The Supreme Court of South Carolina

Re: Extension of Time for Administration
of the Amended Lawyer's Oath.

ORDER

By order dated October 22, 2003, this Court amended the Lawyer's Oath contained in Rule 402(k), SCACR. By order dated January 9, 2004, the Court stated that, except for certain out-of-state members, all members of the South Carolina Bar were required to attend a one-hour continuing legal education seminar on the oath, take the oath and certify on their South Carolina Bar 2005 Dues Statement that they had taken the oath. Out-of-state members who do not live in South Carolina and do not engage in the practice of law in South Carolina were not required to take the CLE seminar, but were required to execute the new oath using a form provided by the South Carolina Bar.

On December 13, 2004, due to the number of members of the South Carolina Bar who had yet to meet these requirements, the Court issued an order extending the time to meet the requirements until February 28, 2005. The order further provided that those members of the Bar who had not yet

done so, must certify in writing, on a form provided by the South Carolina Bar, that they have taken the new oath and, if applicable, attended the accompanying CLE seminar, and the certification must be sent to the South Carolina Bar on or before March 1, 2005.[1]

It has now come to our attention that a significant, and frankly, disappointing number of members of the South Carolina Bar have still not met these requirements and, as of March 1, 2005, will be suspended and prohibited from practicing law in this State until reinstated. We are not only disappointed that a significant number of attorneys in this State have failed to comply with an order of this Court, but that they have not taken seriously this opportunity to reaffirm their commitment and dedication to upholding the

[1] The order provides that on March 1, 2005, any member of the South Carolina Bar who has not taken the new oath and attended the accompanying CLE seminar shall be automatically suspended from the practice of law in this State by the South Carolina Bar. **As of that date, those members who have been suspended can no longer practice law in this state, and will be subject to discipline if they do so, until reinstated.** Those members are to be notified of their suspension and may be reinstated upon a showing that they have taken the new oath and attended the accompanying CLE seminar and after paying a $25 fee made payable to the Commission on Continuing Legal Education and Specialization. The names of those members not reinstated by the South Carolina Bar before April 1, 2005 are to be published in the Shearouse Advance Sheets. Those remaining on suspension by the South Carolina Bar as of May 1, 2005, shall be suspended by order of this Court and must forward their certificate of admission to practice law in this state to the Clerk of Court.

dignity, integrity and honor of their profession. In addition, those members who have not complied with the oath requirements have not benefited from the sense of renewed dedication to the profession that those who have attended the accompanying CLE seminar have reported receiving from the experience.

This Court, in adopting the amended oath, sought for this to be a positive opportunity and experience for members of the Bar. Accordingly, in order to insure that everyone has had an adequate opportunity to take the new oath and attend the accompanying CLE, we extend the deadline for meeting these requirements, for a final time, to May 31, 2005. Those members of the South Carolina Bar who have not yet done so must certify in writing that they have taken the new oath, to include the CLE seminar if applicable, on or before May 31, 2005. This certification shall be done on the attached form and sent to the South Carolina Bar on or before June 1, 2005.

On June 1, 2005, any member who has not taken the new oath and the accompanying CLE seminar, if applicable, shall be automatically suspended from the practice of law in this state by the South Carolina Bar. We emphasize that those members suspended at that time will be prohibited from practicing law in this State until reinstated. The Bar shall notify these

members of their suspension, and the Bar may reinstate a member upon a showing that the member has taken the new oath and the accompanying CLE seminar, if applicable, and payment of a $25 fee made payable to the Commission on Continuing Legal Education and Specialization. If not reinstated by the South Carolina Bar before July 1, 2005, their names will be published in the Shearouse Advance Sheets.

The South Carolina Bar shall forward to this Court a list of the names of those members who remain suspended on August 1, 2005. These members shall be suspended by order of this Court and shall thereafter forward their certificate of admission to practice law in this State to the Clerk of this Court. Any petition for reinstatement shall be submitted as provided by Rule 419(f), SCACR, and, if not reinstated within three years of the date of being suspended by this Court, the member's membership in the South Carolina Bar will be terminated as provided by Rule 419(g), SCACR.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

February 22, 2005

CERTIFICATION OF TAKING AMENDED LAWYER'S OATH

I certify that (check one):

( ) I have taken the revised lawyer's oath in conjunction with a Continuing Legal Education (CLE) seminar developed for the administration of the new oath. I took the seminar and oath on ______________________.
(date)

( ) I do not live in or practice law in South Carolina, and have taken the revised lawyer's oath using the form provided by the South Carolina Bar. I took the oath on
_________________________.
(date)

____
Signature

____
Name (printed or typed)

____
South Carolina Bar Number

____
Date

This form is to be used by members of the South Carolina Bar that did not show completion of the oath and any required seminar in their 2005 Bar License Fee Statement. Except for certain out-of-state members, all members of the South Carolina Bar are required to take the oath in conjunction with a Continuing Legal Education (CLE) seminar developed for the administration of the new oath. As to out-of-state members, a member who does not live in South Carolina and does not engage in the practice of law in South Carolina is not required to take the CLE seminar, but is required to execute the new oath using a form provided by the South Carolina Bar. This form must be returned to the South Carolina Bar (P.O. Box 608, Columbia, SC 29202) before June 1, 2005. Failure to do so will result in suspension of the member.

Judicial Merit Selection Commission

Sen. Glenn F. McConnell, Chairman
Rep. F.G. Delleney, Jr., V-Chairman
Richard S. "Nick" Fisher
John P. Freeman
Amy Johnson McLester
Sen. Thomas L. Moore
Sen. James H. Ritchie, Jr.
Judge Curtis G. Shaw
Rep. Doug Smith
Rep. Fletcher N. Smith, Jr.

Post Office Box 142
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(803) 212-6092

Michael N. Couick
Chief Counsel

Patrick G. Dennis
House of Representatives Counsel

Jane O. Shuler
S. Phil Lenski
J.J. Gentry
Senate Counsel

MEDIA RELEASE
February 14, 2005

The Judicial Merit Selection Commission is currently accepting applications for the judicial offices listed below. In order to receive application materials, a prospective candidate must notify the Commission in writing of his/her intent to apply. Correspondence and questions may be directed to the Judicial Merit Selection Commission as follows:

Michael N. Couick, Chief Counsel
Post Office Box 142, Columbia, South Carolina 29202
(803) 212-6092

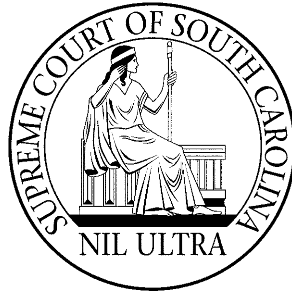
The Commission will not accept applications after **12:00 noon on Tuesday, March 15, 2005.**

A vacancy will exist in the office currently held by the Honorable James E. Brogdon, Jr., Judge of the Circuit Court, At-Large Seat 12, upon Judge Brogdon's retirement on February 28, 2005. The term of this office expires on June 30, 2008.

A vacancy exists in the office formerly held by the Honorable Brooks P. Goldsmith, Judge of the Family Court for the Sixth Judicial Circuit, Seat 1, which term expires on June 30, 2007.

For further information about the Judicial Merit Selection Commission and the judicial screening process, you may access the website at www.scstatehouse.net/html-pages/judmerit.html.

* * *



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 9

February 22, 2005

Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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2004-UP-346-State v. Brinson	Pending
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Regina Spruill, Appellant,

v.

Richland County School District 2, Employer, and EBI Companies, Carrier, Respondents.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 25942
Heard September 23, 2004 – Filed February 22, 2005

AFFIRMED

John S. Nichols, of Bluestein & Nichols, LLC, and Preston F. McDaniel, of McDaniel & Johnson, both of Columbia, for Appellant.

W. Hugh McAngus, of McAngus Goudelock & Courie, LLC, of Columbia, for Respondents.

JUSTICE PLEICONES: This is a worker's compensation case. Appellant (Employee) contends the single commissioner erred in refusing to allow Employee to withdraw her Form 50 following the hearing. We affirm.

FACTS

In December 1999, Employee obtained a report from Dr. Fechter. Employee believed Dr. Fechter's report found a link between Employee's disability and her workplace exposure to dust created by construction work. On January 3, 2000, Employee made Dr. Fechter's report available to respondents. When respondents sought to depose the doctor, they learned he was out of the country. Respondents requested relief. As a result, the hearing, which had been scheduled for January 13, was moved to January 17 by the hearing commissioner, who also ordered that the record would remain open to allow respondents to depose Dr. Fechter. No party objected to these rulings.

Dr. Fechter was deposed on January 28, 2000. In this deposition he 'clarified' his earlier report, opining that Employee's disability was the result of an idiopathic disease and not connected to her earlier exposure to dust and debris at her place of employment. In late April 2000, the single commissioner informed the parties of her decision to deny Employee's permanent disability claim. Several days later, Employee sought to withdraw her Form 50, relying upon 25A S.C. Regulation 67-609 (Supp. 2003). The single commissioner denied this request, and her ruling was affirmed by the full commission and the circuit court. This appeal follows.

ISSUE

> Does Regulation 67-609 permit a claimant to withdraw her Form 50 at any time?

ANALYSIS

Employee contends that Regulation 67-609 permits a claimant to withdraw her Form 50 "once as a matter of right with leave to renew" at any point in the proceeding. The commissioner held that a claimant could not withdraw her Form 50 after the hearing had been held and a decision rendered. We agree that Regulation 67-609 applies only where the request is made prior to the hearing.

Regulation 67-609 provides:

67-609. Withdrawing a Request for Hearing.

A. A claimant may withdraw a Form 50 or Form 52 once as a matter of right with leave to renew.

(1) A Form 50 or 52 may be withdrawn by writing the Commission's Judicial Department, if a hearing notice has not been issued, or, the Commissioner's office identified on the hearing notice.

(2) When a Form 50 or Form 52 is withdrawn, a notice removing the case from the docket will be filed in the Commission's record and a copy mailed to the parties in R. 67-210.

B. The notice is without prejudice to the claimant's right to proceed with his or her claim.

(1) If the nature of the claim and the relief requested does not change, write the Judicial Department requesting the Form 50 or Form 52 be reset for hearing.

(2) If the nature of the claim or relief requested changes, file according to R. 67-207, a new Form 50 or Form 52 with the word "Amended" printed or typed boldly on the top of the form.

C. Withdrawing a Form 50 or Form 52 the second time without good cause may operate as a

voluntary dismissal of the claim when the form is withdrawn by a claimant who has once withdrawn a Form 50 or Form 52 based on the same set of facts, and, in the opinion of the Commissioner, the form is withdrawn merely for the purpose of delay.

D. Withdrawing a Form 15 request for hearing waives the sixty day hearing requirement. If the jurisdictional commissioner is unable to reschedule the case, the file will be returned to the Judicial Department to be reassigned.

The first sentence of Regulation 67-609(A), read in isolation, supports Employee's contention. We do not, however, determine the meaning of a regulation by reading its component parts in isolation, but rather construe the regulation as a whole. See Byerly v. Connor, 307 S.C. 441, 415 S.E.2d 796 (1992).

The purpose of the regulation is reflected in its title, Withdrawing a Request for a Hearing, and the text reflects this limited application. Regulation 67-609(A)(1) requires the claimant to notify the Judicial Department if the withdrawal is made before the hearing notice has been issued: if made after the notice has been issued, then the withdrawal should be directed to the commissioner assigned to hear the case. Regulation 67-609(B) provides that if the refiled claim and relief are unchanged, the claimant should simply request the matter "be reset for hearing." If, however, the nature of the claim or relief changes, then the claimant must file an amended Form 50 and comply with Regulation 67-207, which outlines the procedures to be followed by a claimant requesting a hearing. Regulation 67-609(B)(2).

Regulation 67-609 contemplates that the withdrawal request will be made prior to the hearing before the single commissioner and provides the procedures for requesting a new hearing date. Nothing in this regulation

supports Employee's assertion that she is entitled to withdraw her Form 50 at any point in the process.

Further, we traditionally defer to an executive agency's construction of its own regulation. Such a construction is "accorded most respectful consideration and will not be overturned absent compelling reasons." E.g., Dorman v. South Carolina Dep't of Health and Enviro. Control, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002). Even if Regulation 67-609 were ambiguous, we would defer to the commission's interpretation since it reflects a sound policy decision not to permit disgruntled claimants a second "bite at the apple."

CONCLUSION

Regulation 67-609 did not entitle Employee to withdraw her Form 50 following the single commissioner's hearing. The circuit court order, upholding the denial of Employee's request, is

AFFIRMED.[1]

MOORE, WALLER and BURNETT, JJ., concur. TOAL, C.J., dissenting in a separate opinion.

[1] We affirm the trial court's rulings on the remaining issues raised by Employee pursuant to Rule 220(b)(1), SCACR, and the following authority: Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004).

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, the circuit court erred in affirming the Workers' Compensation Commission's decision forbidding Employee from withdrawing her Form 50. Therefore, I would reverse the circuit court's decision and remand this case with instructions permitting the Employee to withdraw the form.

The majority holds that a Form 50 must be withdrawn before a hearing commences, or a claimant loses the right to withdraw the form. I do not agree with this holding because (1) it is not supported by the terms of the controlling regulation and (2) it imposes even stricter requirements than those imposed by the Workers' Compensation Commission.

The controlling regulation provides that "[a] claimant may withdraw a Form 50 . . . *once as a matter of right* with leave to renew." 25A S.C. Code Ann. Regs. 67-609(A) (Supp. 2003) (emphasis added). Given its plain and ordinary meaning, this regulation, in my view, does not require that the Form 50 be withdrawn at any particular time in the proceeding. *See Byerly v. Connor*, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992) ("The words of a regulation must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the regulation's operation."). Had the appropriate rulemaking agency intended to impose the requirement established by the majority today—that a claimant must withdraw the form before the hearing commences—the agency would have done so.

In addition, the majority's holding imposes stricter limitations on the right to withdraw than those imposed by the Commission itself. In the case at hand, the Commission ruled that "[o]nce a hearing is convened, concluded, and a determination rendered, the claimant cannot withdraw the Form 50." This ruling, in my view, provides that a claimant may not withdraw the form *after a determination has been rendered*, not *before the hearing commences*, as the majority holds.

In the present case, a decision had yet to be rendered when Employee sought to withdraw the form. On May 8, 2000, Employee requested that the Form 50 be withdrawn. At that time, the Commission had merely written a letter asking the attorneys to draft an order. Attached to the letter were

"notes" outlining the Commission's findings. The final order incorporating these findings was not signed until September 6, 2000.

Given these facts, it is my opinion that the letter and its accompanying notes do not constitute an order, and until an order has been issued, and the case removed from the docket, Employee had the right to withdraw the Form 50.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Petitioner/Respondent,

v.

Gerrod Lewis, Respondent/Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Dorchester County
Luke N. Brown, Jr., Circuit Court Judge

Opinion No. 25943
Heard November 16, 2004 – Filed February 22, 2005

AFFIRMED IN PART, REVERSED IN PART

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, and Assistant Attorney General Deborah R.J. Shupe, all of Columbia; and Robert D. Robbins, of Summerville, for petitioner/respondent.

Assistant Appellate Defender Eleanor Duffy Cleary, of Columbia, for respondent/petitioner.

JUSTICE MOORE: Respondent/petitioner (Lewis) and his co-defendant, Timothy Washington, were convicted of first-degree criminal sexual conduct (CSC), two counts of kidnapping, grand larceny of a vehicle, and armed robbery. Lewis was sentenced to concurrent terms of thirty years for CSC, thirty years for each kidnapping charge, five years for grand larceny, and thirty years for armed robbery.[1] The Court of Appeals affirmed in part, reversed in part, and remanded. State v. Lewis, 354 S.C. 222, 580 S.E.2d 149 (Ct. App. 2003). Judge Anderson dissented. We now affirm in part and reverse in part.

ISSUES

I. Did the Court of Appeals err by affirming the trial court's failure to suppress an in-court identification?

II. Did the Court of Appeals err by holding the trial court improperly disallowed Lewis's attempt to strike a juror who had previously been struck in violation of Batson?[2]

DISCUSSION

I

Lewis argues the Court of Appeals erred by affirming the trial court's decision not to suppress an in-court identification or to require an *in camera* hearing prior to the in-court identification.

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[1] Washington received a sentence of life imprisonment without parole for the two kidnapping charges, the first-degree CSC charge, and the armed robbery charge. He also received five years' imprisonment for each of the following charges: unlawful possession of a pistol, possession of a weapon during a certain crime, and grand larceny. All of the sentences were to be served consecutively.

[2] Batson v. Kentucky, 476 U.S. 79 (1986).

Gill Armstrong and Jane Doe[3] were driving from Virginia to their home in Florida with their seven-month-old daughter when they stopped at a motel off I-95 in St. George about 11:00 p.m. Armstrong then left to get food. Upon his return, he noticed three black males in the breezeway of the motel and assumed they were guests of the motel. He had a direct view of the men because of the fluorescent lighting in the breezeway. After taking the food into the hotel room, Armstrong then went to the vending machines to get drinks. As he began to place money in the machine, the three men walked up to him and placed a gun to the back of his head.

The men then forced him into the motel room. Before entering the room, the men turned him around and Armstrong saw Washington holding the gun to his head. When they entered the room, the lights were on. Doe was just getting out of the shower and was clad only in a towel. Lewis asked where the money and jewelry was. While Lewis was digging in a duffel bag, Washington instructed Lewis to turn off the lights. Before the lights were turned off, Armstrong was able to view his assailants for a few minutes.

After the men did not find anything, Washington pointed the gun at Armstrong's daughter who was still asleep and said, "If you try anything, she's gone." The men became extremely angry when they discovered the couple had only $14. At this point, Armstrong was taken into the bathroom and was placed on his knees, bending over into the bathtub, with the gun pointed at him. At first, Lewis held Armstrong in the bathroom at gunpoint, but then the third man, Shermaine Elmore,[4] switched with Lewis.

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[3]To protect the female victim's identity, she will be referred to as Jane Doe.

[4]Elmore pled guilty to armed robbery and grand larceny on the first day of trial. Armstrong testified that Elmore was not involved in the assault on Doe.

Doe testified that two of the men, allegedly Lewis and Washington, then took turns forcing her to perform oral sex on them. Washington then took Doe into the bathroom, bent her over the toilet, and raped her while forcing Armstrong to watch. Then, the men asked for Armstrong's car keys. As they left, Washington told Armstrong "Happy Father's Day."[5] The men then took the couple's car and burned it.

Doe was not able to give a description of the attackers.[6] However, Armstrong told the police that the men were black males and gave general descriptions of their height, facial hair, and clothing.[7] A few days later, Shermaine Elmore informed the police he was the lookout during the crimes. Elmore told the police that Washington and Lewis were the two men who sexually assaulted Doe. Armstrong confirmed at trial that Elmore had no involvement in the sexual assault.

At trial, Armstrong identified Washington and Lewis as the perpetrators. In fact, Armstrong stated he was "100 percent positive" in his identification of Lewis. Further, Armstrong testified the individuals that committed the crimes were "stuck in [his] mind." Counsel objected to the in-court identification and requested an *in camera* hearing to determine the reliability of his identification. The trial judge denied the request, and ruled

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[5]The crimes occurred on Father's Day in 1999.

[6]Further, Doe could not identify who had attacked her after viewing a photo line-up that contained all three of the alleged assailants.

[7]The descriptions were as follows: (1) black male wearing a black hat and black coat, mustache, goatee, approximately 6 feet, 2 inches tall, and weighing approximately 175 pounds; identified as Washington at trial; (2) tall black male with slim build wearing baggy jeans and a t-shirt with green lettering, approximately 6 feet, 4 inches tall, and weighing approximately 175 pounds; identified as Elmore at trial; and (3) black male of medium height, medium build, no clothing description, approximately 6 feet tall, and weighing approximately 175 pounds; identified as Lewis at trial.

that Armstrong could identify the defendants in court, even though Armstrong had never previously identified them.[8]

The Court of Appeals held that, since Armstrong had never previously identified the defendants, no hearing was necessary.[9] The court further held that the reliability of Armstrong's identification was a question for the jury and that Lewis' counsel extensively cross-examined Armstrong regarding the identification. In his dissent, Judge Anderson concurred in the result but found that the trial judge should have held an *in camera* hearing to determine the reliability of Armstrong's identification.

The Court of Appeals' decision represents the majority view that the Neil v. Biggers[10] analysis should not be extended to protect criminal defendants against identifications that occur for the first time in court without a pre-trial identification. In Neil v. Biggers, the United States Supreme Court found that a court must review the totality of the circumstances to determine whether an identification is reliable. *See also* State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984). The factors to be considered in evaluating the likelihood of misidentification include: (1) the opportunity of the witness to

[8]Armstrong was unable to return to South Carolina from Florida before the trial due to medical reasons.

[9]The Court of Appeals found that the protection afforded a defendant when there has been an out-of-court identification does not apply to the situation where there has been only an in-court identification. If there had been a pre-trial identification, a hearing is mandated on the admissibility of that identification. *See* Rule 104(c), SCRE (hearings on admissibility of pretrial identifications of an accused shall in all cases be conducted out of the jury's hearing); State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (2002) (*in camera* hearing required by Rule 104(c) allows defendant to question witness more stringently regarding possible misidentification or bias outside jury's presence; *per se* rule requiring court to hold *in camera* hearing when State offers identification testimony and defendant challenges in-court identification as being tainted by previous illegal identification.).

[10]Neil v. Biggers, 409 U.S. 188 (1972).

view the accused; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. at 199; State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987), *cert. denied*, 484 U.S. 1079 (1988).

We conclude, as the majority of courts have, that Neil v. Biggers does not apply to in-court identifications and that the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument. The United States Supreme Court has not extended its exclusionary rule to in-court identification procedures that are suggestive because of the trial setting. *See* State v. Smith, 512 A.2d 189, 193 (Conn. 1986).

The Georgia supreme court has stated, "[b]ecause pretrial identification procedures occur beyond the immediate supervision of the court, the likelihood of misidentification in such cases increases, and courts have required that pretrial identification procedures comport with certain minimum constitutional requirements in order to ensure fairness." Ralston v. State, 309 S.E.2d 135, 136 (Ga. 1983). *See also* United States v. Domina, 784 F.2d 1361 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987) (concern with in-court identification, where there has been suggestive pretrial identification, is that witness later identifies the person in court, not from his recollection of observations at time of crime, but from suggestive pretrial identification). However, as the Ralston court explained, these extra safeguards are not applicable to an in-court identification because the witness' testimony is subject to the same rules of evidence, witness credibility, and cross-examination as all testimony in a criminal trial. Ralston v. State, 309 S.E.2d at 136-137. *See also* United States v. Bush, 749 F.2d 1227 (7th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985) (deference shown jury in weighing reliability of potentially suggestive out-of-court identification would seem even more appropriate for in-court identifications where jury is present and able to see first-hand the circumstances which may influence a witness); People v. Brazeau, 759 N.Y.S.2d 268 (N.Y. 2003) (where there has not been a pretrial identification and defendant is identified in court for first time, defendant is not deprived of fair trial because defendant is able to explore

weaknesses and suggestiveness of identification in front of the jury); State v. Smith, 512 A.2d 189 (Conn. 1986) (defendant's protection against obvious suggestiveness in courtroom identification confrontation is his right to cross-examination); People v. Rodriguez, 480 N.E.2d 1147, 1151 (Ill. App. 1985) *cert. denied*, 475 U.S. 1089 (1986) (where witness first identifies defendant at trial, defense counsel may test perceptions, memory, and bias of witness, contemporaneously exposing weaknesses and adding perspective to lessen hazards of undue weight or mistake).

Accordingly, we conclude Neil v. Biggers does not apply to a first-time in-court identification because the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations. Therefore, the Court of Appeals properly concluded the trial court did not err by denying Lewis' request for an *in camera* hearing prior to the in-court identification by Armstrong.[11] In any event, Armstrong's in-court identification was strong, detailed, and clear, and would have survived an *in camera* hearing.

II

The State argues the Court of Appeals erred by holding the trial judge improperly disallowed Lewis' attempt to strike a juror who had previously been struck for discriminatory reasons in violation of Batson.[12]

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[11]Regarding Lewis' argument that the trial court should have conducted a photographic lineup prior to Armstrong being allowed to give an in-court identification, we find there is no constitutional entitlement to an in-court line-up or other particular method of lessening the suggestiveness of an in-court identification. *See* United States v. Domina, 784 F.2d 1361, 1369 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987); State v. Smith, 512 A.2d 189 (Conn. 1986).

[12]Batson v. Kentucky, 476 U.S. 79 (1986).

During jury selection, Lewis exercised peremptory strikes on nine white jurors. His co-defendant, Washington, also separately struck nine white jurors, including juror 304, a white female. At the end of jury selection, the State requested a Batson hearing. Each defendant separately presented reasons for his respective strikes. Lewis stated he did not want housewives to be jurors and that is why he struck two white females. Washington explained he struck juror 304 because she was a housewife. In argument, the State pointed out that neither Washington nor Lewis had struck Juror 166, who was also a housewife. The trial court found several jurors, including juror 304, had been struck for reasons not race-neutral or gender-neutral. The parties then began selecting a second jury.

Juror 304 was presented again. Washington accepted the juror, but Lewis attempted to strike her. At that point, the trial court asked the attorneys to approach the bench and told Lewis' attorney he could not strike the juror because the court had already held that the reason for the previous strike was pretextual. Lewis therefore accepted the juror. After finishing the second jury selection process, Lewis moved to quash the jury and re-select another jury because he was not allowed to exercise a peremptory strike. Lewis' counsel argued he should be allowed to strike juror 304 because he had an independent reason to strike her, *i.e.* due to her demeanor. The trial court denied the motion and stated counsel was "stuck with [the reason] given the first time."

The Court of Appeals reversed the trial court on the grounds that Lewis had not previously attempted to strike the juror, only Washington had, and because Lewis gave a race-neutral reason for striking the juror that was different from Washington's reason.

We find the Court of Appeals erred by reversing the trial court's decision not to allow Lewis to strike a juror who had previously been stricken in violation of Batson. *See* State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999) (trial court's findings of purposeful discrimination rest largely on court's evaluation of demeanor and credibility, and reviewing court should give the findings great deference on appeal).

As we stated in State v. Franklin, 318 S.C. 47, 456 S.E.2d 357, *cert. denied*, 516 U.S. 856 (1995), to hold that a trial court may not seat a juror who was previously improperly excluded by defense counsel due to a Batson violation would reward a party for his own improper conduct.[13] Lewis offered a reason for striking juror 304, *i.e.*, due to her demeanor,[14] that was different from the reason his co-defendant struck juror 304, *i.e.* she was a housewife. However, the previous discriminatory explanation that the juror was stricken because she was a housewife tainted the selection process. This is true regardless of the other explanations for the strike. *See* Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998) (discriminatory explanation vitiates entire selection process regardless of genuineness of other explanations for the strike). "To excuse such obvious prejudice because the challenged party can also articulate nondiscriminatory reasons for the peremptory strike would erode what little protection Batson provides against discrimination in jury selection." Payton v. Kearse, 329 S.C. at 60, 495 S.E.2d at 210. *See also* Coleman v. Hogan, 486 S.E.2d 548 (Va. 1997) (allowing a constitutionally proper reason to override a constitutionally infirm reason if the acceptable reason is given later would erode the constitutional protections enunciated in Batson and its progeny).

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[13]We disagree with the Court of Appeals' conclusion that Lewis should have been allowed to strike Juror 304 because co-defendant Washington had previously improperly struck the juror instead of Lewis. We defer to the trial court's conclusion that the defendants were acting in concert when using their peremptory strikes. *See* State v. Ford, *supra* (reviewing court should give trial court's findings regarding purposeful discrimination great deference on appeal).

[14]The demeanor of a juror is normally a legitimate reason for striking a juror. *See* State v. Shuler, 344 S.C. 604, 545 S.E.2d 805, *cert. denied*, 534 U.S. 977 (2001) (demeanor of venire member when responding to questions about ability to impose death penalty provided valid racially neutral explanation for State's peremptory strike); State v. Tucker, 334 S.C. 1, 512 S.E.2d 99, *cert. denied*, 527 U.S. 1042 (1999) (counsel may strike venire persons based on their demeanor and disposition).

To allow a striking party to challenge the reseated juror a second time would require the trial court to ignore its prior determination and the prior explanations and conduct each successive evaluation of a newly proffered rationale as if on a blank slate. Coleman v. Hogan, *supra*. Such a process improperly restricts the ability of the trial court to make the required evaluation. *Id.*

We conclude that once a juror has been unconstitutionally stricken, the jury selection process relative to that juror is tainted. If the trial court chooses to reseat the improperly stricken juror, the striking party may not use a peremptory strike to remove that juror from the panel a second time.

CONCLUSION

We find the Court of Appeals properly affirmed the trial court's decision not to suppress an in-court identification. However, we find the Court of Appeals erred by finding the trial court had erred by not allowing Lewis to strike a juror who had previously been struck in violation of Batson. Therefore, the decision of the Court of Appeals is
AFFIRMED IN PART, REVERSED IN PART.

TOAL, C.J., WALLER, BURNETT, JJ., and Acting Justice A. Victor Rawl, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. Coastal Conservation League, Coastal Conservation Association - South Carolina, Beth Keyserling-Kramer, Frank DeMarco, Karen DeMarco, Joseph Mueller, Mary Mueller, Vicky Snowden, John Snowden, Janice Maize, John Maize, Kerry Solomon, Cindi Solomon, Julie Gautreaux, Wilson Gautreaux, and Gerald Hazin, Respondents,

v.

South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, and LandTech of Charleston, L.L.C., Appellants.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 25944
Heard October 20, 2004 – Filed February 22, 2005

REVERSED

Leslie West Stidham, of Charleston, for Appellant South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management; Ellison D. Smith, IV, of Smith, Bundy, Bybee & Barnett, of Mt. Pleasant, and James B. Richardson, of Richardson & Birdsong, of Columbia, for Appellant LandTech of Charleston, L.L.C.

G. Trenholm Walker and Amanda Rajsich Maybank, both of Pratt-Thomas, Epting & Walker, PA, of Charleston, for Respondents.

Neil C. Robinson, Jr. and Paul A. Dominick, both of Nexsen Pruet Adams Kleemeier, LLC, of Charleston, for Amicus Curiae South Carolina Tourism Council, Inc.

JUSTICE PLEICONES: This case involves a permit to build a concrete bridge for vehicular traffic over "critical area" as defined in South Carolina Code section 48-39-10(J).[1] The South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (OCRM) granted the permit. After a contested hearing, the Administrative Law Judge Division (ALJD) upheld the grant. On appeal the Coastal Zone Management Appellate Panel of OCRM (the Panel) affirmed. The circuit court reversed and vacated the permit. We certified the case for review under Rule 204(b), SCACR. We reverse the circuit court's decision and reinstate the permit.

FACTS

LandTech of Charleston, L.L.C. (LandTech) applied to OCRM for a permit to build a bridge across the marshes of the Wando River to Park Island in the Town of Mt. Pleasant. OCRM staff deemed Park Island a small island and therefore considered the permit application governed by the access-to-

[1] S.C. Code Ann. § 48-39-10(J) (Supp. 2003).

small-islands regulation, Regulation 30-12(N) (Small Islands Regulation).[2] LandTech claimed that Park Island was not a small island and that the application was governed by the transportation-projects regulation, Regulation 30-12(F) (Transportation Regulation).[3] OCRM disagreed and processed the permit application under the Small Islands Regulation, the criteria of which are more stringent than those of the Transportation Regulation. OCRM granted the permit.

Respondents objected and requested a contested hearing before the ALJD. At the hearing, LandTech raised its argument that Park Island was not a small island and that the Transportation Regulation, not the Small Islands Regulation, governed. Respondents countered that Park Island was a small island and that the criteria for the grant of a permit for bridge access had not been met. OCRM staff agreed with Respondents that Park Island was a small island but argued that the Small Islands Regulation was satisfied.

The Administrative Law Judge (ALJ) observed that "small island" is not defined in the regulations and decided "there needs to be some standard to guide the OCRM in its application of its regulation dealing with bridges to islands." The ALJ compared Park Island only to other islands within the Wando River basin; islands in other coastal areas were not considered. Because Park Island was larger than eighty percent of the Wando River basin's islands, the ALJ found that Park Island was not a small island. He therefore adopted LandTech's position that the application was governed by the Transportation Regulation, not the Small Islands Regulation. He held that the Transportation Regulation was satisfied and upheld the permit.

Nevertheless, because OCRM staff had granted the permit under the Small Islands Regulation, the ALJ addressed whether the permit complied with that regulation assuming Park Island were small. He found that each factor in the regulation that OCRM must consider weighed in favor of granting the permit. He stated that even if the Small Islands Regulation were the governing regulation, its criteria had been satisfied.

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[2] S.C. Code Ann. Regs. R. 30-12(N) (2004).

[3] S.C. Code Ann. Regs. R. 30-12(F) (2004).

Respondents appealed to the Panel, which affirmed without analysis.

Respondents then appealed to the circuit court, which reversed. With respect to the issue whether the Transportation Regulation or Small Islands Regulation governed, the court held that the ALJ erred by using a test not promulgated by regulation. The court deferred to OCRM staff and found that Park Island was in fact a small island and that the permit application was therefore governed by the Small Islands Regulation. The court held that the permit's issuance did not comply with that regulation's criteria.

In addition, the circuit court held that there was not substantial evidence to support the finding that the permit's issuance complied with the regulation requiring OCRM to consider the direct and cumulative effects of a project, Regulation 30-11 (Effects Regulation).[4] The court vacated the grant of the permit.

LandTech appeals, arguing that the Transportation Regulation is the governing project-specific regulation and that its criteria are satisfied. OCRM also appeals, arguing that the Small Islands Regulation governs and that its criteria are satisfied. Both argue that the grant of the permit complies with the Effects Regulation.

ISSUES

I. Whether the Transportation Regulation or the Small Islands Regulation is the governing project-specific regulation.

II. Whether the grant of the permit complies with the governing project-specific regulation.

III. Whether the grant of the permit complies with the Effects Regulation.

[4] S.C. Code Ann. Regs. R. 30-11 (2004).

STANDARD OF REVIEW

The ALJ presided as the finder of fact at the contested hearing. S.C. Code Ann. § 1-23-600(B) (Supp. 2003). The Panel's review of the ALJ's decision was governed by South Carolina Code section 1-23-610(D).[5] The circuit court's appellate review of the Panel's decision was governed by section 1-23-380(A)(6),[6] which also governs this Court's review of the circuit court's decision. Brown v. Dep't of Health and Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002).

ANALYSIS

South Carolina Code section 48-39-30[7] sets forth state policy with respect to development of critical area. Section 48-39-150[8] lists general

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[5] S.C. Code Ann. § 1-23-610(D) (Supp. 2003).

[6] The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2003).

The circuit court erroneously believed its review was governed section 1-23-610(D), which is basically the same as section 1-23-380(A)(6). This error did not affect the circuit court's decision.

[7] S.C. Code Ann. § 48-39-30 (Supp. 2003).

[8] S.C. Code Ann. § 48-39-150 (Supp. 2003).

considerations for OCRM to consider when deciding whether to grant a permit. The Effects Regulation repeats these policies and considerations and further requires OCRM to consider the cumulative effects of a project in critical area. Regulation 30-12[9] sets forth project-specific criteria for proposed construction in critical area, including transportation projects and projects for access to small islands.

I. The Governing Project-Specific Regulation

The circuit court held that the Small Islands Regulation, not the Transportation Regulation, was the governing project-specific regulation. We disagree.

"As a creature of statute," OCRM has "only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). OCRM has the duty to approve or deny permit applications. S.C. Code Ann. § 48-39-50(G) (Supp. 2003). To fulfill this duty, OCRM must promulgate rules and regulations. S.C. Code Ann. § 48-39-130(B) (Supp. 2003).

Whether an island is small is the threshold issue in determining whether the Transportation Regulation or the Small Islands Regulation is the governing project-specific regulation. No statute or regulation defines "small island." The circuit court held that the ALJ and Panel's test for determining whether an island is small – comparing Park Island only to other islands within the same watershed – was invalid because it was not promulgated by regulation. We agree.

The circuit court also held that Park Island was a small island, using no test but rather deferring to OCRM staff. OCRM and Respondents assert that "small" is a term of common understanding, so no particular test is necessary. We disagree.

[9] S.C. Code Ann. Regs. R. 30-12 (2004).

"Small" is a term of subjective relativity, and the regulations provide no benchmark for comparative size. Smallness arguably could be determined per watershed, with respect to all of South Carolina's islands, or on an absolute scale. The problem is that there is nothing to interpret or apply.[10] Allowing OCRM to exercise unrestrained discretion is inconsistent with the statute requiring the agency to evaluate permit applications pursuant to regulation.[11] See Captain's Quarters Motor Inn, Inc., 306 S.C. at 490-91, 413 S.E.2d at 14 (invalidating a test used by OCRM's predecessor in evaluating permit applications because it was not promulgated by regulation); see also Edisto Aquaculture Corp. v. S.C. Wildlife and Marine Res. Dep't, 311 S.C. 37, 40, 426 S.E.2d 753, 755 (1993) (distinguishing mandatory agency enabling statutes from permissive ones).

That there is no promulgated test means that the Small Islands Regulation fails for vagueness.[12] Any test to determine whether an island is small is invalid as not promulgated by regulation.

In light of the Small Islands Regulation's invalidity, the circuit court should have deferred to the Panel's decision that the permit was governed by the Transportation Regulation. Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ. Brown, 348 S.C. at 515, 560 S.E.2d at 414; Byerly Hosp. v. Health and Human Serv. Fin. Comm'n, 319 S.C. 225, 229, 460 S.E.2d 383, 386 (1995). The Panel, not OCRM staff, is entitled to deference from the courts. See S.C. Code Ann. § 1-23-610(A) (Supp. 2003); S.C. Code Ann. § 48-39-40(A) (Supp. 2003); S.C. Code Ann. § 48-39-

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[10] Compare Regulation 30-12(M)(3), which generally prohibits the construction of "nonwater-dependent structures," but not boats, in critical area. S.C. Code Ann. Regs. R. 30-12(M)(3) (2004). 30-12(M)(3) grants OCRM discretion to determine whether a structure is a boat, but it also provides a guideline – "the primary function of the floating structure."
[11] S.C. Code Ann. § 48-39-130(B) (Supp. 2003).
[12] No party has ever specifically raised the issue whether the Small Islands Regulation is vague, but the absence of specific criteria is critical to the issue whether Park Island is small, which LandTech has continuously raised.

150(D) (Supp. 2003); see also Dorman v. Dep't of Health and Envtl. Control, 350 S.C. 159, 167, 565 S.E.2d 119, 123-24 (Ct. App. 2002).

There was no compelling reason to overrule the Panel's decision that the Transportation Regulation governed. Despite its adoption of the invalid ALJ test to determine whether an island is small,[13] the Panel's conclusion that the Transportation Regulation controlled was correct. As OCRM Director of Permitting and Certification Richard Chinnis testified, the Transportation Regulation is the default bridge regulation. OCRM staff would have applied it had the staff recognized that the Small Islands Regulation was invalid.

Consequently, we reverse the circuit court's decision and hold that the Transportation Regulation was the governing project-specific regulation.

II. Compliance With The Transportation Regulation

After holding that the Transportation Regulation was the governing project-specific regulation, the ALJ held that the regulation's criteria were met. As already noted, the Panel affirmed without analysis.

The criteria of the Small Islands Regulation are much more stringent than those of the Transportation Regulation. In fact, Respondents have not disputed the meeting of the Transportation Regulation's criteria. Rather, as already discussed, Respondents have argued only that the Small Islands Regulation controls and that its more stringent criteria are not met. Because of our resolution of the first issue, however, we address only the unchallenged ruling that the permit's issuance complied with the criteria of the Transportation Regulation.

A ruling not challenged on appeal is the law of the case, regardless of the correctness of the ruling. S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group, 353 S.C. 249, 251, 578 S.E.2d 8, 9 n.1 (2003). The law of this case is that the grant of the permit complied with the Transportation Regulation.

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[13] The Panel affirmed the ALJ's decision in its entirety.

Moreover, notwithstanding the law of the case, there is substantial evidence to support the finding that the grant of the permit complied with the Transportation Regulation. A reviewing court may reverse or modify an administrative decision if the findings of fact are not supported by substantial evidence. S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp. 2003). "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Southeast Res. Recovery, Inc. v. Dep't of Health and Envtl. Control, 358 S.C. 402, 407, 595 S.E.2d 468, 470 (2004) (quoting 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. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

There is conflicting evidence in the record regarding the permit issuance's compliance with the Transportation Regulation. The evidence that the issuance did comply constitutes substantial evidence.

III. Compliance With The Effects Regulation

Regulation 30-11(B) requires OCRM to consider the direct effects of a project in critical area. Regulation 30-11(C)(1) requires OCRM to be guided by "[t]he extent to which long-range, cumulative effects of the project may result within the context of other possible development and the general character of the area."[14]

The circuit court held that there was not substantial evidence to support the finding that the grant of the permit complied with the Effects Regulation. We disagree.

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[14] Subsections (2) and (3) of Regulation 30-11(C) do not apply to this permit application.

The record contains conflicting evidence concerning the direct and cumulative effects of building the bridge to Park Island. The evidence that the effects will be minimal constitutes substantial evidence supporting the finding that the permit complies with the Effects Regulation. The circuit court's view of the weight of the evidence did not justify vacating the grant of the permit.

CONCLUSION

South Carolina Regulation 30-12(F), the Transportation Regulation, is the project-specific regulation governing this permit's issuance, and the law of the case is that the issuance complies with the Transportation Regulation. Further, there is substantial evidence that the issuance also complies with Regulation 30-11, the Effects Regulation. The circuit court's decision vacating the grant of the permit is therefore

REVERSED.

MOORE, WALLER and BURNETT, JJ., concur. TOAL, C.J., concurring in a separate opinion.

CHIEF JUSTICE TOAL: I agree with the result reached by the majority. In my view, however, OCRM properly granted the permit under the Small Islands Regulation. As the ALJ explained, in a decision affirmed by the Panel, OCRM determines which regulation governs the issuance of a permit on a "case-by-case basis." Moreover, the ALJ found that "OCRM gave appropriate consideration to the 11 specific requirements under [the Small Islands Regulation] in issuing the bridge permit . . . and the permit satisfies all 11 requirements." Accordingly, I agree with the majority that the circuit court decision vacating the grant of the permit should be reversed.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Alexander Santee Johnson, Appellant.

ON WRIT OF CERTIORARI

Appeal from Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 25945
Heard November 16, 2005 – Filed February 22, 2005

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of SC Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: A jury convicted Alexander Santee Johnson (Petitioner) of murder. At trial, the judge allowed evidence of Petitioner's prior convictions to be admitted. The court of appeals affirmed,

holding that, although the trial judge erred in admitting evidence of Petitioner's prior convictions, the error was harmless. *State v. Johnson*, Op. No. 2003-UP-188 (S.C. Ct. App. filed March 12, 2003). This Court granted certiorari to review the decision of the court of appeals. We affirm.

FACTUAL / PROCEDURAL BACKGROUND

Petitioner was convicted of murder and sentenced to life imprisonment. On direct appeal, this Court reversed the conviction and remanded the case for a new trial. *State v. Johnson*, 333 S.C. 62, 508 S.E.2d 29 (1998).

Petitioner was retried for murder in 2000. At trial, Petitioner sought to have his 1986 convictions for second-degree burglary and grand larceny excluded from evidence on the basis that the convictions were more than ten years old. The trial judge ruled that the prior convictions were admissible because they were within ten years of the alleged offense and they were crimes of moral turpitude.

On direct examination, Petitioner acknowledged the prior convictions and stated that he spent thirty days in a juvenile facility when he was twelve or thirteen years old.[1] Petitioner was not questioned about his prior convictions on cross examination.

After closing argument, but before the judge charged the jury, the judge clarified his ruling on the admissibility of the prior convictions. The judge reasoned that the probative value of the prior convictions outweighed their prejudicial effect.

The jury convicted Petitioner of murder, and he appealed. The court of appeals affirmed the decision of the trial court, holding that the admission of the prior convictions was harmless. *State v. Johnson*, Op. No. 2003-UP-188 (S.C. Ct. App. filed March 12, 2003). This Court granted certiorari, and Petitioner now raises the following issues for review:

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[1] After the judge ruled against the motion to exclude the prior convictions, Petitioner decided to present evidence of the convictions on direct examination to lessen the impact that they might have on the jury.

I. Did the trial court apply the proper legal standard in calculating the ten-year time limit under Rule 609(b), SCRE?

II. Did the trial court err by using the moral turpitude standard to determine the admissibility of Petitioner's prior convictions?

III. Did the trial court err in failing to conduct the proper balancing test as set forth by *State v. Colf*?

IV. Did the admission of Petitioner's prior convictions constitute prejudicial error?

LAW / ANALYSIS

I. Rule 609(b), SCRE

Petitioner argues that the trial judge erred in admitting Petitioner's prior convictions because the trial judge did not apply the proper legal standard in calculating the ten-year time limit under Rule 609(b), SCRE. We agree.

Evidence of a prior conviction is admissible to impeach a witness unless a period of more than ten years has elapsed since the date (1) of the conviction or (2) of the release of the witness from confinement for that conviction, whichever date is later. Rule 609(b), SCRE. The evidence is admissible, however, if the trial judge determines that the probative value of the conviction substantially outweighs its prejudicial effect. *Id*.

In 1986, Petitioner was sentenced to thirty days as a juvenile for grand larceny and burglary. The record does not reflect which date is later, the date of the conviction or the release from confinement. What is certain is that the time of release from confinement and the date of the conviction are both pre-1990. Because Petitioner's trial was in 2000, the 1986 conviction was improperly admitted. Therefore, we hold that the trial court erred in calculating the ten-year time period under Rule 609(b), SCRE.

II. Moral Turpitude Standard

Petitioner argues that the trial judge erred by using the moral turpitude standard to determine that Petitioner's prior convictions were admissible. We agree, but the issue is not preserved for review.

Under prior common law, moral turpitude was described as "an act of baseness, vileness, or depravity in the social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rule or right and duty between man and man." *State v. Harvey*, 275 S.C. 225, 227, 268 S.E.2d 587, 588 (1980). But the common law rule was replaced when South Carolina adopted Rule 609(a), SCRE. *Green v. State*, 338 S.C. 428, 432, 527 S.E.2d 98, 100 (2000).

Today, the South Carolina Rules of Evidence provide that if the witness has been convicted of a crime that is punishable by death or imprisonment of more than one year, and the probative value of the conviction outweighs its prejudicial effect, the conviction is admissible to attack the witness's credibility. Rule 609(a)(1), SCRE. In addition, if the crime involved dishonesty or a false statement the conviction is admissible to attack the witness's credibility. Rule 609(a)(2), SCRE.

In the present case, Petitioner had prior convictions of burglary and grand larceny. To determine whether Petitioner's prior convictions were admissible, the judge applied the common law moral turpitude test. Because the prior convictions were crimes of moral turpitude, the judge ruled that Petitioner's convictions were admissible.

Since the adoption of Rule 609, the moral turpitude standard is no longer the proper test for determining the admission of remote prior convictions. Therefore, the trial court erred in using the moral turpitude standard to determine the admissibility of Petitioner's prior convictions.

Although we hold that the trial judge erred in applying the moral turpitude standard, we find that Petitioner did not preserve the issue for appellate review. To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court. *State v.*

Johnson, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996). The objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. *State v. Priouleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). If a party fails to properly object, the party is procedurally barred from raising the issue on appeal. *State v. Pauling*, 322 S.C. 95, 99, 470 S.E.2d 106, 109 (1996).

In the present case, trial counsel did not specifically object to the application of the moral turpitude standard. Instead, trial counsel objected to the admissibility of Petitioner's prior convictions on the basis that the convictions were too remote. When objecting, counsel stated that "it's now 14 years later." Because the objection was clearly based on remoteness and not the use of the moral turpitude standard, we hold that the issue regarding the use of the moral turpitude standard is not preserved for appellate review.

III. *Colf* Balancing Test

Petitioner argues that the trial court erred by failing to conduct the proper balancing test in determining whether Petitioner's prior convictions were admissible. We agree.

This Court has held that a trial judge must conduct a balancing test to determine whether remote convictions are admissible under Rule 609(b). *State v. Colf*, 337 S.C. 622, 626, 525 S.E.2d 246, 248 (2000). Rule 609(b) creates a presumption that remote convictions are inadmissible and places the burden on the State to overcome this presumption. *Id*. at 626-627, 525 S.E.2d at 248. When considering whether to admit prior convictions, a trial judge should consider the following factors:

(1) The impeachment value of the prior crime;
(2) The point in time of the conviction and the witness's subsequent history;
(3) The similarity of the past crime and the charged crime;
(4) The importance of the defendant's testimony; and
(5) The centrality of the credibility issue.

Id. at 627, 525 S.E.2d at 248. After the trial court conducts the balancing test, the judge must make a determination and articulate, on the record, the specific reasons for his ruling. *Id*.

In the present case, the judge explained that the prior convictions were admissible because the probative value outweighed the prejudicial effect. However, the trial judge did not articulate why the probative value outweighed the prejudicial effect. We hold that a trial judge must conduct the *Colf* balancing test when considering the admission of remote prior convictions with reference to the factors enumerated in that opinion. Therefore, in the present case, the trial court erred by not conducting the proper balancing test.

IV. Harmless Error

Petitioner argues that the admission of the prior convictions constituted prejudicial error. We disagree.

To constitute error, a ruling to admit or exclude evidence must affect a substantial right. Rule 103(a), SCRE. An error is harmless if the defendant's guilt has been conclusively proven by competent evidence, such that no other result could have been reached. *Prioleau*, 345 S.C. at 407-408, 548 S.E.2d at 214-215. The circumstances of each individual case are to be considered. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1986). In addition, the error is harmless if the error could not have reasonably affected the outcome of the trial. *Id*.

In the present case, defense counsel strategically introduced Petitioner's prior convictions on direct examination to lessen the impact they might have on Petitioner's credibility. Furthermore, the prosecution placed no other emphasis on these prior convictions. Therefore, we find that the impact was minimal because other evidence introduced by the prosecution likely damaged Petitioner's credibility.

For example, there was testimony that upon arrest, Petitioner gave the police a false name. In addition, there was testimony that the fight that led to the death of the victim was over a stolen car. We find that this testimony was more damaging to Petitioner's credibility than the introduction of the prior

convictions. Therefore, the introduction of the prior convictions was not prejudicial to Petitioner's case.

Because there was overwhelming evidence of Petitioner's guilt, we do not believe the admission of the Petitioner's prior convictions could have reasonably affected the outcome of the trial, and therefore the error was harmless.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals is AFFIRMED.

MOORE, WALLER, BURNETT, JJ., and Acting Justice A. Victor Rawl, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Harold Pittman, Petitioner,

v.

C. E. Lowther, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Jasper County
Gerald C. Smoak, Jr., Circuit Court Judge

Opinion No. 25946
Heard November 18, 2004 – Filed February 22, 2004

AFFIRMED

Darrell Thomas Johnson, Jr. and Mills L. Morrison, Jr., both of Law Offices of Darrell Thomas Johnson, Jr., of Hardeeville, for Petitioner.

H. Fred Kuhn, Jr., of Moss, Kuhn & Fleming, P.A., of Beaufort, for Respondent.

JUSTICE BURNETT: We granted a writ of certiorari to review the Court of Appeals' decision reversing the trial court's order granting Harold Pittman (Petitioner) a private easement by way of prescription across C.E. Lowther's (Respondent's) property. Pittman v. Lowther, 355 S.C. 536, 586 S.E.2d 149 (Ct. App. 2003). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

In 1972, Weldon Wall purchased Good Hope Plantation from Good Hope Corporation. At that time, trails and plantation roads crossed the 3,000-acre tract. One such road, known as Wellington Road, continues to exist and is the subject of this dispute.

Wall divided Good Hope Plantation into two parcels: Parcel A contained approximately 2,340 acres and Parcel B contained approximately 661 acres. Both parcels have frontage on Highway 278. In 1973, Wall sold Parcel A to Petitioner. Mary Wilcox later purchased Parcel B at a foreclosure sale. In 1975, Petitioner bought 279 acres of Parcel B. The 279-acre parcel purchased by Petitioner did not abut any public roads. At the time Petitioner purchased the 279-acre tract of land there was a hunting lodge on it, which Petitioner then made his home. Petitioner used 168 feet of Wellington Road to travel to his home. Around 1980, Petitioner built a road, which served as an additional driveway, leading from his home to Highway 278, crossing his 2,340-acre tract of land. The Wellington Road driveway is more convenient for Petitioner to use because it is closer to town. In 1976, Wilcox sold approximately 312 acres to Respondent. The 168-foot portion of Wellington Road in dispute crosses over Respondent's land.

Around 1982, Respondent began to place obstacles such as setting posts and cables across Wellington Road to prevent Petitioner from using the road. Petitioner continued to drive on Wellington Road, either going around the obstacles or pushing them down. Respondent replaced the obstacles when Petitioner ignored or destroyed them. Respondent reported Petitioner's actions to law enforcement authorities when Petitioner used his tractor to uproot a couple of small trees and scraped the road with his tractor.

In 1992, Petitioner stopped using the road for about four or five months while a mutual friend attempted to mediate the dispute. The attempt to mediate was unsuccessful and Petitioner resumed use of Wellington Road.

The trial court concluded Petitioner established a private prescriptive easement to the portion of Wellington Road in dispute. The Court of Appeals reversed, concluding the trial court erred in finding Petitioner enjoyed uninterrupted adverse use of the land for the twenty-year period necessary to establish an easement by prescription. The Court of Appeals concluded Respondent's repeated attempts to prevent Petitioner from crossing Respondent's land constituted interruptions in Petitioner's use and enjoyment of the disputed portion of Wellington Road.[1]

ISSUE

Did the Court of Appeals err in concluding Petitioner does not have a prescriptive easement over Respondent's property because Petitioner's use was interrupted during the requisite twenty-year period?

LAW/ANALYSIS

The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury. Slear v. Hanna, 329 S.C. 407, 496 S.E.2d 633 (1998). To establish a prescriptive easement, there must be continued and uninterrupted use or enjoyment of the right for a period of twenty years, identity of the thing enjoyed must be proven, and use must be adverse or under claim of right. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993).

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[1] The Court of Appeals also concluded the record was devoid of evidence supporting Petitioner's contention he gained the easement by dedication. We granted certiorari to consider this issue and now dismiss certiorari as improvidently granted.

Petitioner argues Respondent's efforts to interrupt Petitioner's use were ineffective and, therefore, did not prevent Petitioner's use from ripening into possession. Petitioner testified he has used Wellington Road continuously from approximately 1972 until 1992 or sometime thereafter.

We have not previously addressed the issue of what constitutes an interruption in the context of establishing a prescriptive easement where the owner of the servient tenement erects barriers that are repeatedly ignored by the owner of the dominant tenement. Numerous courts have held when the potential servient owner, by either threats or physical barriers, succeeds in causing a discontinuance of the use, *no matter how brief*, the running of the prescriptive period is stopped. 4 Powell on Real Property § 34.10[3][b] (2000); see also Talbot's, Inc. v. Cessnun Enterprises, Inc. 566 P.2d 1320 (Ala. 1977) (property owner's action in conspicuously blocking off area contained in alleged easement prevented user from acquiring easement by prescription); Kelley v. Westover, 938 S.W.2d 235 (Ark. App. 1997) (prescriptive easement did not vest in neighbor where owner built fences and placed various obstructions on property); Serrano v. Grisom, 28 Cal. Rptr. 579 (Ca. 1963) (use interrupted by servient owners plowing up wheeltrack road and farming land the road formerly crossed); Ludwick v. Kassenbrock, 253 S.W.2d 628 (Ky. 1962) (running of prescriptive period stopped by closing of passway); Pugh v. Conway, 299 N.E.2d 214 (Ind. App. 1973) (use interrupted when servient landowner planted a garden on most of disputed area); Dalton v. Real Estate & Import Co., 92 A.2d 585 (Md. 1952) (use interrupted by physical barrier); Rice v. Miller, 238 N.W.2d 609 (Mn. 1976) (servient landowner's efforts interrupted prescriptive period even though efforts on landowner's part were not ultimately successful in that public circumvented or removed barriers); Ormiston v. Boast, 413 P.2d 969 (Wash. 1966) (placing fence across road interfered with continuous use).

Petitioner urges us to adopt the analysis applied by the North Carolina Supreme Court in Concerned Citizens of Brunswick County Taxpayers Ass'n v. State, 404 S.E.2d 677 (N.C. 1991). In Concerned Citizens, the court concluded ineffective interruptions will not prevent use from ripening into an easement. Id. In that case, the landowner made

escalating attempts to stop the public from trespassing on its land, first by putting up "no trespassing" signs. It then placed a telephone pole across the road which the public drove around. Its next step was a padlocked cable that eventually grew to 200 feet long in an attempt to stop the public from bypassing it. Finally, the landowner used locked gates, a guardhouse, and guards, all of which proved unavailing. The majority of the court treated the persistent trespassing as proof of the adversity of the public's use.

We decline to adopt the analysis applied by the North Carolina Supreme Court and conclude a more reasoned approach was articulated by the Oregon Court of Appeals in Garrett v. Mueller, 927 P.2d 612 (Or. App. 1996). The court embraced the opinion of Justice Oliver Wendell Holmes Jr., who stated the following in determining what a landowner must do to interrupt prescriptive use.

> A landowner . . . is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action. Such an assertion interrupts the would-be dominant owner's impression of acquiescence, and the growth in his mind of a fixed association of ideas; or, if the principle of prescription be attributed solely to the acquiescence of the servient owner, it shows that acquiescence was not a fact.

Garrett, 927 P.2d at 617 (quoting Brayden v. New York, H.H. & H.R. Co., 51 N.E. 1081, 1081-82 (1898)).

We conclude actions are sufficient to interrupt the prescriptive period when the servient landowner engages in overt acts, such as erecting physical barriers, which cause a discontinuance of the dominant landowner's use of the land, no matter how brief. In addition to physical barriers, verbal threats which convey to the dominant landowner the impression the servient landowner does not acquiesce in the use of the land, are also sufficient to interrupt the prescriptive period. To adopt an interpretation of "effective interruption" which requires a servient landowner to take actions in addition to erecting barriers like fences and cables, would encourage wrongful or

potentially violent behavior that is contrary to sound public policy considerations and the peaceful resolution of disputes.

Turning to the present case, we conclude Respondent's actions were sufficient to interrupt Petitioner's use of the land for the prescriptive period. Not only did Respondent set posts and cables across it, but Respondent also plowed the road every year and planted the road with rye a couple of years. When Petitioner removed the barriers, Respondent replaced them. Respondent also called law enforcement authorities when Petitioner used his tractor to destroy the barriers. Respondent's actions caused Petitioner to discontinue use of the land, albeit briefly, and were certainly sufficient to leave Petitioner with the impression that Respondent did not acquiesce in the use of his land.

For the foregoing reasons, we affirm the Court of Appeals' decision.

AFFIRMED.

MOORE, A.C.J., WALLER, J., and Acting Justices Reginald I. Lloyd and R. Markley Dennis, Jr., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Helms Realty, Inc., Appellant,

v.

Gibson-Wall Company, a South Carolina Partnership, and Canal Industries, Inc., Defendants,

Of Which Gibson-Wall Company, a South Carolina Partnership, is Respondent.

Appeal From Horry County
John L. Breeden, Circuit Court Judge

Opinion No. 25947
Heard February 1, 2005 – Filed February 22, 2005

AFFIRMED

J. Matthew Dove, of Dove Law Firm, of Murrells Inlet, for Appellant.

William Jerad Rissler and J. Christopher Clark, both of Nelson Mullins Riley & Scarborough, of Myrtle Beach, for Respondent.

JUSTICE PLEICONES: This is a breach-of-contract case. Appellant Helms Realty, Inc. (Appellant) appeals from a jury verdict in favor of Respondent Gibson-Wall Company (Respondent). We certified the case pursuant to Rule 204(b), SCACR. We affirm.

FACTS

Appellant and Respondent orally executed a listing agreement (the Listing Agreement) pursuant to which Appellant was to find a buyer of certain property owned by Respondent. Respondent claims that an express term of the Listing Agreement was that closing of a sale was a condition precedent to Respondent's obligation to pay a commission to Appellant. Appellant claims that the agreement contained no express term concerning what triggered the right to a commission.

Eventually, Appellant found a potential buyer (the Buyer). Respondent and the Buyer fully negotiated and executed a written contract for the sale and purchase of the property (the Sales Contract). The Sales Contract contained a condition precedent to the Buyer's obligation to close on the property. The Sales Contract also contained a term that the contract would expire if the condition remained unsatisfied on a certain date.

At trial, Respondent argued that through no fault of its own, the condition was never satisfied and that the Sales Contract had expired. According to Respondent, Appellant earned no commission because the Sales Contract never closed.

Appellant countered that it earned its commission when Respondent and the Buyer executed the Sales Contract, regardless whether they closed.

The jury found for Respondent.

ISSUES

I. Whether the circuit court erred by denying Appellant's motion for judgment notwithstanding the verdict (JNOV).

II. Whether the circuit court erred in charging the jury.

III. Whether the circuit court erred by granting Respondent's motion for summary judgment on Appellant's third-party-beneficiary claim.

ANALYSIS

I. APPELLANT'S MOTION FOR JNOV

Appellant argues that the circuit court erred by denying Appellant's motion for JNOV. We disagree.

A trial court should grant JNOV when the evidence is insufficient to support the verdict. Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). "In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." Id. (quoting Strange v. S.C. Dep't of Hwys. & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994)).

Appellant argues that it earned its commission as a matter of law when Respondent and the Buyer executed the Sales Contract, even though the Buyer's performance was conditional. Appellant's interpretation of the law is incorrect.

In executing a listing agreement, a seller and a real-estate broker may agree to any condition precedent to the seller's obligation to pay a commission. Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 196-97, 232

S.E.2d 728, 729 (1977); Hamrick v. Cooper River Lumber Co., 223 S.C. 119, 124, 74 S.E.2d 575, 577 (1953). If the listing agreement is silent as to what triggers the broker's right to a commission, then the common law fills the gap. The default term is that the broker is entitled to a commission when it procures a sales contract that is both valid and enforceable by the seller, regardless whether the contract actually closes. Dantzler Real Estate, Inc. v. Boland, 276 S.C. 275, 277-78, 277 S.E.2d 705, 706 (1981); Cass Co. v. Nannarello, 274 S.C. 326, 328, 262 S.E.2d 924, 926 (1980); Thomas-McCain, Inc., 268 S.C. at 196, 232 S.E.2d at 729; Hamrick, 223 S.C. at 123-24, 74 S.E.2d at 577; Fairly v. Wappoo Mills, 44 S.C. 227, 237-38, 22 S.E. 108, 112 (1895).

If the listing agreement is silent as to the point in time at which the broker becomes entitled to a commission, and the sales contract contains a condition precedent to the buyer's performance, then the broker is not entitled to a commission until the condition is satisfied. Only then is the sales contract enforceable by the seller.[1] See Champion v. Whaley, 280 S.C. 116, 119, 311 S.E.2d 404, 406 (Ct. App. 1984) (involving a listing agreement with an express term having the same effect as that of the default term); see also Catherine M.A. Mc Cauliff, *Corbin on Contracts* vol. 8, § 30.9, 18-19 (Rev. ed., LEXIS 1999) (explaining that a condition precedent to performance generally affects a contract's enforceability, not its validity). In that situation, effectively, the condition precedent to the buyer's performance under the sales contract is also a condition precedent to the seller's performance under the listing agreement.

In this case, the jury had to determine whether it believed Respondent or Appellant regarding the disputed term of the oral Listing Agreement. If the jury believed Respondent, then closing was the condition precedent to Respondent's obligation to pay a commission. If the jury believed Appellant, then satisfaction of the condition in the Sales Contract was the condition

[1] Respondent relies on Wahl v. Hutto, 249 S.C. 500, 155 S.E.2d 1 (1967), for this principle. Wahl is not implicated, because it involved a condition precedent to the formation of a contract, not its performance.

precedent to Respondent's obligation. Thus, without regard to which version of the Listing Agreement the jury believed, Appellant was not entitled to JNOV.[2]

II. THE JURY CHARGE

Appellant asserts that it is entitled to a new trial because the circuit court's jury charge was improper. The jury charge is not in the Record on Appeal, and Appellant had the burden of providing a sufficient record. See Germain v. Nichol, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983) (holding that the appealing party has the burden of providing a sufficient record). We therefore decline to address the merits of Appellant's claim. See Rule 210(h), SCACR; see also State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999) (refusing to review a jury charge not in the record); Hobgood v. Pennington, 300 S.C. 309, 314, 387 S.E.2d 690, 693 (Ct. App. 1989) (same); Dennis v. S.C. Nat'l Bank, 299 S.C. 34, 41, 382 S.E.2d 237, 240 (Ct. App. 1988) (same); Scruggs v. Quality Elec. Servs., Inc., 282 S.C. 542, 545, 320 S.E.2d 49, 51 (Ct. App. 1984) (same).

III. APPELLANT'S THIRD-PARTY-BENEFICIARY CLAIM

Before trial, Appellant argued that it was a third-party beneficiary of the Sales Contract. Respondent moved for summary judgment that Appellant could not proceed as a third-party beneficiary. Appellant argues that the circuit court erred by granting Respondent's motion. We disagree.

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[2] At trial, there was an issue whether Respondent wrongfully prevented satisfaction of the condition precedent to its performance under the Listing Agreement, whatever that condition was. A party that wrongfully prevents satisfaction of a condition precedent to its performance is not excused from performing. Hubbard v. Woodmen of the World, 125 S.C. 154, 156, 118 S.E. 418, 419 (1923); Chambers v. Pingree, 351 S.C. 442, 451, 570 S.E.2d 528, 532-33 (Ct. App. 2002), cert. denied, 2003-OR-01141 (S.C. Sup. Ct. Dec. 17, 2003); Champion, 280 S.C. at 120, 311 S.E.2d at 406. There was conflicting evidence, and Appellant did not base its JNOV motion on this issue.

In reviewing an order of summary judgment, an appellate court applies the same standard as that which the circuit court applied in determining whether to enter the order. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Osborne, 346 S.C. at 7, 550 S.E.2d at 321.

Appellant was not a third-party beneficiary of the Sales Contract. A third-party beneficiary is a party that the contracting parties intend to directly benefit. Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). There is no evidence that Respondent and the Buyer intended to directly benefit Appellant. Appellant's expected benefit was merely incidental. The circuit court properly granted Respondent's motion for summary judgment.

CONCLUSION

The denial of Appellant's motion for JNOV was proper, and the Record is insufficient for the Court to review the allegedly improper jury charge. Further, the circuit court did not err by granting Respondent's motion for summary judgment on Appellant's third-party-beneficiary claim. The verdict for Respondent is

AFFIRMED.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Luther E. Atwater, III, Respondent.

ORDER

The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17, RLDE, of Rule 413, SCACR. Respondent does not oppose the petition.

The petition is granted and respondent is suspended, pursuant to Rule 17, RLDE, Rule 413, SCACR, from the practice of law in this State until further order of the Court.

IT IS SO ORDERED.

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

Columbia, South Carolina

February 15, 2005

The Supreme Court of South Carolina

RE: Amendment to 403(h), SCACR

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, the first sentence of Rule 403(h), SCACR, is amended to read:

> A person employed full time for eighteen (18) months as a law clerk or staff attorney for the Supreme Court of South Carolina, the South Carolina Court of Appeals, or the Federal Fourth Circuit Court of Appeals may be certified as having completed the requirements of this rule by participating in or observing two (2) trials.

This amendment is effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
February 17, 2005

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Laura Lawton Arnal, Respondent/Appellant,

v.

David Emil Arnal, Appellant/Respondent.

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

Opinion No. 3943
Heard September 16, 2004 – Filed February 7, 2005

AFFIRMED IN PART, REVERSED IN PART and REMANDED

Sally G. Calhoun, of Beaufort, for Appellant-Respondent.

Susan C. Rosen, Robert N. Rosen and Donald B. Clark, all of Charleston, for Respondent-Appellant.

HEARN, C.J.: David Arnal (Husband) appeals from the final order of the family court which granted the parties a divorce, divided the marital property, imputed income to Husband, established

child support and visitation, and required him to pay attorneys' fees and guardian ad litem fees. Laura Lawton Arnal (Wife) also appeals, contesting the equitable distribution and the determination of marital property. We affirm in part, reverse in part, and remand.

FACTS

The parties were married in 1995. In 1999, they had a son who was diagnosed with Down's Syndrome. Both prior to and during the parties' marriage, Husband was employed by Wife's father in his development company. Wife's father, Charles Fraser, was one of the main developers of Hilton Head Island, where the parties resided. The parties separated in 1999, shortly after the child was born.

Wife and child now reside in Brevard, North Carolina in a home purchased by one of two trusts under which she is a beneficiary. Father remained in Hilton Head and started his own consulting and land development business. Wife's main source of income is from the family trusts. She is also employed part time in order to be able to devote time to the child's special needs.

This case has a very litigious history. Wife initiated the action seeking custody of the child, child support, division of the property, and ultimately a divorce. Husband answered, requesting joint legal custody, equitable division, and rehabilitative or lump sum alimony.

A temporary hearing was held in January 2000, in which the parties were granted joint legal custody, with Wife having physical custody and decision-making authority with regard to the child's treatment. That temporary order granted Husband visitation in Brevard only and required him to pay $621.78 a month in child support.

In May 2000, Husband moved for a change of custody as a result of Wife's failure to begin therapies for the child. Additionally, Husband contended Wife had failed to complete the child's

vaccinations. By the time of the hearing, Wife had commenced therapy and completed the vaccinations, so the change in custody was denied.

Husband then moved to compel discovery and to amend his pleadings to seek custody of the child. In return to Husband's motion, Wife sought the following relief: psychological testing of the parties; sole custody; sanctions for Husband's failure to comply with Rule 11, SCRCP; and a restraining order against Husband. The court compelled Wife to comply with discovery, declined sanctions against Husband, dismissed the motion for a restraining order, and continued the issue of custody of the child. Wife's request for psychological testing was abandoned.

In October 2000, the family court denied Wife's request for sole custody and granted Husband overnight visitation in the Brevard area and visitation in Hilton Head once a month. A second order required Husband to answer interrogatories and produce requested documents.

Thereafter, Wife filed a rule to show cause against Husband seeking to compel him to pay his portion of the medical expenses for the child. The court found Husband in contempt and ordered him to pay the expenses and $1,000 in attorney's fees. Wife filed a subsequent rule to show cause in December 2000, after Husband failed to pay medical expenses and failed to respond to discovery requests. Husband had complied by the date of the hearing, so the court did not hold him in contempt, though it reserved the issue of legal fees, required Husband to pay the medical expenses, and ordered him to produce documents.

In February 2001, upon Wife's motion, the family court reviewed Husband's visitation. The court concluded that because the child "ha[d] been suffering illnesses since December and the final hearing in this matter [was] scheduled shortly, and since it [was] the cold and flu season" it would be in the child's best interest for all visitation to occur in Brevard rather than having the child travel to Hilton Head pending the final hearing.

Wife subsequently filed a motion to hold Husband in contempt for his failure to respond to discovery and produce documents that he claimed contained a confidentiality agreement involving investment property he owned with others. The family court held Husband in contempt and ordered him to pay $10,000 in legal fees to Wife. The same order relieved Husband's counsel and appointed a new guardian ad litem for the child. Husband did not appeal the contempt order until the filing of the current appeal.

This action was tried in April 2001. In its final order, the family court granted Wife sole custody of the child and gave her the right to control all medical and educational decisions for the child. Husband received visitation on alternating weekends, but the first and third visitation of the month were required to be in Brevard rather than at Husband's home in Hilton Head. Additionally, the visitation in Brevard was limited to no more than one hour travel, and Husband was required to provide documentation to that effect. The visitation restrictions were to end when the minor reached forty-three months of age.[1]

The final order also divided the marital property. The court granted Husband the properties he acquired through his partnership and split the personal possessions. Additionally, in calculating child support, the court imputed income to Husband in the amount of $9,060.62 per month and imputed income to Wife in the amount of $5,012.40 per month. According to their sworn financial declarations filed pursuant to Rule 20, SCRFC, Husband earned $3,656 per month and Wife earned $4,750 per month. Husband was required to pay $1,564 in child support and to pay his pro-rata share (64%) of uncovered medical expenses. The court required Wife to apply for

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[1] The parties' child reached forty-three months of age on February 7, 2003. Nevertheless, this court learned during oral argument in September of 2004 that Husband is still not exercising weekend visitation in Hilton Head.

Medicaid and to research and apply for any other financial assistance available in order to pay the costs of caring for the child.

The family court ordered the guardian's fee to be paid equally by the parties up to the date of trial and required Husband to bear the full cost of the guardian's fee at trial. The court found Husband should be responsible for the full fee at trial because "the issue of visitation was tried primarily because [Husband] would not accept the Guardian ad Litem's recommendations." Finally, after analyzing the appropriate factors, the court ordered Husband to pay $65,000 in attorneys' fees in addition to the $10,000 and $1,000 awards previously ordered.

Husband filed a motion for reconsideration, challenging many aspects of the family court's order. The motion was denied in October 2001.

Subsequent to the final order, Wife filed a rule to show cause seeking to hold Husband in contempt on the grounds that: Husband failed to pay uncovered medical expenses, Husband failed to pay his August child support in full, Husband failed to provide documentation he was not traveling more than one hour from Brevard, and Husband failed to pay the remaining balance of $500 on the previous attorneys' fees award of $1,000.

The hearing was held on November 6, 2001. During the hearing, Wife presented the fee affidavit of one of her two attorneys. The attorney was not present, and Husband requested the hearing be continued so that he could cross-examine the attorney on her fee. The subsequent hearing was held two days later.

Following the second hearing, the family court issued two orders in February 2002. One found Husband should pay the increased child support as of August 1, but did not find him in willful contempt for failing to do so. Additionally, he was found in contempt for failing to make timely payments on medical bills and thereafter required to pay uncovered medicals within fourteen days from the date Wife mailed

him notice. Husband was found in contempt for failing to pay the remaining balance on the $1,000 attorneys' fees and was ordered jailed for ten days with the ability to purge the contempt by paying the $500 remaining.

The second order required Husband to pay $4,727.25 in attorneys' fees as a result of Wife's institution of the rule to show cause. This amount was over $2,000 more than the amount submitted at the initial hearing on the rule to show cause.

Husband has appealed the Amended Final Order, the order denying his motion for reconsideration, and the orders resulting from the rule to show cause.

STANDARD OF REVIEW

In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992); Owens v. Owens, 320 S.C. 543, 546, 466 S.E.2d 373, 375 (Ct. App. 1996). However, this broad scope of review does not require us to disregard the family court's findings. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981).

LAW/ANALYSIS

A. HUSBAND'S APPEAL

1. Whether the family court erred in imputing income to Husband

Husband asserts the family court erred by imputing to him an additional $5,403.56 per month in income for calculation of child support.[2] We agree.

[2] Husband's monthly income as reflected on his financial declaration was $3,656.56. This income plus the additional imputed income total $9,060.12.

The South Carolina Child Support Guidelines define "income" as "the actual gross income of the parent if employed to full capacity, or potential income if unemployed or underemployed." 27 S.C. Code Ann. Regs. 114-4720(A) (Supp. 2003). The guidelines further provide:

> Potential Income. If the court finds that a parent is voluntarily unemployed or underemployed, it should calculate child support based on a determination of potential income which would otherwise ordinarily be available to the parent.

27 S.C. Code Ann. Regs. 114-4720(A)(5) (Supp. 2003).

During the marriage, Husband was employed by Wife's father. Husband's expert testified that his annual income during this time was between $35,000 and $40,000, and Wife did not contradict this testimony. Following the separation, Husband's employment with Wife's father was terminated, and he started his own consulting and land development business. Since beginning his own business, Husband made more money than when working for his father-in-law. According to his financial declaration, Husband was earning nearly $44,000 at the time of trial. Nevertheless, at Wife's urging, the family court imputed more income to Husband than he earned at any time during the marriage.

Wife argues that although Husband has increased his income following the separation, he is not earning income commensurate with his earning capacity, and that Husband is capable of earning substantially more than his current income. Wife points out that Husband has an undergraduate degree from Clemson University and a master's degree in landscape architecture from Harvard University. Wife's position is that because Husband is so well educated, he could earn more money than he is currently earning. Wife essentially argues Husband is not billing his clients a high enough hourly rate or billing the maximum number of hours.

Even accepting Wife's assertions as true, we do not find this to be a case for imputation of income because there is no indication that Husband has voluntarily lessened his earning capacity. "[T]he failure to reach earning capacity, by itself, does not automatically equate to voluntary underemployment such that income must be imputed." Kelley v. Kelley, 324 S.C. 481, 488-89, 477 S.E.2d 727, 731 (Ct. App. 1996). "[C]ourts are to closely examine the payor's good-faith and reasonable explanation for the decreased income." Id. at 489, 477 S.E.2d at 731.

In this case, there is no evidence Husband has decreased his income at all. In fact, his income has increased since the time of the parties' separation. Moreover, the mere fact that Husband could make additional income does not warrant the imputation of income. There is no evidence that Husband's failure to make additional income was due to any wrongdoing on his part or motivated by a desire to decrease his support obligation. See Mazzone v. Miles, 341 S.C. 203, 209, 532 S.E.2d 890, 893 (Ct. App. 2000) (declining to impute more than minimum wage to husband when there was no evidence that the loss of his job was due to any wrongdoing, or that his decision to start his own business was motivated by a desire to avoid his child support obligations). "[C]ourts are reluctant to invade a party's freedom to pursue the employment path of their [sic] own choosing or impose unreasonable demands on parties." Kelley, 324 S.C. at 489, 477 S.E.2d at 731.

The family court erred in imputing income to Husband of over $9,000 per month because there is no evidence in this record that Husband voluntarily depressed his income. In fact, at the time of the hearing, Husband was making more income in his new business than he had ever earned during the parties' marriage. Following Wife's argument to its logical conclusion, a family court could impute income to a spouse if it merely found that he or she was capable of earning more income. This is simply not the test for imputation of income in this state. Therefore, because we do not find Husband has voluntarily

lessened his earning capacity, we reverse the family court's decision to impute income to him.

However, for purposes of setting child support we do not accept Husband's income as stated on his financial declaration. Accordingly, we now undertake to establish Husband's income for purposes of determining child support. The guidelines define gross income for self-employed persons as:

> gross receipts minus ordinary and necessary expenses required for self-employment or business operation . . . . However, the court should exclude from those expenses amounts allowed by the Internal Revenue Service for accelerated depreciation or investment tax credits for purposes of the guidelines and add those amounts back in to determine gross income. In general, the court should carefully review income and expenses from self-employment or operation of a business to determine actual levels of gross income available to the parent to satisfy a child support obligation. As may be apparent, this amount may differ from a determination of business income for tax purposes.

27 S.C. Code Ann. Regs. 114-4720(A)(5) (Supp. 2003).

Husband's financial declaration lists his gross monthly income as $3,656.56 per month, or $43,878.72 per year. Husband's financial expert explained roughly how this number was calculated. The expert testified that Husband's consulting and land development business generated gross revenues of $91,000 in 2000. He deducted business expenses of $37,000 to arrive at a net income of approximately $54,000. The expert added back into the net income a $5,010 charitable contribution that was incorrectly deducted from the gross revenues as a business expense on Husband's financial

declaration. The expert reduced Husband's net income by the losses incurred by Husband's Bee Blessed Honey Business of approximately $14,800 and his Heritage Tent Company of approximately $2,000. The expert testified that, as a result, Husband's net income was in the range of $4,056 per month or $48,672 annually.

We accept the testimony of Husband's expert that Husband generated gross revenues of $91,000 and business expenses of $37,000 in the year 2000. We also agree that the $5,010 charitable contribution was incorrectly deducted from Husband's gross revenues. However, we do not believe Husband's monthly income should be reduced by the losses from his honey and tent businesses. From our view of the evidence, we agree with Wife's argument that Husband is operating those businesses as a hobby and therefore cannot use them to reduce his monthly income. In sum, we find Husband's income to be the $91,000 in gross revenues, less $37,000 in business expenses, plus the $5,010 charitable contribution, equaling $4,917.50 per month or $59,010 annually. Thus, we remand[3] the issue of child support for recalculation based on this income. This recalculation should be retroactive to the date of the final order.

2. Whether the family court erred in failing to impute income to Wife

Husband argues that the family court erred in failing to impute more income to Wife based on her ability to rent a home for less than market value because the home is owned by the Grandchildren's Trust. We disagree.

Following the parties' separation, Wife moved to a home in Brevard, North Carolina which had been recently purchased by the

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[3] Because these parties have such a litigious history, we have attempted to remand as few issues as possible. However, we are not able to calculate child support ourselves because the record does not reflect how much Wife pays each month for the child's health insurance.

Grandchildren's Trust, a trust in which she may be one of two trustees[4] and is the sole beneficiary. According to Wife's financial declaration, she paid $1,000 each month to the Grandchildren's trust to rent the home. Husband argues that this rental rate is below fair market value, and based on his own real estate experience, alleges that the fair market rental value of Wife's home is $2,760 a month, or one percent of the sales price. Husband asks that the difference between the fair market rental value and the rent actually paid be considered income as an in-kind subsidization of Wife's housing by the Grandchildren's Trust, analogous to income in the form of in-kind payments received by a self-employed parent provided for in the child support guidelines.

First, it is questionable whether Husband's testimony as to the fair market rental value of Wife's home provided a sufficient basis on which the family court judge could have imputed income to Wife. However, even assuming without deciding that Husband's assertion regarding fair market value is correct, the guidelines provide that "gross income" does <u>not</u> include "in-kind income." Rather, the guidelines provide that "the court should count as income expense reimbursements or in-kind payments received by a parent from self-employment or operation of a business if they are significant and reduce personal living expenses, such as a company car, free housing, or reimbursed meals." 27 S.C. Code Ann. Regs. 114-4720(A)(3)(c) (Supp. 2003). Husband makes no argument that Wife receives a reduced rental rate in exchange for operating a business or through self-employment. Thus, even if Wife is renting her home below fair market value, such a benefit would be in-kind income specifically excluded from gross income under the guidelines. We therefore find the family court did not err in excluding any difference between the fair market value and the actual rent paid from Wife's income.

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[4] The trust document does not appear in the record. Wife's expert testified that Henry Bernheim is the trustee, however, Husband's expert testified that the trust document suggested Wife was a co-trustee with Bernheim.

3. Whether the family court erred in (a) excluding testimony of W.C. Hoecke regarding Medicaid, and (b) failing to assign all uncovered medical expenses to Wife

Husband argues the family court erred in requiring him to pay his pro rata share of the child's medical expenses not covered by health insurance. Husband alleges that Medicaid would cover all of the child's medical costs if the child lived in South Carolina, rather than North Carolina. Because Wife voluntarily moved to North Carolina, Husband argues that he should not bear the burden of the uncovered medical expenses.

The guidelines state that "[e]xtraordinary unreimbursed medical expenses addressed by the court shall be divided in pro rata percentages based on the proportional share of combined monthly adjusted gross income." 27 S.C. Code Ann. Regs. 114-4720(G) (Supp. 2003) (emphasis added). The use of the word "shall" in the guidelines indicates the provision is mandatory. See Charleston County Parents for Public Schools, Inc. v. Moseley, 343 S.C. 509, 519, 541 S.E.2d 533, 538 (2001). A court may deviate from the guidelines upon considering, among other factors, "child-related unreimbursed extraordinary medical expenses." S.C. Code Ann. § 20-7-852 (C)(8) (Supp. 2003).

At trial, Husband sought testimony from W.C. Hoecke, a pastor and employee of Family Connection of South Carolina, Inc., an organization that connects families of children with special needs. The family court excluded the testimony as irrelevant, but permitted Husband to make a proffer. During the proffer of Hoecke's testimony, Hoecke was asked if the child was eligible for Medicaid in South Carolina. He testified: "I have never come across a child yet with Down's Syndrome that isn't eligible." When questioned again if the parties' child specifically would qualify, Hoecke testified that "[a]gain, you're going to have to go to the State of South Carolina to get that, but I have never yet found a child with Down's Syndrome that hasn't qualified . . . ."

On appeal, Husband argues that this testimony was relevant to Wife's claim for contribution from him for the child's uncovered medical expenses and alleges it was error not to assign all uncovered medical expenses to Wife. We believe the family court erred in not ascertaining whether the child's uncovered medical expenditures, which are substantial, would have been covered by Medicaid if Wife had continued to live in South Carolina.[5] We agree with Husband that this evidence was certainly relevant to the determination of payment of uncovered medical expenses. However, the court also ordered Wife to apply for Medicaid on the child's behalf in North Carolina. Because we are remanding the issue of child support to the family court for re-determination, the family court is directed to address the issue of the child's eligibility for Medicaid in apportioning the uncovered medicals between the parties.

4. Whether the family court erred in failing to admit evidence of the corpus of (a) the Fraser Family Trust, and (b) the Grandchildren's Trust

At trial, Husband sought to introduce evidence regarding the corpuses of two trusts of which Wife was a beneficiary, the Fraser Family Trust and the Grandchildren's Trust. The family court excluded this evidence as irrelevant, but allowed Husband to proffer the amount by providing the court with a sealed envelope stating the corpus amounts. Husband contends this was error because the corpuses are relevant to setting child support, awarding attorneys' fees, divvying up uncovered medical bills, and his request that Wife reimburse him for a portion of the costs he incurred while visiting the child in Brevard. Husband maintains Wife has access to the trust property in addition to the income to benefit her and to maintain her lifestyle. We agree that the court erred in excluding the evidence as irrelevant.

Wife is one of three beneficiaries of the Fraser Family Trust and receives income of approximately $12,000 per year in

[5] Evidence in the record indicated that Wife presently lives "down the street" from the South Carolina border.

distributions from this trust.[6] The trustees are Wife, her sister, and her mother. Both Husband's expert and the trust document indicate the trustees can invade the corpus of the trust in order to maintain Wife's standard of living. The trust document provides: "The Trustee may at any time and from time to time encroach on the principal of this trust in such amounts as the Trustee may deem necessary in its judgment to provide for the support of . . . LAURA LAWTON STONE FRASER . . . in [her] accustomed manner of living and for [her] education . . . ." While this invasion of the corpus to maintain Wife's standard of living is neither mandatory nor within the sole power of Wife, as beneficiary Wife may seek payment of the corpus to maintain her standard of living, and as co-trustee Wife has the power to influence any distribution.

While the documents creating the Grandchildren's trust are not in evidence, there is some testimony regarding this trust. Wife's expert testified that Henry Bernheim is the trustee; however, Husband's expert testified that the trust documents suggest Wife is a co-trustee. Wife is the sole income beneficiary and receives approximately $25,000 per year in distributions.[7] Both Wife's and Husband's experts testified that Wife could not receive any corpus distributions from the Grandchildren's Trust. While she may not be able to invade the corpus of this trust as she can the Fraser Family Trust, this trust purchased the home in which she and her child reside in Brevard. Thus, it appears that Wife has the power to influence the investment of the trust corpus for her benefit.

In awarding attorney's fees, the family court should consider, among other things, the respective financial conditions of the parties and the effect the fee would have on each party's standard of living. <u>E.D.M. v. T.A.M.</u>, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816

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[6] Wife has also received payment from the trust from sale proceeds of Six Oaks Cemetery, an asset contained in the trust corpus.

[7] This trust corpus has contained some significant assets in the past, including the Umbro corporation. After its sale, Wife received approximately $134,000 from the trust.

(1992). Because Wife could invade the corpus of one trust to maintain her standard of living and could influence the investment of the other trust for her financial benefit, the family court should have considered the trust corpuses when deciding whether to award attorneys' fees. Furthermore, because these trusts affected Wife's financial condition, the family court should have taken them into consideration when determining whether Wife ought to reimburse Husband for a portion of the costs he incurred while visiting the child in Brevard.[8]

As to the issues of child support and uncovered medical bills, we do not believe the amounts of the trust corpuses are relevant because the child support guidelines do not provide for consideration of nonmarital property. See 27 S.C. Code Ann. Regs. 114-4720 (Supp. 2003). We therefore find the trust corpuses relevant only to the issues of attorneys' fees and travel costs. However, because of our decision infra to reverse the award of attorneys' fees, we reverse and remand only to the extent the trust corpuses affect the issue of travel reimbursement.

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[8] At trial, the guardian suggested Wife pay Husband $300 per month to help defray the cost of exercising visitation in Brevard. On appeal, Husband argues the family court abused its discretion in failing to follow this recommendation. Because we reverse and remand the issue of travel costs based on the family court's failure to consider the trust corpuses, we need not address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining that the appellate court need not address remaining issues when disposition of prior issues is dispositive). Husband also argues that the issue of *child support* should be reversed and remanded because the family court failed to consider the expenses he incurred each time he exercised visitation in Brevard. However, this argument was not raised to the family court at trial, and therefore is not preserved for appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

5. Whether the family court erred in dividing the pre-trial GAL fees equally between the parties when sixty percent of the GAL fees were incurred traveling from Hilton Head to Brevard

Husband argues the family court erred in dividing the pre-trial guardian ad litem fees equally between the parties when sixty percent of the hours charged were with respect to the Wife, and specifically when ten of the 88.45 hours charged were spent traveling to the Wife's home in Brevard. We disagree.

"An award of guardian ad litem fees lies within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion." Shirley v. Shirley, 342 S.C. 324, 341, 536 S.E.2d 427, 436 (Ct. App. 2000) (citation omitted). Husband complains that Wife's move to Brevard, North Carolina caused the guardian to incur additional fees in the form of travel. However, the parties agreed to the appointment of the guardian, Ralph Tupper, an attorney who practices in Beaufort, South Carolina. Had a guardian been appointed who was nearer to Brevard, additional expense would have been incurred when he or she visited with Husband in Hilton Head. Thus, we decline to find that the family court abused its discretion in splitting the pre-trial guardian fees equally between the parties.

6. Whether the family court erred in assigning Husband all of the trial GAL fees

Husband argues the family court erred in imposing upon him the entire cost of the guardian's fees incurred during trial. We agree.

In apportioning guardian fees, the final order stated: "I believe the issue of visitation was tried primarily because [Husband] would not accept the Guardian ad Litem's recommendations. Thus, I believe that it is fair to require him to be responsible for the Guardian ad Litem's fees at trial." In private actions, a guardian "functions as a

representative of the court, appointed to assist the court in making its determination of custody by advocating for the best interest of the children and providing the court with an objective view." Patel v. Patel, 347 S.C. 281, 287, 555 S.E.2d 386, 389 (2001). The family court judge, not the guardian, is the ultimate decision-maker with respect to visitation and the best interest of the child. Therefore, Husband had no obligation to accept the recommendation of the guardian regarding visitation.

In this case, Husband had a legitimate interest in seeking overnight visitation in his own home. We do not feel Husband should be penalized for litigating a meritorious issue. See Green v. Durham Life Ins. Co., 287 S.C. 197, 199, 336 S.E.2d 478, 480 (1985) (affirming the trial court's decision not to award attorney's fees, finding respondent should not be penalized for its decision to litigate a meritorious issue). We find the family court abused its discretion in imposing on Husband the entire cost of the guardian fees incurred during trial. We find it equitable to equally apportion the cost of the guardian's trial fees between the parties.

7. Whether the family court erred in awarding Wife $65,000 in attorneys' fees

The family court's final order required Husband to pay Wife $65,000 for attorneys' fees, in addition to the $10,000 and $1,000 awards previously ordered on the rules to show cause. Husband contends the family court erred in awarding the $65,000 in attorneys' fees to Wife. We agree.

An award of attorney's fees will not be overturned absent an abuse of discretion. Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988). In deciding whether to award attorney's fees, the family court should consider the parties' ability to pay their own fee, the beneficial results obtained by counsel, the respective financial conditions of the parties, and the effect of the fee on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

In awarding attorneys' fees to Wife, the family court concluded:

> Both parties have the ability to pay their own fees. . . . [Wife] prevailed on the major issues. . . . In light of the equitable division, [Husband] is in a superior financial condition. . . . Each party's standard of living would be affected, but I believe that it would be unfair for [Wife] to have to pay the majority of her attorneys' fees since most of the protracted nature of this litigation was precipitated by [Husband].

We agree with the family court's initial observation that both parties have the ability to pay their own fees. However, we strongly disagree that Husband is to blame for the "protracted nature of this litigation." While Husband is guilty of prolonging the discovery process by claiming a confidentiality privilege that he did not have, Husband has already been held in contempt and ordered to pay $10,000 for doing so. It is unfair for the family court to continue to punish Husband for that isolated incident of misbehavior, and frankly, nothing in the record indicates that Husband was more to blame than Wife for this case's litigious history.

Because our opinion has afforded the parties a substantially equivalent result and because each party has the ability to pay his or her own fees, we reverse the award of attorneys' fees. The parties will bear the cost of their own attorneys.

8. Whether the family court erred in denying Husband Easter and summer visitation.

Husband argues the family court erred in denying him Easter and summer visitation. We agree.

"When awarding visitation, the controlling consideration is the welfare and best interest of the child. As with child custody, the issue of child visitation falls within the discretion of the trial judge, and his findings will not be disturbed absent an abuse of discretion." Woodall v. Woodall, 322 S.C. 7, 12, 471 S.E.2d 154, 158 (1996) (citations omitted).

In its final order, the family court established specific guidelines for holiday visitation, but failed to address Easter weekend. The family court also declined to award extended summer visitation to Husband. In his motion for reconsideration, Husband specifically asked for Easter visitation and extended summer visitation, but without explanation, the family court denied his request.

In cases of child custody, our court usually affords great deference to the visitation schedule established by the family court; however, we do have the ability, when necessary, to find facts in accordance with our own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). Where, as here, the best interest of the child is compromised by the family court's visitation schedule, we are compelled to exercise our de novo review.

As to Easter visitation, both parties testified that they are Christians and are involved with church and religious activities. Considering the significance of Easter weekend to the parties' religious faith, we find it to be in the child's best interest to share the holiday in a manner similar to the schedule provided for during the Thanksgiving and Christmas holidays.

Additionally, we find it in the child's best interest to have extended summer visitation with Husband. During the trial, Wife argued that frequent travel caused the child to regress in therapy and to become sick more often. Addressing this issue in its final order, the family court stated:

> I do not believe there is a threat to [the child's] health because of travel in and of itself[.] Because of his condition, I believe that at his age, he is more easily susceptible to infection, stress and tiring. This concern must be balanced against the need to bond with his father. Both parents are needed in [the child's] life.

We agree with this premise and find an award of summer visitation would have furthered these goals. Summer visitation would have reduced any stress associated with frequent travel. Furthermore, now that the child is over forty-three months old, all experts agree that allowing the child to visit Husband in Hilton Head would not adversely affect the child's development. Moreover, because the child is of school age, it is likely impossible for Husband to exercise his weeklong visitation during the months of February, June, and October, as originally provided for in the final order.

Accordingly, we find summer visitation, as well as Easter visitation, to be in the best interest of the child. We therefore remand this issue to the family court to establish a schedule.

9. Whether the family court erred in valuing the Boozer-Arnal lots

Husband argues the family court erred in valuing certain marital property known as the "Boozer-Arnal lots" based on Wife's appraiser's values. Specifically, Husband contends this value should not have been accepted by the family court because Wife's appraiser valued the lots a year after the date of filing and did not adjust for a sales commission. We disagree.

Marital property includes "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation." S.C. Code Ann. § 20-7-473 (Supp. 2003). Thus, for

purposes of equitable distribution, the value of marital property is the value of the property at the time of the commencement of the marital litigation. See Mallett v. Mallett, 323 S.C. 141, 151, 473 S.E.2d 804, 810 (Ct. App. 1996). Importantly, however, both parties are entitled to share in any appreciation or depreciation that occurs to marital property after separation but before divorce. Hatfield v. VanEpps, 358 S.C. 185, 194, 594 S.E.2d 526, 531 (Ct. App. 2004); see also Smith v. Smith, 294 S.C. 194, 203, 363 S.E.2d 404, 409 (Ct. App. 1987) ("We know of no authority, and the husband does not cite any, that holds that only one spouse is entitled to any appreciation in marital assets that occurs after the parties separate and before the parties are divorced. We would think both parties would be entitled to any such appreciation."); Dixon v. Dixon, 334 S.C. 222, 228, 512 S.E.2d 539, 542 (Ct. App. 1999) ("[I]t is not unusual for the value of marital assets to change, sometimes substantially, between the time the action was commenced and its final resolution. In such a case, the family court has the ability to consider the post-filing appreciation or depreciation when valuing and apportioning the marital estate.").

In this case, Wife filed for divorce on December 6, 1999. The case came to trial in late April 2001. Wife's appraiser valued the lots four months prior to trial whereas Husband based his valuation on county tax appraisals that were conducted prior to Wife filing her complaint. Notably, Husband did not present any evidence that the value of the lots stayed the same from the time of filing to the time of the final hearing. Furthermore, Husband's argument concerning the adjustment for commission is speculative and irrelevant to the valuation of the lots. Accordingly, we find no error in the trial court accepting the valuation provided by Wife.

10. Whether the family court erred in excluding testimony of John L. Hunter, when his testimony set the basis for the appreciation of the Six Oaks Cemetery due to Husband's efforts

At trial, Husband sought to introduce testimony from John L. Hunter, the administrator of Six Oaks Cemetery. Six Oaks

Cemetery was owned by the Fraser Family Trust, and Wife managed the property during the marriage. Prior to the final hearing, the cemetery was sold, and Wife received a portion of the proceeds. At trial, Husband attempted to call Hunter to the stand in order to show that the money Wife made from the sale was either (a) non-marital property in which Husband had a special equity interest because of the contributions he made to the cemetery, or (b) marital property because it stemmed from the work Wife performed during the marriage. Wife objected to Hunter testifying about the cemetery because Hunter was listed as a witness who would testify about "a church he was involved with with Mary Fraser, . . . intra-family relationships, [and] inquisition of his wife on [an] EMS call." Husband argued Hunter's testimony would fall within the scope of describing intra-family relationships. The family court sustained Wife's objection, but allowed Husband to proffer the testimony. On appeal, Husband argues the family court erred in excluding Hunter's testimony. We disagree.

The proffered testimony by Hunter concerned the gross receipts of the cemetery and Husband's efforts in improving the cemetery. Hunter's testimony did not describe any interaction between Husband and Wife or between any other family members. We do not see how this testimony comes within the purview of intra-family relationships.

Intertwined with his argument that the proffered testimony should have been considered, Husband also asserts that the family court erred in failing to assign to him a special equity in the cemetery. We disagree.

Generally, any increase in value of nonmarital property is also nonmarital property. S.C. Code Ann. § 20-7-473(5) (Supp. 2003). However, a non-owner spouse has a special equity interest in any increase in value of non-marital property resulting from that spouse's material contribution. See Murray v. Murray, 312 S.C. 154, 159, 439 S.E.2d 312, 316 (Ct. App. 1993). See also S.C. Code Ann. § 20-7-471 (Supp. 2003).

We find Husband failed to prove he made material contributions to the appreciation of the Six Oaks Cemetery. While he testified regarding the use of his landscaping designs and his physical labor at the cemetery, there is no testimony concerning any actual appreciation in value. Additionally, Wife testified Husband was paid for work at the cemetery and that his work amounted to very little time actually spent. See Webber v. Webber, 285 S.C. 425, 427-28, 330 S.E.2d 79, 81 (Ct. App. 1985) (stating that contributions must be material before court will award special equity and review of decision is for abuse of discretion). Therefore, we cannot say the family court abused its discretion by refusing to grant Husband a special equity interest in the proceeds from the sale of the cemetery.

11. Whether the family court erred in awarding Wife $4,725.25 in attorneys' fees for the contempt action

After the conclusion of the trial, Wife brought a contempt action against Husband for failing to pay child support and medical expenses in a timely manner. During the hearing, Wife's attorneys submitted an affidavit of attorneys' fees for $2,635.35 that had accrued in connection with the contempt action. This amount included estimated fees of $875 for the appearance of Mrs. Rosen, one of Wife's attorneys. However, due to an illness, Mrs. Rosen did not actually attend the hearing. Instead, Wife's other attorney, Mr. Rosen, covered the hearing. Mr. Rosen charged $1,125 for his appearance at the hearing.

Husband requested a continuation of the hearing in order to examine Mrs. Rosen regarding the reasonableness of her fees. The family court permitted the continuance and allowed Wife's attorneys to submit supplemental affidavits of attorneys' fees, which included fees incurred by Mr. Rosen, Mrs. Rosen, and a paralegal for their appearance at the second hearing, totaling $8,019. After the second hearing, the family court awarded Wife $4,725.25 in attorneys' fees. This amount included the fees incurred by Mr. Rosen for his

appearance at the first hearing ($2,885.25[9]) and four hours of fees for Mr. Rosen, Mrs. Rosen, and the paralegal ($1,860) for their appearance at the second hearing. Husband contends this was error, and we agree.

Initially, we note that Husband was not at fault for Mrs. Rosen's failure to appear at the first hearing. Furthermore, he should not be penalized for exercising his right to question the reasonableness and validity of Mrs. Rosen's charges. See Green v. Durham Life Ins. Co., 287 S.C. 197, 199, 336 S.E.2d 478, 480 (1985) (affirming the trial court's decision not to award attorney's fees because respondent should not be penalized for litigating a meritorious issue). Thus, although the award of attorney's fees is within the discretion of the family court,[10] we reverse the award to the extent that it reimbursed Wife's attorneys for their fees from the second hearing. It was an abuse of discretion to penalize Husband for exercising his right to cross-examine Mrs. Rosen. Husband is therefore obligated to pay $2,885.25 rather than $4,725.25 for the fees incurred by Wife's attorneys for the contempt action.

12. Whether the family court erred in requiring Husband to pay uncovered medicals within fourteen days of date of mailing or faxing

The final order of the family court requires Husband to pay Wife his portion of the uncovered medical expenses within fourteen days of receiving an itemization by Wife. After Husband failed to make timely payments, the family court found Husband in contempt and ordered him to provide Wife with a facsimile number to which she

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[9] In calculating the fees incurred by Mr. Rosen at the first hearing, the family court subtracted the amount estimated by Mrs. Rosen's appearance at the hearing, $875, from the total submitted in the affidavit, $2,635.25, and added Mr. Rosen's fee for his appearance, $1,125, totaling $2,885.25. Added to this was the $1,860 in attorneys' and paralegal fees. Although this sum comes to $4,745.25, the family court awarded $4,725.25.

[10] Lindsay v. Lindsay, 328 S.C. 329, 345-46, 491 S.E.2d 583, 592 (Ct. App. 1997).

could send notice of expenses. If Husband failed to provide a number, Wife could serve notice by certified mail. In either event, the court ordered Husband to pay Wife his portion of the uncovered medical expenses within fourteen days from which the notice was faxed or mailed. Husband contends this was error. We agree.

Wife has not submitted any evidence that this short time period is necessary to ensure a timely payment of the bills or continued treatment of the child. Therefore, we find fourteen days from the time notice is faxed or mailed to be an unreasonably short period of time given the nature and potential amount of the child's uncovered medical expenses. See Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992) (explaining that, in appeals from the family court, the appellate court may find facts in accordance with its own view of the preponderance of the evidence). Instead, we find it equitable to both parties for Husband to pay Wife his portion of the uncovered medical expenses within thirty days of the date notice is faxed or mailed.

13. Whether the family court erred in excluding testimony of Brian Clark

Prior to trial, Wife moved to hold Husband in contempt for discovery abuses. The family court found Husband had failed to comply with discovery and imposed sanctions on Husband by awarding Wife $10,000 in attorneys' fees. At trial, Husband sought to introduce testimony from Brian Clark and certain exhibits "to clear the air on compliance with discovery requests." The family court excluded the testimony, stating the issue had already been ruled upon. On appeal, Husband argues the testimony was relevant to show that he had fully complied with discovery. Husband makes no argument regarding this issue and cites no authority.[11] Therefore, we find the issue is

[11] In his reply brief, Husband asserts that this argument is not abandoned on appeal because it is intimately intertwined with issue number fifteen on appeal, which was adequately argued and briefed. Even if this issue is related to issue fifteen, Husband has failed to make any reference to the relevancy of Brian Clark's testimony or exhibits in

abandoned on appeal. See Glasscock, Inc. v. Fidelity and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

14. Whether the family court erred in awarding $10,000 attorneys' fees due to abuse in discovery.

As explained above, the family court awarded Wife $10,000 in attorneys' fees after finding Husband failed to comply with discovery. Husband argues this was error. We find this issue was not timely appealed.

An order finding a party in contempt is immediately appealable. See Hooper v. Rockwell, 334 S.C. 281, 291, 513 S.E.2d 358, 364 (1999). Because the order was not appealed within the thirty-day limit under Rule 203(b)(3), SCACR, we dismiss this issue on appeal. See Rule 203(d)(3), SCACR ("If the notice is not timely filed or the filing fee is not paid in full, the appeal shall be dismissed, and shall not be reinstated except as provided by Rule 231.").

15. Whether the family court judge erred in failing to recuse himself

Husband argues that the family court judge erred in failing to recuse himself from the hearing on Wife's action for contempt following the trial. We disagree.

> The Code of Judicial Conduct requires a judge to 'disqualify himself in a proceeding in which his impartiality might reasonably be questioned.' Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR. A judge must exercise sound judicial discretion in

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issue fifteen. Further, Husband cites to no authority with respect to the relevancy of Brian Clark's testimony or exhibits in issue fifteen.

> determining whether his impartiality might reasonably be questioned. Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias. Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature.

Parker v. Shecut, 340 S.C. 460, 497, 531 S.E.2d 546, 566 (Ct. App. 2000), rev'd on other grounds by 349 S.C. 226, 562 S.E.2d 620 (2002).

Husband has failed to present any evidence of bias by the family court judge. It is not sufficient for Husband to assert bias in the contempt action because the same judge presided at the final hearing and ruled against him. See Mallett v. Mallett, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996) ("The fact a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings."). Therefore, we find no error in the family court judge's failure to recuse himself.

B. WIFE'S CROSS-APPEAL

1. Whether the family court's equitable division of the property was erroneous.

Wife argues that the family court judge's equitable division of marital property was tainted because he failed to address the fifteen factors listed in section 20-7-472 of the South Carolina Code (Supp. 2003). We disagree.

Section 20-7-472 sets forth factors the family court should consider when equitably dividing a marital estate and vests the family court with discretion to decide what weight to assign each factor. Jenkins v. Jenkins, 345 S.C. 88, 100, 545 S.E.2d 531,537 (Ct. App. 2001). "This court will affirm the family court judge if it can be

determined that the judge addressed the factors under section 20-7-472 sufficiently for us to conclude he was cognizant of the statutory factors." Id.

In this case, the family court judge specifically stated: "I have applied the factors listed in § 20-7-472 and relevant case law to divide the property . . . ." Therefore, we are satisfied that the judge was cognizant of the fifteen statutory factors set forth in section 20-7-472. Accordingly, we affirm the family court's division of marital property.

2. Whether the family court erred in excluding a real estate lot

Wife argues the family court erred in excluding from the final order a parcel of land that was marital property. The specific lot allegedly excluded was "lot A 39-4," part of the marital property known as the Boozer-Arnal lots. We find this issue is not preserved.

At trial, Wife offered into evidence appraised values of the "Boozer-Arnal lots." However, the appraiser mistakenly appraised "lot A 38-4," a lot that Husband never owned, instead of "lot A 39-4," which Husband owned. In the final order, the family court identifies the marital property to include the Boozer-Arnal property, but specifically excludes the lot improperly appraised by Wife's expert, lot A 38-4. In valuing these lots, the final order accepts the values of Wife's expert. Because Wife's expert did not value lot A 39-4, Wife did not receive any of the lot's value, even though it was deemed marital property.

After the family court issued its order, Wife did not file a Rule 59(e) motion raising the issue of the value of lot A 39-4 to the family court judge. Thus, this issue is not preserved for appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998); Halbersberg v. Berry, 302 S.C. 97, 103, 394 S.E.2d 7, 12 (1990) (finding the omission of the master in equity not preserved because the party did not bring the omission to the attention of the master through a proper motion).

CONCLUSION

We affirm the family court's order with respect to Wife's income, award of pre-trial guardian fees, equitable division, valuation of the Boozer-Arnal lots, and award of $10,000 in attorneys' fees on Wife's action for contempt. We also affirm the family court's exclusion of testimony by John. L. Hunter regarding Six Oaks Cemetery and Brian Clark regarding discovery compliance. Further, we affirm the family court judge's decision not to recuse himself from the contempt action following the final hearing.

We reverse the family court's decision to impute income to Husband and assign Husband income in the amount of $59,010 annually. We also reverse the family court's requirement that Husband pay all of the guardian's fees incurred during trial and find the parties should bear that expense equally. Further, we reverse the family court's exclusion of the trust corpuses; denial of Easter and summer visitation; award of $65,000 in attorneys' fees to Wife; award of $4,725.25 in attorneys' fees on the post-trial contempt action; and requirement that Husband pay uncovered medical expenses within fourteen days, finding thirty days to be more equitable. Finally, we reverse the award of $65,000 in attorneys' fees to Wife and order each party to bear their own attorneys' fees.

We remand the issues of child support, uncovered medical bills, Easter and summer visitation, and reimbursement for Husband's trips to Brevard.

AFFIRMED in part, REVERSED in part, and REMANDED.

HUFF and KITTREDGE, JJ., concur.