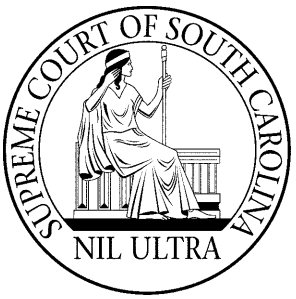

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 8
February 20, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Harriett Arnold Wilburn, Respondent,

v.

Paul Elijah Wilburn, Appellant.

Appellate Case No. 2011-191628

Appeal from Greenville County
Billy A. Tunstall, Jr., Family Court Judge

Opinion No. 27222
Heard December 4, 2012 – Filed February 20, 2013

AFFIRMED IN PART AND REVERSED IN PART

David A. Wilson of The Law Offices of David A. Wilson, LLC, and Kenneth C. Porter of Porter & Rosenfeld, both of Greenville, for Appellant.

Timothy E. Madden of Nelson, Mullins, Riley, & Scarborough, LLP, of Greenville, for Respondent.

JUSTICE HEARN: These parties lived together as husband and wife for thirty years, enjoying a comfortable standard of living and raising two sons. Following the onset of serious health problems for both parties, they ultimately separated, and it became the task of the family court judge to identify and divide their rather substantial estate and dissolve their marriage in an equitable fashion.

Among other issues, this case presents the novel question of whether trust distributions can be marital property, and we hold they can in certain limited circumstances. Additionally, while we affirm the majority of the family court's equitable division, we reverse the inclusion of one tract of timber as marital property and adjust the apportionment of the marital estate so as to give the husband credit for the increase in equity in the marital home he was responsible for during the parties' separation. We also reverse the reservation of alimony to the wife and modify that portion of the order which required the husband to pay $156,182 for the wife's attorney's fees and costs.

FACTUAL/PROCEDURAL BACKGROUND

Harriet Wilburn (Wife) and Paul Wilburn (Husband) were married in 1978, when Wife was twenty-five years old and Husband was twenty-nine years old. At that time, Wife, a college graduate, was employed. Husband had graduated from law school and was employed in private practice.

The parties' first son was born in 1982. After his birth and by mutual agreement of the parties, Wife ceased working. Their second son was born in 1984. Although Wife never returned to work, she made significant expenditures of time and effort throughout the marriage caring for the children and running the household. Around the time their second son was born, Husband became an assistant United States attorney, a position he held until 1994.

After his father's death in 1990, Husband inherited some shares of stock. When his mother died in 1991, he inherited additional stock and several parcels of real property. Thereafter, Husband's health began to deteriorate, and he experienced ulcers and depression. In 1994, he suffered a serious and debilitating stroke. Ultimately, he was paralyzed on the left side of his body. He also suffered significant mental impairment with only a quarter of his brain still functioning, resulting in spatial dyslexia and the inability to process chronologies or numbers. Upon being discharged from the hospital, Husband returned home where he was cared for by Wife and paid caretakers. He was never able to return to work and began receiving a monthly annuity payment from the federal government. Also, the parties' home was not conducive to Husband's disability, so several years after his stroke the parties moved to a new home designed specifically for handicap accessibility.

Prior to his stroke, Husband had opened account 9443 with Smith Barney. The account was titled in his name only and managed by the parties' financial advisor, Geddings Crawford. Shortly after the stroke, Wife and Crawford went to a bank lockbox to remove stock certificates in Husband's name. At Husband's direction, they placed the stocks from the lockbox and other securities in account 9443. Husband then gave Wife power of attorney, and thereafter, she exercised control over that account, writing checks from it as necessary to cover household expenses. Additionally, other assets were placed in the account over the course of their marriage. For example, distributions from a charitable remainder trust and funds from the parties' joint checking account were transferred into the account.

After Husband's stroke, the parties created the Wilburn Family Limited Partnership to which they both contributed assets. Husband and Wife each have a one percent interest in the partnership and their sons have the remaining ninety-eight percent. Husband is the general partner and can pay himself management fees at his discretion.

Additionally, the parties created the Paul E. Wilburn III Charitable Remainder Unitrust, an irrevocable trust, in order to provide them with money during their lifetimes. Under the terms of the trust, Husband receives an annual distribution in the amount of 7% of the value of the trust until his death, and then Wife is to receive an identical distribution until her death, at which time the remainder goes to Presbyterian College.

In 2002, Wife was diagnosed with breast cancer. According to Wife, Husband's response to her illness was primarily concern as to who would care for him. She underwent chemotherapy, a double mastectomy, as well as a hysterectomy. Eventually, the cancer went into remission, and in 2004 she finally began to feel she had recovered.

As Wife was coping with her own illness, she perceived Husband as having become paranoid, irritable, and obsessed with finding a cure for his paralysis. Eventually, the marital relationship became unbearable for her. In 2008, she rented an apartment nearby, but remained in the marital home for five months thereafter to ensure Husband would be cared for when she left. In October of 2008, Wife left the marital home, moved into her apartment, and filed a complaint for separate support and maintenance. Husband then revoked Wife's power of attorney. He also opened two bank accounts—Palmetto Bank accounts 0109 and 8819—and transferred the majority of the assets in account 9443 into those accounts.

Shortly after filing her initial complaint, Wife filed a motion to appoint a guardian *ad litem* for Husband and a motion to supplement the complaint to seek a divorce and to bifurcate the issue of divorce from the other issues. The family court granted both motions and subsequently granted Wife a divorce based on one year's separation. Following a trial on the remaining issues, the family court entered an order classifying the parties' assets as marital or nonmarital, dividing the marital estate, reserving jurisdiction on the issue of alimony, and ordering Husband to pay Wife's attorney's fees and costs. Husband appealed, raising numerous issues related to the family court's identification of marital property, equitable division of the marital estate, reservation of alimony to Wife, and award of attorney's fees and costs.

STANDARD OF REVIEW

This Court exercises de novo review over appeals in family court cases. *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). However, we recognize this broad scope of review does not alter the fact that a family court is better able to make credibility determinations because it has the opportunity to observe the witnesses. *Id.* Additionally, the de novo standard does not relieve the appellant of the burden of identifying error in the family court's findings. *Id.* Accordingly, the decision of the family court will be upheld unless the Court finds that a preponderance of the evidence weighs against the family court's decision. *Id.*

LAW/ANALYSIS

I. EQUITABLE DIVISION

A. Husband's Federal Annuity Payments

Husband contends the family court erred in classifying the monthly annuity payments he receives from the United States as marital property. We disagree.

Subject to certain exceptions, marital property is defined as "all real and personal property which has been acquired by the parties during marriage and which is owned as of the date of filing or commencement of marital litigation." S.C. Code § 20-3-630(A) (Supp. 2011). When confronted with benefits, such as Husband's annuity, that are not specifically addressed by the statute, we look to their nature and purpose to determine if they are marital property. *See, e.g.*, *Tiffault v. Tiffault*, 303 S.C. 391, 392-93, 401 S.E.2d 157, 158 (1991) (considering

vested military retirement benefits); *Hardwick v. Hardwick*, 303 S.C. 256, 259-60, 399 S.E.2d 791, 793 (Ct. App. 1990) (considering a vested retirement fund).

We have consistently held that a retirement benefit earned during the marriage, whether vested or nonvested, is deferred compensation, and thus, is marital property. *See, e.g.*, *Ball v. Ball*, 314 S.C. 445, 447, 445 S.E.2d 449, 450 (1994). A retirement benefit is marital property because spouses contribute to one another's careers and both spouses defer assets they otherwise would have received during the marriage in exchange for the benefit. *Id.* However, disability benefits are treated as income rather than marital property. *Tinsley v. Tinsley*, 326 S.C. 374, 381-82, 483 S.E.2d 198, 202 (Ct. App. 1997). A disability benefit replaces the income a spouse would earn were he or she not disabled, and thus, functions as income, rather than as an asset earned during the course of the marriage. *Id.*

Here, the family court described the benefit as a pension Husband earned through his employment during the marriage. It found the pension was a disability benefit following Husband's stroke, but converted to a pension when Husband reached the retirement age of sixty-two, which occurred shortly before the trial. Accordingly, the court held the annuity was a vested retirement benefit and thus, marital property subject to equitable division; it ordered Husband to pay Wife fifty percent of all monies he received from the pension.

While Husband did begin receiving the annuity payments when he became disabled following his stroke, the record establishes by a preponderance of the evidence that the benefit was and always has been a retirement benefit. Wife testified she understood the benefit to be a pension and that Husband was able to access the money earlier than the normal retirement date because of his disability. In other words, she believed he received the benefits because he became eligible for and took early retirement due to his disability. Wife also testified that she understood the benefit as converting to a retirement benefit when Husband reached age sixty-two. Husband offered no evidence as to the nature of the annuity payments.

More importantly, the records produced by the United States Office of Personnel Management which administers Husband's annuity indicate it was a retirement benefit. Those records, which were introduced by Wife, contain an "Application for Immediate Retirement" completed by Husband shortly after his stroke. The application asked "Is this an application for disability retirement?" and Husband indicated it was. The records also repeatedly refer to the annuity as a

"disability retirement" and state that "disability retirement is a lifetime benefit." The records make clear that the benefit comes from Husband's participation in the Civil Service Retirement System. Also, contrary to the family court's finding, the records contain no indication that the benefit converted to another form when Husband reached age sixty-two.

Therefore, while we disagree with the family court judge that the character of the annuity Husband began receiving upon his disability changed when he turned sixty-two, we conclude the preponderance of the evidence establishes it was a retirement benefit which he received early because of his disability. Thus, we hold the benefit was properly classified as marital property, and affirm the family court as modified.

B. Smith Barney Account 9443 and Palmetto Bank Accounts 0109 and 8819

Husband contends the family court erred in finding that Smith Barney account 9443 and Palmetto Bank accounts 0109 and 8819 were marital property. He asserts the accounts were nonmarital from inception because they only contain his nonmarital property, specifically stocks he inherited, and because the accounts did not undergo transmutation. We find the record does not support Husband's contentions and accordingly affirm the classification of the accounts as marital property.

A party claiming an equitable interest in property upon divorce bears the burden of proving the property is marital. *Miller v. Miller*, 293 S.C. 69, 71 n.2, 358 S.E.2d 710, 711 n.2 (1987). If the party presents evidence to show the property is marital, the burden shifts to the other spouse to present evidence to establish the property's nonmarital character. *Johnson v. Johnson*, 296 S.C. 289, 294, 372 S.E.2d 107, 110 (Ct. App. 1988).

The family court found there was no evidence of which specific securities were used to create account 9443, and while there was evidence that some of the securities in the account were inherited, there was also evidence that other securities in the account were purchased during the marriage and in exchange for marital assets, thus rendering them marital property. Additionally, the court found the account became marital property through transmutation because of how the account was used and controlled.

We find Wife satisfied her burden of proving account 9443 was marital. She testified the account was funded not only with stocks Husband inherited but also with stocks he purchased during the marriage, distributions from the charitable remainder trust, and funds from a joint checking account. Additionally, their financial advisor, Crawford, testified that when he started working for the parties, account 9443 was a longstanding account with his firm that contained between a quarter and a half million dollars in assets, and he and Wife collected the stock certificates from the lockbox and placed them in the account after Husband's stroke. He testified that the stock certificates were all in Husband's name, but otherwise he did not provide any details as to their origins.

The burden thus shifted to Husband to establish the nonmarital character of the account. Husband asserts the only assets placed in account 9443 were stocks he inherited, and property a party acquires through inheritance is not marital property. S.C. Code § 20-3-630(A)(1). However, Husband testified that account 9443 could also contain stocks his mother gave to Wife, Wife's nonmarital stocks, and stocks he purchased using income earned from his employment during the marriage. Thus, Husband's own testimony was contradictory as to the character of the assets in account 9443, and he did not carry his burden of establishing it contained only his nonmarital property. Therefore, we agree with the family court that Smith Barney account 9443 was marital property. Because the two Palmetto Bank accounts were funded solely from account 9443, those accounts were also marital property. Having found account 9443 was marital property from its inception, we need not consider the family court's alternate holding that the account underwent transmutation. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues where a prior issue was dispositive).

C. The McDonald Tract

Husband argues the family court erred in finding the McDonald Tract, a timber farm he inherited from his mother and valued at $740,710, had become marital property through transmutation. We agree.

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. *Trimnal v. Trimnal*, 287 S.C. 495, 497-98, 339 S.E.2d 869, 871 (1986).

The family court found the McDonald Tract became marital property through transmutation due to Wife's contributions to the management of the property and the use of proceeds from the property in support of the marriage. While Wife testified that she devoted considerable time to managing the tract, Husband disputed the extent to which she did so. He testified he made all of the decisions in consultation with the forester, Charles Sibley. Sibley testified that both parties managed the property. Proceeds from timber sales from the property were deposited into the parties' joint checking account. When the value of the joint checking account exceeded $100,000, Wife took money from the account and deposited it into Smith Barney account 9443.

First, Wife's contributions to the management of the property are not sufficient to establish transmutation. While the expenditure of time and labor on property may be some evidence of the intent of the parties to treat property as marital, it alone is not enough to establish intent. *See Pruitt v. Pruitt*, 389 S.C. 250, 263, 697 S.E.2d 702, 709 (Ct. App. 2010) (holding the wife's labor in finishing the construction of the marital home did not show the husband's intent to treat the home as marital property); *Murray v. Murray*, 312 S.C. 154, 158, 439 S.E.2d 312, 315 (Ct. App. 1993) (holding the wife's labor in improving the marital home over seventeen years did not establish transmutation because "contributions of time and labor do not necessarily prove transmutation").

Also, the use of income from the property in support of the marriage does not establish transmutation. This issue was addressed in *Peterkin v. Peterkin*, 293 S.C. 311, 360 S.E.2d 311 (1987), where the husband inherited and received as gifts certain real estate, and the wife claimed the properties underwent transmutation in part because income from the properties was placed in the parties' joint account and used for family expenses. *Id.* at 313, 360 S.E.2d at 312. This Court held that while the use of property in support of a marriage is relevant to transmutation, the mere use of income from nonmarital assets does not transmute those assets into marital property and is not relevant to transmutation. *Id.* at 313, 360 S.E.2d at 313.

Accordingly, we find Wife's contributions to the management of the property and the use of income from the property in support of the marriage do not establish transmutation. Therefore, the McDonald Tract was Husband's nonmarital property, and the family court erred in identifying it as marital property.

D. Wife's Nonmarital Assets

Husband argues the family court erred in classifying three accounts, Smith Barney account 9515, Bank of America money market account 9902, and Bank of America certificate of deposit 5004, as Wife's nonmarital assets.[1] He asserts Wife failed to produce sufficient evidence to establish the source of the funds in the accounts and that the court improperly placed the burden on him to establish the marital nature of the assets. We disagree.

Wife presented testimony that the funds in each of the three disputed accounts were nonmarital property because they were inherited, gifted, or acquired before the marriage. *See* S.C. Code § 20-3-630(A) (excepting these properties from marital property). Husband adduced no evidence to contradict this testimony. Instead, Husband argues her testimony was insufficient because she failed to present any documentary evidence. However, Wife's testimony, absent any evidence to the contrary, is sufficient to establish the source of the funds in these accounts.

Husband also argues the family court erred by accepting Wife's testimony concerning the source of the funds in her accounts when it did not accept his testimony concerning the source of the funds in Smith Barney account 9443. Thus, according to Husband, the family court unfairly manipulated the burden of proof against him. Husband's argument overlooks the evidence presented as to those assets. As noted, Husband did not contest Wife's testimony that the assets in her accounts were nonmarital. His failure to offer evidence controverting Wife's testimony is sufficient justification to affirm the family court. *See Honea v. Honea*, 292 S.C. 456, 357 S.E.2d 191 (Ct. App. 1987) ("[A] party cannot sit back at trial without offering proof, then come to this Court complaining of the insufficiency of the evidence to support the family court's findings."). Regarding account 9443, Wife testified that it was funded in part by marital assets, and Husband conceded that could well be the case. Husband's concession as to the character of some of the assets used to fund this account together with Wife's testimony are enough to support affirming the family court on this issue. Accordingly, we find no error in the classification of these accounts, respectively, as marital and nonmarital property.

E. Trust Distributions

[1] The total value of these three accounts at the time of trial was $379,529.

Husband also claims the family court erred in treating his distributions from the irrevocable Paul Wilburn III Charitable Remainder Unitrust as marital property and ordering him to pay Wife half of all distributions he receives. He asserts that the trust cannot be marital property because neither party owns the trust.[2] While we agree that the trust was not marital property, we find the trust distributions are a marital asset subject to equitable division and accordingly affirm the family court.

While this is an issue of first impression in South Carolina, courts in other jurisdictions have held that trust distributions were marital property. For example, the New Hampshire Supreme Court considered an order holding that the corpus of a trust was not marital property but the right to receive distributions from the trust was marital property. *In re Chamberlain*, 918 A.2d 1 (N.H. 2007). Compared to South Carolina's statutory definition of marital property, the New Hampshire court employed the more expansive definition contained in that state's statute under which any property belonging to either spouse, regardless of title, is marital property.[3] *Id.* at 4. The court held that a trust creates separate legal interests, one in the trust corpus and another in the distributions. *Id.* at 5. The court also held that once the parties placed property in the trust, they no longer owned that property, and therefore, the corpus was not marital property. *Id.* at 4. However, it held that the right to receive distributions from the trust was marital property. *Id.* at 5.

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[2] Husband also contends the family court erred because the spendthrift provision of the trust prohibits the allocation of distributions to Wife and the marital property statute excludes from marital property any property excluded by written contract. Husband did not present that argument to the family court, and therefore, it is not preserved for our review. *See State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997) (holding an appellant cannot argue one ground at trial and then another ground on appeal).

[3] The South Carolina Code defines marital property as "all real and personal property which has been acquired by the parties during marriage and which is owned as of the date of filing or commencement of marital litigation . . . ." S.C. Code § 20-3-630. The statute then excludes from marital property all property acquired by "inheritance, devise, bequest, or gift from a party other than the spouse," acquired before or after the marriage, property acquired in exchange for such property, excluded by written contract of the parties, and any increase in value of such property. *Id.*

The Vermont Supreme Court, applying a definition of marital property similar to New Hampshire's, as any property owned by a spouse, held that the right to receive distributions from a trust was marital property. *Chilkott v. Chilkott*, 607 A.2d 883 (Vt. 1992). The trust there was similar to the trust at issue here, in that upon the death of his mother, the husband was entitled to receive distributions from the trust, and upon his death, the wife was to receive distributions from the trust. *Id.* at 883-84. The husband argued his interest in the trust was not marital property because he did not own the trust. *Id.* at 884. The court concluded the parties owned an interest in the trust distributions and that interest was marital property. *Id.* at 883.

The parties did not direct us to any cases holding that trust distributions were not marital property, and we have found none. Therefore, while we hold the trust corpus is not the property of either spouse and thus cannot be marital property, we hold that trust distributions can be marital property depending on how and when the interest was acquired or if the interest has undergone transmutation.[4]

While the family court here was not explicit, we conclude it found the trust distributions had undergone transmutation because it based its holding on findings that the intent behind the creation of the trust was to provide the parties with income during their lifetimes and that distributions from the trust were deposited into Smith Barney account 9443. The family court found, and Wife's testimony established, that the trust was created with the intent to provide for Husband and Wife for the remainder of their lives. That intent was also evidenced by the terms of the trust that provided distributions to Husband for life and then to Wife for life following Husband's death. The distributions were deposited into Smith Barney account 9443, and the funds in that account were used in support of the marriage. Additionally, Husband was clearly aware that the distributions were being used in support of the marriage because he attended yearly meetings discussing the performance of that account and the parties' anticipated future needs. Taking these facts together, we find the parties intended, from the time the trust was created, to treat the right to receive distributions as marital property; therefore, transmutation

[4] Due to the expansive definition of marital property in New Hampshire and Vermont as any property owned by a spouse, once those courts found a spouse had a legal interest in trust distributions, the distributions were also deemed to be marital property. Our State's narrower definition of marital property causes our holding to also be narrower.

was established. Accordingly, we affirm the family court's finding that the right to receive distributions was marital property.

F. The Marital Home

Husband contends the family court erred in arbitrarily dividing the marital home. Specifically, Husband asserts the court awarded him the home but then effectively rescinded that award by requiring him to pay Wife almost the entire value of the home. Husband also contends the court erred because the apportionment deprived him of his $60,958 in nonmarital equity in the home. While we find no error in the manner in which the family court apportioned the marital home, we agree with Husband that he was deprived of his nonmarital equity in the home and modify the family court order accordingly.

The parties stipulated to a value of $512,814 for the home, both as of the date of filing and as of the date of trial. In apportioning the marital property, the family court awarded the home to Husband and ordered Husband to pay Wife $500,000 at the earlier of the sale of the home or thirty days after the entry of the final order. Thus, according to Husband's argument, he was left with $12,814 of the value of the home as his marital property. The family court also assigned Husband $60,958 as his nonmarital property for the reduction in the mortgage balance which resulted from payments Husband made after the date of filing and before trial.

Initially, we note that the family court's award of the home to Husband combined with the order to pay Wife was not in error. In order to make an in-kind distribution of the home to Husband and effect the equitable division deemed appropriate, the family court required him to pay a sum of money to Wife. Although the order stated the lump sum payment could be satisfied through the sale of the home, it also gave Husband the option of paying Wife within ninety days presumably from other funds or the liquidation of another asset. It was Husband's choice as to how to satisfy the obligation. Accordingly, we reject Husband's argument that the family court awarded him the marital home and then effectively rescinded that award by requiring him to make a payment to Wife in an amount close to the total value of the home.

However, we agree with Husband that the final order deprived him of the $60,958 in nonmarital equity in the home he should have received. As noted previously, the body of the final order assigned the marital home to Husband.

Then, the family court's equitable division schedule, in the row corresponding to the marital home, provided for the division of that asset by listing the $500,000 payment from Husband to Wife in Wife's marital assets column, $12,814 in Husband's marital assets column, and $60,958 in Husband's nonmarital assets column "for reduction in mortgage balance after date of filing and before trial." While the home was valued at $512,814, the family court apportioned all of that value by giving Wife $500,000 and Husband $12,814. Thus, the family court deprived Husband of the $60,958 in nonmarital property by not including it as a nonmarital component of the value of the home. Wife did not contest this in her brief.[5] Accordingly, we modify the family court's order by reducing the $500,000 Husband was ordered to pay Wife by the $60,958 he paid down on the mortgage, for an amended payment to Wife of $439,042.

G. Overall Equitable Division of the Marital Estate

Husband contends the family court erred in apportioning the marital estate because he contributed the majority of the property to the marriage through his inheritances. He asserts he should have received more than approximately one-half of the marital estate and proposes that he receive sixty percent of the estate. We disagree.

Upon divorce, the family court is required to make a final equitable apportionment of the marital estate, and in making the apportionment the court is required to consider fifteen statutory factors. S.C. Code § 20-3-620 (Supp. 2011). On appeal, we must review the fairness of the overall apportionment, and if equitable, we will uphold it regardless of whether we would have weighed specific factors differently. *Roberson v. Roberson*, 359 S.C. 384, 389, 597 S.E.2d 840, 842 (Ct. App. 2004). In short, the family court's apportionment will not be overturned on appeal absent an abuse of discretion. *Murphy v. Murphy*, 319 S.C. 324, 329, 461 S.E.2d 39, 41-42 (1995).

Here, after resolving the parties' disputes as to the marital versus nonmarital nature of their property, the family court set out "Schedule 4" which apportioned

[5] At oral argument, Wife's counsel asserted the $512,814 value of the home did not include the $60,958 because that appreciation occurred after the home was valued. However, the parties stipulated the home was valued at $512,814 as of the date of trial. Thus, the $60,958 in equity in the home realized by Husband after the date of filing but before the trial was included in the $512,814 value on the date of trial.

the marital assets. Of the $3,888,758 in assets and debts for which the family court identified a value, the court awarded Wife $1,744,765.50 or 45% and awarded Husband $2,143,992.50 or 55%.[6]

The family court made extensive factual findings and generally considered all fifteen statutory factors. In particular, the family court found Wife was able to obtain employment but faced great difficulty in doing so due to her lack of skills and long absence from the workforce. Husband neither was employed, nor could he gain employment due to his disability. However, the family court also found Husband had an income of $9,250 per month, or $111,000 per year, from various assets and could increase his income by paying himself a management fee for serving as general partner of the Wilburn Limited Partnership or by cutting timber he owned. The family court found Wife had income of approximately $1,000 per month from a family partnership held by her family and she was capable of earning approximately $1,300 per month through employment. Related to their ability to earn income was the parties' health. Wife's cancer was in remission at the time of trial and she was otherwise in good health. Husband was permanently disabled from his stroke and suffered from a long history of depression. Additionally, after the family court's equitable apportionment, the parties would each receive approximately $1,532.52 per month from the federal annuity and $1,975.08 per month from the Paul E. Wilburn III Charitable Remainder Trust.

The value of the marital property was $3,888,758, and the majority of those assets were acquired through Husband's inheritances. The family court found Husband had $614,344 and Wife had $346,297 in nonmarital assets. The parties

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[6] Schedule 4 stated that Wife was to receive $1,744,768 and Husband was to receive $2,143,995, but those totals reflect a slight addition error. Also, we note the family court gave each party half of four marital assets without stating a value for those assets: the parties' one percent interest in the Wilburn Limited Partnership, the distributions from the federal annuity, the distributions from the Paul E. Wilburn III Charitable Remainder Trust, and the Smith Barney #607-18926 Paul E. Wilburn III TTEE FBO I. Remainder Trust. While those assets are relevant under the statutory factors for apportionment and to the extent possible we consider them, they were not included in the family court's consideration of the total amount of marital property awarded to each party either because no evidence as to their value was presented at trial or they are assets that provide recurring payments subject to fluctuation.

also had minimal debts in relation to their assets. While the family court did not state its reasons for doing so, it awarded the marital home to Husband. However, as previously discussed, the court gave Husband the option of keeping the home or selling it, and thus, Husband cannot complain about the court's consideration of this factor. Neither party was awarded separate maintenance or alimony.

Additionally, in light of our holdings with respect to the McDonald Tract and the marital home, the marital estate will now be significantly smaller and Husband's nonmarital assets will be significantly larger. Thus, following this appeal, Wife has an even greater need for a large portion of the marital estate.

In conclusion, we find no abuse of discretion in the family court's apportionment. Unquestionably, Husband contributed the majority of the assets and has serious medical expenses, however, this was a thirty year marriage and Wife spent many years contributing to the marriage as well as caring for Husband in addition to the parties' children. While Wife was not awarded alimony due to the size and apportionment of the marital estate as well as husband's disability, there is no question she otherwise would have been a candidate for permanent alimony. Because of all these circumstances, we affirm the family court's equitable division of the marital estate of 45% to Wife and 55% to Husband.

II. RESERVATION OF JURISDICTION ON ALIMONY

Husband contends the family court erred in reserving jurisdiction to award Wife alimony because there were no exigent circumstances present to justify the reservation. We agree.

Alimony may be reserved where the family court identifies circumstances that are likely to create a need for alimony in the reasonably near future. *Donahue v. Donahue*, 299 S.C. 353, 363, 384 S.E.2d 741, 747 (1989). Where a spouse does not need alimony at the time of trial and there is no evidence the spouse has an illness, the spouse's needs will foreseeably change in the near future, or some other extenuating circumstance, it is error to reserve jurisdiction on alimony. *Id.*

At trial, Wife testified that if she received her requested apportionment of the marital estate, she did not want alimony, but that if the requested division was not awarded, she would need alimony. Additionally, Wife's counsel stated to the family court that alimony would only be appropriate if the family court or an appellate court did not agree with Wife's proposed apportionment of the marital

estate. Wife presented no evidence of physical or mental illness, foreseeable future need, or other extenuating circumstances. While she testified she had suffered from breast cancer in the past, she did not assert the cancer as a reason to reserve alimony. She also testified the cancer was in remission and she had been healthy for several years prior to the trial.

The family court held that due to the equitable apportionment of the marital property, the parties would each have sufficient assets to provide for them and alimony was not necessary. However, the court reserved the issue of alimony if, on appeal, the equitable apportionment was not upheld as provided in the final order. Thus, the family court reserved the issue of alimony solely on the basis that its equitable division might be altered on appeal.

While we appreciate the dilemma in which Wife could find herself if her equitable division award was drastically altered on appeal, we decline to hold that possible changes in equitable apportionment on appeal constitute a sufficient justification for the reservation of alimony. Were we to hold otherwise, the reservation of alimony would be appropriate in every case and our prior case law on the reservation of alimony would be superfluous. Accordingly, we hold the family court erred in reserving jurisdiction on alimony.

III. ATTORNEY'S FEES AND COSTS

Finally, Husband contends the family court erred in ordering Husband to pay all $156,182 of Wife's attorney's fees and costs because the court did not consider the required factors, and even to the extent the court did properly consider the factors, it reached an erroneous result. In light of our holdings herein, the beneficial results obtained by Wife and the parties' respective financial conditions have markedly changed. *See E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992) (listing the factors to be considered in determining whether to make an award); *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) (listing the factors to be considered in determining the amount of an award). Therefore, we conclude the attorney's fee award should be reduced and Husband shall pay only half of Wife's attorney's fees and costs.

CONCLUSION

For the reasons set forth, we affirm in part and reverse in part the family court order. We affirm the classification of Husband's annuity payments, account

9443, the Palmetto Bank accounts, and the trust distributions as marital property, the classification of Wife's three accounts as her nonmarital property, and the ratio used to divide the marital estate. However, we conclude the family court erred in finding the McDonald Tract was marital property, in failing to give Husband credit for the increase in equity in the marital home, and in reserving jurisdiction on the issue of alimony. Also, we reduce the award of attorney's fees and costs to $78,091.

We modify the family court's equitable apportionment by removing the McDonald Tract, valued at $740,710, from the marital estate and deeming it Husband's nonmarital property. We also reduce Husband's payment in relation to the marital home from $500,000 to $439,042. Those modifications reduce the marital estate from $3,888,763 to $3,087,090. In order to effect the 45%/55% equitable division ordered by the family court, we further reduce the payment Husband must make to Wife to $144,425. In total, in addition to the approximately $3,507.60 per month Wife will receive from Husband's federal annuity and trust distributions, Wife shall receive $1,389,190.50 of the marital assets identified on Schedule 4, and Husband shall receive $1,697,899.50.

TOAL, C.J., PLEICONES, BEATTY, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kendrick Taylor, Appellant.

Appellate Case No. 2009-143506

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 5084
Heard September 11, 2012 – Filed February 20, 2013

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia, for Respondent.

THOMAS, J.: Kendrick Taylor appeals his conviction for murder, arguing the trial court erred in (1) refusing to allow him to cross-examine the State's chief witness regarding unrelated charges against the witness that the State dismissed after the witness gave a statement implicating Taylor in the present case and (2)

allowing the State to introduce a SLED report prepared in connection with the matter. We affirm.

FACTS AND PROCEDURAL HISTORY

On September 13, 2008, at 2:20 a.m., Forrest Johnson, a patrol officer with the North Charleston Police Department, received a call about a shooting in a residential neighborhood. Upon arriving at the scene, Johnson noticed the lifeless body of a middle-aged male, who was later identified as Scott Yelton. Yelton was bleeding profusely on the left side of his face, and a great deal of blood was seeping through his clothes. Johnson learned that Yelton had been involved in a disagreement involving a car and ended up either exiting the car or being forcibly ejected from it.

After examining contact numbers stored in Yelton's telephone, police located Joshua Wilder at his grandmother's house. Wilder voluntarily went to the police station; however, he did not provide truthful information about his involvement in Yelton's death and told police that he was asleep at his girlfriend's house when the incident occurred.

The day after Wilder met with the police, a pistol was found on the premises of AAA Rentals by Denise Berto, whose family owned the business. Berto gave the pistol to the North Charleston Police Department. Swabs taken from the pistol were sent to SLED on October 1, 2008. SLED test-fired the weapon and found it matched shell casings found at the scene. In addition, a detective with the North Charleston Police Department learned that the pistol had been in Taylor's possession. Both Wilder and Taylor were developed as suspects in the crime.

In October 2008, police arrested both Wilder and Taylor in connection with Yelton's death and charged them with murder. While in police custody, Wilder agreed to cooperate with the authorities. The charges against Wilder regarding his involvement in Yelton's death were then changed to accessory after the fact of murder.

According to Wilder, he and other drug dealers would give Yelton money or drugs in exchange for the use of Yelton's truck. During the early morning hours immediately preceding Yelton's death, Wilder drove his car, with Taylor in the front passenger seat, to Yelton's residence to "rent the truck." Yelton, who was drunk and high when he met Wilder and Taylor, told them he had already lent his

truck to someone else and was waiting for its return. Yelton then got into the back seat of the car that Wilder was driving and demanded money. Wilder and Taylor asked Yelton to leave, but Yelton refused.

At trial, Wilder testified that Taylor turned and struck Yelton with a gun in order to make him exit the vehicle. Yelton began bleeding, but resisted efforts to pull him from the car. By this time, Yelton's cousin arrived at the scene and attempted without success to extricate Yelton. According to Wilder, Taylor, already worried about blood inside the car, "flipped out" when Yelton threatened to call the law and shot Yelton several times after both Taylor and Yelton had exited the car. Taylor returned to the passenger seat of the car, and Wilder, in shock from the incident, drove away. As they proceeded, Taylor cautioned Wilder to "keep everything silent" and not to say anything to the police. A few days later, Taylor told Wilder that "he [Taylor] had to throw the gun" and wanted Wilder to look for it.

In July 2009, Taylor was indicted for Yelton's murder. His trial took place that same month. Wilder appeared as a witness for the State. Taylor did not take the stand; however, family members testified he was asleep at the time of the shooting.

The jury found Taylor guilty of murder, and the trial judge sentenced him to life imprisonment. Taylor then filed this appeal.

ISSUES

I. Did the trial court abuse its discretion in refusing to allow Taylor to cross-examine Wilder about charges against him that had been dismissed a few months before trial but were pending when Wilder gave a statement implicating Taylor in Yelton's murder?

II. Should the trial court have excluded a SLED ballistics report on the ground that it constituted impermissible bolstering of trial testimony?

STANDARD OF REVIEW

An appellate court "will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion." *State v. Gracely*, 399 S.C. 363, 371, 731 S.E.2d 880, 884 (2012). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *State v. Adams*, 354 S.C.

361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). "We review a trial court's decision regarding Rule 403, [SCRE] pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." *Id.* As with any issue regarding the admissibility of evidence, a trial court's decision to admit evidence notwithstanding an objection that it amounts to improper bolstering is to be reviewed on appeal under an abuse of discretion standard. *State v. Whitner*, 399 S.C. 547, 563, 732 S.E.2d 861, 867 (2012).

LAW/ANALYSIS

I. Cross-Examination Regarding Dismissed Charges

Taylor first argues the trial court should have allowed him to cross-examine Wilder about unrelated charges that were pending against Wilder when Wilder implicated Taylor in Yelton's murder and about the dismissal of those charges before Taylor's case was called to trial. We disagree.

Before Wilder's testimony began, both sides agreed that Taylor could cross-examine Wilder about prior convictions for breach of trust and shoplifting and that Wilder's convictions for simple possession of marijuana and driving under suspension would not be admissible. The trial court also stated it would admit a conviction for felony possession of cocaine and allow Taylor to (1) question Wilder about his pending charges, including any charges related to the present case and certain unrelated drug offenses and (2) suggest that Wilder might be testifying for the State to obtain a better deal for himself.

The only dispute concerned the admissibility of unrelated charges that were pending against Wilder when he agreed to cooperate in prosecuting Taylor for Yelton's murder. The pending charges included three counts of assault with intent to kill, one count of discharging a firearm into a car, and two counts of unlawful possession of a gun. These charges were dismissed in May 2009 by the same solicitor who was prosecuting Taylor in the present case. Taylor argued the dismissals were probative of Wilder's bias, further noting the disposition sheet said only that the charges were "nol prossed in the interest of justice."

The solicitor opposed allowing Taylor to question Wilder about the May 2009 dismissals or the corresponding charges, stating he dropped the charges because they were old and the lead officer on the cases had been arrested and indicted. The solicitor further advised the trial court that Wilder would testify that no promises or

threats had been made to influence his testimony. Although Taylor offered to stipulate that the officer had been arrested and the arrest may have been a reason for the dismissals, the solicitor refused to agree to the stipulation, explaining he "cut these cases loose" as soon as the officer was indicted and the dismissals were not part of any deal with Wilder.

The trial court ruled Taylor could not impeach Wilder with the dismissed charges. In so ruling, the court stated the information was unfairly prejudicial. The court further found that neither the charges nor their dismissals were related to the present case; therefore, to allow information about them was likely to confuse the jury and require the solicitor to testify under oath about his reasons for dismissal.

Under Rule 403, SCRE, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[1] We agree with the trial court that the probative value of the information that Taylor sought to elicit from Wilder did not justify making the solicitor take the stand to testify about his reasons for dismissing the charges.[2] The probative value of the information in dispute was limited at best. Other than the fact that the charges were dismissed after Wilder implicated Taylor, there was no evidence linking the dismissals to Wilder's decision to cooperate with the police. To the contrary, the record indicates Wilder gave a statement against Taylor soon after his arrest, but the unrelated charges pending against him were not dismissed until several months later. Furthermore, Taylor was allowed to impeach Wilder on other felony charges that were still pending as well as on certain prior convictions; thus, he already had the means to attack Wilder's credibility and emphasize his motive to testify untruthfully. Balancing the limited probative value of the information against the inconvenience of requiring the solicitor to testify under oath and possibly requiring a substitution

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[1] At oral argument, counsel for both sides agreed that a determination of this issue should be analyzed under Rule 403, SCRE.

[2] As the State notes in its brief, the South Carolina Rules of Professional Conduct allow a lawyer to act as an advocate in a trial in which the lawyer is likely to be a necessary witness only in certain limited circumstances, none of which are applicable here. Rule 3.7, RPC, Rule 407, SCACR.

of counsel for the State, we hold the trial court acted within its discretion in finding the dismissals would confuse the issues, mislead the jury, or waste time and in refusing to allow Taylor to question Wilder about them.[3]

II. Admissibility of SLED Ballistics Report

Taylor also challenges the admission of a SLED report, arguing it constituted impermissible bolstering of the trial testimony of the SLED firearm and tool-mark examiner. We find no error.[4]

The State called Suzanne Cromer, a SLED firearm and tool-mark examiner. Cromer examined seven fired cartridge casings, four fired bullets, and the pistol found by Berto. The pistol had four unfired .40 S&W cartridges. Cromer testified the unfired rounds were the same brand as the fired cartridge casings, but she ultimately determined only that she could not rule out the pistol as the firearm from which the fired projectiles were shot. After Cromer testified about these results, the State offered her report, Exhibit 40, into evidence. Taylor objected, arguing that Cromer already testified about the results and the report would be either

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[3] We are aware that in the recent decision of *State v. Gracely*, 399 S.C. 363, 374-75, 731 S.E.2d 880, 886 (2012), the Supreme Court of South Carolina reversed and remanded the defendant's conviction, holding "[t]he fact that a cooperating witness avoided a *mandatory minimum* sentence is critical information that a defendant must be allowed to present to the jury." (emphasis in original). In *Gracely*, however, it appears undisputed that the minimum sentences avoided by the cooperating witnesses were for charges that were reduced in exchange for those witnesses' cooperation with the State.

[4] As noted in the opinion, the State proffered two reports prepared by Suzanne Cromer, its firearm and tool-mark identification examiner. Exhibit 40 noted only that the pistol could not be excluded as the weapon from which the fired projectiles were shot, and Exhibit 41 contained Cromer's findings that the seven fired cartridge casings came from the pistol. The State contends that Taylor purports to challenge the admission of only Exhibit 40, but gives record citations corresponding to Exhibit 41 and suggests that for this reason, we should hold the argument unpreserved for appeal. Based on our reading of Taylor's brief, we find that Taylor is challenging the admission of Exhibit 41 and that he has preserved this issue for appeal.

cumulative or impermissible bolstering. The trial court overruled Taylor's objections and admitted the report.

Based on further testing, Cromer also determined that the seven fired cartridge casings were fired from the pistol. The State offered the corresponding report, Exhibit 41, into evidence, and Taylor objected to this evidence on the ground that it was cumulative or impermissible bolstering. The trial court admitted the report over Taylor's objection as well.

On appeal, Taylor argues "the SLED report constituted impermissible bolstering of [Cromer's] testimony because it unduly emphasized her ballistics opinion, which remained her *opinion* about the critical 'match' of the gun that was found where [Taylor] told his friends it would be found." (emphasis in original). We disagree.

"Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." *State v. Douglas*, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009). Generally, the prohibition against bolstering is for the purpose of preventing a witness from testifying whether another witness is telling the truth and to maintain "the assessment of witness credibility . . . within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Here, Cromer's report was relevant to her own testimony, not that of any other witness. Nor did the report vouch for her credibility; rather, it was a written representation of the findings on which her opinions and testimony were based.

CONCLUSION

We hold the trial court did not abuse its discretion in refusing to allow Taylor to cross-examine Wilder about the pending charges against him that were dismissed after Wilder agreed to cooperate with the State. We also affirm the trial court's admission of the SLED report documenting the link between Taylor's pistol and the cartridge casings found at the crime scene.

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Margaret Anne Curry, Respondent,

v.

Allen T. Curry, Appellant.

Appellate Case No. 2011-198030

Appeal From Charleston County
Daniel E. Martin, Jr., Family Court Judge

Opinion No. 5085
Heard January 9, 2013 – Filed February 20, 2013

AFFIRMED AS MODIFIED

Paul E. Tinkler and Taylor Elizabeth Long, both of the Law Office of Paul Tinkler, of Charleston, for Appellant.

Anne Frances Bleecker, of The Bleecker Law Firm, LLC, of Charleston, and Dana Rachel Wine, of The Wine Law Firm, LLC, of Mt. Pleasant, for Respondent.

CURETON, A.J.: Husband appeals the family court's order granting the parties a divorce and equitably dividing marital property. He argues the family court erred in (1) giving him an insufficient credit for contributing nonmarital property and (2) finding his use of alcohol constituted habitual intoxication. We affirm but modify the family court's order as discussed below.

FACTS

Husband and Wife married in 1978. The marriage produced two children, both of whom were emancipated by the end of June 2000. In 1993, Husband acquired from his mother a waterfront lot (Lot 34) on which the parties subsequently constructed the marital home, a swimming pool, and a dock. In exchange for the title to the lot, Husband disclaimed any future inheritance from his mother. Prior to the construction of the home, Husband conveyed a one-half interest in the lot to Wife.

Wife left the marital home on Labor Day weekend in 2010. On October 4, 2010, she filed an action seeking a divorce on the ground of Husband's habitual intoxication. Husband answered, denying fault, alleging Wife's drinking contributed to the breakdown of the marriage, and seeking an order of separation.

Following a failed mediation in November 2010, on April 8, 2011, the parties participated in an arbitration that resulted in an agreement settling, among other issues, alimony and the division of personal property. The remaining issues were tried before the family court.

I. Trial Testimony

At trial, Wife testified the parties had "struggled for years to try to make the marriage work," but it fell apart because Husband drank alcohol to excess and became loud, rude, and verbally abusive when he drank. In addition, she believed Husband's drinking enhanced his lack of respect for her and her contributions.

In general, Wife described Husband as behaving worse with every drink and going to bed drunk at 8:00 p.m. each night. Nevertheless, he woke up "bright and cheery" between 6:30 and 7:00 each morning and served Wife toast and coffee in bed until she moved to a different bedroom. According to Wife, Husband's drinking increased on the weekends, when he would begin drinking around noon or 1:00 p.m. However, she conceded Husband's drinking did not prevent him from getting up and preparing her coffee and toast each morning, participating in housework, and earning an income that supported their comfortable lifestyle.

Although Wife admitted drinking cocktails, she denied drinking to excess. She rated Husband's drinking at nine on a ten-point scale and her own at either four or five. She recalled Husband stopped drinking after she told him she was

considering divorce, but he began again approximately two weeks later. She stated she had suggested Husband needed professional help to overcome his alcohol problem, but he refused. Wife noted neither Husband's bout with prostate cancer nor Husband's drinking benefited their sexual relationship.

With regard to Lot 34, Wife testified the property was first titled only in Husband's name. She recalled telling him it would need to be in her name as well, "not only because [they] always owned everything jointly, [but also because they] were going to need [her] income" to qualify for a $200,000 construction loan. Shortly thereafter, Husband deeded Wife an undivided one-half ownership in the lot. Wife believed Husband intended that they own the property jointly. Additionally, Wife testified she was the financial manager of the marital partnership.

Wife also presented the testimony of her sisters, her brother-in-law, and a family friend, who supported her claim that Husband became mean and insulting toward her when he drank. Each witness described at least one event when Husband's intoxication led him to behave erratically or unusually. Although they acknowledged Wife occasionally drank alcoholic beverages, they testified she rarely became intoxicated.

Husband testified that as a financial consultant, he had handled investments for many family members, as well as institutional investors. In addition to work, Husband described supporting Wife's employment decisions, caring for her after her foot surgeries, serving her breakfast daily, and sharing in household chores.

Husband admitted drinking alcohol to excess at times and admitted doing so seven days a week just before Wife left. In his own estimation, he consumed a little more alcohol than Wife: if his consumption were nine on a ten-point scale, he stated Wife's "would have to be a seven or eight." He stated he had "absolutely" seen Wife intoxicated and that she had missed work at a former job because of her overindulgence. Husband believed both parties' drinking had "put pressure" on their familial relationships. Although he believed his own drinking significantly affected the marital relationship, he also believed the breakdown of Wife's relationship with his mother also caused "discomfort."[1]

[1] Wife, who had previously been very close to Husband's mother, distanced herself from her mother-in-law after a disagreement about how the parties should handle

Husband recalled two conversations with Wife concerning alcohol's impact on their lives and their marriage counselor's recommendation that they "examine [it] closely." He admitted his attempt to quit lasted only a week but stated, "you know, have a glass of wine and all of a sudden everybody is drinking again," including Wife. Husband testified he "might have [had] two, three, four drinks" of two to three ounces of Scotch daily. At the time of trial, he stated he had decreased his intake of alcohol and no longer drank to excess, but he had never entered a treatment program.

Husband stated the parties had approximately $900,000 in equity in the marital home and land. He believed the value of the house accounted for one third of the equity, with the land holding the remaining value. He reasoned Wife was entitled to half the equity in the house alone, while he was entitled to the other half, plus the full value of the equity in the land beneath it. As a result, Husband concluded Wife was entitled to one sixth of the value of the parties' equity in the marital home, and he should have the rest. However, he conceded advising Wife at one point that she should not leave him yet, because when the marital home appreciated in value, she would likely receive more than the $400,000 to which she was then entitled.

Husband also presented the testimony of General Charles Barnhill, Jr., an expert real estate appraiser. General Barnhill testified the fair market value of the marital home was $1,300,000, with the lot alone representing $850,000 of that amount.

II. Documentary Evidence

The parties submitted copies of various financial records, the deeds and disclaimer to which they referred in their testimony, and the mortgages encumbering the marital home. In addition, they provided copies of documents showing the values of Lot 34 and the marital home in 1994 – a tax assessment valuing Lot 34 at $127,000 and an appraisal report valuing the land at $200,000 and the home and land together at $425,000. The parties also submitted an appraisal report valuing

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their daughter's wedding. This disagreement occurred approximately three years before trial.

Lot 34 and the marital home in 2010. The appraiser arrived at values of $850,000 for Lot 34 alone and $1,225,000 for the home and lot.

III. Final and Amended Final Orders

On June 7, 2011, the family court entered its final order. It recited and incorporated the parties' arbitration agreement as part of the order. With regard to fault, the family court found Husband admitted habitually "drinking three or more alcoholic drinks of two to three ounces" daily at the time the parties separated. According to the family court, Wife and four other witnesses had testified Husband's frequent intoxication impaired and damaged both the marriage and the parties' interactions with others outside the home. By contrast, Husband presented no testimony supporting his contentions about Wife's drinking. The family court concluded, "Husband's habitual drinking led to the breakdown of the marital relationship."

The family court accepted the parties' stipulation that the marital home was marital property valued at $1,300,000 and awarded Husband possession of it. The family court reviewed South Carolina law allowing for "special consideration" of inherited property or property exchanged for inherited property at the time of equitable division. In evaluating the statutory factors for equitable distribution, the family court found significant the fact that "Husband's contribution of the lot was from a gift and a waiver of his right to further inheritance from his father's estate." The family court awarded Husband a fifty-five-percent interest in the parties' equity in the marital home and Wife, a forty-five-percent interest. The family court based its decision upon an analysis of the statutory factors, including Husband's fault, both parties' contributions to the marriage, Husband's superior income and educational credentials, and the parties' individual retirement accounts.

In view of its decision concerning apportionment, and allowing for advances Wife had already received from marital assets, the family court required Husband to pay Wife $285,698.42 "to effect a fifty[-]percent distribution of the parties' non-real estate marital assets." In addition, it ordered Husband to pay approximately half of Wife's attorney's fees.

IV. Rule 59(e) Motion

Husband filed a motion to alter or amend, seeking a greater credit for his contribution of nonmarital property and clarification of particular aspects of the overall apportionment award, and requesting the family court make findings of fact supporting the award of attorney's fees to Wife.

On July 18, 2011, the family court heard arguments on the motion. Husband pointed to testimony valuing Lot 34 at between $120,000 and $200,000 at the time he deeded a half-interest in it to Wife. Furthermore, he contended the lot had undergone passive appreciation during the marriage, arriving at a value of $850,000, with the house valued at an additional $400,000 at the time of commencement of litigation. According to Husband, prior cases suggested the family court should have been "more liberal in giving him credit for that original contribution." In addition, Husband asked the family court to clarify whether it intended, as portions of the final order stated, to divide the equity in the marital home fifty-five/forty-five but the overall marital estate fifty/fifty. Wife joined in Husband's request for clarification but maintained the family court had correctly apportioned the equity in the marital home.

On August 4, 2011, the family court entered an amended final order. Although the amended final order included additional findings of fact and some minor modifications, the family court did not disturb its findings concerning Husband's fault or the apportionment and division of property. This appeal followed.

STANDARD OF REVIEW

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

However, appellate courts, in reviewing the equitable division of marital property, look at the overall apportionment for fairness. *Johnson v. Johnson*, 296 S.C. 289,

300, 372 S.E.2d 107, 113 (Ct. App. 1988) (citing *Morris v. Morris*, 295 S.C. 37, 39-40, 367 S.E.2d 24, 25 (1988)).

LAW/ANALYSIS

I. Contribution of Nonmarital Property

Husband asserts the family court erred in giving him insufficient credit for his contribution of nonmarital property.[2] We agree in part.

Our supreme court has recognized "a transmutation of inherited nonmarital property into marital property [does] not extinguish the inheritor's right for special consideration upon divorce." *Dawkins v. Dawkins*, 386 S.C. 169, 173, 687 S.E.2d 52, 54 (2010), *abrogated on other grounds by Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011) (citation omitted). Furthermore, our supreme court held that "the correct way to treat [an] inheritance is as a contribution by [the inheriting party] to the acquisition of marital property [and that] [t]his contribution should be taken into account in determining the percentage of the marital estate to which [the inheriting party] is equitably entitled upon distribution." *Id.* at 173-74, 687 S.E.2d at 54 (alterations in original) (quoting *Toler v. Toler*, 292 S.C. 374, 380 n.1, 356 S.E.2d 429, 432 n.1 (Ct. App. 1987)).

We affirm, but modify the family court's order to award Husband a fifty-five-percent share, and Wife a forty-five-percent share, of the entire marital estate, not just the equity in the marital home. In his argument before the family court and on appeal, Husband conceded the property had been transmuted and the marital home was marital property. The family court properly analyzed this issue by determining Husband's contribution of the land on which the parties constructed their home deserved special consideration. *See id.* (confirming the inheriting party's contribution of inherited property that is later transmuted "should be taken into account in determining the percentage of the marital estate to which [the inheriting party] is equitably entitled upon distribution"). The evidence reflects that when Husband received title to Lot 34 from his mother in 1993, the lot was

[2] While Husband concedes Wife is entitled to fifty percent of the non-real estate portion of the marital estate, he claims he is entitled to more than seventy-five percent of the equity in the marital home.

appraised at $200,000. Within one month, Husband contributed Lot 34 to the marital estate by transferring half of his ownership interest to Wife. Giving Husband the benefit of the doubt, the value of his contribution at that time was approximately $200,000.

The lot remained marital property, jointly owned by Husband and Wife, from the time of Husband's contribution until the filing of the divorce action. During that period of approximately seventeen years, the lot passively appreciated to a value of $850,000. We find each party is entitled to share in the passive appreciation in value that occurred while the lot was a part of the marital estate.

Next, the family court evaluated and apportioned the equity in the marital home to reflect the quality of Husband's contribution. *See* S.C. Code Ann. § 20-3-620(B) (Supp. 2012) (stating when a party has contributed to "the acquisition, preservation, depreciation, or appreciation in value of the marital property," the family court "shall consider the quality of the contribution as well as its factual existence"). Having found Husband contributed Lot 34 and having determined the value of that contribution, the family court proceeded to weigh the value of Husband's contribution in its consideration of the fifteen statutory factors for equitable apportionment. *See Dawkins*, 386 S.C. at 173-74, 687 S.E.2d at 54 (confirming the inheriting party's contribution of inherited property that is later transmuted "should be taken into account in determining the percentage of the marital estate to which [the inheriting party] is equitably entitled upon distribution"); *accord Barrow v. Barrow*, 394 S.C. 603, 614, 716 S.E.2d 302, 308 (Ct. App. 2011).

In complaining the family court's division does not fairly represent the value of his contributions, Husband appears to ignore the family court's findings concerning the remaining factors, including his fault in the breakdown of the marriage. Findings that militated in favor of reducing Husband's share of the equity include (1) Wife established that the marriage failed due to Husband's habitual drunkenness, (2) Husband failed to prove Wife's consumption of alcohol rose to the level of habitual drunkenness, (3) great disparities existed between Husband's and Wife's respective educations and earning capacities, and (4) Wife was the financial manager of the marital partnership. In addition, the family court's award to Husband of the marital home required Wife to secure other lodging.

We find the family court properly afforded special consideration to Husband's contribution of Lot 34. While we agree with the family court's decision to award Husband a greater interest in the marital home, which constituted the bulk of the marital estate, we hold the equity in the marital home should have been included in the overall marital estate.[3] *See Dawkins*, 386 S.C. at 173-74, 687 S.E.2d at 54 (holding special consideration for the contribution of transmuted, inherited property affects "the percentage of the marital estate to which [the inheriting party] is equitably entitled upon distribution"). Moreover, since the bulk of the marital estate was tied up in the marital home and Husband made most of the material contributions to the acquisition of the marital estate, the preponderance of the evidence reasonably supports a fifty-five/forty-five division of the entire estate. Therefore, we modify the family court's order to extend the fifty-five/forty-five apportionment to the entire marital estate.

We adopt the family court's factual findings concerning property values, which indicate the marital estate consists of $907,889.01 in equity in the marital home and $198,760.01 in other assets, for a total value of $1,106,649.02. We find Husband receives value of $608,656.96 for his fifty-five-percent share. We further find Wife receives value of $497,992.06 for her forty-five-percent share. Adhering to the family court's distribution of non-real estate assets, we find Wife received marital assets valued at $193,231.63 and advances from the marital estate valued at $29,000. Accordingly, to complete the equitable division of the marital estate, Husband shall pay Wife $275,760.43 within one hundred twenty (120) days from the date this opinion is filed.

II. Habitual Intoxication

Husband asserts, and we agree, the family court erred in stating it could grant a divorce based upon prima facie evidence of habitual intoxication. Nevertheless, we hold the preponderance of the evidence demonstrates Wife was entitled to a divorce based on habitual intoxication.

[3] We note the family court found Husband's contributions to the non-real estate portion of the marital estate were overwhelming when compared to Wife's contributions.

Our supreme court has held a party seeking temporary relief must make a "prima facie showing of probable cause for a divorce or separation." *Fisher v. Fisher*, 276 S.C. 375, 377, 278 S.E.2d 780, 781 (1981).

A family court may grant a divorce on the ground of habitual drunkenness. S.C. Code Ann. § 20-3-10(4) (1985).

> Habitual drunkenness is the fixed habit of frequently getting drunk; it does not necessarily imply continual drunkenness. Based on this definition, one need not be an alcoholic to be guilty of habitual drunkenness. It is sufficient if the use or abuse of alcohol causes the breakdown of normal marital relations.

Lee v. Lee, 282 S.C. 76, 78-79, 316 S.E.2d 435, 437 (Ct. App. 1984).

In the case at bar, the family court recited:

> A divorce may be granted on the grounds of habitual drunkenness if there is a prima facie showing that the "abuse of alcohol caused the breakdown of the marriage and that such abuse existed at or near the time of the filing for divorce." *Bodkin v. Bodkin*, 388 S.C. 203, 235, 694 S.E.2d 230 (Ct. App. 2010) (citing *Epperly v. Epperly*, 312 S.C. 411, 414, 440 S.E.2d 884, 885 (1994)).

Neither *Bodkin* nor *Epperly* permits the grant of a divorce based solely upon a prima facie showing of habitual drunkenness. Rather, both opinions describe the showing a party must make to establish habitual drunkenness, quoted above by the family court, but they do not discuss the requisite level of proof. *Bodkin v. Bodkin*, 388 S.C. 203, 212, 694 S.E.2d 230, 235 (Ct. App. 2010); *Epperly v. Epperly*, 312 S.C. 411, 414, 440 S.E.2d 884, 885 (1994). A party may receive temporary relief upon a prima facie showing of habitual drunkenness. *Fisher*, 276 S.C. at 377, 278 S.E.2d at 781. However, a party seeking a divorce on that ground must prove it by a preponderance of the evidence. *Lee*, 282 S.C. at 79, 316 S.E.2d at 437.

We find the preponderance of the evidence supports the family court's decision. The party asserting fault must establish that the other party's "abuse of alcohol

caused the breakdown of the marriage and that such abuse existed at or near the time of filing for divorce." *Bodkin*, 388 S.C. at 212, 694 S.E.2d at 235 (quoting *Epperly*, 312 S.C. at 414, 440 S.E.2d at 885). Wife testified Husband drank alcohol to excess on a regular basis during the latter part of their marriage; became loud, rude, and verbally abusive when he drank alcohol and behaved worse with every drink; routinely went to bed drunk at 8:00 p.m.; and refused to seek professional help to address his drinking. Wife also presented corroborating testimony from her two sisters, her brother-in-law, and the parties' friend. One sister stated Husband's drinking had increased during the latter portion of the marriage, and he became mean and insulting when he drank and "thought he did everything and didn't give [Wife] much credit." Wife's brother-in-law observed Husband was especially mean and insulting toward Wife when he was drinking. Each of the four witnesses recalled at least one event when Husband's intoxication led him to behave erratically or unusually. The parties' friend testified she and her husband had limited their association with the parties during the months before Wife left, in part because they found Husband "angry and difficult to be around" when he was drinking.

Husband did not present evidence rebutting this testimony. Rather, he admitted he drank alcohol to excess seven days a week just before Wife left and stated alcohol consumption had "put pressure" on their relationship. Husband recalled discussions about alcohol consumption with both Wife and their counselor. He also admitted his attempt to stop drinking before Wife left failed after a week. His defense consisted of complaints concerning Wife's drinking and testimony that, despite his drinking, he functioned normally. In view of the record, we find the preponderance of the evidence supports the family court's finding that Husband's habitual intoxication contributed to the breakdown of the marriage.

CONCLUSION

We find Husband received special consideration for his contribution of Lot 34 to the marital estate. However, we find the family court's equitable apportionment scheme improperly segregated the equity in the marital home from the remainder of the marital estate. Accordingly, we affirm the family court's decision but

modify its award so that Husband receives a fifty-five-percent share of the entire marital estate and Wife receives a forty-five percent share.

In view of our finding that the preponderance of the evidence establishes Husband's abuse of alcohol caused the breakdown of the marriage, we find Husband suffered no prejudice from the family court's incorrect statement of the standard of proof. Accordingly, the decision of the family court is

AFFIRMED AS MODIFIED.

FEW, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Willie Lee Simmons, Appellant,

v.

SC STRONG, Employer, and Hartford Underwriters Insurance Company, Carrier, Respondents.

Appellate Case No. 2012-207088

Appeal From The Workers' Compensation Commission

Opinion No. 5087
Heard December 10, 2012 – Filed February 20, 2013

AFFIRMED

Cynthia Barrier Patterson, of Columbia, and David Dusty Rhoades, of Charleston, for Appellant.

Kathryn Rose Fiehrer, of Wood & Warder, LLC, of Charleston, for Respondents.

LOCKEMY, J.: Willie Lee Simmons argues the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) erred in failing to find he was an employee of SC STRONG. We affirm.

FACTS/PROCEDURAL BACKGROUND

Simmons was a participant in the SC STRONG program. SC STRONG is a residential, non-profit organization in which "former substance abusers, ex-convicts, and homeless adults" are provided with educational and vocational

opportunities. Simmons began participating in the SC STRONG program in May 2010 as a condition of his probation.[1] On May 18, 2010, Simmons signed a Resident Statement, which provided:

> (1) Any remuneration which was, or in the future will be, due because of work which I have performed, or will perform, for South Carolina STRONG, I donate to South Carolina STRONG. This donation is done freely, and without duress.
>
> (2) Any work, which I have done, or will do, for South Carolina STRONG, is done as a volunteer without any expectation of remuneration.
>
> (3) Not withstanding paragraphs (1) and (2) above, if any governmental body determines that I am not a volunteer or cannot donate to South Carolina STRONG any remuneration which might be due to me from South Carolina STRONG, then I state that I was more than adequately paid by room, board, and services that I received from South Carolina STRONG including counseling, vocational training, entertainment, clothing, medical and dental services, education, rehabilitation, transportation, recreational and legal services, which have, and will be, provided to me by South Carolina STRONG free of charge for the duration of my time as a resident of South Carolina STRONG.

As a SC STRONG participant, Simmons worked at various landscaping and construction projects at the direction of SC STRONG. On January 14, 2011, Simmons slipped on ice and fell thirty feet off a roof at a SC STRONG jobsite. Simmons was treated at the Medical University of South Carolina (MUSC). A cervical CT scan revealed Simmons suffered a C-5 anterior superior end plate fracture. Additionally, Simmons's head CT scan revealed a soft tissue laceration/hematoma over the left frontal bone. Simmons received staples for his forehead laceration. On January 15, 2011, Simmons returned to the emergency

[1] Simmons pled guilty to two counts of second-degree burglary in March 2009. Simmons requested he be allowed to participate in the SC STRONG program at the time of his plea.

room complaining of foot pain and facial swelling. Simmons was given oxycodone and a hard cervical collar. The instructions provided by MUSC required Simmons to wear the collar at all times to protect his neck while his "compression fracture" healed. The instructions further noted that Simmons's fracture was "not serious" and he could "expect to fully recover within a few weeks."

On February 17, 2011, Simmons filed a Form 50 alleging he injured his head and cervical spine in the course of his employment with SC STRONG. Simmons requested temporary total disability benefits at a rate based on a similar employee. On March 2, 2011, Hartford Underwriters Insurance Company (Hartford), SC STRONG's insurance carrier, filed a Form 51 wherein it denied Simmons was an employee of SC STRONG and sustained a compensable injury arising out of employment with SC STRONG. On March 16, 2011, Hartford and SC STRONG (collectively Respondents) filed an amended Form 51 again alleging Simmons did not sustain a compensable injury in the course of his employment as alleged. Respondents filed a second amended Form 51 on April, 25, 2011, adding a denial that Simmons was an employee of SC STRONG.

A hearing was held before the single commissioner on May 25, 2011. At the hearing, Simmons testified he was provided room, board, and daily work instructions by SC STRONG. Simmons further testified he worked six days a week and was performing work for SC STRONG when he fell on January 14, 2011. According to Simmons, he was forced to leave SC STRONG after he contacted an attorney following his accident.

John Tecklenburg, President of SC STRONG's Board of Directors, testified SC STRONG has only two employees: John Glemser, the executive director, and John Hamilton, the co-executive director and vocational training supervisor. According to Tecklenburg, SC STRONG receives compensation for the construction services provided by its participants. Tecklenburg stated the SC STRONG model "involves a sustainable concept whereby the work training that we do for our residents is utilized as an enterprise to help generate funds that run the organization." Tecklenburg testified the food, clothing, and shelter provided to Simmons as a SC STRONG participant were not provided in lieu of wages. Additionally, Hamilton testified participants are provided with tools and given work assignments by SC STRONG and are not allowed to seek independent work while enrolled in the program. Hamilton further testified SC STRONG participants do not have any expectation of wages.

Following the hearing, the single commissioner found Simmons was not entitled to workers' compensation benefits because he was a volunteer and/or gratuitous worker and not an employee of SC STRONG. In his finding of fact number six, the single commissioner noted Simmons would have been entitled to temporary total disability benefits had he been an employee of SC STRONG but reiterated Simmons was not an employee. Following a hearing in November 2011, the Appellate Panel affirmed the single commissioner on December 20, 2011. The Appellate Panel adopted the single commissioner's order with the exception of finding of fact number six. This appeal followed.

STANDARD OF REVIEW

"The existence of an employer-employee relationship is a factual question that determines the jurisdiction of the Workers' Compensation Commission." *Shuler v. Tri-County Elec. Co-op., Inc.*, 374 S.C. 516, 520, 649 S.E.2d 98, 100 (Ct. App. 2007), *aff'd*, 385 S.C. 470, 472, 684 S.E.2d 765, 767 (2009). "When an issue involves jurisdiction, the appellate court can take its own view of the preponderance of the evidence." *Id.* "In determining jurisdictional questions, doubts of jurisdiction will be resolved in favor of inclusion of employees within workers' compensation coverage rather than exclusion." *Id.*

LAW/ANALYSIS

Simmons argues he was an employee of SC STRONG and thus entitled to workers' compensation benefits. We disagree.

Under the Workers' Compensation Act, an employee is defined as

> every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written, . . . whether lawfully or unlawfully employed, but excludes a person whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer . . . .

S.C. Code Ann. § 42-1-130 (Supp. 2012). "To be considered an employee under a contract of hire pursuant to section 42-1-130, a person must have a right to payment for his services." *Shuler v. Tri-County Elec. Co-op, Inc.*, 385 S.C. 470, 473, 684 S.E.2d 765, 767 (2009) (citing *Kirksey v. Assurance Tire Co.*, 314 S.C. 43, 45, 443 S.E.2d 803, 804 (1994) (finding unpaid daughter of store owner not an

employee)); *see also Doe v. Greenville Hosp. Sys.*, 323 S.C. 33, 39-40, 448 S.E.2d 564, 567-68 (Ct. App. 1994) (holding an unpaid volunteer candy striper was not the employee of a hospital); *McCreery v. Covenant Presbyterian*, 299 S.C. 218, 223-24, 383 S.E.2d 264, 267 (1989) (finding an unpaid church volunteer not an employee of the church for workers' compensation purposes), *rev'd on other grounds*, 303 S.C. 271, 400 S.E.2d 130 (1990).

Here, the Appellate Panel, relying on *Shuler*, *Kirksey*, and *McCreery*, found Simmons was a volunteer and/or gratuitous worker. The Appellate Panel held the term "contract of hire" connoted payment and "a worker who neither receives nor expects payment for his services is not generally considered an employee within the definition." On appeal, Simmons maintains that although he did not receive any monetary payments for the work he performed as a SC STRONG participant, he received benefits from SC STRONG for his work in the form of housing, clothing, and food.

We find Simmons was a volunteer/gratuitous worker. Simmons neither received nor expected to receive any kind of pay for his services. Pursuant to his Resident Agreement, Simmons acknowledged he was a volunteer and was not owed any remuneration for his services. Furthermore, the room and board Simmons received as a SC STRONG participant were not provided as payment for his work. Rather, Simmons, as well as all of the other SC STRONG participants, were provided a residential setting to "develop their strengths through learning - and teaching - academics and vocational skills, as well as personal, interpersonal, and practical 'survival skills.'" As a SC STRONG participant, Simmons was learning skills to aid in his transition into the working world. Simmons was not performing services as an employee of SC STRONG; rather, he was performing services as a volunteer in a rehabilitative program to improve his skills and avoid incarceration.

Simmons relies on *Wilson v. Georgetown County*, 316 S.C. 92, 447 S.E.2d 841 (1994) to support his position that South Carolina does not require a particular form of payment to establish an employee/employer relationship. In *Wilson*, the circuit court allowed Wilson, who informed the court he could not sit on a jury because of his religious beliefs, to perform janitorial services in lieu of jury service. *Id.* at 93, 447 S.E.2d at 842. Wilson was injured when he slipped and fell while washing the courthouse windows. *Id.* Our supreme court found Wilson was an employee of Georgetown County when he fell because the work he was performing was for the benefit of the County, and he was under the direction and control of the Clerk of Court. *Id.* at 94, 447 S.E.2d at 842-43. Here, Simmons argues SC STRONG billed its customers for the services he performed, and

therefore, his work was for the benefit of SC STRONG. We find *Wilson* is distinguishable from the present case. The circuit court required Wilson to perform janitorial services in lieu of jury service. Simmons was an admitted volunteer who chose to participate in the SC STRONG program in lieu of serving his prison sentence.

For the foregoing reasons, we find Simmons was not an employee of SC STRONG. Therefore, we affirm the Appellate Panel's determination that Simmons was not entitled to workers' compensation coverage.[2]

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

[2] Simmons also argues he was an apprentice in the SC STRONG program, and thus, he was entitled to workers' compensation coverage. This argument is not preserved for our review because (1) Simmons raises this argument for the first time in his reply brief and (2) it was not ruled upon by the Appellate Panel. *See Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (holding an issue is not preserved for appellate review if it was not ruled upon by the Appellate Panel); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (holding an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charlotte Williams, Employee, Appellant,

v.

David Stafford Drywall, Self-Insured Employer, and Accident Insurance Company, Respondents.

Appellate Case No. 2011-182266

Appeal From The Workers' Compensation Commission

Opinion No. 5088
Heard December 11, 2012 – Filed February 20, 2013

AFFIRMED

Kevin B. Smith, of The Steinberg Law Firm, LLP, of Charleston, for Appellant.

Kirsten Leslie Barr and Jamie C. Guerrero, both of Trask & Howell, LLC, of Mount Pleasant, for Respondents.

SHORT, J.: Charlotte Williams appeals from the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel) finding her totally and permanently disabled and awarding her lifetime medical treatment for the injuries to her back, left leg, and pelvis. She argues the Appellate Panel erred in: (1) basing her average weekly wage on Workers' Compensation Commission (Commission) Form 20; (2) failing to find her neurogenic bladder

related to her back injury; and (3) denying her claim for partial paraplegia. We affirm.

FACTS

On October 13, 2008, Williams was working as a drywall finisher for David Stafford Drywall[1] when she fell 12 to 14 feet. As a result of the accident, on December 22, 2008, Williams filed a Form 50, claiming she injured her left ankle bone, pelvis, right foot, left foot, right hip, and left hip. On June 8, 2009, she filed an amended Form 50, asserting injuries to her left hip, left leg, pelvis, right leg, back, brain, head, and left foot. Williams filed her second amended Form 50 on January 6, 2010, more than one year after the accident, claiming she injured her left hip, left leg, pelvis, right leg, back, brain, head, left foot, and for the first time, her bowels and bladder. Respondents admitted the accident, but only as to Williams' injuries to her left leg, spine, and pelvis. Respondents denied Williams was permanently and totally disabled. Williams challenged her average weekly wage and compensation rates, claiming her compensation rate should be $253.35.

The Single Commissioner held a hearing on the matter on March 22, 2010. The Commissioner issued his order on May 10, 2010, finding Williams sustained injuries only to her back, pelvis, and her left leg. He found she was permanently and totally disabled as a result of the combination of her injuries, pursuant to section 42-9-10 of the South Carolina Code, and was entitled to five-hundred weeks of compensation, less weeks paid. He determined Williams' average weekly wage was $198.08, with a compensation rate of $132.05, and provided her award be paid in lump sum.[2] The Commissioner ordered Respondents to pay for all past, present, and future causally-related medical treatment, excluding any treatment Williams sought from unauthorized providers. He further ordered Respondents to pay for all lifetime repair, replacement, removal, and maintenance of any causally-related retained hardware.

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[1] David Stafford Drywall and Accident Insurance Company are the Respondents (collectively, Respondents).

[2] Williams accepted payment of this award on June 29, 2010.

Williams filed a request for Commission review on May 18, 2010, which was denied by the Commissioner on August 16, 2010.[3] On August 3, 2010, Williams filed a motion to submit additional and newly discovered evidence. Williams then appealed to the Appellate Panel, and a hearing was held on September 21, 2010. The Appellate Panel issued its order affirming the Commissioner's order in its entirety on December 17, 2010. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. *Carolinas Recycling Grp. v. S.C. Second Injury Fund*, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *See* S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2012). Our supreme court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion the Appellate Panel reached. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). "Where there are no disputed facts, the question of whether an accident is compensable is a question of law." *Grant v. Grant Textiles*, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007).

LAW/ANALYSIS

I. Form 20

Williams argues the Appellate Panel erred in basing her average weekly wage on Commission Form 20. We disagree.

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[3] Williams did not appeal the Commissioner's denial of her claims for the right leg, left hip, brain, head, or bowel.

Section 42-1-40 of the South Carolina Code provides four alternative methods for the commission to use to calculate the average wage. S.C. Code Ann. § 42-1-40 (Supp. 2012); *see Pilgrim v. Eaton*, 391 S.C. 38, 44, 703 S.E.2d 241, 244 (Ct. App. 2010). The primary method of calculation requires that the "'[a]verage weekly wage' must be calculated by taking the total wages paid for the last four quarters . . . divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less." S.C. Code Ann. § 42-1-40 (Supp. 2012). However, "[w]hen for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." *Id.* "The statute provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." *Sellers v. Pinedale Residential Ctr.*, 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct. App. 2002). "'The objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity.'" *Id.* (quoting *Bennett v. Gary Smith Builders*, 271 S.C. 94, 98, 245 S.E.2d 129, 131 (1978)).

Williams argues the Appellate Panel erred in basing her average weekly wage on the Form 20 because it does not include all her wages and violates section 42-1-40 of the South Carolina Code. Williams bases this assertion on Stafford's testimony during the March 22, 2010 hearing. When questioned, Stafford testified Williams earned $76 per day when she was working for him. He said some wage records may have been left out of the computation because he could not find them. He further answered "yes" to the following question: "And I think you indicated in your deposition, I asked you is it fair to say she made more money working for you than she is getting right now?"

Williams also argues the Form 20 was not completed correctly because it divides her total wages by fifty-two weeks, and she did not work all fifty-two weeks in the year preceding her injury. Williams claims she earned $76 per day, or $380 per week, resulting in a compensation rate of $253.35. Williams did not introduce any wage records or pay stubs to support the higher compensation rate.

The Form 20 filed by Respondents claimed Williams' average weekly wage was $198.08, with a weekly compensation rate of $132.05. Stafford testified the Form 20 included all the wages he could find at the time. He stated they worked some

weeks and some weeks they did not. He added that for the last year-and-a-half to two years "work was just awful."

The Single Commissioner found the average weekly wage and compensation rate should remain as stated in the Form 20 because he saw no reason to deviate from the Form 20, and Williams did not present any additional evidence to support an increase in her wages. He also noted Stafford testified he "used all of her wages he located and that work had been very slow prior to her accident." Further, the Commissioner stated Williams "agreed that if David Stafford prepared a wage statement on her behalf she would accept it as being accurate," and she "conceded that the number of hours she worked was affected by the availability of work." Additionally, she agreed she has received temporary disability compensation since the date of the injury at the current compensation rate and had not challenged it as being inaccurate until now. Therefore, we find substantial evidence in the record supports the Appellate Panel's decision not to deviate from the primary method of calculation as provided in section 42-1-40.

II. Bladder Problem

Williams argues the Appellate Panel erred in failing to find her neurogenic bladder related to her back injury. We disagree.

This court must affirm the Appellate Panel's findings of fact if they are supported by substantial evidence. *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Id.* "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Id.* This court may not substitute its judgment for that of the agency's as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. *Id.* at 339, 513 S.E.2d at 845.

When determining if a claimant has established causation, the Appellate Panel has discretion to weigh and consider all the evidence, both lay and expert. *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). "Thus, while medical testimony is entitled to great respect, the fact finder may

disregard it if other competent evidence is presented." *Id.* The Appellate Panel has the final determination of witness credibility and the weight to be accorded the evidence. *Id.* "If a medical expert is unwilling to state with certainty a connection between an accident and an injury, the 'expression of a cautious opinion' may support an award if there are facts outside the medical testimony that also support an award." *Tiller*, 334 S.C. at 340, 513 S.E.2d at 846. "Proof that a claimant sustained an injury may be established by circumstantial and direct evidence where circumstances lead an unprejudiced mind to reasonably infer the injury was caused by the accident." *Id.* at 341, 513 S.E.2d at 846-47. The extent of impairment need not be shown with mathematical precision; however, an award "may not rest on surmise, conjecture, or speculation; it must be founded on evidence of sufficient substance to afford it a reasonable basis." *Linen v. Ruscon Constr. Co.*, 286 S.C. 67, 68, 332 S.E.2d 211, 212 (1985).

Williams argues the Appellate Panel erred in failing to find her neurogenic bladder was related to her injury. Williams asserts she repeatedly mentioned to Dr. Robert Alexander, of the Spine and Orthopaedic Specialists of South Carolina, P.A., that her bladder was leaking and she was urinating on herself. She further asserts he told her that was "not a type of problem he could handle" and did not write her complaints in her medical records. Williams independently saw Dr. Steven Poletti, of the Southeastern Spine Institute, on July 15, 2009, and his notes suggest Williams was suffering from "some measure of bowel and bladder dysfunction." Williams then independently saw Dr. Eric Rovner, a urologist at MUSC, on February 2, 2010, and as a result, he concluded she has "urge urinary incontinence and stress urinary incontinence" as a result of her work related accident. Dr. Poletti's notes from a February 3, 2010 visit state Williams saw Dr. Rovner and was diagnosed with voiding dysfunction. Williams also independently saw Dr. Timothy Zgleszewski, of Palmetto Spine Sports Medicine, P.A., on January 20, 2010, and his notes mention a diagnosis of neurogenic voiding dysfunction. Additionally, on March 3, 2010, Williams independently saw Dr. Jeffrey Faaberg, of the Edisto Spine Center, Inc., and his notes state Williams has frequent urinary incontinence.

However, the Single Commissioner stated Dr. Christopher Merrell's medical notes from her visits on December 18, 2008, March 3, 2009, and July 23, 2009, all noted Williams had no bowel or bladder incontinence. Dr. Alexander's notes from her visits on August 3, 2009, and October 12, 2009, state she denied any bowel or bladder changes. Therefore, the Commissioner found Williams repeatedly told the

authorized providers she did not have urinary incontinence. He further found that "although Dr. Poletti diagnosed her with urinary problems during the first [independent medical exam], [Williams] testified that she never reported any urinary problems to him. Moreover, she testified that Dr. Poletti only met with her for 10 minutes during the first [independent medical exam]." Additionally, the Commissioner found that contrary to Dr. Rovner's report, the medical records from Dr. Langdon Hartsock and Dr. Merrell, both also from MUSC, "specifically note that [Williams] was *not* suffering from urological problems following her accident." The Commissioner noted that during the hearing, Williams testified she was open and honest with Dr. Hartsock and Dr. Merrell about all of her symptoms and problems and was happy with their treatment. Furthermore, she acknowledged she did not raise any complaints about Dr. Alexander's treatment during her discovery deposition. The Commissioner also noted in his order Respondents did not learn about Williams' alleged urinary incontinence allegation until Williams' Form 50 was filed on January 6, 2010.

Although the record references her urinary problems, the only medical evidence relating to Williams' urinary problems are the doctors she saw independently, and Williams testified she never reported any urinary problems to Dr. Poletti. Therefore, we find the substantial evidence in the record supports the Appellate Panel's finding Williams was not entitled to a claim for urinary incontinence.

III. Partial Paraplegia

Williams argues the Appellate Panel erred in denying her claim for partial paraplegia. We disagree.

During a February 3, 2010 visit, Dr. Poletti determined Williams was qualified for a diagnosis of incomplete paraplegia. Williams also independently saw Dr. Faaberg on March 3, 2010, and his notes state Williams "requires gait assistance with a walker" and determined she qualifies for the criteria specified for incomplete paraplegia.

However, the Commissioner's order states Williams testified that contrary to Dr. Faaberg's report, she never told him she relied on a walker or a cane and that she has not used a walker since the beginning of her claim. Additionally, Dr. Zgleszewski's notes from her January 20, 2010 visit state Williams told him "she does *not* use a cane, walker, or crutches." (Emphasis added.) He did not diagnose

her with incomplete paraplegia. Further, Williams conceded that none of her authorized doctors, Dr. Hartsock, Dr. Merrill, or Dr. Alexander, had ever diagnosed her as suffering from incomplete paraplegia. Video surveillance was admitted into evidence that shows Williams going shopping, driving a car, and walking without assistive devices. Williams admitted she does not use the cane when she goes out because it is hard on her back, and she conceded she sometimes walks at a normal pace. The Commissioner's order also noted Respondents did not receive notice of the incomplete paraplegia claim until they received Williams' pre-hearing brief. Therefore, we find substantial evidence in the record supports the Appellate Panel's finding Williams was not entitled to a claim for partial paraplegia.

CONCLUSION

Accordingly, the Appellate Panel's order is

AFFIRMED.

KONDUROS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

J. Mars Sapp, Respondent,

v.

Will D. Wheeler, P.I. Leasing & Management, Inc., Winston Kenneth Altman, II, and JDBD, LLC, Defendants,

Of whom, Will D. Wheeler is the Appellant.

Appellate Case No. 2011-189347

Appeal From Georgetown County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 5089
Heard November 13, 2012 – Filed February 20, 2013

AFFIRMED

James Mixon Griffin, of Lewis Babcock & Griffin, LLP, of Columbia, for Appellant.

Thomas Whatley Bunch, II, of Robinson McFadden & Moore, PC, of Columbia, for Respondent.

SHORT, J.: In this action brought by J. Mars Sapp (Sapp) to collect rent obligations, Will Wheeler (Wheeler) appeals from a $252,798 verdict against him, arguing the trial court erred in denying his: (1) motion for a directed verdict on the

claim for future damages; (2) motion for a directed verdict based on the statute of limitations; (3) request for a jury charge on the three-year statute of limitations for a breach of contract action; (4) motion for a new trial; and (5) motion for a new trial under the thirteenth juror doctrine. We affirm.

FACTS

On September 27, 1994, P.I. Leasing entered into a lease agreement with Sapp to rent a building in Surfside Beach, South Carolina.[1] The lease was to expire on October 1, 2014. Wheeler, as president of P.I. Leasing, personally guaranteed performance by P.I. Leasing of the lease obligations, including payment and rent. From October 1994 to June 1998, P.I. Leasing operated a video gambling establishment on the leased premises; however, in June 1998, Wheeler sold the business to Resort Properties South, Inc. (Resort Properties) and assigned the lease to it. Under the assignment, P.I. Leasing was liable for the rent obligations of Resort Properties, and Wheeler again personally guaranteed performance of the lease terms. Sapp continued to receive rent checks from P.I. Leasing through February 2001. Thereafter, several different entities continued to send monthly rental checks to Sapp, including: Save the Ocean Project, Inc.; Coastal Rescue Mission; Ken Altman, II, LLC; and JDBD, LLC and Kenneth Altman, II. Sapp testified every rent check from 1994 to September 2007 was signed by Wheeler, Altman, or Faircloth. Wheeler never provided Sapp with written notice he was revoking his guaranty. By September 2007, P.I. Leasing had defaulted in its payments and was evicted in June 2008.[2]

Sapp filed a complaint on September 30, 2008, seeking accelerated rent and damages, discounted by rent from the current tenant, in the amount of $556,099, plus attorney's fees and costs. In his answer, Wheeler asserted the lease agreement was void for a mutual mistake because Sapp leased the premises to P.I. Leasing for the purposes of operating a video gambling establishment; however, subsequent to the execution of the lease, South Carolina outlawed video gambling and the purpose for which the lease was entered could not be performed. Therefore,

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[1] Wheeler was a majority owner of P.I. Leasing and Jarvis Faircloth was a minority owner. Ken Altman provided accounting services to P.I. Leasing and Wheeler; served as the registered agent for P.I. Leasing; and collected rent from the leased property's occupants.

[2] P.I. Leasing was dissolved with the Secretary of State's office on July 30, 2007.

Wheeler claimed P.I. Leasing was excused from performing its duties under the terms of the lease due to legal impossibility. Wheeler also pleaded the following as defenses: the doctrine of estoppel, failure to mitigate, failure to state a claim for relief, statute of limitations, the doctrine of laches, the doctrine of waiver, and the guaranty was void for lack of consideration. Further, Wheeler demanded a jury trial. Sapp filed an amended complaint on October 6, 2009, alleging a cause of action against Wheeler for breach of contract.[3]

A trial was held June 1-3, 2010. At the close of his case, Wheeler moved for a directed verdict on Sapp's claim for future damages and asserted Sapp's claim was barred by the three-year statute of limitations. At the close of testimony and after counsels' closing arguments, the court denied both of Wheeler's motions for directed verdict. The jury returned a $252,789 verdict for Sapp against Wheeler. The court also awarded Sapp $48,929 in legal fees against Wheeler.

On June 14, 2010, Wheeler filed a motion for new trial absolute, or in the alternative, a new trial *nisi remittitur*. Wheeler argued the verdict against him was facially inconsistent with the $7,300 verdict against P.I. Leasing. Therefore, he asserted the court had to order a new trial absolute or in the alternative a new trial *nisi remittitur* to limit Wheeler's liability to the same liability as against P.I. Leasing. Wheeler also claimed the verdict was a product of confusion, passion, prejudice, partiality, corruption, or some other improper motive, and not supported by the evidence. Therefore, he requested the court grant a new trial under the thirteenth juror doctrine. Further, Wheeler alternatively sought an order remitting the verdict to $7,300. Sapp objected to Wheeler's motion, asserting Wheeler waived the ability to challenge the verdict by failing to make the objection prior to dismissal of the jury. The court denied Wheeler's motion, finding Wheeler failed to timely object. This appeal followed.

STANDARD OF REVIEW

An action for breach of contract seeking money damages is an action at law. *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 541-42 (Ct. App. 2008). "In an action at law, on appeal of a case tried by a jury, the jurisdiction of this [c]ourt extends merely to the correction of errors of law, and a

[3] Sapp also added two defendants: Kenneth Altman, the registered agent for P.I. Leasing, and JBDB, LLC, Altman's company; however, only Wheeler is appealing.

factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

I. Directed Verdict Motions

When reviewing the denial of a motion for a directed verdict, this court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002). A directed verdict motion is properly granted if the evidence as a whole is susceptible of only one reasonable inference. *Id.* In ruling on a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence. *Id.* This court will only reverse the trial court when no evidence supports the ruling below. *Id.*

A. Future Damages

Wheeler argues the court erred in denying his motion for a directed verdict on the claim for future damages because no evidence was presented that the reasonable rental value at the time of termination was less than the reserved rent under the lease. We disagree.

At trial, Wheeler moved for a directed verdict, requesting the court strike Sapp's claim for future damages. The court held the language in the lease between P.I. Leasing and Sapp was the binding method for determining future loss of rental income following the termination of the lease. The lease Wheeler signed as a guaranty provides: "If such rentals received from such re[-]letting during any month be less than those to be paid by [sic] during that month by Tenant hereunder, Tenant shall pay any such deficiency to Owner. Such deficiency shall be calculated and paid monthly." It further provides Sapp can terminate the lease for any breach and recover from the tenant

> all damages [Sapp] may incur by reason of such breach, including the cost of recovering the [l]eased premises, reasonable attorney's fees, and, including the worth at the

> time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this [l]ease for the remainder of the stated term over the then reasonable rental value of the [l]eased [p]remises for the remainder of the stated term, all of which amounts shall be immediately due and payable from [t]enant to [o]wner.

On appeal, Wheeler argues Sapp failed to present any evidence he was entitled to future damages. Wheeler asserts that to be entitled to an award of future damages, Sapp was required to present evidence that on August 13, 2008, the reserved rent per month under the lease of $6,618 was greater than the reasonable rental value of the leased premises on the same date.

At the time the lease went into default, the monthly rent was $6,618. Once Sapp regained control of the property in Spring 2008, he was able to re-lease the property to several different tenants, and he presented evidence he netted $20,623.28 in income from the property from May 2008 to May 2010. Sapp asserts the rents he received are the reasonable rental value of the leased premises. He maintained his total damages are $494,053. Therefore, Sapp argues the reasonable rental value at the time of the termination of the lease was a question of fact for the jury because the reasonable rental value of the leased premises was subject to different interpretations. Further, the jury returned a verdict against Wheeler for $252,798, or approximately 51% of the total damages Sapp sought; thus, the jury's verdict was within the range of damages presented. Because the evidence as a whole was susceptible of more than one reasonable inference as to the reasonable rental value of the property, we find the court properly denied Wheeler's motion for a directed verdict.

B. Statute of Limitations

Wheeler argues the court erred in refusing to grant his motion for a directed verdict because Sapp failed to bring an action to enforce the guarantee against Wheeler within three years after P.I. Leasing ceased making rent payments. We disagree.

A lease agreement is a contract and an action for breach of contract must be brought within three years from the date the action accrues. S.C. Code Ann. § 15-3-530(1) (2005). Therefore, at trial, Wheeler moved for a directed verdict,

asserting Sapp's claim was barred by the three-year statute of limitations. Wheeler claimed Sapp was required to bring his action within three years of the date P.I. Leasing stopped making its payments, which was in 2001. The court responded:

> [T]he statute of limitations doesn't begin to run until . . . Sapp . . . knew or in the exercise of ordinary and reasonable diligence should have known that he had a right of cause of action against another entity. In this case[,] he was being paid and the checks were coming from everybody and everywhere and every entity that was out there. . . . He did not have any reason to believe that he had a cause of action against [Wheeler] until the payments quit coming from anybody, and it's my understanding that suit was filed thereafter within the statute of limitations. So, I must respectfully deny your motion for a directed verdict on the statute of limitations issue.

On appeal, Wheeler asserts he only guaranteed the performance of two entities, P.I. Leasing and Resort Properties, and neither of these entities made payments to Sapp after February 2001. Further, Wheeler argues Sapp did not provide any evidence of a written communication between Sapp and Wheeler in which either party consented or communicated that third parties, other than P.I. Leasing, Resort Properties, or Wheeler, would make payments under the lease on behalf of the identified tenants and guarantors under the lease. Therefore, Wheeler maintains Sapp's cause of action to enforce the guaranty accrued in 2001 and was barred by the statute of limitations.

Sapp received the last lease payment in January 2008, and he filed the suit on September 30, 2008; therefore, Sapp brought the action to enforce the guaranty against Wheeler within a year after the default on the lease payments. Sapp entered into the lease with P.I. Leasing in 1994, and the lease was assigned to Resort Properties in 1998. No other assignments or substitutions of tenants occurred, and Sapp received rent payments for the amounts required by the lease from 1994 until September 2007. Further, Sapp testified Wheeler, Altman, or Faircloth signed every check he received, and they were all involved at the inception of the lease in 1994. We find no error in the trial court's determination that Sapp had no reason to believe he had a cause of action against Wheeler until

the rental payments ceased, and therefore, Sapp filed his action within the statute of limitations. Thus, the court properly denied Wheeler's motion for a directed verdict on the statute of limitations issue.

Jury Charge

Wheeler argues the court erred in denying his request for a jury charge on the three-year statute of limitations for a breach of contract action. We disagree.

The trial court need only charge the current and correct law of South Carolina. *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys., Inc.*, 397 S.C. 348, 362, 725 S.E.2d 112, 120 (Ct. App. 2012). "In reviewing an alleged error in jury instructions, we are mindful that an appellate court will not reverse the [trial] court's decision absent an abuse of discretion." *Hennes v. Shaw*, 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). In our review, this court must consider the trial court's jury charge as a whole in light of the evidence and issues presented at trial. *Hennes*, 397 S.C. at 402, 725 S.E.2d at 507. "A trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal." *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005).

At trial, Sapp asked the court: "[A]re you going to charge statute of limitations as a defense in the case?" The court responded: "No." Sapp replied: "Okay." The court then stated:

> I don't think it's a factual issue. I don't think in this particular case that Mr. Sapp had any reason to expect, as I've indicated earlier, that he had a cause of action against Mr. Wheeler until the payments stopped coming in.

Wheeler did not object to the court's ruling that it was not going to charge the statute of limitations, and he did not object after the jury was charged. Sapp argued in his response to Wheeler's motion for a new trial that Wheeler waived his right to object to the jury charge by failing to object before the jury was discharged. On appeal, Wheeler argues the trial court erred by refusing to charge

the jury on the applicable three-year statute of limitations because the evidence conflicted as to the date the cause of action accrued.

We find Wheeler has not demonstrated he was prejudiced by the court's decision not to charge the statute of limitations because Sapp presented evidence he was receiving checks until September 2007 for the correct amount of rent that Wheeler, Altman, or Faircloth signed, and Sapp filed this action within one year of the default. Further, Wheeler never gave Sapp written notice he was terminating the lease, and Sapp never consented to assignments of the lease. The court found any leases for which Sapp did not give his consent were legally void and did not impact Wheeler's guaranty. Therefore, the trial court did not err in denying Wheeler's request for a jury charge on the three-year statute of limitations for a breach of contract action.

II. Motion for New Trial

Wheeler argues the court erred in denying his motion for a new trial because the verdict was irreconcilably inconsistent and excessive. We disagree.

"In South Carolina, an appellate court must uphold a jury verdict if it is possible to reconcile its various features." *Camden v. Hilton*, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct. App. 2004). "Furthermore, 'a jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention.'" *Id.* (quoting *Johnson v. Parker*, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983)). "When the jury's verdict is inadequate or excessive, the trial [court] has the discretionary power to grant a new trial *nisi*." *Waring v. Johnson*, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000). "Compelling reasons, however, must be given to justify invading the jury's province in this manner." *Id.* "The grant or denial of a motion for a new trial *nisi* rests within the discretion of the trial [court] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Id.* "This [c]ourt has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law." *Id.* at 257, 533 S.E.2d at 911.

In his motion for new trial absolute, or in the alternative, a new trial *nisi remittitur*, Wheeler argued the verdict against him was facially inconsistent with the $7,300 verdict against P.I. Leasing. Therefore, he asserted the court had to order a new trial absolute or in the alternative a new trial *nisi remittitur* to limit Wheeler's

liability to the same liability as previously decided against P.I. Leasing. The court denied Wheeler's motion, finding Wheeler did not object to the jury's verdict until the jury was discharged. Thus, the court determined he failed to timely object, and the issue was waived.

We find the verdicts were not inconsistent. P.I. Leasing assigned its interest in the 1994 lease to Resort Properties in 1998; made its last payment under the lease in 2001; and was dissolved as a company in 2007. Wheeler also signed as a guaranty under the assignment of the lease to Resort Properties and was still the guaranty for the lease until the lease was breached in 2007. Therefore, the jury could reasonably award Sapp fewer damages against P.I. Leasing than for Wheeler. Additionally, the jury's finding that P.I. Leasing breached its lease agreement and Wheeler breached his guaranty agreement was not ambiguous or inconsistent because the jury awarded Sapp actual damages against both P.I. Leasing and Wheeler, and did not award punitive damages against either. Therefore, we find the evidence supports the trial court's denial of Wheeler's motion for a new trial because the verdict was not irreconcilably inconsistent or excessive.

III. Thirteenth Juror Doctrine

Wheeler argues the court erred in denying his motion for a new trial under the thirteenth juror doctrine because the verdict was inconsistent, reflected jury confusion, and was excessive.

"Under the 'thirteenth juror' doctrine, a trial [court] may grant a new trial absolute when [it] finds the evidence does not justify the verdict." *Vinson v. Hartley*, 324 S.C. 389, 402, 477 S.E.2d 715, 722 (Ct. App. 1996). The trial court has the authority to grant a new trial upon its finding that justice has not prevailed or if the verdict is inconsistent and reflects the jury's confusion. *Id.* at 404, 477 S.E.2d at 722. "A trial [court]'s order granting or denying a new trial upon the facts will not be disturbed unless [its] decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." *Id.* at 403, 477 S.E.2d at 722.

As stated above, we find the verdict was not inconsistent or excessive; therefore, we also find the court did not err in denying Wheeler's motion for a new trial under the thirteenth juror doctrine.

CONCLUSION

Accordingly, the trial court is

AFFIRMED.

KONDUROS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Independence National Bank, Respondent,

v.

Buncombe Professional Park, LLC, and David DeCarlis, s/a David D. DeCarlis, Appellants.

Appellate Case No. 2011-196049

Appeal From Greenville County
Charles B. Simmons, Jr., Master-In-Equity

Opinion No. 5090
Heard November 13, 2012 – Filed February 20, 2013

REVERSED

Mary Leigh Arnold, of Mary Leigh Arnold, PA, of Mount Pleasant, for Appellants.

Martin Kyle Thompson, of Clawson & Staubes, LLC, of Greenville, for Respondent.

LOCKEMY, J.: Buncombe Professional Park, LLC (Buncombe) and David DeCarlis (collectively Appellants) appeal the Master-In-Equity's (Master) reformation of Independence National Bank's (Independence) mortgage, which placed it in a superior position to DeCarlis's mortgage. Appellants also appeal the Master's additional finding that pursuant to the doctrine of equitable subrogation, Independence was entitled to a first and superior mortgage. We reverse.

FACTS

Buncombe obtained a commercial loan in the amount of $1.65 million from Independence, of which DeCarlis was an individual guarantor. This loan was secured by approximately 4.9 acres of land in Greenville County (Greenville property). Buncombe and DeCarlis retained attorney Tommy Dugas to handle the loan closing. Independence's loan was to satisfy a first mortgage on the Greenville property held by First National Bank of Spartanburg (First National). After receiving information from Independence regarding the details of the loan, Dugas conducted an examination of the Greenville property's title. As part of that examination, Dugas determined the Greenville property was encumbered by two mortgages of record, the one held by First National and a second mortgage held by DeCarlis individually.

At the closing, Robert M. Lowery was present on behalf of Independence, and DeCarlis was present on behalf of Buncombe and individually as a guarantor of the note. DeCarlis individually guaranteed the commercial promissory note, and a separate guaranty agreement was executed as well. Buncombe and Independence executed a loan commitment letter that stated Independence would make the requested loan to Buncombe under certain terms and conditions, one being that Buncombe would grant a first in priority real estate mortgage in the Greenville property to Independence. Specifically, one of the requirements within the conditions precedent section of the loan commitment letter stated,

> A commitment to issue a standard ALTA mortgagee title insurance policy in form, content and from a title insurer satisfactory to Independence, insuring the mortgage as a **first lien on the Property** for the full amount of the loan, with such endorsements as Independence may require. Title shall be fee simple and marketable, free and clear of all defects, liens and encumbrances, including mechanics' liens.

(emphasis added). DeCarlis signed the loan commitment letter, dated September 25, 2007, as a guarantor and on behalf of Buncombe. Moreover, the mortgage included the following language: "The words "Related Documents" mean . . . any . . . documents or agreements executed in connection with this Security Instrument

whether now or hereafter existing. The Related Documents are hereby made a part of this Security Instrument by reference thereto, with the same force and effect as if fully set forth herein." Dugas was the only attorney at the closing, representing all parties. DeCarlis, on behalf of Buncombe and individually, further signed a business loan agreement stating that any additional documents necessary to make the terms of the loan conform to the conditions contained in the lender's commitment would be executed accordingly. The commercial real estate mortgage issued to Buncombe contained similar language.

DeCarlis did not subordinate his previously recorded mortgage to that of Independence's mortgage, nor was his mortgage satisfied or released during the closing. Lowery testified that while Dugas reviewed the lender's commitment letter with DeCarlis, DeCarlis never revealed the existence of his mortgage on the Greenville property. Independence's mortgage was recorded in the Greenville County Register of Deeds (ROD) on September 26, 2007, at Book 4855, Page 978. The mortgage to DeCarlis remained open and of record.

The maturity date for Independence's loan was originally March, 25, 2009. However, through a change in terms agreement, the date was extended to March 25, 2010. The loan was not paid off by the maturity date, and Independence sought to foreclose on their mortgage. Independence then discovered that DeCarlis's loan was still open and of record. Dugas contacted Buncombe and DeCarlis regarding the issue and requested that DeCarlis sign a subordination agreement. DeCarlis declined to execute the agreement.

On May 14, 2010, Independence filed a foreclosure complaint against Appellants. On June 18, 2010, Appellants filed an answer and counterclaim challenging the priority of Independence's mortgage. On October 14, 2010, the court denied a motion for summary judgment by Independence. Thereafter, on March 24, 2011, Independence filed a motion to amend its complaint, which was granted over Appellants' objection. The amended complaint included a new cause of action for reformation.

Dugas testified at the hearing on April 29, 2011, and stated he had been aware of DeCarlis's mortgage on the Greenville property and had written himself a note that DeCarlis's mortgage needed to be released. Dugas admitted he made a mistake in failing to have DeCarlis execute a satisfaction, release, or subordination of DeCarlis's mortgage at the loan closing and stated the parties agreed Independence

would have a first mortgage. However, when he tried to correct the mistake a couple of years later, DeCarlis replied through his attorney, refusing to sign a subordination agreement. He stated he did "not have any independent recollection that the loan was contingent on [his] subordinating his individual mortgage to Independence National Bank." A manager from Independence's loan department testified that Independence would not loan $1.65 million as a second mortgage and had DeCarlis's mortgage been revealed to him, he would have refused to issue the loan.

Following the hearing, in which DeCarlis failed to appear and did not put forth any evidence, the Master entered an order of foreclosure prepared by Independence. Subsequently, Appellants filed a motion to reconsider, and Independence filed a motion to alter or amend the order to include a ruling on equitable subrogation. Appellants objected to altering the order on the grounds that equitable subrogation was not pled by Independence. The Master denied Appellants' motion, but granted Independence's motion and found it met the requirements for equitable subrogation as well. Appellants then timely filed this appeal.

ISSUES ON APPEAL

Did the Master err by failing to give priority to DeCarlis's mortgage when it was filed prior to Independence's mortgage?

Did the Master err in reforming Independence's mortgage?

Did the Master err in amending his original order to provide for equitable subrogation?

STANDARD OF REVIEW

"An action to establish lien priorities is an action in equity," *SunTrust Bank v. Bryant*, 392 S.C. 264, 267, 708 S.E.2d 821, 822 (Ct. App. 2011) (citing *Fibkens v. Fibkens*, 303 S.C. 112, 115, 399 S.E.2d 158, 160 (1990)), as is an action to foreclose a mortgage. *Rakestraw v. Dozier Assocs., Inc.*, 285 S.C. 358, 360, 329 S.E.2d 437, 438 (1985). "The appellate court's standard of review in equitable matters is our own view of the preponderance of the evidence." *SunTrust Bank*, 392 S.C. at 267, 708 S.E.2d at 822-23 (citing *Williams v. Wilson*, 349 S.C. 336, 339-40, 563 S.E.2d 320, 322 (2002)).

LAW/ANALYSIS

Appellants first argue the Master erred in giving priority to Independence's mortgage because it is clear that DeCarlis's mortgage was filed first in time, and therefore is superior.

Section 30-7-10 of the South Carolina Code (2007) provides:

> All . . . mortgages or instruments in writing in the nature of a mortgage of any real property, . . . all assignments, satisfactions, releases, and contracts in the nature of subordinations, . . . or other liens on real property created by law or by agreement of the parties and generally all instruments in writing conveying an interest in real estate required by law to be recorded in the office of the register of deeds or clerk of court in those counties where the office of the register of deeds has been abolished or in the office of the Secretary of State delivered or executed after July 31, 1934, except as otherwise provided by statute, are valid so as to affect the rights of subsequent creditors (whether lien creditors or simple contract creditors), or purchasers for valuable consideration without notice, only from the day and hour when they are recorded in the office of the register of deeds or clerk of court of the county in which the real property affected is situated. In the case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate for valuable consideration without notice, the instrument evidencing the subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and **the priority is determined by the time of filing for record**.

(emphasis added). We agree that section 30-7-10, read without reference to any other doctrine or statute, indicates DeCarlis's lien is superior to Independence's lien. However, we examine whether the Master was correct in finding

Independence had the superior lien pursuant to reformation of the mortgage and/or the doctrine of equitable subrogation.

Reformation

Appellants maintain the Master's reformation of the mortgage was error because Independence did not prove by clear and convincing evidence a "meeting of the minds." We agree.

"'A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it.'" *George v. Empire Fire & Marine Ins. Co.*, 344 S.C. 582, 590, 545 S.E.2d 500, 504 (2001) (quoting *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987)). "'A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended.'" *Id.* (quoting *Crosby*, 293 S.C. at 206, 359 S.E.2d at 300). "'Reformation is the remedy by which writings are rectified to conform to the actual agreement of the parties.'" *Crosby*, 293 S.C. at 206, 359 S.E.2d at 300 (quoting *Crewe v. Blackmon*, 289 S.C. 229, 234, 345 S.E.2d 754, 757 (Ct. App. 1986)). "Before equity will reform a contract, the existence of a mutual mistake must be shown by clear and convincing evidence." *Id.* (citing *Crosby*, 293 S.C. at 206, 359 S.E.2d at 300).

The Master can reform a material element affecting subject matter or the terms and stipulations of the contract. In the present case, the error was failing to have DeCarlis sign a subrogation agreement. DeCarlis was not a party to the mortgage and reformation does not permit a court to write a new, additional party into the mortgage to correct the error. *See* 66 Am. Jur. 2d *Reformation of Instruments* § 51 (2011) ("A court of equity may not add or substitute other parties for those appearing on the face of a contract where the effect may be to make a new contract."). Thus, we find the Master erred in reforming the mortgage to alter the parties' priority rights.

Equitable Subrogation

Appellants argue the Master erred in altering his final order to include findings regarding the concept of equitable subrogation because relief for the same was

never pled by Independence. Alternatively, Appellants argue even if the Master was correct in allowing Independence to allege a claim of equitable subrogation, he erred in determining it was an appropriate remedy when Independence failed to establish any of the essential elements. We find their first argument to be without merit, but agree with their second argument.

In its amended complaint, Independence contended that DeCarlis's mortgage should be ruled junior and secondary to Independence's mortgage pursuant to the theory of equitable subrogation. In their amended answer, Appellants responded that because Independence does not hold a first priority lien and was aware it did not hold a first priority lien, its allegations in Paragraph 13, which included the equitable subrogation claim, were "completely improper." Appellants' direct response to Independence's claim of equitable subrogation indicates they had notice of the claim, and further, had time to prepare any defense or argument they may have had against the claim. We believe it was appropriate to amend the final order to include findings on the claim of equitable subrogation, and Appellants were not prejudiced by the Master's decision.

Continuing to the merits, equitable subrogation allows a subsequent creditor to assume the rights and priority of a prior creditor. To be granted the remedy of equitable subrogation, the mortgagee must establish the following requirements: (1) the party claiming subrogation has paid the debt; (2) the party was not a volunteer but had a direct interest in the discharge of the debt or lien; (3) the party was secondarily liable for the debt or for the discharge of the lien; and (4) no injustice will be done to the other party by the allowance of the equity. *Dedes v. Strickland*, 307 S.C. 155, 158, 414 S.E.2d 134, 136 (1992). "Additionally, the party asserting the doctrine must not have had actual notice of the prior mortgage." *Id.* In considering this doctrine, it is important to note that constructive notice is not a bar. *Pee Dee State Bank v. Prosser*, 295 S.C. 229, 238, 367 S.E.2d 708, 713 (1988), *overruled on other grounds by United Carolina Bank v. Caroprop, Ltd.*, 316 S.C. 1, 446 S.E.2d 415 (1994).

Independence, the party claiming subrogation, paid Buncombe's debt to First National by satisfying First National's mortgage on the Greenville property. Independence loaned Buncombe $1.65 million secured with a mortgage on the Greenville property, in part to satisfy First National's mortgage, and thus, was not a volunteer. Regarding the third requirement, Independence was secondarily liable for the discharge of First National's mortgage under the instruments creating the

new mortgage. As to the fourth requirement, we also do not believe an injustice would be done to DeCarlis, because it appears from the record he was aware Independence expected a first mortgage, and he would be placed in the same position he would have been if the closing had gone as intended by the parties.

However, we find Independence had actual notice of the prior mortgage. *See Spence v. Spence*, 368 S.C. 106, 118, 628 S.E.2d 869, 875 (2006) ("[I]n the context of a real estate transaction, a purchaser of real property has actual notice of a title defect or other claim, lien, or interest adverse to his own in a particular property when he actually knows about the defect or claim, or when a reasonable person, if made aware of the same information known to the buyer, would be charged with actual notice of the defect or claim. Actual notice may consist of facts or conditions observed by a prospective purchaser as well as information conveyed orally or in writing to him."). While the record does not contain evidence that Independence was directly informed about the existence of DeCarlis's lien, we believe there was an agent-principal relationship between Dugas and Independence, such that actual notice to Dugas was actual notice to Independence. *See Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 242, 597 S.E.2d 165, 168 (Ct. App. 2004) ("[T]he relationship of agency need not depend upon express appointment and acceptance thereof. Rather, an agency relationship may be, and frequently is, implied or inferred from the words and conduct of the parties and the circumstances of the particular case."); *see also Citizens' Bank v. Heyward*, 135 S.C. 190, 199, 133 S.E. 709, 712 (1925) (stating notice to agent is notice to principal); *compare Pee Dee State Bank*, 295 S.C. at 238, 367 S.E.2d at 713-14 (finding no evidence in the record of any information the closing attorney had regarding other liens on the property; thus, equitable subrogation was not barred).

Independence now claims no evidence established Dugas was its agent. However, Dugas was the only attorney present at the closing, and he was the only one authorized to conduct the closing. Independence admits in its brief Dugas represented both parties with regard to the closing. Despite the fact Buncombe and DeCarlis paid for Dugas's services, Independence required them to do so in the "Costs" section of its loan commitment letter, stating "[o]n or before the closing Borrower shall pay all costs, expenses and fees (including, without limitation, any appraisal, survey, insurance, environmental assessment, engineering, inspections, searches, recording and attorneys' fees) associated with this transaction." Dugas conducted a title search before the closing and discovered DeCarlis's lien. He admitted he knew of DeCarlis's mortgage at the closing, yet failed to subordinate

the mortgage to Independence's mortgage. Thus, we find Independence had actual knowledge of DeCarlis's mortgage. For the foregoing reasons, we reverse the Master's ruling that equitable subrogation was a proper remedy under these facts.

CONCLUSION

We hold neither reformation nor equitable subrogation were appropriate remedies under these facts. Accordingly, the Master's rulings are

REVERSED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Tommy Burgess, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2010-155115

ON WRIT OF CERTIORARI

Appeal From Williamsburg County
R. Ferrell Cothran, Jr., Circuit Court Judge

Opinion No. 5091
Heard January 10, 2013 – Filed February 20, 2013

AFFIRMED

Attorney General Alan Wilson, Assistant Attorney General Mary S. Williams, and Assistant Attorney General Megan E. Harrigan, all of Columbia, for Petitioner.

Appellate Defender Robert M. Pachak, of Columbia, for Respondent.

WILLIAMS, J.: In this post-conviction relief (PCR) case, this court granted the State's petition for writ of certiorari to review the PCR court's order granting Tommy Burgess a new trial. The State argues the PCR court erred in failing to determine whether Burgess was prejudiced by his counsel's failure to request a jury charge regarding Burgess's absence from his criminal trial. We affirm.

FACTUAL/PROCEDURAL HISTORY

In 2002, Burgess proceeded to trial on charges of distribution of marijuana and distribution of marijuana within proximity of a school. After jury selection, Burgess was permitted to remain free on bond and when he did not return following a brief recess, he was tried in absentia. During closing arguments, the State did not mention Burgess's absence. However, Burgess's counsel did, stating as follows:

> Of course, [Burgess] doesn't have to present anything. The State has the burden of proof. He is innocent. He doesn't have to testify. He doesn't have to present any evidence at all. As a matter of fact, he was here yesterday, whatever. He was having a trial. Obviously, he's telling you I didn't do this or whatever. That's his position on this. And the State has got to prove to you that he did do this. If he were here, he wouldn't have to get up there and testify or do anything. He didn't have to present any evidence. The State has to do that.

After closing arguments, the circuit court charged the jury. The circuit court instructed the jury on the State's burden of proof and explained that Burgess was not required to testify in his own defense nor could the jury infer or draw conclusions from the fact that he did not testify. However, the circuit court did not explicitly inform the jury that, pursuant to *State v. Jackson*,[1] they could not construe Burgess's absence as an admission of guilt. Burgess's trial counsel did not object or request any additional charges. During deliberations, the jury asked two factual questions but made no inquiry concerning Burgess's absence. The jury convicted Burgess on both counts and the circuit court's sentence was sealed.

[1] 301 S.C. 49, 389 S.E.2d 654 (1990).

Almost three years later, Burgess was found, arrested, and brought before the circuit court for sentencing. Burgess was sentenced to five years' imprisonment for distribution within proximity and fifteen years' imprisonment for distribution, third offense. Burgess did not file a direct appeal.

Burgess filed an application for PCR, arguing, inter alia, that his trial counsel erred in failing to request a *Jackson* charge. At the PCR hearing, Burgess's trial counsel testified he did not recall requesting a *Jackson* charge but stated he did not think it was important because the "bell [had] rung." Additionally, trial counsel explained he felt he did an adequate job explaining and emphasizing reasonable doubt and Burgess's right to remain silent during closing arguments. According to trial counsel, he believed no further instructions were necessary because "if we are having this trial, obviously he's telling you he didn't do this." The PCR court granted Burgess a new trial based on its finding that Burgess's counsel was ineffective in failing to request a *Jackson* charge. Specifically, the PCR court ruled as follows:

> The Applicant was convicted of the charges in absentia and in accordance with . . . *State v. Jackson*, 301 S.C. 49, the trial attorney failed to object to the jury's instructions which did not include language regarding the Applicant'[s] absence from this trial and whether or not his absence could be held against him with respect to delivering a verdict in this matter and as such his case should be remanded for a new trial in the General Sessions Court.

The State petitioned for a writ of certiorari, and this court granted the petition.

LAW/ANALYSIS

The State argues the PCR court erred in finding trial counsel was ineffective in failing to request a *Jackson* charge. Specifically, the State maintains the PCR court failed to undertake an analysis of whether Burgess was prejudiced and, had the PCR court done so, Burgess failed to meet his burden. We hold that the State's argument is not preserved for appellate review because the State failed to file a Rule 59(e), SCRCP, motion asking the PCR court to specifically determine whether Burgess suffered prejudice as the result of his trial counsel's deficient performance.

In *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007), the PCR court disposed of several of the applicant's allegations as follows:

> As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them. Therefore, any and all allegations not specifically addressed in this Order are hereby denied and dismissed.

Id. at 409, 653 S.E.2d at 266. Our supreme court held that this paragraph did not constitute a "sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law." *Id.* Accordingly, the supreme court found that this court erred in addressing the merits of Marlar's PCR application. *Id.* at 410, 653 S.E.2d at 267. The supreme court emphasized that to properly preserve an issue for appellate review, it is incumbent upon a party in a PCR action to file a Rule 59(e) motion in the event the PCR court fails to make specific findings of fact and conclusions of law regarding an issue. *Id.*

In the instant case, the PCR court's ruling contains greater detail than that in *Marlar* but is nevertheless lacking sufficient findings of fact and conclusions of law. Among other things, the PCR court failed to address whether Burgess suffered any prejudice as the result of his counsel's deficient performance. Because the State failed to file a Rule 59(e) motion asking the PCR court to make specific findings of fact and conclusions of law regarding the prejudice prong, we find the issue on appeal is not preserved for our review. Accordingly, we affirm the PCR court's order.

AFFIRMED.

FEW, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mark Edward Vail, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2009-112367

ON WRIT OF CERTIORARI

Appeal from Charleston County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 5092
Heard October 16, 2012 – Filed February 20, 2013

REVERSED

Daniel J. Westbrook and Travis Dayhuff, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley Elliott, Assistant Attorney General Matthew Frideman, and Assistant Attorney General Ashleigh Rayanna Wilson, of Columbia, for Respondent.

LOCKEMY, J.: In this appeal from the denial of his post-conviction relief (PCR) application, Mark E. Vail argues the PCR court erred in finding trial counsel was not ineffective for failing to object to alleged hearsay testimony. We reverse and grant Vail a new trial.

FACTS

This case involved allegations from a thirteen-year-old girl (Victim), who claimed she and Vail, a teacher and coach at her First Baptist Church School (First Baptist), were having a sexual relationship. At trial, the State called several witnesses, including Kelsey R. (Sister) and John R. (Father), to testify regarding Victim's statements. Portions of witnesses' testimonies went into detail about the alleged sexual encounters and the resulting actions that were taken. At least two witnesses, Sister and Caroline O., testified Victim recanted her story soon after her confession to them.

Trial counsel did not object to the testimonies now alleged to be inadmissible hearsay, did not request limiting instructions, and did not move to exclude any of the statements pursuant to Rule 403, SCRE. The jury convicted Vail on the charges of second-degree criminal sexual conduct (CSC) with a minor and lewd act with a minor. He received a ten-year sentence and an eight-year sentence, to be served concurrently. The jury acquitted him of two other counts of CSC with a minor. Vail filed a timely notice of appeal but later withdrew it. Subsequently, Vail sought PCR claiming trial counsel had rendered ineffective assistance by failing to object to many instances of inadmissible hearsay. An evidentiary hearing was held on January 23, 2008.

At the PCR hearing, trial counsel explained his trial strategy was to use alibi witnesses for all the alleged instances of sexual intercourse except for one on November 4, 2003. While trial counsel admitted the November 4, 2003 incident presented a problem because Vail had no way of refuting it through an alibi witness, he hoped his attacks on the other instances would undermine the Victim's credibility. Trial counsel stated he had a "huge mountain to overcome" when the jury was presented with evidence of thirty hours of telephone calls between Vail and Victim, many of which were late at night. He maintained he did not object to all instances of hearsay because he wanted to be "transparent" with the jury and

avoid appearing as if he was playing "hide the ball," because credibility was crucial in this case. He explained he failed to object to further hearsay from other witnesses because he had to elicit Victim's recantations through them as well. However, he admitted that even without the recantations and collateral attacks on Victim's credibility, he had various other credibility issues he could have pursued as well. He testified that another trial strategy was creating a picture that Victim had a teenage obsession with Vail. Trial counsel believed allowing the jury to hear through other witnesses the constant altering of Victim's story contributed to that picture.

The PCR court found trial counsel was not ineffective for failing to object to hearsay. To support its finding, the PCR court determined the majority of statements alleged by Vail to be hearsay did not fall under the definition of hearsay, or in the alternative, fell under various exceptions to the rule against hearsay. After the denial of PCR relief, Vail filed a petition for writ of certiorari, which this court granted on August 16, 2011.

STANDARD OF REVIEW

"For [a] petitioner to be granted PCR as a result of ineffective assistance of counsel, he [has the burden to prove] both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective assistance." *Dawkins v. State*, 346 S.C. 151, 155-56, 551 S.E.2d 260, 262 (2001) (citing *Strickland v. Washington*, 466 U.S. 668 (1984); *Brown v. State*, 340 S.C. 590, 533 S.E.2d 308 (2000)).

"'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" *Smith v. State*, 386 S.C. 562, 565, 689 S.E.2d 629, 631 (2010) (quoting *Strickland*, 466 U.S. at 691). "To establish prejudice, the defendant is required 'to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* at 565-66, 689 S.E.2d at 631 (quoting *Strickland*, 466 U.S. at 694). "Moreover, no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt." *Id.* at

566, 689 S.E.2d at 631 (citing *Rosemond v. Catoe*, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009)).

Upon appellate review, this court "will uphold the PCR court if any evidence of probative value supports the decision." *Id.* at 565, 689 S.E.2d at 631 (citing *Smith v. State*, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006)).[1]

LAW/ANALYSIS

Failure to Object to Instances of Hearsay

Vail cited numerous instances in the record in which he claims trial counsel should have objected on the basis of inadmissible hearsay testimony or irrelevance. He argues the PCR court erred in finding the challenged testimony fell under Rule 801(d)(1), SCRE, was an exception to the rule against hearsay, or did not fit within the definition of hearsay. We agree.

"'The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies.'" *Watson v. State*, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006) (quoting *Dawkins*, 346 S.C. at 156, 551 S.E.2d at 262). However,

> [i]n a CSC case, the testimony of a witness regarding the Victim's out-of-court statement is *not* hearsay when: "The declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged Victim and the statement is *limited to the time and place of the incident.*"

Smith, 386 S.C. at 566, 689 S.E.2d at 631-32 (quoting Rule 801(d)(1)(D), SCRE). "Any other details or particulars, including the perpetrator's identity, must be excluded." *Watson*, 370 S.C. at 71-72, 634 S.E.2d at 644 (citing *Dawkins*, 346 S.C. at 156, 551 S.E.2d at 262-63).

[1] Within this opinion, we reference two separate opinions both titled *Smith v. State*.

Additionally, Rule 801(d)(1)(B), SCRE, provides a prior statement by a witness is not hearsay

> if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose . . . .

In other words, for a prior consistent statement to be admissible pursuant to Rule 801(d)(1)(B), the following elements must be present:

> "(1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive."

State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010) (quoting *State v. Saltz*, 346 S.C. 114, 121-22, 551 S.E.2d 240, 244 (2001)).

We find portions of challenged testimony far exceeded the limitations provided in Rule 801(d)(1)(B) & (D). For example, Victim's father, John R. (Father), gave the following statements during the State's direct examination:

> A: Well, a lot of the admissions that came out, it didn't just all come out in one big package for us. You know, a lot of the details, especially, you know, the more intense sexual details, she had a hard time telling me face to face.

. . . .

A: I know that, at one time, it occurred in his apartment . . . and that there was at least one time in his car while it was in our neighborhood.

Q: Was she able to give you any details about when these things had happened?

A: I know – I will be honest, a lot of those – the hard details about the sexual intercourse and oral sex, I think they were probably as hard for her to tell me as they were for me to listen.

. . . .

Q: What did she say?

A: Well, there was kind of a real poignant moment where she said, daddy, he took everything, she [sic] took everything I have.

Q: Did she took everything or he took everything?

A: He did, he took everything.

Additionally, Sister testified Victim "admitted to us that she and Coach Vail had been having sex. . . . She had told me originally that they had sex. But they had been talking, and they had both eventually started saying, you know, we just went to the pier on Folly Beach." In related testimony, Caroline O. stated Victim

> talked to [Sister] and [Sister] was informed that [Victim] and Mr. Vail had been having sex. . . . As soon as she informed Kelsey that they had been having sex, . . . [Victim] informed me that they had been having sex as well. . . . I believe the three-minute call was when

> [Victim] first informed Kelsey about the two of them having sex . . . .

These statements from Sister, Caroline O., and Father were not confined to time and place, nor did they meet all the requirements necessary to satisfy Rule 801(d)(1)(B).

Further, other testimonies were offered for no other purpose but to prove the truth of the matter asserted, or were far more prejudicial than probative. Specifically, Sister gave testimony that only served to prove Victim's story of a sexual relationship between Vail and Victim. Moreover, Thomas Mullins, First Baptist's principal at the time of the incident, testified to "a rumor or a statement that there was some inappropriate behavior with [Vail] and another student," which was extremely prejudicial, with only minimal probative value.

The PCR court found testimonies provided by Caroline O. and Virginia Murray fell under the exception to the rule against hearsay established in Rule 803(3), SCRE, which provides,

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Caroline O. testified Victim told her "[Vail] was mad at her for telling us and somehow he found out that she had told us they had sex." Murray testified Victim was very upset Vail had left First Baptist, and Victim stated "it was because of her and everybody would hate her because of it. . . . And then she went on to say that she had given her virginity to him and that's why she was really upset." We find neither of the statements by Caroline O. or Virginia Murray fit within the exception provided in Rule 803(3). *See State v. Tennant*, 394 S.C. 5, 16, 714 S.E.2d 297, 303 (2011) ("'If the reservation in the text of [Rule 803(3)] is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition—'I'm scared'—and not belief—'I'm scared because

someone threatened me.'" (quoting *State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999))).

Accordingly, we hold trial counsel erred in failing to object to several portions of the challenged testimony. To determine whether trial counsel's failure to object to inadmissible hearsay fell below an objective standard of reasonableness, we next examine whether a legitimate trial strategy existed. *See Strickland v. Washington*, 466 U.S. 668, 689-90 (1984).

Valid Trial Strategy

"Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness." *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (citing *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995), *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992)). "Where counsel articulates a strategy, it is measured under an objective standard of reasonableness." *Id.* (citing *Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313).

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting *Strickland*, 466 U.S at 690 (1984)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Id.* (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

"[Our supreme court] has held that the failure to object to improper hearsay testimony in a [CSC] case because the testimony is merely cumulative to the victim's testimony is not a reasonable strategy where the evidence is not overwhelming or the improper testimony bolsters the victim's testimony." *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006) (citing *Dawkins v. State*, 346 S.C. 151, 156-57, 551 S.E.2d 260, 263 (2001)); *see Smith*, 386 S.C. at 568, 689 S.E.2d at 633 (finding the presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledges there was no trial strategy in mind when failing to object to the improper hearsay and bolstering testimony). "'[I]t is precisely this cumulative effect which enhances the

devastating impact of improper corroboration.'" *Dawkins*, 346 S.C. at 157, 551 S.E.2d at 263 (quoting *Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994)). In *Dawkins*, our supreme court found trial counsel's explanation that he did not want to confuse or upset the jury did not have merit because counsel "could have sought a determination as to the inadmissibility of the hearsay testimony out of the hearing of the jury as he had previously done." *Id.* Further, the court found the strategy was inappropriate given the fact "there was not overwhelming evidence that [the defendant] sexually abused [the victim]." *Id.* at 157 n.7, 551 S.E.2d at 263 n.7. "For instance, while [the victim's] hymen was found to be ruptured upon medical examination, this examination did not occur until approximately three years after the alleged abuse had occurred." *Id.*

"However, where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Watson*, 370 S.C. at 72, 634 S.E.2d at 644 (citing *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992)). Distinguishing *Watson* from its decision in *Dawkins*, our supreme court found trial counsel did not fail to object because of the cumulative effect of the corroborative testimony, "but instead decided that objections to the corroborative testimony might lead to the more damaging introduction of the victim's videotape." *Watson*, 370 S.C. at 73, 634 S.E.2d at 644. Thus, trial counsel articulated a valid reason for employing his strategy. *Id.*

In the present case, we note trial counsel's statement that some of the hearsay from witnesses was also introduced through Victim's testimony is not a valid reason for failing to object to it. *See id.* at 72, 634 S.E.2d at 644. Trial counsel admitted he could have requested a hearing outside the presence of the jury concerning the constant hearsay, but stated his strategies must have been slightly effective because the jury acquitted Vail on two of the charges.

Portions of the hearsay testimony exceeded the purpose of trial counsel's stated trial strategies. First, the failure to object to Mullins's testimony about inappropriate behavior with another student does not seem to have any place amidst his articulated trial strategies. We are unable to determine how Mullins's testimony was relevant, much less part of a legitimate trial strategy. Trial counsel admitted it could potentially be very damaging for the jury to hear there were rumors of Vail having inappropriate relations with another student and stated he did not know why he failed to object to that portion of Mullins's testimony. He

commented that throughout the trial, he was trying to build Vail's credibility and be transparent.

Additionally, trial counsel's failure to object to Murray's and John R.'s testimonies does not fit within the purpose of his stated trial strategies. Their statements went into detailed accounts of the alleged relationship that were unnecessary to trial counsel's strategy of showing Victim was "obsessed" with Vail and further, were not necessary to build Vail's credibility. The only purpose these testimonies served was to corroborate and bolster Victim's story and to evoke an emotional response from the jury, which was improper. *See Dawkins*, 346 S.C. at 157, 551 S.E.2d at 263. Accordingly, we hold trial counsel's failure to object to inadmissible hearsay fell below the professional norms.

Prejudice

The evidence in the record establishes trial counsel was deficient in failing to object to numerous admissions of improper hearsay, thereby satisfying the first prong of *Strickland*. We next consider whether Vail was prejudiced by trial counsel's deficient performance.

"[I]mproper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless." *Id.* at 156, 551 S.E.2d at 263; *see Jolly v. State*, 314 S.C. 17, 21, 443 S.E.2d 566, 569 (1994) (finding the admittance of the social worker's hearsay testimony identifying the defendant as the perpetrator could not be harmless error because testimony was cumulative to social worker's unobjected testimony and victim's testimony). "'[I]t is precisely this cumulative effect which enhances the devastating impact of improper corroboration.'" *Dawkins*, 346 S.C. at 157, 551 S.E.2d at 263 (quoting *Jolly*, 314 S.C. at 21, 443 S.E.2d at 569).

As trial counsel admitted, Victim's credibility was "extremely crucial" to the outcome of this case regarding the alleged sexual relationship between her and Vail, and there was otherwise an absence of overwhelming evidence of Vail's guilt. Victim's hymen was fully intact with either no evidence of trauma or the trauma had healed despite the alleged six to nine incidents of sexual intercourse. There was no eyewitness to any sexual or inappropriate activity. The State's case was built upon Victim's story against Vail's story. *See Smith v. State*, 386 S.C. 562, 568-69, 689 S.E.2d 629, 633 (2010) (finding that because the outcome of the case

hinged on victim's credibility regarding identification of the perpetrator and there was a lack of otherwise overwhelming evidence of defendant's guilt, the forensic interviewer's hearsay testimony impermissibly corroborated the victim's identification of defendant as the assailant); *compare Huggler v. State*, 360 S.C. 627, 634-35, 602 S.E.2d 753, 757 (2004) (finding that because the victims' testimonies on direct provided overwhelming evidence that sexual abuse did in fact occur, counsel's failure to object to admission of their written statements did not prejudice the outcome of the case and evidence of abuse was overwhelming even without the content in the written statements). Amongst the numerous instances of inadmissible hearsay noted in this opinion, we find the testimony from Father particularly prejudicial, including his statement: "Well, there was kind of a real poignant moment where she said, daddy, he took everything, she [sic] took everything I have." Moreover, Mullins's statement regarding an instance of inappropriate behavior with another student was highly prejudicial in light of what Vail is charged with in this case.

In light of the circumstantial evidence presented to the jury in addition to the heavy emphasis on Victim's credibility, we cannot find the admission of the inadmissible hearsay was harmless beyond a reasonable doubt. Accordingly, we hold the trial counsel's failure to object to instances of inadmissible hearsay was prejudicial to Vail.

CONCLUSION

In conclusion, we hold the PCR court erred in determining some of the alleged hearsay statements either fell under an exception to the rule against hearsay or did not meet the definition of hearsay. Trial counsel articulated a legitimate trial strategy for some of his failures to object to inadmissible hearsay, but the remainder did not fit within his stated objective. Lastly, the failure to object to hearsay statements that did not fit within a legitimate trial strategy was highly prejudicial and cumulative and affected the outcome of the trial. Accordingly, we reverse the denial of PCR and find Vail is entitled to a new trial.

REVERSED.

SHORT and KONDUROS, JJ., concurring.