployed for a portion of the parties' marriage, his monthly income exceeded that of Wife by the date of the final hearing. We are cognizant of the family court's findings that Wife had no debt, possessed significant nonmarital properties, and had more time before retirement to acquire assets. However, we do not believe Wife's lack of debt should be used against her in the assessment of attorney's fees, particularly considering Husband's income and earning potential.

We recognize Husband achieved greater beneficial results than Wife. Husband successfully established the mobile home and his retirement account were nonmarital property and several pieces of real estate acquired during the marriage were marital property, despite Wife's claims they were acquired with her nonmarital funds. However, Wife successfully argued Messina Road was transmuted into marital property. Although we acknowledge Husband prevailed on more issues than Wife, the beneficial results factor is only one of several factors to consider in deciding whether or not to award attorney's fees. *See Wooten v. Wooten*, 358 S.C. 54, 65, 594 S.E.2d 854, 860 (Ct. App. 2003), *aff'd in relevant part, rev'd in part*, 364 S.C. 532, 615 S.E.2d 98 (2005) (holding "[e]ven though Husband prevailed on two of the equitable division issues in this appeal, the beneficial results obtained are only one of several factors to be considered by the family court in deciding whether or not to award attorney's fees"). Further,

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[1] Wife does not appeal the reasonableness of Husband's attorney's fees. Accordingly, we need not consider the factors enunciated in *Glasscock* pertaining to the reasonableness of attorney's fees. *See Simpson v. Simpson*, 377 S.C. 527, 539, 660 S.E.2d 278, 285 (Ct. App. 2008) (addressing only whether the wife was entitled to attorney's fees pursuant to *E.D.M.* and declining to address the reasonableness of attorney's fees when the husband only appealed the family court's ruling requiring him to pay half of the wife's attorney's fees).

although the family court declined to grant Wife a fault-based divorce, we find its decision to grant the parties a no-fault divorce should not work a detriment to Wife in the beneficial results analysis as neither ground would have dissolved the marriage any more completely. *See Mick-Skaggs*, 411 S.C. at 105, 766 S.E.2d at 876 (finding family court's decision to grant parties a no-fault divorce, despite the wife's claims of the husband's adultery, was neither beneficial nor harmful to either party in an *E.D.M.* analysis of whether to award attorney's fees).

Further, the family court briefly stated that "[t]he entries in [Husband's] fee affidavit indicated that discovery was resisted initially by [Wife] or her previous attorneys," but we find little evidence in the record that Wife was uncooperative or hindered litigation. Husband testified Wife resisted discovery and unnecessarily delayed the case; however, he submitted no proof that Wife's actions amounted to actual misconduct sufficient to warrant the imposition of all of Husband's attorney's fees against Wife. Accordingly, we find that requiring Wife to pay all of Husband's attorney's fees was improper. *Cf. Simpson*, 377 S.C. at 539–40, 660 S.E.2d at 285 (upholding fee award due to husband's lack of candor with the family court and his failure to fully cooperate throughout the litigation process); *Taylor v. Taylor*, 333 S.C. 209, 216–17, 508 S.E.2d 50, 54–55 (Ct. App. 1998) (finding the family court properly required husband to pay all of wife's attorney's fees when husband was overly litigious, uncooperative, and largely disorganized throughout the discovery and litigation process). Reiterating our de novo standard of review and the equities inherent in family court proceedings, we modify the family court's attorney's fees award and require Wife to contribute $15,000 toward Husband's attorney's fees.

CONCLUSION

For the foregoing reasons, the family court's order is

AFFIRMED AS MODIFIED.

LOCKEMY, C.J., and MCDONALD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Pee Dee Health Care, P.A., Appellant-Respondent,

v.

Estate of Hugh S. Thompson, III, Respondent-Appellant.

Appellate Case No. 2014-001275

Appeal From Darlington County
J. Michael Baxley, Circuit Court Judge

Opinion No. 5451
Submitted March 24, 2016 – Filed November 2, 2016

VACATED IN PART, AFFIRMED IN PART

James M. Griffin, of Griffin & Davis, LLC, and Ariail King, of Lewis Babcock LLP, both of Columbia, for Appellant-Respondent.

J. René Josey, of Turner Padget Graham & Laney, P.A., of Florence, and John Jay James, II, of Darlington, for Respondent-Appellant.

WILLIAMS, J.: In this civil matter, Pee Dee Health Care, P.A. (PDHC) appeals the circuit court's award of sanctions to the estate of Hugh S. Thompson, III (the Estate) pursuant to Rule 11, SCRCP. PDHC argues the court erred in failing to dismiss the Estate's motion for sanctions as untimely, granting Rule 11 sanctions when PDHC's filings and arguments to the court were not frivolous, awarding

sanctions for the thirty hours the Estate's counsel spent responding to discovery requests served upon third parties, not reducing the award for the time the Estate's counsel spent preparing the sanctions motion, and ignoring the Estate's inequitable conduct when deciding to grant sanctions. The Estate cross-appeals, arguing the court erred in concluding its claim for sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act[1] (the FCPSA) was untimely and not awarding additional sanctions. We vacate in part and affirm in part.

FACTS/PROCEDURAL HISTORY

Although this case has a long procedural history, the instant appeal arises out of a sanctions order the circuit court entered against PDHC after this court issued a remittitur in the case. PDHC, a professional medical association doing business in Darlington, South Carolina, formerly employed Thompson as a medical doctor in its clinic from late 1998 to 2000. In exchange for his salary, Dr. Thompson assigned PDHC the rights to his Medicare payments, and PDHC billed Medicare for his services.

Several years before Dr. Thompson began working for PDHC, the South Carolina Board of Medical Examiners (the Board) suspended his medical license and, as a regulatory requirement, he was excluded from the Medicare program by the Medicare Office of the Inspector General (OIG). Although the Board later reinstated Dr. Thompson's medical license in 1998, he failed to seek removal of his name from OIG's list of excluded providers until 2002. In 2007, the Centers for Medicare and Medicaid demanded that PDHC return over $200,000 in benefits it collected while Dr. Thompson was on the excluded provider list.

Following an unsuccessful federal administrative appeal, PDHC filed an action in probate court against the Estate in 2010, seeking reimbursement for the money it was required to pay back to Medicare. The Estate disallowed the claim, and PDHC removed the action to circuit court. Subsequently, the Estate sought to disqualify PDHC's attorney, Tony R. Megna, on the ground that—as PDHC's chief executive officer—he was a necessary fact witness in the case. The court agreed and disqualified Megna in an order dated April 15, 2011. PDHC filed a motion to alter or amend the disqualification order on May 2, 2011.

[1] S.C. Code Ann. §§ 15-36-10 through -100 (2005 & Supp. 2015).

The Estate and PDHC then filed cross-motions for summary judgment. To avoid any potential prejudice to PDHC, the circuit court allowed Megna to appear for the limited purpose of arguing the pending summary judgment motions at the July 19, 2011 hearing before it ruled upon PDHC's motion to alter or amend the disqualification order. The court subsequently denied PDHC's motion to alter or amend its disqualification order on August 15, 2011. In its order, the court quashed all motions, subpoenas, and filings made subsequent to June 17, 2011, that contained only Megna's signature.

On September 1, 2011, the circuit court issued an order granting summary judgment in favor of the Estate, finding PDHC's fault for not satisfying its nondelegable duty to ensure the proper credentialing of its employee was dispositive as to all causes of action. The court later dismissed PDHC's motion to alter or amend the summary judgment order as void ab initio because Megna's signature was the only one to appear on the motion in violation of the court's disqualification order.

PDHC filed various appeals with this court regarding the circuit court's summary judgment order, disqualification order, and order dismissing PDHC's appeal from the probate court. This court consolidated the appeals and issued an unpublished opinion on July 3, 2013, in which it dismissed PDHC's appeal of the summary judgment order as untimely, found the disqualification issue was moot, and affirmed the circuit court's dismissal of PDHC's appeal of the probate court's order. *See Pee Dee Health Care, P.A. v. Thompson*, 2013-UP-311 (S.C. Ct. App. filed July 3, 2013). This court denied PDHC's petition for rehearing, and our supreme court later denied its petition for a writ of certiorari. The court of appeals issued a remittitur in the case on January 7, 2014.

Nine days after the remittitur was issued, on January 16, 2014, the Estate filed a motion in circuit court for sanctions—pursuant to Rule 11, SCRCP, and the FCPSA—against PDHC, Megna, Benjamin R. Matthews, and Matthews & Megna, LLC. In its motion, the Estate claimed it expended at least $96,580 in attorney's fees defending against PDHC's allegedly meritless lawsuit as well as Megna's violation of the circuit court's disqualification order. PDHC filed a motion to strike the Estate's motion for sanctions under the FCPSA, arguing the circuit court no longer had subject matter jurisdiction over the matter because the motion was untimely.

At the conclusion of a hearing on the motions, the circuit court announced it would award sanctions. The court, however, directed the Estate to submit a supplemental fee affidavit segregating the amount of time spent addressing Megna's violations of the disqualification order and filing the motion for sanctions. After the Estate submitted a fee affidavit listing $60,300 for these expenses, the court awarded it $34,150 in sanctions against PDHC, Megna, and his law firm pursuant to Rule 11. Nevertheless, the court declined to award sanctions pursuant to the FCPSA. PDHC filed a motion to alter or amend the award of sanctions, and the court denied its motion. This cross-appeal followed.

STANDARD OF REVIEW

The decision of whether to award attorney's fees pursuant to Rule 11 or the FCPSA is treated as one in equity. *Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (Ct. App. 2011). "In an action in equity tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence." *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004). "However, the abuse of discretion standard plays a role in the appellate review of a sanctions award." *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). When the appellate court agrees with the circuit court's factual findings, it reviews the award of sanctions under an abuse of discretion standard. *Atl. Coast Builders*, 394 S.C. at 104, 713 S.E.2d at 654. "Under the abuse of discretion standard, the imposition of sanctions will not be disturbed on appeal unless the decision is controlled by an error of law or is based on unsupported factual contentions." *Id.*; *see also Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006) ("An abuse of discretion may be found if the conclusions reached by the court are without reasonable factual support." (quoting *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996))).

LAW/ANALYSIS

I. PDHC's Appeal

PDHC contends the circuit court erred in failing to dismiss the Estate's motion for sanctions pursuant to Rule 11, SCRCP, because the motion was untimely and, therefore, the court lacked jurisdiction to consider it. We agree.

The circuit court generally "loses jurisdiction over a case when the time to file post-trial motions has elapsed." *Russell*, 370 S.C. at 20, 633 S.E.2d at 730 (footnote omitted). "Jurisdiction refers to the [circuit] court's authority to retain jurisdiction over the case, not the court's subject matter jurisdiction." *Id.* at 20 n.10, 633 S.E.2d at 730 n.10; *see also In re Beard*, 359 S.C. at 358, 597 S.E.2d at 838 (explaining the ten-day rule limiting the time within which a party may file a post-trial motion is a rule of limitation on the circuit court's ability to retain the case, not the power of the court to hear cases of that nature).

Our appellate courts have held that a circuit court cannot entertain a motion for sanctions made pursuant to the FCPSA if it is filed more than ten days after judgment. *See Russell*, 370 S.C. at 20, 633 S.E.2d at 730 (providing "a motion for sanctions must be filed within ten days of the notice of the entry of judgment"); *In re Beard*, 359 S.C. at 357, 597 S.E.2d at 838 (noting this court has held "a [circuit] court cannot entertain a motion for sanctions under the FCPSA whe[n] that motion was filed more than ten days after the judgment"); *Pitman v. Republic Leasing Co., Inc.*, 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct. App. 2002) (finding the circuit court no longer had jurisdiction over the case to award sanctions under the FCPSA two months after granting summary judgment and noting that, "because a [circuit court] retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment").

In the instant case, however, the circuit court only granted the Estate's motion for sanctions pursuant to Rule 11, SCRCP. Rule 11(a), SCRCP, in pertinent part, provides the following:

> The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.
>
> . . .
>
> If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the

> attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Pursuant to Rule 11, "an attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments." *Burns v. Universal Health Servs., Inc.*, 340 S.C. 509, 513, 532 S.E.2d 6, 9 (Ct. App. 2000). "The attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith (i.e., to cause unnecessary delay) whether or not there is good ground to support it." *Id.*

> The sanction may include an order to pay the reasonable costs and attorney's fees incurred by the party or parties defending against the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future frivolous action or action in bad faith. Further, if appropriate under the facts of the case, the court may order a party and/or the party's attorney to pay a reasonable monetary penalty to the party or parties defending against the frivolous action or action brought in bad faith.

Runyon, 322 S.C. at 19, 471 S.E.2d at 162.

In *Burns*, this court noted Rule 11 "provides little guidance as to the procedural guidelines to be followed prior to the imposition of sanctions under the rule. The rule merely provides that whe[n] a violation occurs, the court, upon motion or its own initiative, may impose appropriate sanctions." 340 S.C. at 513, 532 S.E.2d at 9. Notwithstanding the lack of guidance, this court held "a signing party or attorney is entitled to notice and an opportunity to respond prior to imposition of

sanctions under Rule 11." *Id.* at 514, 532 S.E.2d at 9. In another case, this court indicated that "[t]he criteria for Rule 11 sanctions are essentially the same as those for sanctions under the [FCPSA]." *Father v. S.C. Dep't of Soc. Servs.*, 345 S.C. 57, 72, 545 S.E.2d 523, 531 (Ct. App. 2001). Nevertheless, our supreme court has distinguished between sanctions under Rule 11 and the FCPSA, stating no requirement exists "that a motion for sanctions made pursuant to Rule 11 be made within ten days from notice of entry of judgment." *Russell*, 370 S.C. at 20 n.11, 633 S.E.2d at 730 n.11. In *Russell*, our supreme court expressly declined to determine what time limit for Rule 11 sanctions would be proper because the issue was not before the court. *See id.* Accordingly, the issue is one of first impression for this court.

Our supreme court has emphasized that "[t]he [South Carolina] Rules of Civil Procedure 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'" *Ex parte Wilson*, 367 S.C. 7, 15, 625 S.E.2d 205, 209 (2005) (quoting Rule 1, SCRCP). "In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes." *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (per curiam). "Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." *Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004) (alteration in original) (quoting *Green*, 314 S.C. at 304, 443 S.E.2d at 907). "When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning." *Id.*

> Courts should consider not only the particular clause in which a word may be used, but the word and its meaning in conjunction with the purpose of the whole rule and the policy of the rule. In construing a rule, language in the rule must be read in a sense which harmonizes with its subject matter and accords with its general purpose.

Ex parte Wilson, 367 S.C. at 15, 625 S.E.2d at 209 (internal citation omitted).

Rule 11, of course, is silent as to when a party must file a motion for sanctions for it to be considered timely. Thus, we find it necessary to analyze the purposes behind the rule. Our "state rule is based upon the language of the pre-1983 version of Federal Rule 11." *Burns*, 340 S.C. at 513, 532 S.E.2d at 9. Although the

current version of Rule 11 of the Federal Rules of Civil Procedure, unlike our state rule, contains a safe harbor provision, we find the U.S. Court of Appeals for the Fourth Circuit's explanation of the purposes behind the rule instructive. *Cf. Renner v. Hawk*, 481 S.E.2d 370, 374 (N.C. Ct. App. 1997) (stating decisions pertaining to the federal version of Rule 11 are "pertinent to [the] analysis" of the state rule). "Under Rule 11, the primary purpose of sanctions against counsel is not to compensate the prevailing party, but to 'deter future litigation abuse.'" *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002) (quoting *In re Kunstler*, 914 F.2d 505, 522 (4th Cir. 1990)). The expenses opposing counsel incurs in combatting frivolous claims is an appropriate factor for a court to consider when determining whether to issue a monetary sanction. *In re Kunstler*, 914 F.2d at 522. "[O]ther purposes of the rule include compensating the victims of the Rule 11 violation, as well as punishing present litigation abuse, streamlining court dockets[,] and facilitating court management." *Moore v. Southtrust Corp.*, 392 F. Supp. 2d 724, 736 (E.D. Va. 2005) (quoting *In re Kunstler*, 914 F.2d at 522).

Regarding the federal rule, scholars have made the following observations:

> Although a motion for sanctions may not be filed or presented to the district court until twenty-one days have elapsed after service of the motion on the parties, the cases under both the 1983 and 1993 versions of the rule make clear that Rule 11 proceedings should be initiated promptly after the challenged conduct takes place. The Advisory Committee Note to the 1993 amendment explains that "[o]rdinarily, the motion should be served promptly after the inappropriate paper is filed, and if delayed too long, may be viewed as untimely." If the alleged misconduct occurs during the discovery process or another part of the pretrial phase, the matter usually should be resolved at once . . . to avoid prejudicing the resolution of the litigation's substantive issues on their merits and to discourage the possibility of further abuses. If the challenged conduct is the institution of the action itself or occurs during a hearing or at trial, however, the question whether there has been a Rule 11 violation generally is not decided until after litigation has

> completed . . . to avoid delaying the disposition of the merits of the case.

5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1337.1, at 713–15 (3d. ed. 2004) (alteration in original) (footnotes omitted).

Although the decision of whether to award Rule 11 sanctions is a collateral issue, and does not constitute a ruling upon the merits of the case, we do not believe a circuit court retains the ability to award sanctions in perpetuity without any limitation. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) ("Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated."); *id.* at 406 (finding the respondents' interpretation of Rule 11 to cover any expenses incurred "because of the filing" overly broad because it "would lead to the conclusion that expenses incurred 'because of' a baseless filing extend indefinitely"). Indeed, as the U.S. Court of Appeals for the Federal Circuit has noted, the "[c]ourts that have discussed the matter have endorsed the application of time limits on Rule 11 motions." *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 875 (Fed. Cir. 2010).

Jurisdictions are split regarding the timeliness standards used for sanctions motions. Some jurisdictions, for example, impose their own local rules. *See, e.g.*, *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 100 (3d Cir. 1988) ("To carry out the objectives of expeditious disposition, we adopt as a supervisory rule for the courts in the Third Circuit a requirement that all motions requesting Rule 11 sanctions be filed in the district court before the entry of a final judgment. Whe[n] appropriate, such motions should be filed at an earlier time—as soon as practicable after discovery of the Rule 11 violation."). Others require a party seeking sanctions against an opponent to file the motion within a reasonable time after discovering the inappropriate conduct. *See, e.g.*, *Griffin v. Sweet*, 525 S.E.2d 504, 506 (N.C. Ct. App. 2000) ("Although Rule 11 does not specify a time limit for filing a sanctions motion, . . . 'a party should make a Rule 11 motion within a reasonable time after he discovers an alleged impropriety.'" (quoting *Rice v. Danas, Inc.*, 514 S.E.2d 97, 100 (N.C. Ct. App. 1999); *Renner v. Hawk*, 481 S.E.2d 370, 374 (N.C. Ct. App. 1997)); *Kaplan v. Zenner*, 956 F.2d 149, 152 (7th Cir.

1992) (stating "[p]rompt filings of motions for sanctions after discovery of an abuse best serve both the systemic and case-specific deterrent functions of Rule 11," and "reasonableness must serve as the guide" in determining whether a Rule 11 motion was promptly filed).

In our view, the North Carolina Court of Appeals' treatment of the timeliness issue is persuasive. In *Griffin*, our sister court held "that[,] by waiting over thirteen months after [the North Carolina] Supreme Court denied defendants' petition for discretionary review, plaintiff failed to file his motion for Rule 11 sanctions within a reasonable time of detecting the alleged impropriety." 525 S.E.2d at 508. According to the *Griffin* court, the "plaintiff was put on notice of any alleged sanctionable conduct when defendants filed an answer to the supplemental complaint . . . and again when the trial court granted summary judgment." *Id.* Although the court explained it was "not suggesting that plaintiff's motion for Rule 11 sanctions should have been filed at the summary judgment stage," the court—applying an objective, de novo standard of review—nevertheless concluded the plaintiffs failed to file the motion within a reasonable time. *Id.*

Some courts recognize the ability of a party to file a motion for sanctions at the end of litigation or after a judgment, but we are unable to find any authority to support the proposition that a party can wait until the entire case has finished. The U.S. Court of Appeals for the Third Circuit's discussion of the negative consequences of allowing such a delay in filing a Rule 11 motion is instructive:

> Promptness in filing valid motions will serve not only to foster efficiency, but in many instances will deter further violations of Rule 11 which might otherwise occur during the remainder of the litigation. If a party's action is "abusive" as contemplated by Rule 11, [then] the adversary should be able to realize immediately that an offense has occurred. Seldom should it be necessary to wait for the district court or the court of appeals to rule on the merits of an underlying question of law. If there is doubt how the district court will rule on the challenged pleading or motion, [then] the filing of the paper is unlikely to have violated Rule 11. . . . [M]ere failure to prevail does not trigger a Rule 11 sanction order.

Lingle, 847 F.2d at 99. The Third Circuit further noted that "timely filing and disposition of Rule 11 motions should conserve judicial energies. In the district court, resolution of the issue before the inevitable delay of the appellate process will be more efficient because of current familiarity with the matter." *Id.* Moreover, the court stated that "concurrent resolution of the challenges to the merits and the imposition of sanctions avoids the invariable demand on two separate appellate panels to acquaint themselves with the underlying facts and the parties' respective legal positions." *Id.* According to the court, "[t]he fragmented appeals" in that case "graphically illustrate[d] the inefficiency resulting from delay in filing a sanction motion until after resolution of the merits appeal." *Id.*

Because Rule 11, SCRCP, is silent regarding when a motion sought thereunder would be considered timely, we decline to read any specific time limits into the rule. We do, however, hold that a party must file a motion for sanctions pursuant to Rule 11 within a reasonable time of discovering the alleged improprieties to comport with the purposes of the rule. Turning to the instant case, the Estate filed its motion for sanctions nine days after this court issued a remittitur.[2] In other words, the Estate waited over twenty-eight months after the circuit court granted summary judgment in its favor, and some thirty-three months after the court disqualified Megna, to file a motion for sanctions against PDHC and its counsel. In light of our thorough review of the record, as well as the various authorities addressing this issue, we find the Estate's delay in filing the motion for sanctions until final resolution of the merits appeal failed to come in line with the underlying purposes of Rule 11.

While the Estate argues that waiting until the conclusion of the case was more efficient, we respectfully disagree. The fact that this court is reviewing yet another issue in this contentious case in a separate appeal only further demonstrates the point that it was inefficient for the Estate to delay in bringing the motion for sanctions. We agree that Megna's behavior was concerning, particularly given that the law regarding his recusal was so clear. *See* Rule 3.7(a), RPC, Rule 407, SCACR ("A lawyer shall not act as advocate at a trial in which the lawyer is likely

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[2] As our supreme court has explained, once the remittitur is sent down from an appellate court, the circuit court acquires jurisdiction over the case to enforce the judgment and take any action consistent with the appellate court's ruling. *See Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 414–15, 438 S.E.2d 248, 250 (1993).

to be a necessary witness . . . ."). The main purpose of Rule 11, however, is to defer future litigation abuse, not compensate the opposing party. By waiting until the case has been fully litigated and decided by the appellate courts on the merits, the Estate failed to challenge or prevent any litigation abuse from occurring in this case. Instead, the Estate made the tactical decision of waiting until the conclusion of the case to recover attorney's fees for all of the abuses that took place over a three-year period. In our view, the Estate's delay in bringing the motion for sanctions failed to serve the deterrence and efficiency purposes of Rule 11 and, therefore, was unreasonable.

Notwithstanding the fact that sanctions may have been warranted in this case, we hold the Estate failed to file its motion within a reasonable time of discovering PDHC's alleged improprieties. Given that the motion was untimely, we are constrained to find the circuit court abused its discretion in awarding sanctions because the award was controlled by an error of law. Accordingly, we vacate the court's award of Rule 11 sanctions.[3]

II. The Estate's Cross-Appeal

On cross-appeal, the Estate argues the circuit court erred in concluding the Estate's claim to sanctions under the FCPSA was untimely and denying the corresponding award of fees for time spent in response to PDHC's motion to strike. We disagree.

The FCPSA, in pertinent part, provides the following:

> At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.

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[3] In light of our finding that the Estate's motion for Rule 11 sanctions was untimely, we decline to address PDHC's remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding the appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

S.C. Code Ann. § 15-36-10(C)(1) (Supp. 2015).

As discussed in Part I, *supra*, our case law is quite clear regarding the time frame within which a party must file a motion for sanctions pursuant to the FCPSA. *See Russell*, 370 S.C. at 20, 633 S.E.2d at 730 (providing "a motion for sanctions must be filed within ten days of the notice of the entry of judgment"); *In re Beard*, 359 S.C. at 357, 597 S.E.2d at 838 (noting this court has held "a [circuit] court cannot entertain a motion for sanctions under the FCPSA whe[n] that motion was filed more than ten days after the judgment"); *Pitman*, 351 S.C. at 432, 570 S.E.2d at 189 (finding the circuit court no longer had jurisdiction over the case to award sanctions under the FCPSA two months after granting summary judgment and noting that, "because a [circuit court] retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment").

Nevertheless, the Estate—mounting, in essence, a direct challenge to our precedent—asks us to extend the meaning of "at the conclusion of the trial" to the period following the remittitur of a case from an appellate court. We decline the Estate's invitation to adopt such an unduly expansive reading of the FCPSA. If the General Assembly wished to extend the time window to ten days following the remittitur, as opposed to ten days following judgment, then it would have included that in the list found in subsection 15-36-10(C)(1).

Accordingly, because the circuit court correctly found the Estate did not prevail on the FCPSA issue in its motion for sanctions, we affirm its denial of the corresponding award of fees for time spent in response to PDHC's motion to strike.[4]

[4] Because our resolution of the prior issues is dispositive in this appeal, we decline to address the Estate's remaining issue. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (holding the appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

CONCLUSION

Based on the foregoing analysis, we **VACATE** the award of Rule 11 sanctions and **AFFIRM** the circuit court's decision not to award sanctions pursuant to the FCPSA.[5]

HUFF and THOMAS, JJ., concur.

[5] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frank Gordon, Jr., Individually and as Trustee of Dorothy S. Gordon (Deceased) Trust, Respondent,

v.

Donald W. Lancaster, Appellant.

Appellate Case No. 2014-001247

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Published Opinion No. 5452
Submitted June 1, 2016 – Filed November 2, 2016

AFFIRMED

John Joseph Dodds, III, of The Law Firm of Cisa & Dodds, LLP, of Mt. Pleasant; and Stephen Peterson Groves, Sr., of Nexsen Pruet, LLC, of Charleston, for Appellant.

Stephanie D. Drawdy and Justin O'Toole Lucey, both of Justin O'Toole Lucey, PA, of Mount Pleasant, for Respondent.

SHORT, J.: Donald W. Lancaster appeals an order awarding damages to Respondent Frank Gordon, Jr., Individually and as Trustee of the Dorothy S. Gordon (Deceased) Trust, in a lawsuit Gordon filed to collect on a prior judgment

he obtained against Lancaster's uncle. On appeal, Lancaster argues the underlying judgment was no longer enforceable and challenges the findings that he and his uncle engaged in various fraudulent conveyances. We affirm.[1]

FACTS AND PROCEDURAL HISTORY

From 1946 until approximately 1992, Lancaster's maternal uncle, Rudolph Robert Drews, owned and operated "The Drews Company," a construction business in Charleston, South Carolina. During his high school and college years, Lancaster worked at The Drews Company and became close to both Drews and Drews's wife, Effie. According to Lancaster, The Drews Company suffered financially after Hurricane Hugo in 1989 as a result of the acts of an unscrupulous business associate who absconded with customer deposits for lucrative jobs. As a result of this misfortune, the Drewses began borrowing heavily on their home in an effort to raise revenue for their business. The situation worsened when the Internal Revenue Service (IRS) filed liens against Drews and his business. Drews sold what was left of his business to Dorsey Biller, who had been the General Manager of The Drews Company. The Drewses decided to sell their home to raise funds to pay the various IRS liens and outstanding loans associated with The Drews Company. Lancaster asserted the Drewses had $100,000 "[a]fter appropriately paying off the IRS and satisfying other standing debts."[2]

In May 1992, at Drews's request, Lancaster used the $100,000 allegedly remaining from the sale of Drews's residence, along with $60,000 of his own funds to purchase 17 Bainbridge Drive, in Charleston, South Carolina. On May 22, 1992, Lancaster executed an agreement purporting to grant the Drewses a life estate in this property. The agreement was not a deed and was not recorded in the public records. It does not reference the $100,000 Drews gave to Lancaster to purchase the property, and it indicated the consideration for the conveyance of the life estate was "the sum of TEN ($10.00) AND NO/100S DOLLARS and love and affection for my uncle and aunt."

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] Contrarily, the court noted that for the remainder of his life, Drews had "pending creditor claims, including IRS assessments and liens . . . ."

On June 12, 1992, Lancaster obtained a $40,000 open-ended mortgage on the Bainbridge Property. From 1993 to 1995, Lancaster paid Drews $40,000 in checks drawn from the bank from which the $40,000 line of credit was obtained, supposedly for the purpose of helping the Drewses pay their living expenses. Drews, however, paid the interest incurred on the line of credit, but did not sign any IOUs or notes of indebtedness for the disbursements. Lancaster maintained he used a spreadsheet to document payments by Drews on the loan and updated the entries contemporaneously with the corresponding events; however, Lancaster was unable to explain a discrepancy between the spreadsheet produced during his deposition and the one at trial.

In March 1995, Drews granted Lancaster a $40,000 mortgage on real property Drews owned at 1705 Meeting Street, Charleston, South Carolina. The mortgage was not recorded until November 1995. Drews did not execute a note on the mortgage, and Lancaster did not provide any contemporaneous consideration for it.

On April 27, 1995, Drews, as attorney-in-fact for Lancaster, signed an agreement to purchase a residence at 2 Nuffield Road, in Charleston, South Carolina. Lancaster claimed he and Drews agreed they would substitute a one-story house chosen by the Drewses for the Bainbridge property because of medical problems with Drews's knees. Lancaster claimed he gave Drews a power of attorney to sign a sales contract on Lancaster's behalf; however, at trial, Lancaster could not find the document granting this authority, and no such document could be found in the public records. Mrs. Drews paid the $1,000 deposit on the home. On May 15, 1995, Lancaster increased the $40,000 line of credit to $79,250 and purchased the Nuffield property for $125,000 the following day. On May 17, 1995, Lancaster executed a "Memorandum of Lease and Subordination Agreement" for the Nuffield property that actually granted the Drewses a life tenancy in the property for consideration of $10.00 "and other good and valuable consideration." The document was recorded; however, it was titled as a "lease" rather than as a deed.

In 1996, Drews and his business partner, Raymond Beasley, opened a hardware store in Charleston. The store, known as Builders Station, was incorporated, and its board of directors approved a business plan and capital structure that provided for the sale of stock to outside investors. Gordon, one of the outside investors, purchased fifty shares of stock on September 9, 1996, for $50,000, on his mother's behalf and with her funds. The business failed and ultimately closed in 1997.

On April 15, 1998, Drews granted Lancaster a $100,000 mortgage on the Meeting Street property, again without executing a note and without contemporaneous consideration from Lancaster. The mortgage was filed on May 4, 1998. However, contrary to Lancaster's position at trial that this mortgage was intended to replace the $40,000 mortgage Drews granted Lancaster in March 1995, no satisfaction of the $40,000 mortgage was filed contemporaneously with the creation of the $100,000 mortgage.

In April 1999, Gordon, as attorney-in-fact for Dorothy Gordon, filed a lawsuit against Drews, claiming the sale of the stock in Builders Station was illegal and fraudulent under the Uniform Securities Act and also asserting claims for common-law misrepresentation and breach of fiduciary duty.

In July 1999, three months after Gordon filed his action against Drews, Drews granted Lancaster a $20,000 mortgage on the Meeting Street property. As with the two prior mortgages Drews gave to Lancaster on the same property, there was no contemporaneous consideration from Lancaster and no note.

On November 5 and 6, 2001, Lancaster executed satisfactions of the three mortgages on the Meeting Street property. By deed dated November 6, 2001, Drews conveyed this property to Charleston Antiques District, LLC, for $205,000. On November 7, 2001, Drews received a $190,000 note and mortgage from Charleston Antiques as consideration for the purchase. Drews simultaneously assigned this note and mortgage to Effie Drews.

On November 7, 2001, Mrs. Drews gave Lancaster a note for $50,912 that was secured by the assignment of the mortgage on the Meeting Street property. Lancaster explained he received $11,089.63 from the sale, which reduced the balance on the amount the Drewses owed him to $50,912. According to Lancaster, as Charleston Antiques made monthly payments of about $2,400 on its $190,000 note and mortgage, Drews made corresponding monthly payments of about $540, eventually reducing the balance on the $50,912 note to $35,621.12.

Following a three-day jury trial in December 2001, Gordon received a judgment of $50,000 against Drews, plus $15,789.12 in interest. On March 14, 2002, Gordon was awarded $42,693.50 in attorney's fees, for a total judgment of $108,482.62.

Drews appealed the judgment awarded to Gordon. On April 12, 2004, this court affirmed the judgment. *Gordon v. Drews*, 358 S.C. 598, 595 S.E.2d 864 (Ct. App. 2004). On September 22, 2005, the Supreme Court of South Carolina denied certiorari in the matter, and Gordon received an additional award on September 28, 2005, of $1,467.21 in appellate court costs and expenses.

In September 2005, Charleston Antiques sold the Meeting Street property to unrelated third parties. As a result of the sale, Drews, by way of his wife, received the final payment of $130,293.37 on the $190,000 note and mortgage. On September 26, 2005, Lancaster received a final payment of $35,621.12, for which he issued a satisfaction, and assigned back to Effie Drews the $190,000 mortgage.

In August 2006, the circuit court issued an order for supplemental proceedings to aid Gordon in obtaining satisfaction of the judgment. The Master-in-Equity for Charleston County held a hearing in the matter on September 26, 2006; the Master continued the hearing and left the supplemental proceedings open because Drews did not provide certain court-ordered documents. During the hearing, Gordon's attorney expressed suspicion that Effie Drews and Lancaster were "intertwined in this" and indicated she wanted to subpoena Mrs. Drews, Lancaster, and any new property owners counsel deemed necessary to give a full picture of what happened with assets that had once been owned by Drews.

Drews died on September 25, 2007, and his estate was opened the following month. In February 2010, an inventory and appraisement was filed indicating there were no assets in Drews's estate. On February 26, 2010, Lancaster gave a deposition in the supplemental proceedings. During the deposition, Gordon became aware of the transfers between Drews and Lancaster that allegedly resulted in Drews's insolvency.

Effie Drews died on February 27, 2010, two days before she was scheduled to give a deposition in the supplemental proceedings. Her estate was filed on March 30, 2010, with her sister, Jessie B. Atkinson named as personal representative. Effie's estate was valued at $55,460.44.

In November 2010, Gordon filed this action in the Court of Common Pleas for the Ninth Judicial Circuit against Drews's Estate, Effie Drews's Estate, and Lancaster. Gordon later filed a petition in the Charleston County Probate Court against Atkinson in her capacity as personal representative of Effie Drews's estate,

Lancaster, and Shirrese Brockington, in her capacity as special administrator of Drews's estate. In November 2011, Gordon settled with Drews's estate and Effie Drews's estate, both of which assigned Gordon their rights against Lancaster. The probate court also issued a consent order for removal of the case to the circuit court.

The present action came before the circuit court on June 13-14, 2013, for a nonjury trial. Following the presentation of testimony by both sides, Lancaster moved for a directed verdict, arguing the judgment Gordon was attempting to collect was extinguished. The circuit court denied the motion.

By order filed August 19, 2013, the circuit court found Gordon proved the fraudulent nature of all the alleged transfers, including the following: (1) the 1992 transfer of $100,000 for the purchase of the Bainbridge property; (2) the Nuffield property substitution; (3) the first mortgage of $40,000 on the Meeting Street property; (4) the second mortgage of $100,000 on the Meeting Street property; (5) the third mortgage of $20,000 on the Meeting Street property; and (6) the assignment of the $190,000 mortgage on the Meeting Street property. The court further noted that "[w]hile some of the transfers between Drews and Lancaster occurred prior to the September 1996 accrual of the underlying action resulting in [Gordon's] [j]udgment, [Gordon] has presented evidence that the transfers between Drews and Lancaster involved actual moral fraud as is required to set aside transfers that occurred before Gordon became a creditor." Based on these findings, the circuit court granted Gordon judgment against Lancaster for $211,677.30. The circuit court later issued a supplemental order dismissing Gordon's claims for constructive trust, civil conspiracy, and negligence/aiding and abetting. Lancaster's post-trial motions were denied, and this appeal followed.

LAW/ANALYSIS

I. Enforceability of the Judgment

Lancaster argues the judgment Gordon obtained against Drews expired by operation of law before the present action was decided and could not be enforced against Lancaster. We disagree.[3]

Section 15-39-30 of the South Carolina Code (2005) currently reads as follows:

> **§ 15-39-30. Issuance of executions; effective period.**
>
> Executions may issue upon final judgments or decrees at any time within ten years from the date of the original entry thereof and shall have active energy during such period, without any renewal or renewals thereof, and this whether any return may or may not have been made during such period on such executions.

In *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 185, 512 S.E.2d 123, 128 (Ct. App. 1999), this court held that even though the judgment creditor exercised due diligence in discovering the debtor's fraudulent conveyance of

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[3] Gordon correctly argues that Lancaster, in requesting dismissal of this action, made a directed verdict motion when he should have moved for an involuntary nonsuit. *See Waterpointe I Prop. Owner's Ass'n v. Paragon, Inc.*, 342 S.C. 454, 458, 536 S.E.2d 878, 880 (Ct. App. 2000) (noting Rule 50, SCRCP "by its nature is applicable to jury trials" and "the proper motion for [the appellant] to have made was a motion for involuntary non-suit under Rule 41, SCRCP"). However, Lancaster's incorrect terminology does not warrant a refusal on the part of this court to address the merits of his motion. *See Dorchester Cty. v. Branton*, 286 S.C. 20, 22, 331 S.E.2d 377, 378 (Ct. App. 1985) (stating the court would overlook the appellants' "semantic lapse and treat their motion as having been properly made for involuntary nonsuit of the case pending against them" so that the appellants "w[ould] not be prevented from having their argument on appeal addressed on its merits").

property to a third party and attempted to execute upon the wrongfully conveyed property more than one year before the expiration of the ten-year enforcement period, these circumstances did not extend the life of the creditor's judgment beyond the ten-year period provided for in section 15-39-30. In so holding, this court explained:

> Here we have an enforcement action wherein Commercial Credit seeks to foreclose its lien against Riddle's property pursuant to a judgment of limited duration. The public policy of this state is to limit the life of a judgment to ten years. While this court does not condone efforts by judgment debtors to secrete assets to avoid payment of judgment, "[a] judgment creditor should recognize this [public] policy and proceed expeditiously to conclude his efforts to collect his judgment within the ten year period."

Id. (quoting *Wells ex rel. A.C. Sutton & Sons, Inc. v. Sutton*, 299 S.C. 19, 22, 382 S.E.2d 14, 16 (Ct. App. 1989) (alterations by the court)).

In *The Linda Mc Company v. Shore*, 390 S.C. 543, 553-55, 703 S.E.2d 499, 504-05 (2010), the Supreme Court of South Carolina took a less rigid approach in interpreting section 15-39-30. The judgment at issue in *Linda Mc* was subject to execution and levy until June 2, 2005. *Id.* at 548 n.1, 703 S.E.2d at 501 n.1. By that date, the special referee had conducted a supplemental hearing to determine whether the debtors had assets to satisfy the balance of the judgment. *Id.* at 549-50, 703 S.E.2d at 502. The order authorizing the execution and levy upon debtors' assets was issued June 3, 2005, the day after the judgment expired. *Id.* at 550, 703 S.E.2d at 502. In allowing the execution to proceed, the court stated:

> [W]hen a party has complied with the applicable statutes, as Respondent did in this case, and is merely waiting on a court's order regarding execution and levy, the ten year limitation found in section 15-39-30 is extended to when the court finally issues an order. To hold otherwise would put those trying to enforce their judgments at the mercy of the court system to conclude the matter within the ten-year period.

Id. at 554-55, 703 S.E.2d at 505. We hold the circuit court in this case correctly ruled that under *Linda Mc*, Gordon could still obtain satisfaction of his judgment because he filed his action against Lancaster within the ten-year statutory period of active energy. *See id.* at 554 n.7, 703 S.E.2d at 505 n.7 (acknowledging the equitable approach of *Hardee v. Lynch*, 212 S.C. 6, 14, 46 S.E.2d 179, 182 (1948), which recognized an exception to nullification of a judgment after ten years if an action was brought prior to the expiration of the ten years). Gordon's amended complaint alleged the judgment remained unsatisfied, and the hearing in the 2006 supplemental proceedings was left open due to the judgment debtor's failure to produce documents. The trial court considered the action as "commenced by [Gordon] to aid in executing on [the j]udgment." We find the action was filed to aid in enforcing the judgment. *See Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) ("[P]leadings in a case should be construed liberally so that substantial justice is done between the parties."). Like the court in *Linda Mc*, we find the action was active because it was filed before the ten-year period expired and Gordon continued to pursue satisfaction of his judgment.[4]

II. Fraudulent Conveyances[5]

Lancaster argues the circuit court erred in finding the following transactions constituted fraudulent conveyances: (1) the $100,000 Drews paid to Lancaster in 1992; (2) the $40,000 Lancaster loaned to Drews; and (3) the $20,000 mortgage Drews gave Lancaster. We disagree.

The evidentiary standard governing fraudulent conveyance claims brought under the Statute of Elizabeth is the clear and convincing standard. *Oskin v. Johnson*, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012). "An action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a de novo

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[4] We decline to address Gordon's additional sustaining ground. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding when reversing a lower court's decision it is within an appellate court's discretion as to whether to address any additional sustaining grounds).

[5] We combine Lancaster's issues challenging separate findings of fraudulent conveyance.

standard of review applies." *Id.* "However, this broad scope [of review] does not relieve the appellant of his burden to show that the trial court erred in its findings[,] . . . [and] we are not required to disregard the findings of the trial judge, who was in a better position to determine the credibility of the witnesses." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012).

A. 1992 Payment of $100,000

Lancaster argues the circuit court erred in finding the 1992 payment of $100,000 was a fraudulent conveyance. We disagree.

Section 27-23-10(A) of the South Carolina Code (2007) provides as follows:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

In the recent decision of *Judy v. Judy*, 403 S.C. 203, 208-09, 742 S.E.2d 672, 675 (Ct. App. 2013) (internal citations omitted) (first alteration in original), this court stated the following regarding the application of section 27-23-10:

> The Statute of Elizabeth "does not limit its application to judgment creditors. Its protection also extends to other types of parties defrauded in connection with the conveyance of property. . . ."
>
> Subsequent creditors may have conveyances set aside when (1) the conveyance was "voluntary," that is, without consideration, and (2) it was made with a view to future indebtedness or with an actual fraudulent intent on the part of the grantor to defraud creditors. Subsequent creditors must show "actual moral fraud," rather than legal fraud. Actual moral fraud involves "a conscious intent to defeat, delay, or hinder [one's] creditors in the collection of their debts." With a voluntary int[ra]-family transfer, the burden shifts to the transferee to establish the transfer was valid.

In determining whether a transferee has met his burden to show the bona fides of a conveyance, the court will look to whether there are indicia of "badges of fraud," including insolvency or indebtedness of the transferor, lack of consideration for the conveyance, a close relationship between the transferor and the transferee, pendency or threat of litigation, secrecy or concealment, departure from the usual method of business, reservation of benefit to the transferor, and the retention by the transferor of possession of the property allegedly conveyed. *Coleman v. Daniel*, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973). "[W]he[n] there is a concurrence of several such badges of fraud[,] an inference of fraud may be warranted." *Id.* at 210, 199 S.E.2d at 79 (first alteration in original).

We find the record has evidence of multiple badges of fraud warranting setting aside Drews's 1992 payment to Lancaster. First, Lancaster was Drews's nephew and there was ample evidence indicating their multiple transactions departed from the usual method of business. Although Lancaster argued the Drewses were debt free in 1992 after they sold their home, there was no documentary evidence the liens had been discharged or the sales proceeds were sufficient to pay off outstanding obligations. To the contrary, Gordon submitted evidence of a federal tax lien of $56,988.85 had been filed against the Drewses in September 2000 for the years 1995, 1996, and 1997. Furthermore, contrary to Lancaster's assertion that the Drewses were able to pay off pending tax liens with the proceeds from the sale

of their home in 1992, counsel's questions during the supplemental proceedings suggest the public records show the home sold for only $5 and Drews, though testifying he did not think the house sold for that price, would not reveal what he actually received for the property and could not explain why the stated consideration according to the public records was only $5. Considering the badges of fraud, including Drews's insolvency, the failure to follow the usual formalities in granting a life estate, and Drews's retention of benefits in the funds conveyed, we affirm the circuit court's finding that the 1992 transfer of funds involved actual moral fraud and could be set aside even though it occurred before Gordon became a creditor.

B. $40,000 Loan from Lancaster to Drews

Lancaster next argues the circuit court erred in finding the $40,000 he paid to the Drewses between 1993 and 1995 constituted fraudulent conveyances. We disagree.

We find ample evidence in the record indicating the payments were not loans to the Drewses, but rather the payments constituted a surreptitious scheme to return to Drews a portion of the $100,000 Drews provided Lancaster in 1992. Shortly after the Bainbridge purchase, Lancaster obtained a $40,000 open-end, equity line mortgage on the property. From 1993 until 1995, Lancaster paid Drews a total of $40,000. Drews paid the interest on the line of credit. Also, Drews did not acknowledge the debt in writing or make payments to Lancaster on it. Finally, Lancaster presented no evidence of an arrangement with Drews regarding repayment of the alleged loans. We agree with the circuit court's finding that Lancaster's payments to Drews totaling $40,000 from 1993 until 1995 were for the purpose of returning to Drews part of the $100,000 transfer and involved actual moral fraud.

C. $20,000 Mortgage

Lancaster also argues the circuit court erred in finding the July 1999 mortgage of $20,000 on the Meeting Street property was the result of actual moral fraud. We disagree.

The circuit court noted Lancaster did not give Drews any contemporaneous consideration for the mortgage and no note was executed. Furthermore, the circuit

court found "Lancaster gave contradictory testimony that he was not contemporaneously aware of the $20,000 Meeting Street Mortgage while later testifying that he did participate in its genesis and that the purpose of the Third Mortgage was to fund a settlement on a bank guarantee." The circuit court appears to have rejected Lancaster's assertion that Drews granted him the mortgage in return for past consideration. We agree with the circuit court's findings that the $20,000 mortgage was not supported by either contemporaneous or past valuable consideration and constituted actual moral fraud, which were based on credibility determinations. *See Clardy v. Bodolosky*, 383 S.C. 418, 424, 679 S.E.2d 527, 530 (Ct. App. 2009) (explaining the broad scope of review in an equity proceeding "does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses").

III. Directed Verdict and Post-Trial Motions

Lancaster finally argues the circuit court erred in denying his motion for directed verdict and his post-trial motions seeking reconsideration. We disagree.[6]

"After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Rule 41(b), SCRCP. Rule 41(b), SCRCP, "allows the judge as the trier of facts to weigh the evidence, determine the facts and render a judgment against the plaintiff at the close of his case if justified." *Johnson v. J.P. Stevens & Co.*, 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992). In reviewing the rulings of a trial judge on motions for involuntary nonsuit, this court must review the evidence and all inferences in the light most favorable to the nonmoving party. *Rewis v. Grand Strand Gen. Hosp.*, 290 S.C. 40, 41-2, 348 S.E.2d 173, 174 (1986). If more than one reasonable inference can be drawn from the evidence, the motion for nonsuit must be denied. *Id.*

In support of his argument, Lancaster reiterates the arguments previously discussed. We find no error by the circuit court on the merits of those arguments;

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[6] As previously noted, we address the directed verdict issue as if it was properly raised as a motion for involuntary nonsuit under Rule 41(b), SCRCP.

thus, we affirm the circuit court's denial of Lancaster's motion for involuntary nonsuit and post-trial motions for reconsideration.

CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

WILLIAMS, J., concurs.

THOMAS, J., dissenting: I respectfully dissent and would reverse the circuit court's order because the judgment Respondent obtained against Rudolph Robert Drews expired by operation of law before the present action was decided and, thus, could not be enforced against Appellant. I disagree with the majority's reliance on *Linda Mc*[7] and find the circumstances in this case are distinguishable from those in *Linda Mc*.

As of March 18, 2012, the final day of the ten-year period following enrollment of the judgment, Respondent had only filed the present action in the circuit court and settled his allegations against the Drews' estates. Although Respondent filed this action prior to the expiration of the ten-year period, he was not "merely waiting on the court's order regarding execution and levy" as was the situation in *Linda Mc*. *See Linda Mc*, 390 S.C. at 554, 703 S.E.2d at 505 ("[W]hen a party has complied with the applicable statutes, as [r]espondent did in this case, and is merely waiting on a court's order regarding execution and levy, the ten year limitation found in section 15-39-30 is extended to when the court finally issues an order."). Indeed, the circuit court did not hold the final hearing in this case until June 2013, more than one year after the expiration of the ten-year period. Based on the facts distinguishing this case and *Linda Mc*, I would decline Respondent's invitation to extend *Linda Mc*'s narrow holding to encompass these circumstances. *See id.* ("We want to stress that this is a narrow holding limited to facts similar to those at issue in this case."). I believe extending *Linda Mc* in this case thwarts the public policy

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[7] *Linda Mc Co. v. Shore*, 390 S.C. 543, 703 S.E.2d 499 (2010).

of this state that limits the life of a judgment to ten years. *See Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 176, 185, 512 S.E.2d 123, 128 (Ct. App. 1999) ("The public policy of this state is to limit the life of a judgment to ten years."). Additionally, because the majority concludes Respondent's action was active simply because he filed it prior to the expiration of the ten-year period, the majority's interpretation could effectively allow any judgment holder to extend automatically the ten-year period by merely filing a new action to execute prior to the expiration of the ten-year period.

Accordingly, I would reverse the circuit court's order because Respondent's judgment against Drews expired prior to the circuit court deciding the present action and the narrow exception in *Linda Mc* is inapplicable.