The Supreme Court of South Carolina

In the Matter of
Louis M. Cook, Respondent.

ORDER

Pursuant to Rule 31, RLDE, Rule 413, SCACR, the Commission on Lawyer Conduct has filed a Petition to Appoint Attorney to Protect Clients' Interests in this matter. This request is based on the current medical condition of respondent. The petition is granted.

IT IS ORDERED that Catherine H. Dingle, Esquire, is hereby appointed to assume responsibility for Louis M. Cook's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Cook maintained. Ms. Dingle shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of Mr. Cook's clients. Ms. Dingle may make disbursements from Mr. Cook's trust account(s), escrow account(s), operating account(s), and any other law office account(s) Mr. Cook maintained that are necessary to effectuate this appointment.

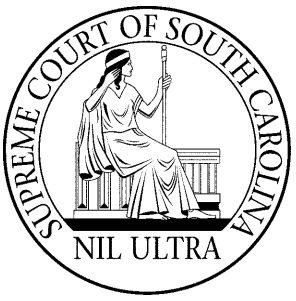
This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of Mr. Cook, shall serve as notice to the bank or other financial institution that Catherine H. Dingle, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Catherine H. Dingle, Esquire, has been duly appointed by this Court and has the authority to receive Mr. Cook's mail and the authority to direct that Mr. Cook's mail be delivered to Ms. Dingle's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

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

Columbia, South Carolina
February 18, 2011



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 7
February 28, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Beaufort County School District, Respondent,

v.

United National Insurance Company, the South Carolina School Boards Insurance Trust, and the South Carolina School Boards Insurance Trust-Property/Casualty Trust Fund, Appellants.

Appeal From Beaufort County
Marvin Dukes, III, Special Circuit Court Judge

Opinion No. 4794
Heard September 14, 2010 – Filed February 23, 2011

AFFIRMED

David M. Dolendi, Catalina J. Sugayan, and Kirk C. Jenkins, all of Chicago, Illinois, Edward K. Pritchard, III, of Charleston, and Thomas C. Salane, of Columbia, for Appellants.

Frank S. Holleman, III, David H. Koysza, and J. Theodore Gentry, all of Greenville, for Respondent.

SHORT, J.: Beaufort County School District (Beaufort) filed this action against Appellants South Carolina School Boards Insurance Trust, South Carolina School Boards Insurance Trust – Property/Casualty Trust Fund (collectively, the Trust), and United National Insurance Company (United). Beaufort alleged breach of contract and bad faith, and sought compensatory and punitive damages, and a declaratory judgment regarding insurance coverage. The trial court granted Beaufort's motion for partial summary judgment on the issue of coverage. We affirm.

FACTS

Beaufort and a number of other South Carolina school districts formed the Trust to pool their resources to obtain insurance coverage. The Trust purchased a comprehensive general liability insurance policy (the policy) to cover its district members, including Beaufort, for the year beginning July 1, 2003, and ending July 1, 2004. The terms of the policy provide that United will cover losses in excess of $150,000 in a self-insured retention loss fund. The policy includes endorsements covering sexual abuse and sexual harassment.

In April and May 2004, seven students filed two lawsuits against Beaufort, alleging sexual molestation by an elementary school music teacher.[1] Beaufort settled the claims for $4.75 million and sought coverage under the endorsements.

[1] The teacher pled guilty to ten counts of indecent exposure, seven counts of lewd act on a minor, and one count of assault and battery of a high and aggravated nature. He is currently serving a twenty-five year prison sentence.

The sexual abuse endorsement provides:

> [C]overage is extended to include the following:
>
> Coverage is provided for CLAIMS (as defined within this endorsement) . . . arising out of SEXUAL ABUSE (as defined within this endorsement) by any employee or any volunteer worker of the NAMED ASSURED. This coverage is subject to . . . the following special conditions and limitations:
>
> . . . .
>
> 2. This coverage applies only if a CLAIM for damages, because of SEXUAL ABUSE, is "first made" against the ASSURED during the PERIOD OF INSURANCE . . . . **All CLAIMS based on or arising out of one SEXUAL ABUSE shall be considered "first made" when the first of such CLAIMS is made to the ASSURED, regardless of:**
>
> a. **The number of persons SEXUALLY ABUSED;**
>
> . . . .
>
> 4. Limits: $500,000/$3,000,000 Annual Aggregate not to exceed $500,000 **per member** excess of $150,000 SELF INSURED RETENTION **each CLAIM**. . . .
>
> . . . .
>
> 8. The coverage extension under this endorsement does not apply to SEXUAL

> HARASSMENT, or to any CLAIMS arising from actual or alleged physical abuse arising out of SEXUAL HARASSMENT.

The sexual abuse endorsement includes a "DEFINITIONS" section as follows:

> CLAIM: For the purposes of this endorsement only, **CLAIM means all notices or SUITS** demanding payment of money based on, or **arising out of the same SEXUAL ABUSE or series of SEXUAL ABUSES** by one or more employees or volunteer workers.
>
> NAMED ASSURED: For the purposes of this endorsement only, NAMED ASSURED means the South Carolina School Board Insurance Trust Property/Casualty Trust Fund. NAMED ASSURED does not include any employee or volunteer worker.
>
> SEXUAL ABUSE means any actual, attempted or alleged criminal sexual conduct **of a person by another person, or persons** acting in concert . . . which causes physical and/or mental injuries. SEXUAL ABUSE also includes actual, attempted or alleged criminal sexual molestation, sexual assault, sexual exploitation or sexual injury.
>
> But **SEXUAL ABUSE does not include SEXUAL HARRASSMENT.**
>
> **All CLAIMS based on or arising out of the same SEXUAL ABUSE or a series of related SEXUAL ABUSES by one or more employees or volunteer workers shall be deemed one SEXUAL ABUSE.**

> Only one policy issued by the Company, one SELF INSURED RETENTION, and one EXCESS LIMIT OF INSURANCE is applicable to any one SEXUAL ABUSE.
>
> SEXUAL HARASSMENT means any actual, attempted or alleged unwelcome sexual advances . . . .
>
> . . . .
>
> **But SEXUAL HARASSMENT does not include SEXUAL ABUSE.**

(Capitalization in original; bold added.)[2] The sexual harassment endorsement, using substantially the same language, provides limits of $850,000/$2,550,000.

The Trust paid $150,000 to Beaufort and United paid $500,000. The Trust and United deny further liability, arguing, inter alia, the seven settlements constitute one claim. The parties filed cross-motions for summary judgment. After a hearing, the trial court granted partial summary judgment to Beaufort, finding: (1) the seven settlements gave rise to seven claims; (2) the annual aggregate limits in each endorsement were available to Beaufort; (3) recovery under the sexual abuse endorsement did not preclude recovery under the sexual harassment endorsement for acts of sexual harassment; and (4) the Trust was required to pay the self-insured retention for each claim. Appellants filed a joint motion for reconsideration. After a hearing, the trial court denied the motion. This appeal followed.

[2] Hereinafter, quotations of the policy omit capitalization, and bold is added for emphasis.

ISSUES ON APPEAL

I. Did the trial court err in holding Beaufort's settlements gave rise to seven claims?

II. Did the trial court err in holding Beaufort may access the entire aggregate annual limits?

III. Did the trial court err in holding Beaufort's settlements were covered by both the sexual abuse and sexual harassment endorsements?

IV. Did the trial court err in holding the Trust is liable to Beaufort for more than one self-insured retention?

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, appellate courts apply 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. Rule 56(c), SCRCP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

LAW/ANALYSIS

I. Seven Claims

Appellants argue the trial court erred in holding Beaufort's settlements gave rise to seven claims, contending the only reasonable interpretation of the endorsements, giving effect to each of the various provisions, is that the victims' claims constitute one claim because the same perpetrator committed each act of sexual misconduct. Beaufort contends, and the trial court found, there were seven claims because there were seven victims. We agree with Beaufort.

Insurance policies are subject to the general rules of contract construction. Century Indem. Co. v. Golden Hills Builders, Inc., 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002). "Courts must enforce, not write, contracts of insurance . . . ." USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (quoting Sloan Constr. Co. v. Central Nat'l Ins. Co., 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977)). The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect. Id. An insurance contract is read as a whole document so that "one may not, by pointing out a single sentence or clause, create an ambiguity." Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). However, an insurance contract which is "in any respect ambiguous or capable of two meanings must be construed in favor of the insured." Reynolds v. Wabash Life Ins. Co., 251 S.C. 165, 168, 161 S.E.2d 168, 169 (1968).

A. Definitions of the Terms of the Policy

Appellants argue the trial court's holding is not a reasonable interpretation of the policy's definition of "claim," or of the undefined terms "series" and "related." We disagree.

The policy's sexual abuse endorsement defines "sexual abuse" as "any actual, attempted or alleged criminal sexual conduct **of a person by another person, or persons** acting in concert . . . ." The sexual abuse endorsement defines "claim" as "all notices or suits . . . based on, or arising out of the same **sexual abuse or series of sexual abuses** by one or more employees or volunteer workers." The endorsement also includes the following "related sexual abuses" clause: "All claims based on or arising out of the same **sexual abuse or a series of related sexual abuses** by one or more employees . . . shall be deemed one sexual abuse."[3] Appellants rely on the phrases "series of sexual abuses" and "series of related sexual abuses" to assert there is only one claim arising from the abuse of the seven victims. Appellants contend the clause defines multiple claims arising from a series of related abuses as one claim, regardless of the number of victims.

The trial court relied on the incorporation of the definition of "sexual abuse" in the definition of the term "claim" and in the "related sexual abuses" clause to find seven claims. The court found that because the definition of "claim" incorporates the definition of "sexual abuse," the use of the singular "person" in reference to the victim in the definition of sexual abuse controls. Thus, according to the trial court, when the definition of "claim" refers to a series of sexual abuses, it is referring to a series of abuses against "a person." Likewise, the court concluded the "related sexual abuses" clause also incorporates the definition of "sexual abuse." The trial court found it

[3] The corresponding clauses of the sexual harassment endorsement are substantively identical, and the analysis for the sexual abuse endorsement applies to the sexual harassment endorsement for purposes of Appellants' "one claim" argument.

significant that United used, in the definition of "sexual abuse," the singular "person" when referring to a victim, compared to its use of the singular and plural "person, or persons" when referring to the perpetrator(s). The court found the parties' intent, by the use of the singular "person" to describe the victim, distinguished the policy from the general rule that "the use of the singular in an insurance policy includes the plural unless it is clear that [the] parties intended otherwise." (quoting 2 Couch on Insurance § 22:5 (3d ed. 2007)). The court found that United demonstrated clear understanding of how to articulate the concept of the plural when it wanted to in the endorsements, compelling its conclusion that the "difference has meaning." The trial court finally noted the close proximity of the singular and plural uses of the term "person" in the endorsement, and determined this proximity compels the conclusion United intended this difference.

The term "series" is not defined in the endorsements, so it must be defined according to the usual understanding of the ordinary person. See Golden Hills Builders, Inc., 348 S.C. at 565, 561 S.E.2d at 358 (stating policy language must be given its plain, ordinary, and popular meaning). "Series" is defined as "a group of . . . things or events standing or succeeding in order and having a like relationship to each other . . . ." Webster's Third New International Dictionary 2073 (1971). The trial court found the language "series of sexual abuses" in the definition of "claim" referred to multiple instances of abuse involving a single victim.

The term "related" also is not defined in the endorsements, so it must be defined according to the usual understanding of the ordinary person. See Golden Hills Builders, Inc., 348 S.C. at 565, 561 S.E.2d at 358 (stating policy language must be given its plain, ordinary, and popular meaning). The term "related" is defined as "connected by reason of an established or discoverable relation." Webster's Third New International Dictionary 1916 (1971).

The trial court found the appropriate reading of "a series of related sexual abuses" refers to a series of related abuses "of a person." It again relied on the language's incorporation of the definition of "sexual abuse," which expressly states that a sexual abuse is committed on "a person." The

court read the language as limiting each victim to one claim, even if they were subjected to abuse multiple times, and finding one claim per victim. It concluded: "[T]his reading is at very least a reasonable interpretation of the provision that must be adopted because it favors coverage."

We find no error by the trial court in its interpretation of the policy's definition of "claim," or the terms "series" and "related." A clause in an insurance policy will not be read in isolation. Stewart v. State Farm Mut. Auto Ins. Co., 341 S.C. 143, 151-52, 533 S.E.2d 597, 601 (Ct. App. 2000). Like the trial court, when we consider the definitions of "claim," "series," and "related" in light of their use in the endorsements, and the definition of sexual abuse, we find the trial court's interpretation of the endorsements is reasonable. See Quinn v. State Farm Mut. Auto. Ins. Co., 238 S.C. 301, 304, 120 S.E.2d 15, 16 (1961) (finding where the words of an insurance policy are capable of two reasonable interpretations, the interpretation most favorable to the insured will be adopted).

B. The Deemer Clause

Appellants next argue the trial court erred in finding the deemer clause was not relevant to the issue of the number of claims arising from Beaufort's settlement agreements. We disagree.

A deemer clause in an insurance contract deems a particular date in the progression of an injury as the triggering date for when the injury takes place for purposes of insurance coverage. Scott M. Seaman & Jason R. Schulze, Allocation of Losses in Complex Insurance Coverage Claims § 3:4 (2010), available at WL, ALCICC § 3:4. The deemer clause in the sexual abuse endorsement[4] provides: "All claims based on or arising out of one sexual abuse shall be considered 'first made' when the first of such claims is made to the assured, **regardless of . . . [t]he number of persons sexually abused** . . . ." The trial court found "[t]he deemer clause addresses only the issue of

[4] The corresponding clause of the sexual harassment endorsement is substantively identical.

when [c]laims are deemed to have arisen for purposes of triggering coverage in a given policy year, not what conduct constitutes a [c]laim." Therefore, the court found the deemer clause has no bearing on the separate question of how many claims are presented.

In Western World Insurance Co. v. Lula Belle Stewart Center, Inc., the United States District Court concluded a deemer clause in a sexual molestation endorsement had no bearing on the issue of whether a series of related acts of molestation constituted more than one occurrence. 473 F. Supp. 2d 776, 785 (E.D. Mich. 2007). The court opined:

> As the courts have recognized, this coverage-triggering inquiry is analytically distinct from the question whether a policy treats a series of related acts or incidents as one or multiple occurrences. In TIG Insurance [Co. v. Smart School, 401 F. Supp. 2d 1334 (S.D. Fla. 2005)], for instance, the court noted that "numerous cases involving occurrence policies" had "ma[d]e a distinction between the issue of whether and under what policy particular claims are covered versus the issue of whether, if there is coverage, the claims amount to more than one occurrence." 401 F. Supp. 2d at 1347 (collecting cases). Similarly, in a case "present[ing] the question of what constitutes a separate 'occurrence'" under the policies at issue, the Sixth Circuit repeatedly emphasized that the portions of the policies addressing coverage-triggering issues– i.e., that specified "when and where an occurrence must take place for . . . coverage to exist" – had no bearing on the distinct question of "the number of occurrences." Michigan Chemical Corp. v. American Home Assurance Co., 728 F.2d 374, 378, 381-82 (6th Cir. 1984) . . . . Consistent with this distinction, the Court concludes that the "first occurs" policy language in

> this case is intended to address the trigger-of-coverage issue, and has no bearing upon the separate question whether a series of related acts of molestation should be treated as one or multiple occurrences.

Id.; see also TIG Ins. Co. v. Smart School, 401 F. Supp. 2d 1334, 1347 (S.D. Fla. 2005) (finding a deemer clause unrelated to the issue of whether separate claims constitute single or multiple occurrences); TIG Ins. Co. v. Merryland Childcare & Dev. Ctr., Inc., 2007 WL 316571, at *6 (W.D. Tenn. 2007) (quoting Smart School to find the deemer clause did not conflict with the definition of "sexual abuse occurrence"). We agree with the trial court that the deemer clause has no bearing on the issue of the number of claims in this case.

C. Foreign Jurisdictions

Appellants maintain the trial court erred in relying on cases from foreign jurisdictions. We disagree.

Both parties cite decisions of other jurisdictions in support of their arguments. We do not regard any of the authorities cited as controlling because the policies involved in the cited decisions contain language different from the policy in this case.

The cases cited by Appellants primarily contain language defining "occurrences" or "sexual abuse occurrences" and find sexual molestations of multiple victims by one perpetrator constitute one occurrence. See Merryland Childcare, 2007 WL 316571, at *2, *6 (finding abuse of multiple children constituted one "sexual abuse occurrence," defined as "[a] single act, or multiple, continuous, sporadic, or related acts of sexual abuse . . . . A 'sexual abuse occurrence' must occur while the claimant is in the care, custody or control of an insured . . . ."); Smart School, 401 F. Supp. 2d at 1342-44 (interpreting language identical to that in Merryland Childcare to reach the same conclusion); TIG Ins. Co. v. San Antonio YMCA, 172

S.W.3d 652, 661 (Tex. App. 2005) (holding that although there were six "occurrences" under the general liability policy, there was only one "sexual abuse occurrence" where "sexual abuse occurrence" was defined as "a single act, or multiple, continuous, sporadic, or related acts of sexual molestation or abuse caused by one perpetrator"); Preferred Risk Mut. Ins. Co. v. Watson, 937 S.W.2d 148, 149-50 (Tex. App. 1997) (finding "occurrence," defined in policy as "[a]ll acts of sexual misconduct by one person . . . [,]" constituted one occurrence).

Contrarily, the cases cited by Beaufort generally contain language defining "claims" or "occurrences," and find sexual molestations of multiple victims, or multiple molestations of one victim, by one perpetrator, constitute multiple occurrences. See Essex Ins. Co. v. Doe, 511 F.3d 198, 201 (D.C. Cir. 2008) (finding four "claims" under the policy where there were four "occurrences" of sexual assault on one victim by four perpetrators); Lee v. Interstate Fire & Cas. Co., 86 F.3d 101, 103-05 (7th Cir. 1996) (finding the underlying facts, not merely policy language, determined if there were multiple "occurrences" where: (1) victim was abused during two policy periods in two distinct places where "occurrence" was defined as "an accident or . . . a continuous or repeated exposure to conditions . . . . All such exposure to substantially the same general conditions . . . shall be deemed one occurrence"; and (2) insurer failed in its burden of proof to show one "occurrence"); Soc'y of the Roman Catholic Church of the Diocese of Lafayette & Lake Charles, Inc. v. Interstate Fire & Cas. Co., 26 F.3d 1359, 1364-65 (5th Cir. 1994) (finding "definition of 'occurrence' affords little assistance because 'a continuous or repeated exposure to conditions' and 'substantially the same general conditions' are malleable. An 'occurrence' could be the church's continuous negligent supervision of [two] priest[s], the negligent supervision of [two] priest[s] with respect to each [of 31] child[ren over seven years], the negligent supervision of [two] priest[s] with respect to each molestation[,]" and concluding each child suffered an 'occurrence' in each policy period in which he was molested); State Farm Fire & Cas. Co. v. Elizabeth N., 12 Cal. Rptr. 2d 327, 329-30 (Cal. Ct. App. 1992) (finding each molestation of a victim was not a separate occurrence, but the molestation of each victim was an occurrence where the policy stated that all bodily injury

resulting from continuous or repeated exposure to the same general conditions would be deemed the result of one occurrence); S.F. v. West Am. Ins. Co., 463 S.E.2d 450, 452-53 (Va. 1995) (concluding the definition of occurrence was ambiguous as it could apply to either negligent hiring, supervision, or retention of the perpetrator, and construing the policy in favor of the insured to find seven occurrences as there were seven victims, but all abusive acts against each victim constituted one occurrence).

We find guidance in the discussion by the Fifth Circuit Court of Appeals in H.E. Butt Grocery Co. v. National Union Fire Insurance Co., 150 F.3d 526 (5th Cir. 1998). The court in H.E. Butt Grocery Co. stated that "while the decisions of other courts are not binding precedent under Texas law, most courts that have considered the question have concluded that the sexual molestation of different children constitutes separate occurrences." 150 F.3d at 532 (citing multiple jurisdictions that held the molestation of different children constituted separate occurrences). The court rejected the insurer's argument that a policy had to be found ambiguous before determining each child suffered a separate occurrence. Id. at 532-33. The court also rejected the insurer's contention that the insured's negligence could only be one "occurrence." Id. at 533-34. The court stated:

> We recognize that courts have not been uniform in their interpretation of "occurrence" under similar circumstances. The Virginia Supreme Court, without much analysis, found that "occurrence" was ambiguous with regard to the molestation of multiple children, but then concluded that the molestation of each child was a separate occurrence because that was the interpretation favorable to the insured in that case. See S.F. v. West Am. Ins. Co., 250 Va. 461, [464-65,] 463 S.E.2d 450, 452 (1995). The Nevada Supreme Court recently reached the opposite conclusion: it did not find "occurrence" to be ambiguous, yet the court concluded that the molestation of different children constituted only one

> occurrence when premised on the county's underlying negligence. See Washoe County v. Transcontinental Ins. Co., 110 Nev. 798, [802-04,] 878 P.2d 306, 308-10 (1994). Even though the court recognized that "the actions of the individual wrongdoers are the most direct causes of harm for the victims," it "conclude[d] that the County's negligence in the licensing process and in its attendant duties to investigate and monitor [the day-care center] constitutes a single occurrence for purposes of liability." Id. We find, however, that the Nevada court's approach conflicts with the greater weight of authority . . . .

Id. at 534; see Interstate Fire & Cas. Co. v. Archdiocese of Portland, 35 F.3d 1325, 1330 (9th Cir. 1994) (concluding "the 'occurrence' is not the . . . negligent supervision of [the perpetrator] . . . , but, rather, the exposure of the [victim] to the negligently supervised [perpetrator]").

We also find persuasive the reasoning employed by the court in the recent case of Lantana Insurance, Ltd. v. Ritchie, 2010 WL 3749084 (N.D. Fla. Sept. 17, 2010). In Lantana, the sexual abuse endorsement provided coverage for claims resulting from "an incident of abuse." Lantana at *1. The policies at issue also provided: "Multiple incidents of abuse caused by one perpetrator . . . shall be deemed to be a single incident of abuse . . . ." Id. at *2. The court found a plain reading of the language limited multiple acts of sexual abuse against one child to one "incident" under the policy. Id. at *3. However, the court concluded that "it is unclear whether 'incident' also includes multiple child victims." Id. Finding the language of the endorsement reasonably susceptible to both interpretations, the court interpreted the policy in favor of the insureds. Id. at *3, *5.

Our review of the cases cited by the parties, and other cases, does not change our conclusion that, under the terms of this policy, the molestation of seven victims gives rise to seven claims. See S.S. Newell & Co. v. Am. Mut.

Liab. Ins. Co., 199 S.C. 325, 332, 19 S.E.2d 463, 466 (1942) ("[T]he express terms and language the parties have used should be given effect [when interpreting an insurance policy] and their intention must be derived from the language employed.").

II. Annual Aggregate in the Limits Clause

Appellants argue the trial court erred in holding Beaufort could access the annual aggregate limits in the sexual abuse and sexual harassment endorsements. We disagree.

The sexual abuse endorsement includes a limits clause providing coverage limits of "$500,000/$3,000,000 Annual Aggregate not to exceed $500,000 **per member** excess of $150,000 self-insured retention **each claim**." The sexual harassment endorsement provides limits of $850,000/$2,550,000.

A. One Claim

Appellants initially argue the trial court erred in reaching the issue of whether Beaufort could access the annual aggregate limits of the endorsements because there is only one claim. This issue is decided in our discussion in the foregoing section, in which we find seven claims arose from the seven settlements.

B. Construction of the Limits Clause

Appellants next assert the trial court erred in construing the limits clause by failing to give separate meaning to the "per member" language in the clause. We disagree.

Appellants argue the annual aggregate limits are "pool" limits intended for all members of the Trust collectively, and that Beaufort, as one member of the Trust, is entitled only to the "sub-limits" in the endorsements. Appellants argue the trial court ignored the phrase "per member," and the

aggregate limits are the amounts available to all members of the Trust per policy period.

The trial court found Appellants' construction of the limits clause ignored the phrase "per claim." It determined the endorsements employed "the familiar 'per-claim limit/aggregate limit' formulation routinely found in insurance policies." The court concluded restricting Beaufort to the "per-claim limit" "focuses only on the phrase 'per member' and ignores the phrase 'each Claim,' which appears in the same sentence."

We find the trial court's interpretation of the limits clause is reasonable. A party "may not, by pointing out a single sentence or clause, create an ambiguity." Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). Where the words of an insurance policy are capable of two reasonable interpretations, the interpretation most favorable to the insured will be adopted. Quinn v. State Farm Mut. Auto. Ins. Co., 238 S.C. 301, 304, 120 S.E.2d 15, 16 (1961). An insurance contract which is "capable of two meanings must be construed in favor of the insured." Reynolds v. Wabash Life Ins. Co., 251 S.C. 165, 168, 161 S.E.2d 168, 169 (1968).[5]

[5] In their Reply Brief, Appellants argue the phrase "each claim" does not modify the phrase "per member," but instead modifies the phrase "self-insured retention." An appellant may not raise additional arguments in the reply brief that were not raised in the initial brief. Glasscock, Inc. v. United States Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001). Therefore, we need not consider this argument. In any event, we find it reasonable to interpret "each claim" as modifying either "per member" or "self-insured retention" and, therefore, affirm the trial court. See Quinn, 238 S.C. at 304, 120 S.E.2d at 16 (stating where words of an insurance policy are capable of two reasonable interpretations, the interpretation most favorable to the insured will be adopted).

C. Patent or Latent Ambiguity

Appellants maintain the language of the limits clause unambiguously limits Beaufort to $500,000 in coverage, but that if an ambiguity exists, the trial court erred in refusing to permit extrinsic evidence to resolve the ambiguity. We disagree.

"When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense." C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377-78, 373 S.E.2d 584, 586 (1988). Extrinsic evidence may not be used to create an ambiguity in an otherwise unambiguous policy. Yarborough, 266 S.C. at 592, 225 S.E.2d at 348 (finding it appropriate to consider extrinsic evidence only if an ambiguity exists within the policy). Even if an ambiguity exists in a contract, extrinsic evidence may not be considered if the ambiguity is a patent ambiguity. Smith v. Coxe, 183 S.C. 509, 516, 191 S.E. 422, 425-26 (1937) (finding parol testimony may be received in construing instrument with latent ambiguity); Polson v. Craig, 351 S.C. 433, 437 n.2, 570 S.E.2d 190, 192 n.2 (Ct. App. 2002) (involving a will, and noting extrinsic evidence is admissible when there is a latent ambiguity, not a patent ambiguity); Bob Jones Univ. v. Strandell, 344 S.C. 224, 231, 543 S.E.2d 251, 254 (Ct. App. 2001) ("A court may admit extrinsic evidence to determine whether a latent ambiguity exists.").

A patent ambiguity is one that arises upon the words of a will, deed, or contract. Smith, 183 S.C. at 516, 191 S.E. at 425-26. A latent ambiguity exists when there is no defect arising on the face of the instrument, but arising when attempting to apply the words of the instrument to the object or subject described. Id. (offering an example of a latent ambiguity as a named beneficiary in a will that is unambiguous on the face of the will, but creates a latent ambiguity where there are two people with that name). Interpretation of an unambiguous policy, or a policy with a patent ambiguity, is for the court. Hann v. Carolina Cas. Ins. Co., 252 S.C. 518, 526-27, 167 S.E.2d 420,

423 (1969); B.L.G. Enters., Inc. v. First Fin. Ins. Co., 328 S.C. 374, 377, 491 S.E.2d 695, 697 (Ct. App. 1997), aff'd, 334 S.C. 529, 514 S.E.2d 327 (1999). Interpretation of a policy with a latent ambiguity is for the jury. Wheeler v. Globe & Rutgers Fire Ins. Co., 125 S.C. 320, 329, 118 S.E. 609, 612 (1923) (Cothran, J., dissenting).

Appellants proffered numerous items in support of their interpretation of the limits clause. Appellants first proffered the affidavit of Randy Plyler, the Director of Risk Management for the Trust. Plyler stated he was involved in the negotiation and purchase of the insurance policy, and the sublimit was the maximum available coverage for all sexual abuse claims for a member in a given year. Plyler stated the aggregate is the maximum coverage available to all members combined. Plyler relied in part on the Trust Fund Agreement and the Coverage Agreement.

Article VI of the Trust Fund Agreement provides the trustees of the Trust with the authority to determine coverage questions. The Coverage Agreement is a document distributed by the Trust to its members.[6] On the second page of the Coverage Agreement, in the Declarations section summarizing the limits of liability, the agreement provides: "Sexual Abuse – Each Claim - $500,000; Aggregate Each Agreement Period Per Member - $500,000; Deductible - $0; *Pool Shared Aggregate Each Agreement Period* - $3,000,000."

The trial court refused to consider Appellants' extrinsic evidence, finding Appellants relied on extrinsic evidence essentially to buttress their interpretation of the policy, which is not an appropriate use of extrinsic evidence. The court concluded its interpretation of the limits language was

[6] At the hearing on the cross-motions for summary judgment, Beaufort argued the Coverage Agreement submitted to the court covered the year following the policy year at issue in this case. The Coverage Agreement in the record states "05 07 04," and explains the policy provides coverage for sexual abuse in the policy, rather than the coverage at issue here, which is provided for in the endorsements.

reasonable, and must be adopted as a matter of law because it favored coverage.

We find even if the policy contains an ambiguity, it is a patent ambiguity as it arises from the language of the policy itself. Therefore, we conclude the trial court did not err in refusing to consider the extrinsic evidence proffered by Appellants.

III. Sexual Harassment Endorsement

Appellants argue the trial court erred in finding the settlements were covered by both the sexual abuse and sexual harassment endorsements. We disagree.

The rules of contract construction require exclusionary clauses to be narrowly interpreted. Buddin v. Nationwide Mut. Ins. Co., 250 S.C. 332, 337, 157 S.E.2d 633, 635 (1967). Where the words of a policy are capable of two reasonable interpretations, the court will adopt the construction most favorable to the insured. Pitts v. Glens Falls Indem. Co., 222 S.C. 133, 137, 72 S.E.2d 174, 176 (1952).

The sexual abuse endorsement defines sexual abuse as "any actual, attempted or alleged criminal sexual conduct of a person by another person, or persons acting in concert . . . which causes physical and/or mental injuries . . . . Sexual abuse also includes actual, attempted or alleged criminal sexual molestation, sexual assault, sexual exploitation or sexual injury." The sexual harassment endorsement defines sexual harassment as "any actual, attempted or alleged unwelcome sexual advances, requests for sexual favors or other conduct of a sexual nature of a person by another person, or persons acting in concert, which causes mental injuries." The endorsements state: "sexual abuse does not include sexual harassment" and "sexual harassment does not include sexual abuse."

Appellants argue even if the victims were the target of acts of misconduct that meet the definition of sexual harassment, their claims would

always arise from sexual abuse. They argue the definition of "claim" is broader than a single act of misconduct, as it is defined as "all notices or suits demanding payment of money based on, or arising out of the same sexual abuse or series of sexual abuses . . . ." Beaufort concedes it may not receive double recovery by coverage under both the sexual abuse and sexual harassment endorsements, but argues recovery under the sexual abuse endorsement does not preclude recovery under the sexual harassment endorsement for acts of sexual harassment.

The trial court agreed with Beaufort, finding to accept Appellants' interpretation of the endorsements would lead to the absurd result of no coverage any time a claim arose from conduct that meets the definitions of both sexual abuse and sexual harassment. Appellants disagree with this finding and maintain they never argued the two endorsements cancel each other out. Rather, they assert the trial court focused on whether an act of sexual abuse could meet the definition of sexual harassment, instead of the language in the sexual harassment endorsement excluding coverage for a "claim" arising directly or indirectly from sexual abuse.

We find no error by the trial court. The complaint in this case alleges the victims suffered both sexual abuse and sexual harassment. As the trial court found, if interpreted as argued by Appellants, the endorsements would cancel each other out any time a claim arose from conduct that meets the definitions of both sexual abuse and sexual harassment. Thus, no coverage would be available at all for conduct that plainly meets both definitions.

Finally, Appellants argue the sexual harassment endorsement includes an "anti-stacking" provision, providing:

> The coverage extension under this endorsement does not apply to any claim arising from actual or alleged physical abuse arising out of sexual harassment of

> any kind or to any claim seeking damages, including defense of same, arising directly or indirectly from any actual or alleged participation in any act of sexual abuse of any person by any assured.

Appellants argue the trial court erred in refusing to interpret this provision as an "anti-stacking" provision. "Stacking is defined as the insured's recovery of damages under more than one policy until all of his damages are satisfied or the limits of all available policies are met." Giles v. Whitaker, 297 S.C. 267, 268, 376 S.E.2d 278, 279 (1989). "Stacking does not depend upon the number of policies issued but rather the number of additional coverages for which the insured has contracted." Ruppe v. Auto-Owners Ins. Co., 329 S.C. 402, 404 n.3, 496 S.E.2d 631, 632 n.3 (1998). Generally, an insured may stack policies unless limited by statute or by a valid policy provision. Id. at 404, 496 S.E.2d at 631-32.

We find the law governing "anti-stacking" provisions does not apply because there is no attempt in this case to apply multiple policies to one event. Rather, the issue is one of applying coverage to multiple events. In this case, there is one policy with two endorsements providing coverage for different risks.

We affirm the trial court's finding that recovery under the sexual abuse endorsement does not preclude recovery under the sexual harassment endorsement for acts of sexual harassment. Construing the policy in this manner does not provide double recovery, as conceded by Beaufort. The victims have alleged acts of sexual abuse and sexual harassment. Whether the claims asserted by the victims constitute sexual abuse or sexual harassment under the terms of the endorsements remains to be determined at trial.

IV. Self-Insured Retentions

Appellants finally argue the trial court erred in holding the Trust is required to pay the self-insured retention for each claim. They claim the trial court: (1) granted relief beyond the scope of Beaufort's summary judgment

motion because it interpreted the Trust Agreement, which was not at issue in the cross-motions for summary judgment and is still in dispute; and (2) misinterpreted the Trust's arguments. We disagree.[7]

In its Answer, the Trust admits "it is obligated under the Trust agreements to indemnify members or assume from trust funds the self-insured retention under the Policy" and that "the insurance program established by the Trust agreements provides for only those coverages/limits provided for by the Policy and one Self-Insured Retention per occurrence/claim . . . ." Beaufort raised the issue in its Memorandum in Support of Beaufort's Motion for Partial Summary Judgment. Beaufort argued: "The Trust . . . pays any self-insured retention ("SIR") applicable to its members under coverage obtained by the Trust." Beaufort also maintained: "The Trust is obligated to pay the $150,000 Self-Insured Retention for each of the seven Claims, or a total of $1,050,000."

The issue was also raised to the trial court in the Trust's "Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment." In its Memoradum, the Trust argued the issue of its obligation under the policy is limited to payment of a single self-insured retention of $150,000.

Finally, the issue was again raised at the hearing on the cross-motions for summary judgment. When arguing for the trial court to consider extrinsic evidence, the Trust acknowledged Beaufort's contention the Trust is "the

[7] The Trust also argues it views the claim of negligent hiring, retention, or supervision of the perpetrator as constituting a single claim with only a single self-insured retention. This is essentially another argument regarding the number of claims, discussed in Section I. See Soc'y of the Roman Catholic Church of the Diocese of Lafayette & Lake Charles, Inc. v. Interstate Fire & Cas. Co., 26 F.3d 1359, 1364-65 (5th Cir. 1994) (finding multiple occurrences could arise from continuous negligent supervision of perpetrators).

entity responsible for multiple [self-insured retentions.]" Beaufort argued if the trial court found seven claims, the Trust would not have the power to change the language in the policy. The Trust responded: "then that opens the Trust up to the payment of seven single self-insured retentions of $150,000, which was never in the contract." The Trust argued:

> The first thing that I want the Court to understand under the policy provisions is that [the Trust's] obligations under the policy are only to pay $150,000 after the self-insured retention has been paid. That is, if you take a look at the policy and look at the sexual abuse endorsement . . . [w]hat that is saying is that [the Trust] doesn't have to pay more than one self-insured retention.
>
> Now, [Beaufort's] interpretation would suggest that now [the Trust] has to pay a self-insured retention of $150,000 for each claim, each individual victim, and that is simply not the case.

In concluding the Trust was liable for seven self-insured retentions, the trial court relied on the endorsements and pleadings. The clauses containing the coverage limits in each endorsement provide that the limits are in "excess of $150,000 self insured retention **each claim**." The court found the clause "each claim" entails a $150,000 self-insured retention, and there were seven claims. Thus, the Trust was responsible for seven retentions. The court discounted the Trust's reliance on the clause in each endorsement, which provides: "The coverage extension under this endorsement does not increase the Self Insured Retention nor the Excess Limit of Insurance of this policy," finding the clause did not contradict the plain language in the endorsements providing for limits of $150,000 for <u>each claim</u>.

We find the Trust's issues were fully raised, within the scope of the cross-motions for summary judgment, and correctly interpreted by the trial

court.[8] See generally Rule 15(b), SCRCP (stating issues not raised by the pleadings but tried by consent of the parties shall be treated as if they had been raised in the pleadings); Staubes v. City of Folly Beach, 339 S.C. 406, 414, 529 S.E.2d 543, 547 (2000) (citing Rule 15(b), SCRCP, and finding although the issue of negligence was not pled, it was raised at the summary judgment hearing and thus the trial court "obviously treated the complaint as if it had been amended"); Murray v. Holnam, 344 S.C. 129, 136 n.1, 542 S.E.2d 743, 747 n.1 (Ct. App. 2001) (finding an amendment to a complaint was impliedly consented to in a summary judgment hearing); Marietta Garage, Inc. v. S.C. Dep't of Pub. Safety, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999) (finding a claim preserved, despite its omission from an amended complaint, because it was raised in the summary judgment and Rule 59 motions without objection).

CONCLUSION

For the foregoing reasons, the trial court's order granting partial summary judgment to Beaufort County is

AFFIRMED.

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[8] Beaufort argues the issues raised by the Trust are not preserved for appellate review because although raised at the Rule 59(e) hearing, the issues were not included in the Rule 59(e) motion. In the Rule 59(e), SCRCP, motion to reconsider, Appellants argued: "The Court erroneously found that [the Trust] must pay more than one self insured retention in that under the plain language of the Policy and Trust documents, [the Trust] is only required to pay a total self insured retention of $150,000 as a result of the underlying litigation." The arguments were discussed at the hearing on the motion to reconsider. The trial court permitted the parties to submit supplemental memoranda. The trial court denied Appellants' motion to reconsider. Therefore, we find the Trust's issues preserved for appeal. See Pye v. Estate of Fox, 369 S.C. 555, 566, 633 S.E.2d 505, 511 (2006) (finding an issue preserved where it was raised at the summary judgment and Rule 59(e) motions hearings).

THOMAS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Richland Horizontal Property Regime Homeowners Association, Inc., Peggy Johnson, and Michael D. McCord, Respondents,

v.

Sky Green Holdings, Inc., ARC, LLC, Ron Cobb, and also all other persons unknown claiming any right, title, estate, interest in or lien upon the real estate described in the Complaint, Appellants.

Appeal From Greenville County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4795
Submitted December 1, 2010 – Filed February 23, 2011

AFFIRMED

James A. Blair, III, Nikole Setzler Mayo, and Manton M. Grier, all of Greenville, for Appellants.

Jason James Andrighetti, of Greenville, for Respondents.

FEW, C.J.: In this appeal we are called upon to determine what the Legislature meant by the term "on the first page of the contract" in section 15-48-10(a) of the South Carolina Uniform Arbitration Act (2005). We hold that the term means the page preceding all other pages in the contract. We agree with the circuit court that the notice of arbitration in this case does not comply with the statute, and affirm the denial of the motion to compel arbitration.[1]

"The Richland" is a condominium building in the City of Greenville. The original design for the building as reflected in the master deed[2] contained twenty-four units. Sky Green Holdings, Inc., the developer, sold twenty of the twenty-four units according to the terms of the master deed. Section 5 of the master deed provides: "A Condominium owner shall have the exclusive ownership of his Condominium and shall have a common right to share, with the other Co-owners, in the common elements of the Regime . . . ." After the sale of the first twenty units, Sky Green filed a "supplemental" master deed amending the original by adding one unit that did not previously exist. It also allotted the new unit a 4% ownership interest in the common elements, and reduced each of the original units' share in the common elements accordingly. Sky Green conveyed the new unit to ARC, LLC for five dollars.

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

[2] "'Master deed' . . . means the deed . . . establishing and recording the property of the horizontal property regime." S.C. Code Ann. § 27-31-20(i) (2007).

Peggy Johnson and Michael McCord are two of the original unit owners and members of The Richland Horizontal Property Regime Homeowner's Association. Johnson, McCord and the Homeowner's Association filed suit against Sky Green, ARC and others alleging that the sale of the new unit violated the terms of the master deed. They sought various forms of relief, primarily a declaratory judgment that the new unit remained a part of the original common elements. The defendants filed a motion to compel arbitration, which the circuit court denied on the basis that the notice of arbitration is not located on the first page of the master deed as required by section 15-48-10(a).[3] Defendants contend on appeal that the circuit court misconstrued the term "on the first page of the contract."

Section 15-48-10(a) of the Uniform Arbitration Act provides:

> Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

S.C. Code Ann. § 15-48-10(a) (2005) (emphasis added).[4] Our supreme court has held that the terms of this section are "clear" and "the court must apply those terms according to their literal meaning." Soil Remediation Co. v. Nu-

[3] The plaintiffs also opposed the motion to compel arbitration on the ground that the master deed is not a contract. Apparently satisfied with his ruling on the "first" issue, however, the circuit court did not reach this question; nor do we.

[4] Neither party asserts that the master deed is a transaction involving interstate commerce. Thus, section 15-48-10(a) is not pre-empted by the Federal Arbitration Act in this case. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (holding Uniform Arbitration Act preempted and thus not enforceable as to a transaction involving interstate commerce).

way Envtl., Inc., 323 S.C. 454, 457, 476 S.E.2d 149, 151 (1996). See also Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001) ("The notice provision must be typed . . . on the first page of the contract. No other variation is acceptable."). The term "first" is defined as preceding all others. Black's Law Dictionary 635 (6th ed. 1990).[5] Thus, the "first page" of a contract is the page preceding all other pages. The first page of the master deed does not contain the required notice of arbitration. Therefore, the master deed does not comply with section 15-48-10(a), and is not subject to arbitration.

The defendants argue, however, that the master deed contains a "cover page," and thus the second page is actually the first page. In support of this argument, the defendants point out that the second page contains the following statement:

> This is the first page of the Master Deed for The Richland Horizontal Property Regime. In the event other pages including but not limited to cover pages, indexes, or tables of contents are placed in front of this page, those pages shall not be deemed the first page. This page and this page only shall be deemed the first page of the Master Deed for all legal purposes.

Despite this language, the first page is part of the master deed. It prominently displays the title of the document: "MASTER DEED OF THE RICHLAND HORIZONTAL PROPERTY REGIME." It contains the stamp of the Register of Deeds with book and page numbers; the statement "Developer: Sky Green Holdings, Inc.;" and the name, firm and contact information of the lawyer who "prepared" the master deed. Because it is part of the master deed, and because it precedes all other pages, it is the first page of the master deed.

[5] Black's Law Dictionary defines "first" more fully as "[p]receding all others; foremost; . . . earliest in time or succession or foremost in position; in front of or in advance of all others." Id.

The defendants suggest we should decide this case "in light of the strong public policy favoring arbitration." While we acknowledge the strength of that policy, we adhere to the even stronger mandate that we apply the plain language of a statute. See Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue., 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (internal quotations omitted)). Parties to a contract may not circumvent the requirements of a statute by redefining its plain and unambiguous terms.

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kenneth Ray Harris, Appellant.

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

Opinion No. 4796
Submitted September 11, 2010 – Filed February 23, 2011

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr.,

all of Columbia; Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

KONDUROS, J.: Kenneth Ray Harris appeals the trial court's denial of his motion for a new trial based on after-discovered evidence in the form of a recantation by a witness for the State. We affirm.[1]

FACTS/PROCEDURAL HISTORY

In 1996, a jury convicted Harris of offenses including two counts of first-degree burglary, two counts of felony driving under the influence (DUI), and assault and battery of a high and aggravated nature (ABHAN).[2] The trial court sentenced him to twenty years' imprisonment for each count of burglary, fifteen years' imprisonment for each count of felony DUI, and thirty days' imprisonment for ABHAN, all to run concurrently. Harris's convictions arose out of events occurring on April 19, 1996. The State contended that while they were intoxicated, Harris, Chad Moore, and Steve "Peanut" Allen broke into the home of Moore's neighbor, Palaemon "Pete" Hilsman, beat him, and then forced him to take a ride with them in Hilsman's truck. Harris, while driving the truck, collided with a vehicle, injuring the two women in the other car.

At trial, Hilsman testified that on the night of the incident, while he was sleeping, he heard a loud noise and then saw three people running at his door. He testified they kicked the door in, knocking the deadbolt out of it. Hilsman had previously met Allen and Moore and recognized them as two of the men in his house on the night of the incident. He did not know the third person before that night but identified him at trial as Harris. He stated that Allen held him down while Harris kicked him in the rib cage, and then Allen began hitting him in the head.

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

[2] Harris was acquitted of kidnapping and grand larceny.

Hilsman further provided that the three men left and returned about fifteen minutes later and began throwing and breaking objects in his house. They then "got [him] out of the house in the truck." He testified they all got into his truck and Harris was driving. He stated Harris, Allen, and Moore were all drinking beer as they drove around. Hilsman indicated Harris was driving at a high speed along a straight road and did not even slow down when they approached a stop sign. While going through the intersection, they hit another car, injuring two women in that car.

Moore testified that early in the morning on April 19, 1996, he woke up to find his friends, Harris and Allen, in his house drinking beer. The three of them then went to Hilsman's house, and Harris kicked in the door. Harris and Allen entered the house and began arguing with Hilsman. Hilsman got a knife, and Allen tackled him. Harris and Allen then started hitting Hilsman and one of them also kicked him. Moore testified that he, Harris, and Allen left Hilsman's house but returned a few hours later. They asked to borrow Hilsman's truck but he would only let them borrow it if he went with them. Hilsman bought more beer, and they continued driving around until Harris drove through a stop sign without stopping, colliding with another car, injuring two women in the other car.

In 2001, Harris moved for a new trial based on an affidavit by Moore that his testimony against Harris at trial was incorrect. Moore stated Solicitor Mark Moyer had threatened him that he would ensure Moore went to prison for at least thirty years if he did not testify as Moyer instructed him. On October 27, 2005, Moore, Harris, and Moyer all testified at a hearing on the matter.

Moore testified that some of the testimony he had given at trial was false. He stated that his testimony that Harris had kicked Hilsman's door was untrue. He testified Moyer had insinuated that if he did not say Harris had kicked the door in, Moore would go to prison for the rest of his life. He further testified Hilsman and Harris did not argue or fight that night. Moore also stated that Hilsman and Allen did wrestle but they were just playing, there was no malice, and Harris was not involved. He stated that Moyer had

told him "it's either you or them, but somebody has got to take it." Moore also testified Moyer told him he would receive a life sentence for the first-degree burglary charge against him but agreed to reduce it to second-degree burglary to run concurrent with the time he already received for a probation violation if Moore cooperated. Moyer also agreed to drop the kidnapping charge. Additionally, Moore testified that Moyer wrote him a couple of letters while he was incarcerated and requested to visit him once but never came.

Moore explained he wrote an affidavit describing how his testimony was incorrect because he wanted to "let it be known that everything I stated at the time of the trial wasn't the absolute truth, and why I stated the things I did. And that it was because – at the time, I really didn't have a firm grasp of how, you know, legal proceedings were." He further stated:

> I really was under the impression, at the time, that pretty much whatever Mr. Moyer said he could give me is what he could give me. I didn't, you know, really realize it wasn't really up to him, period, with what the sentence was, or for that matter any lengths of time that he couldn't give me anything. The Judge had to give it to me. I figured that if I didn't, you know – and he was an authority figure, too, also.

Moore also testified he currently had charges pending against him from the solicitor's office where Moyer worked.

Harris testified at the hearing he always turned his head and did not speak to Moore the few times he had seen Moore in prison. Harris provided that Moore approached him and apologized and then wrote the affidavit recanting some of his testimony. He further testified that he believed Moore's testimony was the reason he was convicted; "[h]e was their only witness, their only evidence." Despite Hilsman's testimony that Harris beat him, Harris maintained the State did not prove he assaulted Hilsman because the State never introduced any pictures of Hilsman's injuries or medical reports.

Harris speculated that the State probably pressured Hilsman to testify against him like it did Moore.

Moyer also testified at the hearing. He stated that he met with Moore before Harris's trial and Moore was very cooperative and eager. Moyer believed Moore's testimony matched Hilsman's story of what had happened. Moyer also explained that he had contacted Moore while he was in prison because he wanted to interview Moore about a paper he was writing for a class on a link between education level and criminal activity. However, after Moyer decided not to write the paper, he had no further contact with Moore.

In 2008, the trial court issued an order finding Moyer's testimony credible.[3] It further found the circumstances surrounding Moore's giving the affidavit recanting his trial testimony, the time when the affidavit was given, and Moore's testimony during the hearing caused it to find the recantation testimony unreliable. This appeal followed.

LAW/ANALYSIS

Harris contends the trial court erred in denying his motion for a new trial based on after discovered evidence of perjury by a witness for the State. He maintains he could not have discovered the false testimony during the trial and the recanted testimony was material, helpful to the State, and undoubtedly contributed to his conviction. We disagree.

"A motion for a new trial based on after-discovered evidence must be made within a reasonable period of time after the discovery of the evidence . . . ." Rule 29(b), SCRCrimP. "A motion for a new trial based on after-discovered evidence is addressed to the sound discretion of the trial judge." State v. Irvin, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978). "The granting of a new trial because of after-discovered evidence is not favored," and this court will affirm the trial court's denial of such a motion unless the trial court abused its discretion. Id. at 545, 243 S.E.2d at 197-98.

[3] The court noted: "Through inadvertence, a written order was not issued after the hearing. This written order is issued for the purpose of any appeal."

The credibility of newly-discovered evidence is for the trial court to determine. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). Only the trial court and not the appellate court has the power to weigh the evidence; the trial court's judgment will not be disturbed except for error of law or abuse of discretion. Id. "In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009). "On review, we may not make our own findings of fact. The deferential standard of review constrains us to affirm the trial court if reasonably supported by the evidence." Id.

In order to warrant the granting of a new trial on the ground of after-discovered evidence, the movant must show the evidence (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999). "'Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.'" Porter, 269 S.C. at 621, 239 S.E.2d at 643 (quoting State v. Mayfield, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959)).

This issue comes down to a matter of the credibility of the witnesses, which we leave to the trial court's discretion. The trial court found Moyer to be credible. It also found the circumstances surrounding Moore's recantation as well as Moore's testimony at trial made the recantation unreliable. The record supports the trial court's assessment. Accordingly, the trial court did not abuse its discretion in denying Harris's motion for a new trial. Therefore, the trial court's order is

AFFIRMED.

WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Margaret M. Reiss,	Respondent,
v.	
Paul W. Reiss and Pamela Buck a/k/a Pamela Evans,	Defendants,
of whom Paul W. Reiss is the	Appellant.

Appeal From Charleston County
Judy L. McMahon, Family Court Judge

Opinion No. 4797
Heard November 3, 2010 – Filed February 23, 2011

AFFIRMED

Anthony P. LaMantia, III, of Charleston, for Appellant.

Stephanie P. McDonald, of Charleston, for Respondent.

LOCKEMY, J.: In this domestic action, Paul W. Reiss (Husband) appeals the family court's final decree of divorce alleging error in the family

court's (1) valuation of marital property, (2) equitable apportionment, (3) award of alimony to Margaret M. Reiss (Wife), (4) calculation of his support arrearage, and (5) award of attorney's fees in favor of Wife. We affirm.

FACTS

Husband and Wife were married in June 1990, and no children were born as a result of the marriage. During the marriage, the parties maintained a marital home on Kiawah Island (Kiawah Property). Husband was employed as a commercial fisherman and participated in the wreckfish fishery off the coast of South Carolina. In 1991, the parties formed Pamar Holdings to administer the fishing business as equal shareholders. Wife worked in the parties' fishing business for most of the marriage. In 2002 Wife was diagnosed with breast cancer.

In spring 2004, Husband began an adulterous relationship with Pamela Buck. Unbeknownst to Wife, Husband sold an investment property the parties owned on Seabrook Island (Seabrook Property) netting approximately $437,000. Husband used a portion of the proceeds personally and transferred approximately $362,000 to Buck, who used the funds to aid in the purchase of a property in Florida (Florida Property). Buck subsequently transferred the Florida Property to PBR Holdings, LLC owned by Husband and Buck. A month after this action was filed in family court, PBR Holdings transferred the Florida Property back to Buck. Buck later sold the Florida Property for approximately $750,000.

In January 2004, Husband left the Kiawah Property to fish in the Gulf of Mexico region. A few months later, Wife moved in with her parents in Florida to undergo medical treatment for cancer. During her treatment, Wife visited the Kiawah Property and discovered numerous items missing. Later, Wife learned Husband was having an affair with Buck. In March 2005, Wife initiated this action for divorce on grounds of adultery. After a trial, the family court issued a final decree of divorce declaring the parties divorced, awarding Wife alimony, and equitably dividing the parties' marital estate. This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, this court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Wooten v. Wooten, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005). Despite this broad scope of review, this court is not required to disregard the findings of the family court. Id. We are mindful that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Id.

LAW/ANALYSIS

I. Valuation of Marital Property

Husband argues the family court erred in valuing several pieces of the parties' marital property. The family court has broad discretion in valuing marital property. Roe v. Roe, 311 S.C. 471, 478, 429 S.E.2d 830, 835 (Ct. App. 1993). The family court's determination of the value of marital property will not be disturbed absent an abuse of discretion. See id.

A. Cost of Repairs to the Kiawah Property

Husband contends no evidence supports the family court's finding the cost of repairs to the Kiawah Island Property totaled $269,000. We disagree.

The family court issued a temporary order awarding Wife exclusive use and possession of the Kiawah Property and ordered Husband to pay the insurance on the property. However, in August or September 2005, Husband allowed the insurance to lapse and when Wife subsequently visited the Kiawah Property, she discovered water damage. Wife testified an engineering report revealed the air conditioning system malfunctioned causing extensive water damage to the floors, walls, and ceiling. At trial, Wife estimated the cost of repairs at $221,000; however, her financial declaration listed an estimated repair cost of $269,000. According to Husband, he hired a contractor to repair the Kiawah Property for $8,000. The family court was free to accept Wife's valuation over Husband's, and its finding is within the range of the evidence presented. See Pirri v. Pirri, 369

S.C. 258, 264, 631 S.E.2d 279, 283 (Ct. App. 2006) (finding the "family court may accept the valuation of one party over another, and the court's valuation of marital property will be affirmed if it is within the range of evidence presented"). Accordingly, we find the family court did not abuse its discretion in valuing the cost of repairs to the Kiawah Island property.

Additionally, Husband maintains the family court erred in making him solely responsible for the cost of repairs because the water damage was present when the insurance policy was in effect. Husband points to inconsistencies in Wife's testimony and concludes they indicate she discovered the water damage while the insurance was in effect and failed to file an insurance claim. Although Wife's testimony is vague on the issue of exactly when she discovered the damage in relation to when the insurance policy lapsed, she was consistent in her testimony that she did not file an insurance claim because no insurance was in effect. Because this is an issue of credibility, and the family court was in a better position than this court to judge the witness's credibility, we defer to the family court's findings. See Avery v. Avery, 370 S.C. 304, 315, 634 S.E.2d 668, 674 (Ct. App. 2006) (deferring to the family court's equitable distribution when issue was one of witness credibility).

B. Kiawah Property Equity

Husband argues the family court erred in determining the equity in the Kiawah Island property was $485,000. Husband contends the family court improperly reduced the amount of equity in the Kiawah Property by $400,000 to account for the mortgage Wife unilaterally secured on the property and should have determined the amount of equity to be $735,000. We disagree.

Husband's argument misconstrues the family court's order. The family court valued the equity in the Kiawah Property at $885,000 based upon two appraisals. The family court then subtracted $400,000 from the equity to account for the loan Wife unilaterally secured on the property during litigation and awarded her $485,000 in credit towards the equitable apportionment. Husband did not receive any credit for the equity in the Kiawah Property. It appears the family court counterbalanced the Kiawah

Property equity in Wife's favor with Husband's fishing vessel, the Bold Venture, valued at $450,000 in his favor. Further, the family court ordered that Wife assume sole responsibility for the mortgage. In sum, the family court reduced the amount of credit awarded to Wife for the equity in the Kiawah Property. This reduction was to Husband's benefit. We find no abuse of discretion in the family court's calculation of the equity in the Kiawah Property.

C. Bold Venture

Husband argues the family court erred in valuing the fishing vessel Bold Venture at $450,000 when the overwhelming evidence presented at trial demonstrated its value was $100,000. At trial, Husband asserted the value of the Bold Venture was $100,000.[1] However, in a salvage action filed in the United States District Court for the District of South Carolina six months before Wife initiated this divorce action, Husband asserted the value of the Bold Venture was $450,000. Relying on Hayne Federal Credit Union v. Bailey, the family court found Husband was judicially estopped from asserting a value different than $450,000. 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997) (adopting the doctrine of judicial estoppel as it relates to matters of fact). Husband has not appealed the family court's judicial estoppel ruling; therefore, it is law of the case. In re Morrison, 321 S.C. 370, 372 n.2, 468 S.E.2d 651, 652 n.2 (1996) (noting an unappealed ruling becomes law of the case and precludes further consideration of the issue on appeal). Accordingly, we are precluded from considering Husband's argument.

II. Husband's Income

Husband argues the family court erred in determining his yearly income and should have imputed a $65,000 per year income to Wife. We disagree.

[1] The family court found Husband's testimony asserting the Bold Venture's value was $100,000 was not credible.

In domestic actions, this court reviews alimony awards and the family court's equitable apportionment of marital property for an abuse of discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002) (finding the decision to grant or deny alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion); Greene v. Greene, 351 S.C. 329, 340, 569 S.E.2d 393, 399 (Ct. App. 2002) ("The apportionment of marital property will not be disturbed on appeal absent an abuse of discretion."). Pursuant to section 20-3-130(C)(6) of the South Carolina Code (Supp. 2010), the family court must determine the current and reasonably anticipated earnings of both spouses in making an award of alimony. Likewise, in equitably apportioning the parties' marital property the family court must consider the income and earning potential of each spouse. S.C. Code Ann. § 20-3-620(B)(4) (Supp. 2010).

Husband's financial declaration fails to expressly specify his income and merely states "See Tax Returns." Husbands 2006 individual tax return states a taxable income of $0.00. Husband's fishing business, Stone Bass Fisheries, LLC, reported a net profit of $61,667 for 2006. However, PBR Holdings, also owned by Husband, reported a net loss of $61,667 for 2006. In contrast, Husband's 2004 individual tax return states a taxable income of $323,096. In an affidavit filed in conjunction with the temporary hearing, Husband asserted he earns a gross income of approximately $250,000 per year. The only evidence of Wife's earning potential independent of the parties' fishing business was Husband's assertion Wife was earning between $70,000 and $80,000 per year at the time the parties married. Further, Wife has battled breast cancer throughout the course of this action, and although her cancer was in remission at the time of the final hearing, she faced several reconstructive surgeries shortly thereafter. Based on the foregoing, we find evidence supports the family court's findings Husband has the ability to earn $350,000 per year, less the normal and ordinary expenses associated with the fishing business, and Wife's earning capacity was minimal due to her health issues. Accordingly, the family court did not abuse its discretion.

Husband also contends the family court's error in determining his yearly income tainted the family court's calculation of (1) his alimony obligation, (2) his support arrearage, (3) the attorney's fees owed Wife, and (4) the equitable apportionment. Essentially, Husband asserts because he

earns only $65,000 per year, he cannot afford these obligations. In light of the disposition above, we do not consider these elements of Husband's arguments below. See Arnal v. Arnal, 363 S.C. 268, 288 n.8, 609 S.E.2d 821, 831 n.8 (Ct. App. 2005) (noting this court need not consider remaining issues when disposition of prior issues is dispositive).

A. Alimony

Husband alleges the family court erred in calculating his alimony obligation. Specifically, Husband points to several factors to which he would assign different weight than the family court. We disagree.

The decision to grant or deny alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. Dearybury, 351 S.C. at 282, 569 S.E.2d at 369. An abuse of discretion occurs when the family court's ruling is controlled by an error of law or based upon findings of fact that are without evidentiary support. Id.

Alimony is a substitute for the support normally incident to the marital relationship and should put the supported spouse in the same position, or as near as is practicable to the same position, enjoyed during the marriage. Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). If an award of alimony is warranted the family court has a duty to make an award that is fit, equitable, and just. Id. The family court may grant alimony in such amounts and for such a term as it considers appropriate under the circumstances. Davis v. Davis, 372 S.C. 64, 79, 641 S.E.2d 446, 454 (Ct. App. 2006). The family court must consider the following factors: (1) duration of the marriage, (2) the physical and emotional health of the parties, (3) educational background of the parties, (4) employment history and earning potential of the parties, (5) standard of living during the marriage, (6) current and reasonably anticipated earnings of the parties, (7) current and reasonably anticipated expenses of the parties, (8) marital and nonmarital property of the parties, (9) custody of the children, (10) marital misconduct or fault, (11) tax consequences, (12) prior support obligations, and (13) any other factors the family court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2010). However, "[t]he family court is only required to consider relevant factors." King v. King, 384 S.C. 134, 142, 681 S.E.2d 609,

613 (Ct. App. 2009); Epperly v. Epperly, 312 S.C. 411, 415, 440 S.E.2d 884, 886 (1994) (remanding for consideration of all relevant factors in section 20-3-130(C)).

In reviewing an award of alimony, we do not reweigh the statutory factors; rather our review is limited to determining whether the family court abused its discretion. See Bodkin v. Bodkin, 388 S.C. 203, 217, 694 S.E.2d 230, 238 (Ct. App. 2010). Here, the family court listed each factor it was required to consider pursuant to section 20-3-130(C) and made findings of fact supported by evidence in the record and conclusions of law regarding each factor. Accordingly, we find the family court did not abuse its discretion in awarding alimony or in determining the amount of alimony. Id. (finding the family court did not abuse its discretion in awarding alimony when it "made findings of fact on all of the relevant factors, and the record contain[ed] evidence to support each of those findings").

B. Support Arrearage

Husband argues no evidence supports the family court's finding he owes a support arrearage of $79,799.77. A review of the record reveals evidence supports the family court's calculation. Wife provided an itemized summary of the arrearage with her financial declaration indicating Husband owed $507,737.13. The family court then subtracted various items that were accounted for in other parts of the final divorce decree. Accordingly, we find Husband's argument is without merit.

C. Attorney's Fees

Husband maintains the family court erred in ordering he pay a portion of Wife's attorney's fees. Specifically, Husband contends the family court erred in determining the attorney's fees of James McLaren and accounting fees of Kenton Thompson would not have been incurred but for Husband's fault in the breakdown of the marriage and his efforts to defeat Wife's interest in marital property. We disagree.

The award of attorney's fees in a domestic action rests within the sound discretion of the family court. Stevenson v. Stevenson, 295 S.C. 412, 415,

368 S.E.2d 901, 903 (1988). In deciding whether to award attorney's fees and costs, the family court should 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) 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 determining an award is appropriate, the family court should next consider the amount of attorney's fees and costs to award. Farmer v. Farmer, 388 S.C. 50, 57, 694 S.E.2d 47, 51 (Ct. App. 2010). In determining a reasonable attorney's fee 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).

Here, the family court addressed the E.D.M. factors and determined an award of attorney's fees was appropriate. The family court also addressed the Glasscock factors in determining a reasonable attorney's fee. Because the family court properly considered the E.D.M. and Glasscock factors, we conclude the family court did not abuse its discretion in awarding Wife $125,551.48 in attorney's fees and $7,000 in accounting costs. See Dickert v. Dickert, 387 S.C. 1, 10-11, 691 S.E.2d 448, 453 (2010) (holding the family court did not abuse its discretion in awarding attorney's fees when it properly considered the E.D.M. and Glasscock factors).

Furthermore, Husband's contention the family court improperly considered his fault in causing the divorce when awarding attorney's fees and costs is without merit. See, e.g., Doe v. Doe, 370 S.C. 206, 219, 634 S.E.2d 51, 58 (Ct. App. 2006) ("A party's fault in causing a divorce . . . is not a factor to be considered when awarding attorney's fees."). In fact, the family court found the time necessarily devoted to the case was substantial and the fees and costs would not have been incurred but for Husband's fault in the breakdown of the marriage and his subsequent efforts to defeat Wife's interest in marital property. The family court specifically noted Wife's counsel and accountant went to great lengths to trace the proceeds from Husband's surreptitious sale of the Seabrook Property. This is in contrast to the family court's erroneous finding in Doe that husband should be awarded attorney's

fees primarily because wife's adultery caused the divorce. Id. Accordingly, Husband's argument is without merit. We find no abuse of discretion in the family court's award of attorney's fees and accounting costs.

D. Amount of Wife's Equitable Distribution

Husband contends the family court erred in ordering he pay Wife in excess of $500,000 in equitable distribution because his yearly income is only $65,000 and he does not have the ability to pay $500,000. We disagree.

"The apportionment of marital property will not be disturbed on appeal absent an abuse of discretion." Greene v. Greene, 351 S.C. 329, 340, 569 S.E.2d 393, 399 (Ct. App. 2002). Section 20-3-620(B) of the South Carolina Code (Supp. 2010) lists fifteen factors the family court must consider in making an equitable apportionment and grants the court the discretion to determine the weight to assign to each of the factors. Id. "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." Id. Here, the family court expressly considered the relevant factors pursuant to section 20-3-620(B). Furthermore, a review of the record reveals the overall equitable apportionment was fair and reasonable especially considering Husband's misconduct in attempting to defeat Wife's interest in the Florida Property and the disparity between the parties' earning potentials. Accordingly, we find the family court did not abuse its discretion in equitably apportioning the parties' marital property.

CONCLUSION

For the foregoing reasons, the decision of the family court is

AFFIRMED.

HUFF and KONDUROS, JJ., concur.