The Supreme Court of South Carolina

In the Matter of Karl P. Jacobsen, Respondent.

ORDER

By order dated March 18, 2004, respondent was placed on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR, and C. Jennalyn Dalrymple, Esquire, was appointed attorney to protect clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. The Office of Disciplinary Counsel (ODC) has now filed a petition for appointment of additional attorneys to protect clients' interests. We grant the petition.

IT IS ORDERED that Gina Rossi McMaster, Esquire, and William Chandler McMaster, III, Esquire, are hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Gina Rossi McMaster, Esquire, and William Chandler McMaster, III, Esquire, shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Gina Rossi McMaster, Esquire, and William Chandler McMaster, III, Esquire, may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office

account(s) respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Gina Rossi McMaster, Esquire, and William Chandler McMaster, III, have been duly appointed by this Court.

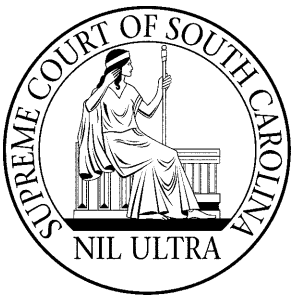
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that, Gina Rossi McMaster, Esquire, and William Chandler McMaster, III, Esquire, have been duly appointed by this Court and have the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to the McMasters' office.

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

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

Columbia, South Carolina

March 24, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

March 29, 2004

ADVANCE SHEET NO. 12

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

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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frances Adena Fuller,
individually and as personal
representative of the Estate of
Robert Ray Fuller, deceased, Respondent,

v.

Gerald E. Blanchard, Appellant.

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 3763
Submitted December 8, 2004 – Filed March 22, 2004

AFFIRMED

Charles E. Carpenter, Jr., George C. Beighley and S. Elizabeth Brosnan, all of Columbia, for Appellant.

Charles L. Henshaw, of Columbia, for Respondent.

GOOLSBY, J.: Frances Adena Fuller ("Mrs. Fuller") brought wrongful death, survival, and loss of consortium claims against Dr. Gerald E.

Blanchard, alleging he committed medical malpractice in negligently failing to advise her husband, Robert ("Mr. Fuller"), of the adverse results of a cancer screening test. Dr. Blanchard moved for summary judgment on his defenses that the action was barred as a matter of law by the exclusive remedy provision of the South Carolina Workers' Compensation Act and because he owed no duty of care to Mr. Fuller. The circuit court granted Mrs. Fuller's cross-motion for summary judgment on the two defenses, and Dr. Blanchard appeals. We affirm.[1]

FACTS

Mr. Fuller worked as a chemical engineer at Westinghouse. In 1996, Westinghouse offered a Prostate Specific Antigen (PSA) test to its male employees as part of the blood work done for their required annual physical examinations. The usual procedure was for the employee to have blood drawn for lab testing and then report to the physician for a physical examination a week to ten days later. At that time, the physician would review the test results, report them to the employee, and give the employee a copy. An abnormal PSA result indicated that the patient's prostate gland could be diseased and that the patient needed to seek further treatment.

Pursuant to an agreement between Westinghouse and Doctors Care, Dr. Blanchard, an employee of Doctors Care, performed physical examinations for the employees of Westinghouse and was on site twice a week to perform these services for a total of about four hours each week. Dr. Blanchard and a nurse, who was a full-time Westinghouse employee, received all blood test results and reviewed them before Dr. Blanchard conducted the physical examinations. Dr. Blanchard's established procedure was to report to each employee any abnormal test results, give the employee one copy of the lab work, and recommend that the employee see his family physician.

Westinghouse employees saw Dr. Blanchard only for routine employment physicals or for examination prior to returning to work after surgery or illness. On average, he saw between ten and fifteen employees

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

during each session at Westinghouse. Dr. Blanchard was paid by Doctors Care and did not receive any payment for his services from Westinghouse.

In October 1996, Mr. Fuller's blood was drawn and sent for lab testing, which included a PSA test. The report showed a 5.0 PSA level. Dr. Blanchard stated that upon seeing a PSA level of 5.0 he routinely would have recommended to the employee that he consult his personal physician. He could not, however, specifically recall whether he informed Mr. Fuller of the elevated PSA level or advised him to see his family physician. There was no notation in the medical chart completed by Dr. Blanchard that Mr. Fuller was ever informed of the elevated PSA level.

In August 1997, Mr. Fuller again had a PSA test performed as part of his annual physical at Westinghouse. This time Mr. Fuller's PSA level was more than double its previous reading. Dr. Blanchard advised Mr. Fuller that he should see his family physician. Mr. Fuller sought further treatment. In September 1997, his urologist diagnosed him with prostate cancer and informed him that his treatment options were limited because of the progression of the cancer. Mr. Fuller died from prostate cancer on November 25, 1998.

Mrs. Fuller brought this action against Dr. Blanchard alleging medical negligence in the wrongful death of her husband. Dr. Blanchard answered and asserted as affirmative defenses that the action was barred as a matter of law because (1) the court did not have jurisdiction as the Workers' Compensation Act was the exclusive remedy, and (2) he was acting as a company physician and therefore did not have a physician-patient relationship with Mr. Fuller giving rise to a duty of care. Mrs. Fuller and Dr. Blanchard filed cross-motions for summary judgment.

The circuit court granted summary judgment to Mrs. Fuller on Dr. Blanchard's two defenses. The court found Dr. Blanchard was an independent contractor, not an employee of Westinghouse, and that Mr. Fuller's death was not a work-related injury. The court additionally found that Dr. Blanchard owed a duty of care, although limited, to Mr. Fuller.

LAW/ANALYSIS

I.

Dr. Blanchard first contends the circuit court erred in granting summary judgment to Mrs. Fuller on his defense that he was immune from suit because any medical malpractice claim was barred as a matter of law by the exclusivity provision of the Workers' Compensation Act. We disagree.

The Workers' Compensation Act is the exclusive remedy against an employer for an employee's work-related accident or injury.[2] The Act's exclusivity provision provides in relevant part as follows:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.[3]

"The exclusive remedy doctrine was enacted to balance the relative ease with which the employee can recover under the Act: the employee gets swift, sure compensation, and the employer receives immunity from tort actions by the employee."[4]

Further, as a general rule, this "immunity is conferred not only on the direct employer, but also on co-employees."[5] Thus, an employee negligently

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[2] Strickland v. Galloway, 348 S.C. 644, 560 S.E.2d 448 (Ct. App. 2002).

[3] S.C. Code Ann. § 42-1-540 (1985) (emphasis added).

[4] Strickland, 348 S.C. at 646-47, 560 S.E.2d at 449.

injured by a co-employee conducting the employer's business may not hold the co-employee personally liable in tort, but must instead rely upon the remedies provided by the Workers' Compensation Act.[6]

Such immunity does not extend, however, to third-party tortfeasors who injure an employee acting within the course and scope of his employment; in such cases, the employee may file a claim for workers' compensation benefits for the injury and may also bring an action against the third party. Any recovery against the third party, however, is subject to subrogation.[7]

"[I]n general, treating physicians, as third parties to the employer-employee relationship, do not fall within the immunity provisions of the Workers' Compensation Act and are subject to suit."[8]

In the case before us, the circuit court found Dr. Blanchard was not entitled to blanket immunity under the Workers' Compensation Act because he provided his services to Westinghouse as an independent contractor, not its employee; further, even if Dr. Blanchard were a co-employee, Mr. Fuller's death from cancer was not work-related.

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[5] Id. at 647, 560 S.E.2d at 449; see also S.C. Code Ann. § 42-5-10 (1985) ("Every employer who accepts the compensation provisions of this Title shall secure the payment of compensation to his employees . . . . While such security remains in force he or those conducting his business shall only be liable to any employee . . . to the extent and in the manner specified in this Title." (emphasis added)).

[6] Strickland, 348 S.C. at 647, 560 S.E.2d at 449.

[7] See S.C. Code Ann. § 42-1-560 (1985) (providing for remedies to be obtained from third parties).

[8] Tatum v. Med. Univ. of S.C., 346 S.C. 194, 202, 552 S.E.2d 18, 22 (2001).

On appeal, Dr. Blanchard contends the circuit court erred in granting summary judgment to Mrs. Fuller on his defense that her claim was barred by the exclusive remedy provision of the Workers' Compensation Act. Dr. Blanchard asserts that he and Mr. Fuller were co-employees and that Mr. Fuller's death was a work-related injury.

"Whether or not an employer-employee relationship exists is a jurisdictional question."[9] When the issue on appeal involves jurisdiction, we can take our own view of the preponderance of the evidence.[10]

"Whether a worker is an employee or independent contractor is a fact-specific matter resolved by applying certain established principles."[11] Our supreme court has stated the general test concerns the extent of the employer's right of control:

> "The general test applied is that of control by the employer. It is not the actual control then exercised, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment."[12]

"There are four elements which determine the right of control: 1) direct evidence of the right or exercise of control; 2) furnishing of equipment; 3) right to fire; and 4) method of payment."[13]

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[9] Nelson v. Yellow Cab Co., 349 S.C. 589, 594, 564 S.E.2d 110, 112 (2002). For additional background information, see 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 112.02(1) to (4) (2003).

[10] Nelson, 349 S.C. at 594, 564 S.E.2d at 112.

[11] Id.

[12] Id. at 594, 564 S.E.2d at 112-13 (quoting Young v. Warr, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969)).

[13] Id. at 594, 564 S.E.2d at 113.

We agree with the circuit court's determination that Dr. Blanchard provided services to Westinghouse not as its employee, but as an independent contractor. As to the evidence of the right of control and the furnishing of equipment, although Westinghouse apparently established Dr. Blanchard would be available on its premises four hours per week and provided a Westinghouse employee to assist as his nurse, the only evidence in the record indicates that Dr. Blanchard scheduled employee visits, conducted a personal review of the test results, and made his recommendations without any direct supervision or instruction from Westinghouse, as such reviews came within the scope of his own professional expertise. Regarding the right to fire and the method of payment, as noted by the circuit court, Dr. Blanchard was not employed directly by Westinghouse; rather, he was on site four hours a week to provide services pursuant to a contractual agreement Westinghouse had with Doctors Care. It was undisputed that Dr. Blanchard was not on Westinghouse's payroll and received no compensation whatsoever from Westinghouse. Rather, he was paid directly by Doctors Care for his professional services. Dr. Blanchard testified he was not involved in negotiating the contract Doctors Care had with Westinghouse and he was unaware of its terms. Finally, there is no evidence in the record that Westinghouse could have fired Dr. Blanchard.

In Garcia v. Iserson, relied upon by Dr. Blanchard, the Court of Appeals of New York held "that the claim of an employee for alleged malpractice [by] a physician whose professional services were made available to the employee at the employer's expense and on its premises [fell] within the scope of the Workmen's Compensation Law."[14] In Garcia, a physician provided by the employer, Imperial Paper Box Corp., on the employer's premises allegedly gave an Imperial employee an injection in a negligent manner. The court explained its reasoning as follows: "There was here a professional service made available by the employer to its employees; the services were not available generally to members of the public; [and the] plaintiff obtained the services not as a member of the public but only in

[14] 309 N.E.2d 420, 421 (N.Y. 1974).

consequence of his employment."[15] The court concluded the plaintiff's exclusive remedy was workers' compensation rather than a common-law action for malpractice because the injury arose out of and in the course of the plaintiff's employment as a result of the alleged negligence of another in the same employ.[16]

We find Garcia distinguishable in a major respect - in Garcia it was undisputed that the physician was a co-employee of the injured worker. The court noted that the doctor was employed by Imperial at a weekly salary to give medical care to its employees, that "[t]he usual payroll deductions were made from the doctor's salary check and he was covered under Imperial's medical plan and its workmen's compensation insurance policy."[17]

The other cases cited by Dr. Blanchard are also distinguishable on this basis.[18]

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[15] Id.

[16] Id. at 422.
[17] Id. at 421.

[18] See, e.g., Scott v. Wolf Creek Nuclear Operating Corp., 928 P.2d 109, 112 (Kan. Ct. App. 1996) (finding, in a case where an employee was allegedly negligently treated for a heart attack by a physician who worked for Wolf Creek, that there was a causal connection between his employment and his negligent medical treatment; the court stated: "Scott received treatment because he was an employee of Wolf Creek. The physician's assistants who treated Scott were employees of Wolf Creek whose purpose was to provide medical treatment to Wolf Creek employees for both occupational and nonoccupational diseases and injuries. In other words, Scott would not have been equally exposed to the risk of negligent medical treatment by Wolf Creek physician's assistants apart from his employment at Wolf Creek."); Marange v. Slivinski, 684 N.Y.S.2d 199, 200 (App. Div. 1999) (holding the fellow-employee rule of the workers' compensation exclusive remedy provision served to bar a plaintiff's malpractice action against a company physician, who was employed as a corporate medical director, for his alleged

Accordingly, we find the circuit court did not err in finding Dr. Blanchard was an independent contractor and not a co-employee of Mr. Fuller; therefore, Mrs. Fuller's malpractice claim is not barred by the exclusive remedy provision of the Workers' Compensation Act.[19]

II.

Dr. Blanchard additionally asserts the circuit court erred in granting summary judgment to Mrs. Fuller on his defense that he owed no duty of care to Mr. Fuller as a matter of law because there never was a physician-patient relationship. We disagree.

The circuit court ruled Dr. Blanchard "owe[d] a duty of care, albeit limited," to Mr. Fuller. The court concluded Mrs. Fuller was "entitled to go forward . . . [on] allegations that the defendant failed to timely advise an employee of abnormal medical findings and failed to recommend follow-up with another physician for testing, diagnosis or treatment." The court noted that "[t]he parties stipulated that [Mrs. Fuller] will be able to produce expert testimony that the defendant deviated from standard medical care."

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negligent failure to diagnose cancer in the plaintiff's wife, it being undisputed that the wife and the physician "were co-employees . . . at all times relevant to this action"); Franke v. Durkee, 413 N.W.2d 667, 669 (Wis. Ct. App. 1987) (finding workers' compensation was the exclusive remedy for the alleged negligence of an employer's in-house medical staff in a malpractice action brought by the surviving spouse of an employee against a company doctor for his negligent failure to diagnose the employee's nonwork-related lung tumor; the court noted the surviving spouse had conceded that her husband and the physician in question were co-employees).

[19] Having affirmed the circuit court's determination on this point, we need not address Dr. Blanchard's additional argument that the circuit court erred in also finding this was not a work-related incident. Even assuming the incident was work-related, as an independent contractor, Dr. Blanchard would still be subject to suit because he would simply be treated as a third-party tortfeasor.

We find there is evidence to support the circuit court's ruling since there was an established protocol, which Dr. Blanchard claimed to follow, which required him to inform employees of any adverse test results and to advise them to seek additional medical treatment as necessary. In this case, irrespective of Dr. Blanchard's status as either a company doctor or an independent contractor, Dr. Blanchard failed to inform Mr. Fuller of the adverse results of a prostate cancer screening test and to advise him to seek follow-up care from another physician. Due to this omission, Mr. Fuller's PSA level had doubled by the time the test was again performed, and Mr. Fuller died from prostate cancer.

We note that, ordinarily, "[t]he existence of a physician-patient relationship is a question of fact for the jury."[20] Dr. Blanchard does not contend that questions of fact remain in this case, so we do not consider that point here. Rather, Dr. Blanchard's only contention is that, based on the facts

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[20] Tumblin v. Ball-Incon Glass Packaging Corp., 324 S.C. 359, 365, 478 S.E.2d 81, 85 (Ct. App. 1996). In Tumblin we observed that a physician who has been retained by a third party to conduct an examination normally is not subject to a malpractice claim by the individual examined unless the physician offered or intended to treat, care for, or otherwise benefit the individual or injured the individual in the course of the examination. Id. at 365-66, 478 S.E.2d at 85. In the current appeal, Dr. Blanchard did not perform the screening tests merely for the benefit of Westinghouse, the employer. Rather, Dr. Blanchard acknowledged that his practice was to inform the Westinghouse employees of any adverse results from the cancer-screening tests and to advise them of the need to seek further evaluation when necessary. We believe this constitutes a benefit to the employee and care that would fall within the exceptions delineated in Tumblin.

We note that in Tumblin, we held that a physician fulfilled any responsibility he had to an employee by informing her of an elevated blood pressure reading and suggesting that she follow up with her private doctor. Id. at 367, 478 S.E.2d at 86. In contrast, in the case before us Dr. Blanchard allegedly failed to inform Mr. Fuller of the adverse results of a cancer-screening test and to advise him to seek further treatment as necessary.

of this case as they are, the court committed an error of law in granting summary judgment to Mrs. Fuller; he maintains his defense should have prevailed. Consequently, we find no basis on which to disturb the court's ruling.[21]

AFFIRMED.

CURETON, A.J., concurs. KITTREDGE, J., concurs in a separate opinion.

KITTREDGE, J.: I concur. However, I write separately to express my concern with the jurisdiction of this court to entertain this appeal. In my

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[21] This case concerned cross-motions for summary judgment regarding two of Dr. Blanchard's defenses; the circuit court simultaneously granted Mrs. Fuller's motion for summary judgment and denied Dr. Blanchard's motion. On appeal, the parties have blurred the distinction between the two motions. Because the granting of a motion for summary judgment is appealable while the denial of a motion for summary judgment is not, we are addressing Dr. Blanchard's arguments to the extent he appears to challenge the circuit court's grant of summary judgment to Mrs. Fuller as an error of law based on the facts of the case, although, as stated, there has been an overlapping of these issues due to the procedural posture of the case. To the extent Dr. Blanchard appears to argue the court should have granted his motion for summary judgment, the denial of summary judgment is not properly before us and we do not address it. See Silverman v. Campbell, 326 S.C. 208, 486 S.E.2d 1 (1997) (reiterating that the denial of a motion for summary judgment is not appealable, even after final judgment); Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994) (stating the denial of a motion for summary judgment is not appealable). Neither party makes this distinction in the briefs and Mrs. Fuller does not assert that Dr. Blanchard is only arguing about the denial of his own motion for summary judgment, so we have addressed the issues in the manner outlined above.

judgment, Appellant's challenge on appeal is limited to the circuit court's *failure to grant him summary judgment.*[22] The refusal to grant summary judgment is not appealable. Olson v. Faculty House of Carolina, 354 S.C. 161, 580 S.E.2d 440 (2003); Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994).

Pursuant to cross-motions for summary judgment, the circuit court granted Respondent's motion. On appeal, Appellant claims error solely on the basis that the underlying action was barred as a matter of law by the exclusive remedy provision of the Workers' Compensation Act and because he owed no duty of care to Respondent's husband. It is significant to note that these issues, as recognized by the majority, are predominantly fact-driven. See Nelson v. Yellow Cab Co., 349 S.C. 589, 594, 564 S.E.2d 110, 112 (2002) ("Whether a worker is an employee or independent contractor is a fact-specific matter resolved by applying certain established principles."); Tumblin v. Ball-Incon Glass Packaging Corp., 324 S.C. 359, 365, 478 S.E.2d 81, 85 (Ct. App. 1996) ("The existence of a physician-patient relationship is a question of fact for the jury."). The final brief and reply brief of Appellant make no claim that there exists a genuine issue as to any material fact. As the majority correctly concludes, Appellant "does not contend that questions of fact remain in this case." In reaching the merits of this appeal, the majority is essentially rehearing the cross-motions for summary judgment. I believe we have neither the authority to reconsider the denial of Appellant's summary judgment motion nor the authority to grant him judgment as a matter of law on the fact-specific issues presented.

Thus, the issue as presented by Appellant is the functional equivalent of an appeal of the refusal to grant summary judgment. I would decline to address the merits and dismiss the appeal.

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[22] This is not an appeal from a merits hearing. The appeal comes to us in the posture of a grant of summary judgment. While Appellant's final brief and reply brief purport to appeal from the circuit court's grant of summary judgment in favor of Respondent, his argument is focused solely on the lower court's failure to grant him judgment as a matter of law.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Louie D. Hawkins, individually and d/b/a Servicemaster of Greenville, Servicemaster of Greenville, LLC, and Dixie P. Hawkins, **Appellants,**

v.

City of Greenville, **Respondent.**

Appeal From Greenville County
Joseph J. Watson, Circuit Court Judge

Opinion No. 3764
Submitted February 11, 2004 – Filed March 22, 2004

AFFIRMED

Robert C. Childs, III, of Greenville, for Appellants.

W. Howard Boyd, Jr., Luanne L. Runge and Fred W. Suggs, III, all of Greenville, for Respondent.

ANDERSON, J.: Louie D. Hawkins brought this action, claiming the city of Greenville ("City") improperly and negligently designed and maintained its municipal drainage system in the area where his business was located. He alleged the City's malfeasance caused his property to flood after a rainstorm in 1997. The trial court granted summary judgment in favor of the City on all of Hawkins' claims. We affirm.[1]

FACTS/ PROCEDURAL BACKGROUND

On July 24, 1997, Hawkins' business, Servicemaster of Greenville, was flooded during a heavy rainfall, causing substantial damage to the business and surrounding property. Hawkins blamed the City for the damage, arguing the flooding was caused by the City's neglect in designing and maintaining its stormwater drainage system. Accordingly, he brought the present action asserting various causes of action stemming from the City's alleged acts and failures to act.

I. The Servicemaster Property and Surrounding Drainage System

The Servicemaster property is located in a low-lying area on the east side of Greenville. This part of Greenville has been heavily developed with retail businesses and other large commercial developments.

The immediate area surrounding the Servicemaster property forms a 3.24-square-mile stormwater basin. Rainwater falling into the basin drains downhill into nearby Laurel Creek. Over the years, the City and private developers made several improvements to the drainage system in the basin. When Hawkins moved Servicemaster to its Haywood Road location, drainage around the property was handled primarily by two ninety-six-inch pipes installed in Laurel Creek to expand the creek's ability to effectively handle runoff in the area. After a severe storm in 1991 caused flooding in the area, the City installed an additional large, elliptical arched pipe in Laurel Creek to further increase the creek's stormwater capacity. In early July 1997,

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

the City installed "riprap" along the banks of the creek to stem erosion that had occurred.[2]

II. The 1991 Flood, Lawsuit and Settlement

A heavy rainstorm in July 1991 caused the Servicemaster property and surrounding area to flood. The Servicemaster property suffered substantial damage when the excess runoff flooded into the building, bringing mud and other debris. As in the present case, Hawkins brought suit against the City, claiming its actions caused the flooding. Hawkins specifically alleged the City was negligent "in failing to design" and "maintain a reasonably adequate surface water drainage system" and "in failing to properly supervise the surface water drainage system to ensure adequate flow of water during periods of inc[l]ement weather."

The case was settled in 1994. The City paid Hawkins $4,000 in exchange for a "full, complete and final release of all damages arising out of the design, construction, maintenance, and operation of the water drainage system on or adjacent to Bryland [sic] Drive." This release was executed in March 1994. It provides:

> [Servicemaster] does hereby release, relieve and forever acquit the City of Greenville, South Carolina, a municipal corporation, their agents, employees, officers, successors, and assigns from any and all liability arising out of or in any way connected with the water and mud damage to [Hawkins'] place of business located at 1 Byrdland Drive which occurred on or about July 30, 1991 and it is the intention in executing this Release to forever discharge the City of Greenville from any and all claims, demands, actions or causes of action which may exist, known or unknown, of any and all damages, past, present and future, in any way connected with or arising out of the aforesaid damages.
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> . . . .

[2] "Riprap" is an industry term for piles of loose stone or angular boulders built seaward of the shoreline to prevent erosion by waves or currents.

> It is acknowledged and understood that this is a full, complete and final release of all damages arising out of the design, construction, maintenance, and operation of the water drainage system on or adjacent to Bryland [sic] Drive, that no future or further payments will be paid as a result thereof and that the persons and corporations in whose favor this Release runs are herewith fully finally and forever discharged from any and all liability with respect to the aforementioned property.

III. The 1997 Flood and the Present Action

On July 24, 1997, a record amount of rain fell in and around Greenville in a short period of time.[3] Stormwater draining into Laurel Creek overwhelmed the creek's capacity, causing water to flood onto the Servicemaster property and several nearby businesses.

In July 1999, Hawkins brought the present action against the City, alleging causes of action for: (1) inverse condemnation, (2) negligence in the City's design and maintenance of its stormwater drainage system, (3) violation of South Carolina Code section 5-31-450, (4) trespass, (5) conversion, and (6) nuisance. Finding no genuine issue of material fact with respect to any of these claims, the trial court granted the City's motion for summary judgment.

STANDARD OF REVIEW

A trial court should grant a motion for summary judgment when "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; accord Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001); Wells v.

[3] Testimony was offered at the summary judgment hearing that the National Climatic Data Center recorded that 2.51 inches fell in Greenville during a one-hour period on July 24, 1997.

City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998); see also Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.").

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." McNair v. Rainsford, 330 S.C. 332, 342, 499 S.E.2d 488, 493 (Ct. App. 1998) (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991); Standard Fire Ins. Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990)). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." Lanham v. Blue Cross & Blue Shield of South Carolina, Inc., 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002) (citing Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)); accord Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Lanham, 349 S.C. at 362, 563 S.E.2d at 333 (citing Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000)).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." Hall v. Fedor, 349 S.C. 169, 173, 561 S.E.2d 654, 656 (Ct. App. 2002) (citing Young v. South Carolina Dep't of Corr., 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999)). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Id. at 173-74, 561 S.E.2d at 656. "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Murray v. Holnam, Inc., 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct. App. 2001) (citing Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 523 S.E.2d 795 (1999)).

In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court: Summary judgment is proper when "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; accord Baughman, 306 S.C. at 114-15, 410 S.E.2d at 545; Murray, 344 S.C. at 138, 542 S.E.2d at 747 (citing Brockbank, 341 S.C. 372, 534 S.E.2d 688; Wells, 331 S.C. at 301, 501 S.E.2d at 749).

LAW/ANALYSIS

Hawkins contends genuine issues of fact exist for each of his claims that should have compelled the trial court to deny the City's motion for summary judgment. We disagree.

I. Inverse Condemnation

Hawkins first argues the trial court erred in granting summary judgment to the City on his inverse condemnation claim, contending he was deprived of his full rights to the Servicemaster property without just compensation as a result of the City's design and maintenance of the drainage system. We disagree.

An action for inverse condemnation is appropriate where the government takes private property for public use. Quality Towing Inc. v. City of Myrtle Beach, 340 S.C. 29, 38, 530 S.E.2d 369, 373 (2000). Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. Horry County v. Ins. Reserve Fund, 344 S.C. 493, 498, 544 S.E.2d 637, 640 (Ct. App. 2001). While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. Horry County, 344 S.C. at 498, 544 S.E.2d at 640. "The term 'inverse condemnation' describes an action grounded, not on statutory condemnation power, but on the constitutional

proscription against the taking or damaging of property for public use without just compensation." Vicks v. South Carolina Dep't of Transp., 347 S.C. 470, 480, 556 S.E.2d 693, 698 (Ct. App. 2001). "One basic difference between condemnation and inverse condemnation is that in condemnation proceedings, the governmental entity is the moving party, whereas, in inverse condemnation, the property owner is the moving party." South Carolina State Highway Dep't v. Moody, 267 S.C. 130, 136, 226 S.E.2d 423, 425 (1976) (quoting 27 Am.Jur.2d Eminent Domain § 829 (1996)). The action is not based on tort, but on the constitutional prohibition of the taking of property without compensation. Horry County, 344 S.C. at 498, 544 S.E.2d at 640.

An inverse condemnation occurs when a government agency commits a taking of private property without exercising its formal powers of eminent domain. To establish an inverse condemnation, a plaintiff must show: "(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence." Marietta Garage, Inc. v. South Carolina Dep't of Pub. Safety, 352 S.C. 95, 101, 572 S.E.2d 306, 308 (Ct. App. 2002); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct. App. 1992).

In the present case, Hawkins has failed to allege any affirmative acts by the City which damaged the Servicemaster property or otherwise diminished his rights in the property. Most of the City's "acts" he avers support his inverse condemnation claim are merely failures to act. Specifically, Hawkins asserts the City improperly allowed the development of neighboring parcels of commercial property which altered the elevation of the area and added strain to the Laurel Creek drainage pipes beyond their capacity and then failed to replace these pipes. The South Carolina cases addressing inverse condemnation are uniform in requiring that the claim be proved by "affirmative, positive, aggressive" acts by the governmental agency. Allegations of mere failure to act are insufficient. See, e.g., Berry's On Main, Inc. v. City of Columbia, 277 S.C. 14, 16, 281 S.E.2d 796, 797 (1981) (holding that proof of inverse condemnation requires that "there must be an affirmative, positive, aggressive act on the part of the governmental

agency"); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct. App. 1993) (listing as an element of inverse condemnation the requirement that there be "an affirmative, positive, aggressive act on the part of the governmental agency").

The only affirmative acts Hawkins cites as forming the basis of his inverse condemnation claim are the replacement of the double-box culvert with the large arched pipe in Laurel Creek in 1994 and the installation of the riprap material along the banks of the creek in 1997. The record contains no evidence that either of these acts caused the flooding of the Servicemaster property in 1997. Hawkins' own expert testified that the installation of the large arched pipe likely improved the drainage situation in the stormwater basin. Regarding the effect of the riprap material on drainage in the Laurel Creek basin, experts for both the City and Hawkins either offered no opinion on the impact of the riprap or opined that it was impossible to determine whether installing the riprap negatively or positively affected drainage.

Based on the lack of any evidence showing an affirmative, positive, aggressive act on the part of the City which would tend to prove the City's actions caused or precipitated the flooding of the Servicemaster property, we are compelled to affirm the trial court's grant of summary judgment on Hawkins' inverse condemnation claim.

II. Negligence

Hawkins argues the trial court erred in finding his negligence claim against the City was barred under the South Carolina Tort Claims Act. S.C. Code Ann. §§ 15-78-10 to 15-78-200 (Supp. 2003). We disagree.

The Tort Claims Act governs all tort claims against governmental entities. Flateau v. Harrelson, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003). It is the exclusive civil remedy available for any tort committed by a governmental entity or its employees or agents. S.C. Code Ann § 15-78-70(b) (Supp. 2003); Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 215, 544 S.E.2d 38, 49 (Ct. App. 2001); Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998). The Tort Claims Act

provides that the State, its agencies, political subdivisions, and other governmental entities are "liable for their torts in the same manner and to the same extent as a private individual under like circumstances," subject to certain limitations and exemptions provided in the Act. S.C. Code Ann. § 15-78-40 (Supp. 2003). "Governmental entity" is defined by the act as "the State and its political subdivisions." S.C. Code Ann. § 15-78-30(d) (Supp. 2002); Flateau, 355 S.C. at 204, 584 S.E.2d at 416. The provisions of the Act establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting liability of the State. S.C. Code Ann § 15-78-20(f) (Supp. 2003); Steinke v. South Carolina Dep't of Labor, Licensing & Reg., 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999); Arthurs v. Aiken County, 338 S.C. 253, 270, 525 S.E.2d 542, 551 (Ct. App. 1999); Staubes v. City of Folly Beach, 331 S.C. 192, 205, 500 S.E.2d 160, 167 (Ct. App. 1998). The governmental entity asserting the Act as an affirmative defense bears the burden of establishing a limitation upon liability or an exception to the waiver of immunity. Strange v. South Carolina Dep't of Highways & Pub. Transp., 314 S.C. 427, 430, 445 S.E.2d 439, 440 (1994); Steinke, 336 S.C. at 393, 520 S.E.2d at 152; Arthurs, 338 S.C. at 270, 525 S.E.2d at 551. The Act does not create a new substantive cause of action against a governmental entity. Moore v. Florence Sch. Dist. No. 1, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 121, 542 S.E.2d 736, 739 (Ct. App. 2001). The Plaintiff must present evidence of the governmental entity's duty to act in order to recover under the Act. Arthurs, 338 S.C. at 270, 525 S.E.2d at 551. The Tort Claims Act expressly preserves all existing common law immunities. Williams v. Condon, 347 S.C. 277, 246, 553 S.E.2d 496, 507 (Ct. App. 2001). The Tort Claims Act is a limited waiver of governmental immunity. Arthurs, 338 S.C. at 270, 525 S.E.2d at 551. Section 15-78-60 sets out thirty-seven "exceptions" to this waiver of sovereign immunity. These exceptions significantly limit the tort liability of government entities.

Several of these exceptions bear directly upon the alleged acts and failures to act by the City with respect to the municipal drainage system. Specifically, under section 15-78-60, the City is not liable for a loss resulting from: (1) "legislative, judicial, or quasi-judicial action or inaction"; (2)

"administrative action or inaction of a legislative, judicial, or quasi-judicial nature"; (3) "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies"; (4) "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee"; or (5) "regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety." S.C. Code Ann. § 15-78-60 (1), (2), (4), (5), and (13) (Supp. 2003).

For each of these specific provisions, the determination of immunity from tort liability turns on the question of whether the acts in question were discretionary rather than ministerial. A finding of immunity under the Act "is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards." Wooten ex rel. Wooten v. South Carolina Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999). "The governmental entity bears the burden of establishing discretionary immunity as an affirmative defense." Sabb v. South Carolina State Univ., 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002).

Although our courts have not applied the Tort Claims Act to facts similar to those of the present case, the Supreme Court of Texas has held that municipalities are not liable for the design and planning of their sewage and drainage systems because these acts are considered quasi-judicial, discretionary functions for which a government entity is not liable. City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997). The court in City of Tyler opined:

> The duties of the municipal authorities in adopting a general plan of drainage, and determining when and where sewers shall be built, of what size and at what level, are of a quasi judicial nature,

> involving the exercise of deliberate judgment and large discretion, and depending upon considerations affecting the public health and general convenience throughout an extensive territory; and the exercise of such judgment and discretion in the selection and adoption of a general plan or system of drainage is not subject to revision by a court or jury in a private action for not sufficiently draining a particular lot of land.

Id. We find a comparable degree of discretion was granted to the City in the present case to exercise the measured policy judgments required to build and maintain an adequate municipal sewer and drainage system in Greenville. Accordingly, the City is immune from liability for negligence claims arising out of the design and maintenance of the drainage system in the Laurel Creek Basin.

III. Liability Under South Carolina Code Section 5-31-450

Hawkins next appeals the trial court's grant of summary judgment as to his claim under South Carolina Code section 5-31-450. We find no error with the trial court's ruling.

Section 5-31-450 mandates:

> Whenever, within the boundaries of any municipality, it shall be necessary or desirable to carry off the surface water from any street, alley or other public thoroughfare along such thoroughfare rather than over private lands adjacent to or adjoining such thoroughfare, such municipality shall, upon demand from the owner of such private lands, provide sufficient drainage for such water through open or covered drains, except when the formation of the street renders it impracticable, along or under such streets, alleys or other thoroughfare in such manner as to prevent the passage of such water over such private lands or property. But if such drains cannot be had along or under such streets, alleys or other thoroughfare, the municipal authorities may obtain, under proper proceedings for condemnation on payment of damages to

> the landowner, a right of way through the lands of such landowner for the necessary drains for such drainage. If any municipal corporation in this State shall fail or refuse to carry out the provisions of this section, any person injured thereby may have and maintain an action against such municipality for the actual damages sustained by such person.

Applying this statute, our courts have held that liability does not obtain under section 5-31-450 absent some affirmative act by the municipality which alters the course or increases the amount of stormwater runoff onto private property. See Brown v. Sch. Dist. of Greenville County, 251 S.C. 220, 225, 161 S.E.2d 815, 817 (1968) (holding that unless the landowner pleads and proves an overt act against the municipality proximately causing the damages complained of, there is no cause of action under the statute). "The statute does not purport to make the municipality an insurer of the landowner against damage from surface water; it is only for such damage as results from the municipality's works that he may recover. By the same token, a municipality may not absolve itself from liability by diverting the surface water from its streets into a natural watercourse too small to carry it off." Hall v. City of Greenville, 227 S.C. 375, 386, 88 S.E.2d 246, 251 (1955). "The statute does not make the municipality an insurer of the landowner against damage from surface water; it is only for such damage as results from the municipality's works that he may recover. Therefore, unless the landowner pleads and proves an overt act against the municipality proximately causing the damages complained of, there is no cause of action under the statute." Taleff v. City of Greer, 284 S.C. 510, 512, 327 S.E.2d 363, 364 (Ct. App. 1985) (citations omitted). "Under this statute proof of negligence, in the usual sense of the word, in the design or construction of the drainage facilities installed by a municipality for the purpose of carrying off surface water along a street or other public thoroughfare is not an essential ingredient of the cause of action in favor of an adjacent landowner whose property has been damaged by surface water cast upon it as the result of such construction." Hall, 277 S.C. at 386, 88 S.E.2d at 251. This section apodictically contemplates positive action by a municipality to render it liable for damages. Brown, 251 S.C. at 225, 161 S.E.2d at 817.

Hawkins failed to offer proof of any affirmative, positive acts which would tend to show the actions of the City caused the flooding of the Servicemaster property. We approve the trial court's finding that Hawkins' claim under section 5-31-450 fails.

IV. Trespass

Hawkins appeals the trial court's grant of summary judgment as to his claim for trespass against real property. We find no error with the trial court's ruling.

"[T]respass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property . . . ." Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 356, 559 S.E.2d 327, 337 (Ct. App. 2001) (quoting Silvester v. Spring Valley Country Club, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001), cert. denied (citing Ravan v. Greenville County, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993))). "To constitute actionable trespass, however, there must be an affirmative act, invasion of land must be intentional, and harm caused must be the direct result of that invasion." Snow v. City of Columbia, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991); accord Mack v. Edens, 320 S.C. 236, 240, 464 S.E.2d 124, 127 (Ct. App. 1995). The gist of trespass is the injury to possession, and generally either actual or constructive possession is sufficient to maintain an action for trespass. Macedonia Baptist Church v. City of Columbia, 195 S.C. 59, 71, 10 S.E.2d 350, 355 (1940).

For a trespass action to lie, "the act must be affirmative, the invasion of the land must be intentional, and the harm caused by the invasion of the land must be the direct result of that invasion." Mack v. Edens, 320 S.C. 236, 240, 464 S.E.2d 124, 127 (Ct. App. 1995). Hawkins argues the same acts that he claims warrant a finding of inverse condemnation also compel a finding of civil trespass. Hawkins did not offer proof that any action by the City caused the flooding of the Servicemaster property.

Having failed to show any affirmative and intentional act necessary to sustain an action for trespass, we hold the trial court properly granted summary judgment.

V. Conversion

Hawkins next argues the trial court erred in granting summary judgment on his claim for conversion. We disagree.

"Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights." Crane v. Citicorp Nat'l Servs., Inc., 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993). "Conversion may arise by some illegal use or misuse, or by illegal detention of another's personal property." Regions Bank v. Schmauch, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003). Conversion is a wrongful act which emanates by either a wrongful taking or wrongful detention. Id. It is well settled that a conversion action does not lie when alleging the exercise of dominion or control over real property. See 18 Am. Jur. 2d Conversion § 7 (1998) (commenting that "an action for conversion ordinarily lies only for personal property which is tangible, or at least represented by or connected with something tangible" and "will not lie for such indefinite, intangible, and incorporeal species of property as a . . . leasehold estate or interest"). Therefore, to the extent Hawkins' conversion claim pertains to the actions of the City with respect to real property, the claim clearly fails as a matter of law. Additionally, Hawkins provided no evidence that the City seized, disposed, denied use, or wrongfully took control of any goods or personal chattels belonging to him or his business.

We affirm the trial court's decision to grant summary judgment on Hawkins' conversion claim.

CONCLUSION

Finding no genuine issue of material fact with respect to any of Hawkins' causes of action, we conclude summary judgment in favor of the City was proper. The judgment of the trial court is therefore

AFFIRMED.

HEARN, C.J. and BEATTY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

InMed Diagnostic Services, L.L.C., Respondent-Appellant,

v.

MedQuest Associates, Inc., Palmetto Imaging, Inc., and Open MRI of Florence, Inc., Appellants-Respondents.

Appeal From Richland County
L. Henry McKellar, Circuit Court Judge

Opinion No. 3765
Heard January 13, 2004 – Filed March 22, 2004

REVERSED

Charles E. Carpenter, Jr., S. Elizabeth Brosnan, M. Elizabeth Crum and Robert W. Dibble, Jr., all of Columbia, for Appellant-Respondent.

Hamilton Osborne, Jr. and James Y. Becker, of Columbia, for Respondent-Appellant.

GOOLSBY, J.: This appeal arises out of a dispute among competing providers of magnetic resonance imaging ("MRI") services. MedQuest Associates, Inc., Palmetto Imaging, Inc., and Open MRI of Florence, Inc. (collectively "MedQuest") appeal a jury verdict in favor of InMed Diagnostic

Services, L.L.C. ("InMed") under the Unfair Trade Practices Act ("UTPA"). InMed cross-appeals, arguing error in the award of attorney fees and the trial court's refusal to award treble damages. We reverse the jury verdict.

FACTS AND PROCEDURAL BACKGROUND

The State Certification of Need and Health Facility Licensure Act ("CON Act")[1] governs the acquisition and use of medical equipment such as MRI machines in South Carolina. Under the CON Act, a medical provider must obtain a certificate of need ("CON") from the South Carolina Department of Health and Environmental Control ("DHEC") before undertaking "the acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess" of $600,000.[2] If the total project cost in a given situation falls below the $600,000 threshold, the provider may seek a determination from DHEC that the CON Act does not apply.[3] A determination of this kind is known as a non-applicability determination ("NAD"). The application and review process to obtain a CON is more detailed and time-consuming than that to obtain a NAD.

DHEC regulations define "total project cost" as "the estimated total capital cost of a project including land cost, construction, fixed and moveable equipment, architect's fee, financing cost, and other capital costs properly charged under generally accepted accounting princip[les] as a capital cost."[4]

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[1] S.C. Code Ann. §§ 44-7-110 to -370 (2002).

[2] Id. § 44-7-160(6); 24A S.C. Code Ann. Regs. 61-15 § 102(f) (Supp. 2003).

[3] See 24A S.C. Code Ann. Regs. 61-15 § 102.3 (Supp. 2003) ("When any question exists, a potential applicant shall forward a letter requesting a formal determination by [DHEC] as to the applicability of the certificate of need requirements to a particular project.").

[4] Id. § 103.25.

Under generally accepted accounting principles, assets are recorded at historical or invoice cost when they are acquired.

MedQuest, formed in 1994, operates six facilities in South Carolina that provide outpatient diagnostic imaging services, including MRI services. In 1998, MedQuest began negotiating with Siemens, a supplier of MRI machines, for the purchase of new MRI machines.[5] Siemens and MedQuest reached an agreement providing that, as MedQuest bought machines from Siemens, Siemens would give a major discount on every third purchase. MedQuest used two of these heavily discounted purchases for its facilities in Columbia and Florence, South Carolina, and applied to DHEC for a NAD for these acquisitions.[6] DHEC approved MedQuest's applications in early 1999.

InMed, a competing provider of outpatient diagnostic imaging services, was formed in 1998, when its founder, Robert Adams, purchased the assets of Image Trust, an MRI provider in Florence and Columbia that had ceased operations. Adams subsequently purchased replacement MRI machines for both locations and obtained a NAD for the Florence acquisition.

Both InMed and MedQuest challenged each other's NAD for their Florence locations. InMed asserted that MedQuest substantially understated the cost of its MRI equipment in its application to DHEC for a NAD. MedQuest asserted that InMed should have included a trade-in allowance for used equipment in the total cost of the project. The appeals went before the Administrative Law Judge Division ("ALJD"); however, they were subsequently dismissed by agreement between the parties.

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[5] Siemens was also originally named as a defendant, but was granted summary judgment and dismissed from the action. InMed has challenged this ruling in a separate appeal.

[6] The purchase prices presented to DHEC for the two machines at issue in this dispute were $365,000 for the Florence location and $395,000 for the Columbia facility.

Several months later, InMed commenced the present action by filing a complaint in the Richland County Circuit Court. In its amended complaint, InMed alleged that the individual defendants "combined and conspired with each other to provide false and fictitious information to DHEC concerning MedQuest's MRI equipment costs for its facilities in Columbia and Florence." The complaint also alleged unfair trade practices, common law unfair competition, interference with prospective contractual relations, and civil conspiracy.

MedQuest answered InMed's complaint, alleging several affirmative defenses, including (1) that exclusive jurisdiction lay with the ALJD, (2) that InMed had failed to exhaust its administrative remedies, and (3) that InMed's cause of action under the UTPA should be dismissed because MedQuest's conduct was controlled by the CON Act and thus was not subject to liability under the Act.

In a form order dated December 6, 2001, and again in a formal order dated February 20, 2002, the circuit court granted summary judgment as to all causes of action against Siemens. The circuit court also granted summary judgment in favor of MedQuest as to the civil conspiracy and interference with prospective contractual relations claims; however, summary judgment was denied as to the UTPA and common law unfair competition claims.

InMed's remaining two claims were then tried to a jury from December 10-13, 2001. During the course of the trial, InMed dropped the common law unfair competition claim, and only the UTPA claim went to the jury. The jury returned a verdict for InMed, awarding $2,107,898 in damages.

On December 19, 2001, MedQuest moved for judgment notwithstanding the verdict, or in the alternative, for a new trial. The next day, InMed moved for treble damages and attorney fees. In a form order dated January 10, 2002, the circuit court denied both motions, noting further that attorney fees would be set following a hearing on the matter. On February 4 and 6, 2002, MedQuest and InMed, respectively, appealed the denial of their motions.

On March 28, 2002, the circuit court heard InMed's motion for attorney fees. By form order dated May 2, 2002, the circuit court awarded InMed $100,000 in attorney fees. InMed filed a motion to alter or amend this ruling, which was denied by form order on May 20, 2002. InMed appealed this ruling on May 29, 2002, and MedQuest likewise appealed the order awarding attorney fees.

On appeal, MedQuest argues the UTPA is inapplicable to InMed's lawsuit because the purchase of medical equipment is specifically regulated by DHEC. MedQuest also argues that InMed's abandonment of its appeal before the ALJD barred it from seeking relief in the circuit court. Finally, MedQuest contends that, even assuming its actions were subject to the UTPA, there was no evidence of a UTPA violation.

In its cross-appeal, InMed argues that the circuit court erred by refusing to award treble damages on its cause of action for unfair trade practices. InMed further asks that the attorney fees award of $100,000 be vacated and the matter remanded to the circuit court for appropriate findings as required by the controlling case law.

LAW/ANALYSIS

MedQuest first argues the UTPA is inapplicable to this case because medical equipment purchases are "actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this state . . . or actions or transactions permitted by any other South Carolina law," which are specifically excluded under section 39-5-40(a).[7] We agree.

The exemption provided in section 39-5-40(a) was first interpreted in State ex rel. McLeod v. Rhoades.[8] In Rhoades, the supreme court reversed

[7] S.C. Code Ann. § 39-5-40(a) (1985).

[8] 275 S.C. 104, 267 S.E.2d 539 (1980).

the overruling of a demurrer to a complaint of "'unfair and deceptive acts or practices' in connection with the public offering and sale" of securities.[9] Holding securities transactions fell within the exemption provided by section 39-5-40, the supreme court adopted what has come to be known as the "general activity" test and stated: "Initially the burden is on the party seeking the exemption to demonstrate its applicability. Once the exemption is demonstrated, the complainant must then show that the specific act in question did not come within the exemption."[10]

Several years later, however, in Ward v. Dick Dyer & Associates, the supreme court determined the general activity test "would not fulfill the intent of the Legislature in prohibiting unfair trade practices"[11] and adopted the reasoning in a decision of a Tennessee appellate court, which explained the purposes of a similar exemption as follows:

> The purpose of the exemption is to insure that a business is not subjected to a lawsuit under the Act when it does something required by law, or does something that would otherwise be a violation of the Act, but which is allowed under other statutes or regulations. It is intended to avoid conflict between laws, not to exclude from the Act's coverage every activity that is authorized or regulated by another statute or agency. Virtually every activity is regulated to some degree. The defendant's interpretation of the exemption would deprive consumers of a meaningful remedy in many situations.[12]

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[9] Id. at 105, 267 S.E.2d at 540.

[10] Id. at 107, 267 S.E.2d at 541.

[11] Ward v. Dick Dyer & Assocs., 304 S.C. 152, 155, 403 S.E.2d 310, 312 (1991).

[12] Id. at 156, 403 S.E.2d at 312 (quoting Skinner v. Steele, 730 S.W.2d 335, 337 (Tenn. Ct. App. 1987)).

In the present case, InMed argues the UTPA exemption should not apply to MedQuest's actions because "[t]he CON Act does not allow the provision of deceptive information to DHEC in order to evade the requirements of the CON Act." We agree, however, with MedQuest that this is an unduly narrow interpretation of the law. Whether MedQuest submitted accurate information in support of its NAD applications was necessarily for DHEC to determine as part of the administrative process in deciding whether or not to grant such applications.

The stated purpose of the CON Act is "to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in [South Carolina]."[13] To these ends, the Act designates DHEC as "the sole state agency for control and administration of the granting of Certificates of Need and licensure of health facilities"[14] and expressly requires "substantive and procedural regulations . . . to carry out [DHEC's] licensure and Certificate of Need duties . . . , including regulations to deal with competing applications."[15]

In carrying out the legislative purpose of the CON Act, DHEC has adopted Regulation 61-15, entitled "Certification of Need for Health Facilities and Services."[16] This regulation includes specific procedures for requesting exemptions from the CON requirements.[17] The stated purpose of

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[13] S.C. Code Ann. § 44-7-120 (2003).

[14] Id. § 44-7-140 (emphasis added).

[15] Id. § 44-7-150(3).

[16] 24A S.C. Code Ann. Regs. § 61-15 (Supp. 2003).

[17] Id. § 104.

Regulation 61-15 is virtually identical to the stated purpose of the CON Act.[18]

We agree with MedQuest that the regulatory exemption in section 39-5-40(a) is based on the concept that the legislature has determined certain matters are appropriate for resolution by administrative agencies with particular expertise, rather than by the general jurisdiction of a trial court.[19] This concept is consistent with the supreme court's reasoning in Ward that the exemption "is intended to exclude those actions or transactions which are . . . authorized by regulatory agencies . . . ."[20]

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[18] Id. § 101.

[19] See, e.g., Unisys Corp. v. South Carolina Budget and Control Bd., 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (holding transactions under the Consolidated Procurement Code are exempt from the UTPA); South Carolina Dep't of Health & Envtl. Control v. Armstrong, 293 S.C. 209, 215-16, 359 S.E.2d 302, 305 (Ct. App. 1987) ("The evaluation of the adequacy of a sewage disposal system is uniquely within the competency of DHEC, not the courts. . . . By interfering with DHEC's final decision on Armstrong's application, the trial judge deprived the department of its opportunity to exercise the discretion granted it by the General Assembly."); United Merchants and Mfrs., Inc. v. S.C. Elec. & Gas Co., 208 F.2d 685, 687 (4th Cir. 1953) (holding that the proper remedy for the plaintiff in an action alleging the defendant had improperly induced it to withdraw opposition to a rate increase was an application to the South Carolina Public Service Commission for revision of rates followed by an appeal from any adverse decision to the South Carolina state court and that an action in the federal district court for fraud was "an attempt to by-pass the Commission, which should not be permitted").

[20] Ward, 304 S.C. at 155, 403 S.E.2d at 312.

Ward concerned the failure of an automobile dealership to inform the plaintiffs that a car it sold to them had been involved in an accident.[21] In that case, the dealership argued the activity in question was regulated by Title 56 of the South Carolina Code, which (1) requires automobile dealers to be licensed by the South Carolina Department of Highways and Public Transportation; (2) subjects dealers who fail to secure a license to criminal liability; (3) provides for denial, suspension, or revocation of dealer licenses in certain cases; (4) declares certain unfair methods of competition and unfair or deceptive acts or practices to be unlawful; and (5) allows for a private right of action for certain violations.[22] Nowhere, however, as far as we can tell, is there any reference in the opinion or in the record to any statute or regulation governing the transaction that formed the basis for the complaint, i.e., the sale of the car. Moreover, the supreme court did not base its holding on the argument that there was no law allowing or authorizing the specific misconduct the defendant was alleged to have committed.[23]

In contrast, the specific transaction at issue in the present controversy is MedQuest's application for a NAD, a process for which DHEC has formulated exacting procedural requirements. Whether or not MedQuest followed these procedures correctly is uniquely within the competency of DHEC, whose involvement in the application process could continue beyond granting the approval should it ever become apparent that a violation of the

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[21] Id. at 154, 403 S.E.2d at 311.

[22] See S.C. Code Ann. §§ 56-15-10 through -360 (1991 & Supp. 2003). The references to Dick Dyer's arguments are taken from the Respondent's Brief for Dick Dyer & Associates at 6-7, Ward v. Dick Dyer & Assocs., 304 S.C. 152, 403 S.E.2d 310 (1991).

[23] Cf. Smith v. Globe Life Ins. Co., 597 N.W.2d 28, 38 (Mich. 1999) ("[W]e conclude that the relevant inquiry is not whether the specific misconduct alleged by the plaintiffs is 'specifically authorized.' Rather, it is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.").

CON Act occurred.[24] To allow a jury in the court of common pleas to make the determination that MedQuest had submitted misleading information in support of its application for a NAD—especially after InMed declined to pursue its administrative appeal of DHEC's approval of the application—would undermine the purpose of the exemption in section 39-5-40(a), even as that section has been narrowly interpreted in Ward, of "exclud[ing] those actions or transactions which are allowed or authorized by regulatory agencies or other statutes."[25]

We therefore hold the circuit court erred in declining to hold that, as a matter of law, the regulatory exemption of section 39-5-40 of the UTPA applies to this lawsuit and bars InMed's UTPA claim. Because our determination of this issue controls the case, we need not address MedQuest's remaining arguments or InMed's cross-appeal concerning treble damages and attorney fees.[26]

REVERSED.

STILWELL, J., and CURETON, A.J., concur.

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[24] Anyone "undertaking any activity requiring certificate of need review" without approval from DHEC is subject to penalty as provided by South Carolina Code sections 44-7-320 through -340. 24A S.C. Code Ann. Regs. § 61-15.702. Sections 44-7-320 through -340 authorize DHEC to deny, suspend, or revoke licenses; to institute lawsuits for violations of the CON Act; and to subject persons or facilities violating the Act to criminal liability. S.C. Code Ann. §§ 44-7-320 through -340 (2002).

[25] Ward, 304 S.C. at 155, 403 S.E.2d at 312.

[26] See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cheryl Howard Craig, **Appellant,**

v.

William Rhett Craig, III, **Respondent.**

Appeal From Greenville County
Robert N. Jenkins, Sr., Family Court Judge

Opinion No. 3766
Heard February 11, 2004 – Filed March 22, 2004

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Jean Perrin Derrick, of Lexington, and Stuart G. Anderson, Jr., of Greenville, for Appellant.

T. Preston Reid, of Greenville, for Respondent.

ANDERSON, J.: The family court granted Cheryl Howard Craig (Wife) and William Rhett Craig, III (Husband) a divorce and divided the marital property. The court set alimony and child support, ordered the marital home be sold and the equity evenly distributed, granted Wife a

special equity interest in several nonmarital properties, and awarded Wife attorney's fees and costs. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

The parties were married in 1974, while Husband was in medical school. Soon thereafter, Husband commenced his service commitment to the United States Army and the couple was stationed in Alaska. They returned to Charleston, where Husband finished his medical residency. The parties later moved to Greenville, where they continue to reside. Husband and Wife have three children. At the time of the divorce, the oldest child lived at home as a result of injuries suffered in a childhood bicycle accident. The second child completed college, but was residing at home while searching for employment. The youngest child was a junior in high school and also lived at the marital residence.

Wife has a Masters Degree in nursing and has been employed as a critical care nurse. She has been fully employed for several years, though she worked part-time during a portion of the marriage. She earns approximately $60,000.00 per year. Husband is a partner in a medical group and specializes in internal medicine. While his income declined when his group separated, his income at the time of the hearing was approximately $200,000.00 per year.

The parties had significant marital property, including a house valued over $500,000.00 with equity of over $260,000.00, significant personal property, Husband's retirement account valued over $1.8 million, and savings and investment accounts. Husband had several nonmarital properties, which he inherited from his father. However, marital funds were used for some improvements on the property after the inheritance.

Wife filed this action for divorce and sought custody of the youngest child, division of the marital property, alimony, child support, and attorney's fees. Husband sought joint custody and admitted his responsibility to pay child support. Further, he sought equitable distribution of the property, including the marital residence.

By consent at a temporary hearing, Wife received sole custody of the minor child and retained use of the marital residence. Husband agreed to pay child support in the amount of $900.00 per month and the mortgage on the residence of $3,425.00 per month. Wife was allowed to withdraw $20,000.00 to defray costs of litigation and other expenses.

Husband admitted adultery prior to separation, and this was the basis for the divorce. The court concluded alimony of $500.00 per month was warranted. Wife was permitted to remain in the marital home until the youngest son graduated from high school. Until that time, she received $850.00 in transitional alimony. Once the son graduated, the marital home was to be sold and the equity divided evenly between the parties.

The court found nonmarital assets owned by Husband were not transmuted into marital property, but that Wife was entitled to a special equity in the property. The court concluded marital funds were used for improvements and awarded Wife a special equity of $8,036.78.

The court further divided the remaining marital property equally. Wife was given the furniture, two retirement accounts, a savings account, and her vehicle. Husband was awarded some furniture, several accounts, his vehicle, and the boat. Husband's retirement account was divided such that the ultimate distribution was equal.

After considering the fault of Husband in the divorce, as well as the other appropriate factors, the court concluded Wife was entitled to a contribution towards her attorney's fees and costs. She was awarded a total of $21,370.00, with Husband receiving credit for half of the $20,000.00 that Wife was allowed to withdraw from an account pursuant to the temporary order.

Wife filed a motion to alter or amend the court's judgment, pursuant to Rule 59(e), SCRCP. The court determined the personal property was properly valued for purposes of equitable distribution. The requirement that the marital home was to be sold was reaffirmed; however, the judge extended the time until the sale was required. Finally, the last major amendment was

to the amount of alimony. The transitional alimony was set at $3,000.00 per month and was to be applied to the mortgage and expenses of the marital home. It was set to continue until December 2003 when the marital home was to be offered for sale. At that time, the periodic alimony was ordered decreased to $875.00 per month.

STANDARD OF REVIEW

In appeals from the family court, this Court has the authority to find the 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); O'Neill v. O'Neill, 293 S.C. 112, 359 S.E.2d 68 (Ct. App. 1987). This broad scope of review does not, however, require this Court to disregard the factual findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). Neither are we required to ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

ISSUES

I. Did the trial court err in failing to award sufficient permanent periodic alimony?

II. Did the trial court err in failing to award Wife ownership of the marital residence instead of requiring its sale?

III. Did the trial court err in failing to award Wife a sufficient special equity interest in Husband's nonmarital property?

IV. Did the trial court err in failing to properly value the personal property for inclusion in the equitable distribution?

LAW/ANALYSIS

I. Alimony

Wife maintains the trial court erred in awarding transitional alimony and not awarding a greater amount of permanent periodic alimony given the financial status of the parties and the lifestyle to which Wife was accustomed. We agree. Luculently, the dissolution of the marriage in this case resulted from the fault of the Husband. The Husband committed adultery pre-separation of the Husband and Wife. The adultery committed by the Husband destroyed this marital relationship. Indubitably, the Husband is at fault.

An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002); Sharps v. Sharps, 342 S.C. 71, 79, 535 S.E.2d 913, 917 (2000); Hatfield v. Hatfield, 327 S.C. 360, 364, 489 S.E.2d 212, 215 (Ct. App. 1997). "Alimony is a substitute for the support which is normally incident to the marital relationship." Spence v. Spence, 260 S.C. 526, 197 S.E.2d 683 (1973); McNaughton v. McNaughton, 258 S.C. 554, 189 S.E.2d 820 (1972); Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988). "Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001); accord Hickum v. Hickum, 320 S.C. 97, 463 S.E.2d 321 (Ct. App. 1995). "It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." Allen, 347 S.C. at 184, 554 S.E.2d at 424 (citing Woodward v. Woodward, 294 S.C. 210, 217, 363 S.E.2d 413, 417 (Ct. App. 1987)). The family court judge may grant alimony in an amount and for a term as the judge considers appropriate under the circumstances. S.C. Code Ann. § 20-3-130(A) (Supp. 2003); accord Smith v. Smith, 327 S.C. 448, 462, 486 S.E.2d 516, 523 (Ct. App. 1997).

Factors to be considered in making an alimony award include: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and

earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations; as well as (13) other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (Supp. 2003); Hatfield, 327 S.C. at 364, 489 S.E.2d at 215. The court is required to consider all relevant factors in determining alimony. Epperly v. Epperly, 312 S.C. 411, 415, 440 S.E.2d 884, 886 (Ct. App. 1994); see also Patel v. Patel, 347 S.C. 281, 290, 555 S.E.2d 386, 391 (2001) (finding the trial court's denial of alimony was erroneous because the court did not address "several important factors" when determining no alimony should be awarded). No one factor is dispositive. Lide v. Lide, 277 S.C. 155, 157, 283 S.E.2d 832, 833 (1981). "Fault is an appropriate factor for consideration in determining alimony in cases where the misconduct affected the economic circumstances of the parties or contributed to the breakup of the marriage." Smith, 327 S.C. at 463, 486 S.E.2d at 523-24.

South Carolina law requires the court to award support sufficient to allow Appellant to maintain the standard of living the parties had themselves chosen and lived by during their marriage. The standard of living established during this marriage was very high. The parties lived in one of the most influential neighborhoods in Greenville; vacationed at the Husband's family lake house, which is in a gated community; enjoyed recreating on their boat; and drove luxury automobiles.

"Although rehabilitative alimony may be an appropriate form of spousal support in some cases, permanent periodic alimony is favored in South Carolina." Jenkins v. Jenkins, 345 S.C. 88, 95, 545 S.E.2d 531, 535 (Ct. App. 2001). "Rehabilitative alimony may be awarded only upon a showing of special circumstances justifying a departure from the normal preference for permanent periodic support. The purpose of rehabilitative alimony is to encourage a dependent spouse to become self-supporting after a divorce." Id. (citing Johnson, 296 S.C. at 301, 372 S.E.2d at 114.).

In this case, the court concluded that Wife should receive $875.00 in permanent periodic alimony. We reject the finding by the trial court on permanent periodic alimony. His ruling completely overlooks the standard of living in place at the time of the separation of the parties. We award the Wife $3000 per month of permanent periodic alimony.

II. Equitable Distribution

Wife contends the trial court erred in distributing the marital property. First, she maintains the court assigned an incorrect valuation to the personal property, which was awarded to her. Second, she asserts the family court should have awarded her sole possession of the marital home instead of requiring it to be sold or her to purchase Husband's share.

The apportionment of marital property is within the discretion of the family court judge and will not be disturbed on appeal absent an abuse of discretion. See Morris v. Morris, 295 S.C. 37, 39, 367 S.E.2d 24, 25 (1988). South Carolina Code Ann. § 20-7-472 (Supp. 2002) provides the family court must consider fifteen factors and give each weight as it determines. On review, this court looks to the fairness of the overall apportionment, and if the end result is equitable, the fact that this court might have weighed specific factors differently than the family court is irrelevant. Johnson v. Johnson, 296 S.C. 289, 300-01, 372 S.E.2d 107, 113 (Ct. App. 1988); Doe v. Doe, 324 S.C. 492, 502, 478 S.E.2d 854, 859 (Ct. App. 1996) (the reviewing court will affirm the family court judge's apportionment of marital property if it can be determined that the judge addressed the relevant factors under section 20-7-472 with sufficiency for the reviewing court to conclude the judge was cognizant of the statutory factors).

In this case, the overall distribution was fifty percent of the estate to each party. We find, given the statutory factors, that this distribution is fair and equitable. Given the length of the marriage, the value of the marital property, and the incomes of the parties, we find the trial court did not abuse its discretion in awarding an even distribution of the marital property.

A. Personal Property Valuation

Wife argues the family court erred in its valuation of the personal property it awarded to her. She maintains the value assigned was much greater than the fair market value and does not have a proper basis in the record. We agree the family court erred in the value assigned to the property.

In dividing marital property, the family court must identify both real and personal property and determine the fair market value of the identified property. Perry v. Estate of Perry, 323 S.C. 232, 237, 473 S.E.2d 860, 863 (Ct. App. 1996). The value given personal property should be its fair market value. Id. at 238, 473 S.E.2d at 864.

The trial court found the value of the personal property in Wife's possession to be $185,743.00. The trial court took the value of the personal property off the Wife's declaration of property and then subtracted the value assigned to the furnishings in Husband's possession. However, the court did not adjust for the values of various bank accounts and other items also included in the delineation by Wife. The $195,000.00 figure offered by Wife clearly includes items such as vehicles and multiple savings and investment accounts, as these are not delineated separately on the declaration form. Additionally, Wife submitted a more detailed valuation of the property, which totaled $70,789.00. Finally, Husband's estimated valuation of the personal property totaled only $62,000.00.

We find the family court failed to make the proper adjustments in valuing the personal property assigned to Wife. The value is not the fair market value, as the figure used included items not awarded to Wife as part of the personal property. The only figures before the court that valued only the personal property were the $70,789.00 offered by Wife and the $62,000.00 offered by Husband.

We remand to the court for a determination of an accurate value of the personal property awarded to Wife. Additionally, the family court is instructed to maintain the fifty percent award for each party by making the necessary adjustments to the distribution.

B. Marital Residence

Wife contends the family court erred in not awarding her the marital residence and instead requiring her to buy out Husband's share or sell the home.

In order to effect an equitable apportionment, the family court may require the sale of marital property and a division of the proceeds. Donahue v. Donahue, 299 S.C. 353, 384 S.E.2d 741 (1989); S.C. Code Ann. § 20-7-476 (Supp. 2002) (providing that "[t]he court in making an equitable apportionment may order the public or private sale of all or any portion of the marital property upon terms it determines"). The court, however, should first attempt an "in-kind" distribution of the marital assets. Donahue, 299 S.C. at 360, 384 S.E.2d at 745; Stevenson v. Stevenson, 295 S.C. 412, 368 S.E.2d 901 (1988). A family court may grant a spouse title to the marital home as part of the equitable distribution. Donahue, 299 S.C. at 360, 384 S.E.2d at 745. Pursuant to section 20-7-472(10) of the South Carolina Code, the court, in making apportionment, "must give weight in such proportion as it finds appropriate to all of the following factors: . . . (10) the desirability of awarding the family home as part of equitable distribution." S.C. Code Ann. § 20-7-472(10) (Supp. 2003).

Section 20-7-472 lists fifteen factors for the family court to consider when making an equitable apportionment of the marital estate. Bowers, 349 S.C. at 97, 561 S.E.2d at 616. The statute vests the family court with the discretion to decide what weight should be assigned to the various factors. Id. On review, this court looks to the overall fairness of the apportionment, and if the result is equitable, that this court might have weighed specific factors differently than the family court is irrelevant. Id.

The family court is to "carefully consider the claim of a party that the interests of that party or the children are so predominant, when balanced against the interests of the other, that an award of exclusive possession of the marital home is compelled." Johnson v. Johnson, 285 S.C. 308, 311, 329 S.E.2d 443, 445 (Ct. App. 1985).

It is not equitable for the home to be sold and Wife required to move from the marital home. Based on our review of the evidence, we conclude the assets should be divided in-kind as follows:

HUSBAND:

Health Source	$15,000.00
Timberwoods	8,000.00
IRA-Solomon	21,990.19
Prudential life cash value	13,468.00
Regions (Bank account 2)	5,941.70
IMA-Stock	5,000.00
Spotted Dog	5,318.79
Furniture	29,642.00
Boat	1,000.00
Dock	5,250.00
1990 Jaguar	7,825.00
Solomon Smith Barney stock account	91,196.27
Tax Refunds	5,233.00
Accounts Receivable	55,396.62
IRA 401(k)	982,453.48
TOTAL	$1,236,715.05

WIFE:

House Equity	$263,262.53
IRA	20,153.00
State Retirement	11,376.00
Regions Bank account	14,837.00
Furniture	70,789.00
1992 Lexus	8,275.00
IRA 401(k)	848,022.52
TOTAL	$1,236,715.05

In awarding the marital home to the Wife in the equitable distribution as outlined above, we rule that the Wife must pay the mortgage payment on the marital home.

III. Special Equity

Wife contends the family court failed to award her a sufficient special equity in the nonmarital property inherited by Husband. She asserts the valuation of her work and the amount of marital funds used to improve the property were greater than that calculated by the trial court.

South Carolina Code section 20-7-473(5) allows a special equity for the increase in value of nonmarital property resulting from the material contribution of the nonowner spouse. The spouse is entitled to a special interest to compensate for the contributions made to the nonmarital property and for the marital funds used in the improvement of the nonmarital property. See Murray v. Murray, 312 S.C. 154, 159, 439 S.E.2d 312, 316 (Ct. App. 1993).

The trial court in this case only considered the monetary contributions from marital funds. He made no allowance for Wife's contributions through her efforts or for any overall increase in the value of the property. If Wife's contributions increased the value of the property or if she put forth sufficient effort to result in a material contribution, this needed to be considered by the family court. We remand this issue to the trial court to properly consider the full extent of Wife's contributions, the full amount of marital funds employed, and any increase in the value of the property resulting directly from the contributions of Wife.

CONCLUSION

We find the amount of alimony provided by the family court was not sufficient and equitable. We conclude the overall apportionment of property at fifty percent to each party was appropriate. The trial court did err in requiring the sale of the marital home. We rule the family court erred in its

valuation of the special equity to be awarded Wife, as it only considered the exact dollar amounts contributed and did not also take into consideration any work done by Wife or the increase in the valuation of the property as a result of Wife's contributions. We conclude the valuation of the personal property was in error. We hold the family court shall maintain the same fifty-percent equitable distributions, but must make such changes as necessary to the apportionment to adjust for changes in the valuation of the personal property consistent with this opinion. Accordingly, the decision of the family court is

AFFIRMED in part, REVERSED in part, and REMANDED.

HUFF, J., concurs.

CURETON, J., concurs and dissents in a separate opinion.

CURETON, AJ (Concurring and dissenting in part): I disagree with the majority on the issues of the amount of alimony and the award to Wife of exclusive ownership of the marital home. I treat these issues together because they are so closely intertwined.

The apportionment of marital property is within the family court judge's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. Bowers v. Bowers, 349 S.C. 85, 97, 561 S.E.2d 610, 616 (Ct. App. 2002). S.C. Code Ann. § 20-7-472 (Supp. 2002) lists fifteen factors for the family court to consider when making an equitable apportionment of the marital estate and vests the family court with the discretion to determine what weight should be assigned to each factor. On review, this court looks to the overall fairness of the apportionment, and if the result is equitable, taken as a whole, that this court might have weighed specific factors differently than the family court is irrelevant. Johnson v. Johnson, 296 S.C. 289, 300-01, 372 S.E.2d 107, 113 (Ct. App. 1988).

The right of spouses to realize the benefits of equity in a marital home has always been guarded in this state. As the majority correctly points out, the family court is to "carefully consider the claim of a party that the interests of that party or the children are so predominant, when balanced against the

interests of the other, that an award of exclusive possession of the marital home is compelled." Johnson v. Johnson, 285 S.C. 308, 311, 329 S.E.2d 443, 445 (Ct. App. 1985). The rationale for scrutinizing such requests lies in the substantial burden upon the party who must defer realization of the value of his or her share of the marital home. Morris v. Morris, 335 S.C. 525, 534, 517 S.E.2d 720, 725 (Ct. App. 1999).

Some, but not all, of the compelling interests the court may consider are: (1) adequate shelter for minors; (2) the inability of the occupying spouse to otherwise obtain adequate housing; (3) the size of the non-occupying spouse's equity in the home relative to his other assets or income; (4) the size of the home relative to the expected use and the cost of maintaining the home in comparison to the benefits received; and (5) the potential duration of the exclusive possession. See Morris, 335 S.C. at 534, 517 S.E.2d at 725.

The threshold issue in this case is whether the award of the house to Wife is required to maintain her standard of living or whether the award of the exclusive ownership of the house places too great of a burden on Husband. The trial judge concluded it was not essential to her standard of living to remain in the house, and I agree.

Factually, the house was acquired when the household consisted of five persons, the parties and their three children.[1] The children are now emancipated and are not a factor in considering Wife's needs. The trial court properly allowed Wife the continued use of the marital residence while the youngest child was still in high school.

The house has five bedrooms, three and a half baths and over 5000 square feet. The trial court found that Wife had not demonstrated she had any practical need for a home the size of the marital home now that two

[1] At time of trial, the court found that Wife, the parties' oldest child Zackery age 27, and a minor child lived in the home. The court further found that all of the children had the benefit of educational trusts, from inheritances. Additionally, while Zackery suffered a head injury as a child in an accident, he "is capable of sole support and has other resources to rely upon for his support." At oral argument, Wife's counsel informed the court that only Zackery continued to remain in the marital home. In any event there is no contention that Wife should be awarded the marital home to accommodate the parties' children.

children are completely emancipated.[2] The costs of ownership of a house that size for one person greatly outweigh any need or benefit obtained from allowing Wife to retain the property.

There is no indication Wife cannot find a suitable home in the same or similar neighborhood, while greatly reducing her monthly housing expenses. She testified that she enjoyed the safety offered by the neighborhood and the ability to walk the neighborhood pathways. However, she also admitted that other neighborhoods could offer just as much and be just as secure.

The trial court reasoned that the parties could sell the marital home and realize over $250,000 from its sale. Expert testimony provided that the parties could then split the equity and each could purchase another home for approximately $250,000 paying $125,000 down, and thereafter have housing expenses of approximately $1664.00 per month instead of the $4,441.00 per month expense on the marital home. The court further concluded that unitizing Wife's claimed expenses and adding to them the $1664.00 projected housing expense, her total expenses would be approximately $4,700.00 per month. Finally, the trial court concluded that by awarding Wife $875.00 per month in permanent alimony, she would still have approximately $600 per month left after paying her expenses. Wife's share of the equity in the home, coupled with her income, alimony, and the other assets she receives in the distribution will allow her to obtain more than sufficient housing and maintain her standard of living.

Questions concerning alimony rest within the sound discretion of the trial court, whose conclusions will not be disturbed on appeal absent a showing of abuse of discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002). An abuse of discretion occurs when the court is controlled by some error of law or where the order, based upon findings of fact, is without evidentiary support. McKnight v. McKnight, 283 S.C. 540, 543, 324 S.E.2d 91, 93 (Ct. App. 1984). In appeals from family court, the appellate court has authority to find facts in accordance with its own view of

[2] The trial court concluded "[t] his ruling does not prevent [Wife] from buying [Husband's] interest in the house (using the agreed valuation) or on other terms mutually agreeable to them."

the preponderance of the evidence. However, when an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and the reason for its decision. Dearybury, 351 S.C. at 283, 569 S.E.2d at 369.

Alimony is a substitute for the support that is normally incident to the marital relationship. Ordinarily, the purpose of alimony is to place the supported spouse, as nearly as practical, in the position of support he or she enjoyed during the marriage. Alimony should not dissuade a spouse, to the extent possible, from becoming self-supporting. McElveen v. McElveen, 332 S.C. 583, 599, 506 S.E.2d 1, 9 (Ct. App. 1998). "Where, as here, a wife has been awarded a fair percentage of the marital estate, it is error to award her permanent alimony substantially in excess of her needs." Woodard v. Woodard, 294 S.C. 210, 217, 363 S.E.2d 413, 417 (Ct. App. 1987). Such an award "is in the nature of a division of the husband's future excess income." Id.

The reason expressed by the majority for increasing Wife's alimony was to maintain her standard of living. It became clear during oral argument that but for the excessive mortgage payment Wife would be burdened with if she remains in the marital home, there would be no practical need for alimony in excess of the amount awarded by the trial court. Thus, the result of the majority's decision to award Wife the marital home is to artificially create a need for additional alimony to pay the expenses on the marital residence.

Clearly, Husband was at fault in the breakup of this marriage and should incur some penalty for his marital fault. The trial court provided significant marital assets to Wife and allowed her to maintain her standard of living without the extravagance of a home that is too costly for her needs. The award by the majority is excessive and unnecessary given her lifestyle and actual needs. As the trial court's order is structured, I fail to see an abuse of discretion in its award of alimony and the required sale of the marital home. I would affirm those awards.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

J. W. Hunt, Jr., and William R. Hunt, **Respondents,**

v.

South Carolina Forestry Commission, **Appellant.**

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

Opinion No. 3767
Submitted March 8, 2004 – Filed March 29, 2004

REVERSED

Robert E. Horner, of Columbia, for Appellant.

C. Kenneth Powell, J. Lewis Cromer and J. Philip Murphy, all of Columbia, for Respondents.

ANDERSON, J.: The South Carolina Forestry Commission ("SCFC") appeals an order of the trial court, which held that a deed granted to the SCFC in 1937 conveying a ten-acre tract of land merely conveyed a fee simple determinable with a possibility of reverter and not a fee simple absolute. We reverse.[1]

FACTS/PROCEDURAL BACKGROUND

On January 11, 1937, The First Carolinas Joint Stock Land Bank of Columbia issued a deed to the SCFC granting the commission ten acres of land for the consideration of one dollar.

The granting clause of this deed reads:

> The First Carolinas Joint Stock Land Bank of Columbia… [has] granted, bargained, sold and released, and by these presents [does] grant, bargain, sell and release unto the said [SCFC] **and their successors in office** all that certain piece . . . .

(emphasis added).

The habendum clause provides:

> To Have and to Hold all and singular the premises before mentioned unto the said [SCFC] **and their successors in office, and assigns forever.**

(emphasis added).

Following a description of the property conveyed to the SCFC, the deed states:

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

> [T]his deed is upon the express condition that the grantee shall with reasonable dispatch erect and maintain on said lands a suitable fire tower or towers and suitable buildings for the keeper thereof, and use said lands in furthering the cause of reforestation and forest protection, and should the grantee at any time for a period of two years cease to use the property aforesaid for said purposes the title thereto shall revert to the grantor, its successors and assigns, provided, however, that in such case the grantee shall have the right to remove any fire tower or towers or other buildings, if any which the grantee may place on the said lands.

In 1941, The First Carolinas Joint Stock Land Bank of Columbia sold a piece of property adjacent to the ten-acre tract to Thomas Thain. This deed to Thain intended to convey the reversionary rights to the SCFC's ten-acre parcel.

By deed granted in 1943, Thain conveyed various parcels of land to J.W. Hunt, Sr., including most of the tract granted to Thain by the bank. This deed purported to convey to J.W. Hunt, Sr., the reversionary rights in the parcel at issue in this case.

Via an instrument entitled "Deed of Reversionary Rights" dated March 30, 1984, J.W. Hunt, Sr., conveyed to J.W. Hunt, Jr., and William R. Hunt ("Respondents") any interest he had received from Thain by the 1943 deed in the ten-acre parcel at issue.

In 1984, Respondents asked the SCFC for a wider easement across the ten-acre tract for the purpose of allowing trucks greater accessibility in harvesting the tract's lumber. Prior to granting Respondents an easement, however, the SCFC requested they execute an estoppel agreement whereby Respondents agreed they would not use the easement extension as a basis for arguing that the property had reverted to them. This document was drafted by Respondents' attorney and was signed by Respondents. The agreement did not profess to bind the SCFC and was not signed by any agent of the State of South Carolina or the SCFC.

With the advent of airplane surveillance, the use of fire towers for forest protection became obsolete. In 1993 and 1994, the fire tower and accompanying buildings located on the ten-acre parcel were removed. The SCFC and Respondents undertook preparations to transfer the land to Respondents. After about a year and half of working with the SCFC on obtaining the ten-acre tract,[2] the SCFC informed Respondents that their attorneys believed that Respondents had no valid interest in the property. Based on the SCFC's refusal to transfer the land, Respondents initiated an action seeking a grant of clear title to the ten-acre parcel.

By order filed June 28, 2001, the trial court found that the SCFC was the owner of the land in question. Following a hearing on Respondents' motion to reconsider, however, the trial court withdrew its initial order and filed a substitute order. In the substituted order, the trial court found that the deed granting the land to the SCFC conveyed only a fee simple determinable with a possibility of reverter. Furthermore, the court found that the conditional fee had terminated in 1997. Nevertheless, the order denied Respondents' claim to legal title of the land due to the fact that *inter vivos* transfers of reversionary rights are invalid and without effect in South Carolina.

STANDARD OF REVIEW

The construction of a clear and unambiguous deed is a question of law for the court. Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987); Hammond v. Lindsay, 277 S.C. 182, 184, 284 S.E.2d 581, 582 (1981). "[I]t is the duty of the court to construe deeds and determine their legal effect, where there is no such ambiguity as requires parol proof and submission to the jury." 26A C.J.S. Deeds § 168 (2001).

[2] Initially, the SCFC helped facilitate this transfer of title to Respondents. The parties agreed to what needed to be done prior to this transfer (e.g., survey the land, establish proof of a clear chain of title, etc.) and agreed to split the costs.

> Deeds are construed to determine the intent of the parties. To construe a deed, a court looks first at the language of the instrument because the court presumes it declares the intent of the parties. When, and only when, the meaning of a deed is not clear, or is ambiguous or uncertain, will a court resort to established rules of construction to aid in the ascertainment of the grantor's intention by artificial means where such intention cannot otherwise be ascertained.

23 Am.Jur.2d Deeds § 192 (2002). "[I]f the language of the deed is unambiguous, then its interpretation is a question of law to be resolved by the reviewing court without resort to extrinsic evidence." Id. While a trial court's findings of fact in a nonjury action at law should not be disturbed on appeal unless they are without evidentiary support, a reviewing court is free to decide questions of law with no particular deference to the trial court. See Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 296, 468 S.E.2d 292, 295 (1996); Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000); see Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) ("In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law."); State Farm Mut. Auto Ins. Co. v. Moorer, 330 S.C. 46, 51, 496 S.E.2d 875, 878 (Ct. App. 1998) ("In legal actions, our scope of review extends only to the correction of errors of law.").

LAW / ANALYSIS

The SCFC argues that the 1937 deed granted it the ten-acre tract in fee simple absolute; thus they are under no legal obligation, no matter how the property is used, to transfer the tract to Respondents. We agree.

Respondents assert that the language following the physical description of the property in the deed "cuts down" the fee simple conveyance of the granting clause to a fee simple determinable with a possibility of reverter. While this is certainly a sensible interpretation of this deed when read in its entirety, this construction is nevertheless legally incorrect. It is a well

established rule of law that where the granting clause of a deed purports to convey title in fee simple, the estate may not be cut down by subsequent words in the same instrument. Shealy v. South Carolina Elec. & Gas Co., 278 S.C. 132, 135, 293 S.E.2d 306, 308 (1982) ("Where granting clause in deed purports to convey fee simple absolute title, subsequent provisions of deed cannot diminish that granted or deprive grantee of incidents of ownership in property."); County of Abbeville v. Knox, 267 S.C. 38, 40, 225 S.E.2d 863, 864 (1976) (holding where the deed conveyed fee simple absolute estate in its granting clause by use of words of inheritance, provision inserted in deed after description of property, that property would be used for industrial development, is not a condition subsequent; instead, deed would be construed as conveying a fee simple absolute estate); Stylecraft, Inc. v. Thomas, 250 S.C. 495, 498, 159 S.E.2d 46, 47 (1968) (finding that "the granting clause conveyed a fee simple absolute; the restrictive words following the description of the property were ineffectual to cut down that estate"). Only if the granting clause is deemed "indefinite," may the court look to other parts of the deed to ascertain the intent of the grantor. See Batesburg-Leesville Sch. Dist. No. 3 v. Tarrant, 293 S.C. 442, 445, 361 S.E.2d 343, 345 (Ct. App. 1987).

Respondents argue that the granting clause of the 1937 deed is indefinite due to the lack of the word "forever." The granting clause of the deed in question conveys the tract to the SCFC and "and their successors in office." Traditionally, the phrase "and their successors in office, forever" is the classic language of inheritance used for granting a fee simple absolute in land to a government entity. See Hoogenboom v. City of Beaufort, 315 S.C. 306, 316, 433 S.E.2d 875, 882 (Ct. App. 1992).

To constitute a definite grant in fee simple absolute, the granting clause of a deed must contain language of inheritance limiting the grant to the intended grantee and his heirs. McMichael v. McMichael, 51 S.C. 555, 557, 29 S.E. 403, 403 (1898); see also Wayburn v. Smith, 270 S.C. 38, 42, 239 S.E.2d 890, 892 (1977) ("It is the rule in this State that where an incomplete or indefinite estate is conveyed by the granting clause, as for instance where no words of inheritance accompany the grant, or where the granting clause creates a life estate, resort may be had to the habendum for the purpose of

ascertaining the intention of the grantor and thus a life estate may be enlarged into a fee simple estate."); Atl. Coast Lumber Corp. v. Langston Lumber Co., 128 S.C. 7, 9, 122 S.E. 395, 396 (1924) ("A conveyance of real estate not carrying the word 'heirs' cannot convey the fee."); Tarrant, 293 S.C. at 445, 361 S.E.2d at 345 (finding an indefinite estate was conveyed by the granting clause because of the omission of words of inheritance; and therefore, resort was had to the habendum clause for the purpose of ascertaining the intent of the grantors). This court is unaware, however, of any authority requiring the inclusion of words of perpetuity such as "forever" in a deed's granting clause. On the contrary, when looking at case law concerning deeds granting fee simple to individuals, it appears, by analogy, that no such language is necessary. See Antley v. Antley, 132 S.C. 306, 309, 128 S.E. 31, 32 (1925) ("A deed to one and his heirs grants a fee-simple estate."). When conveying property to a government entity, the words "successors in office" contemplate the same principle of inheritance that "heirs" would in a deed granted to an individual. While the phrase "successors in office" is bolstered by the word "forever," the word is not logically required to communicate the required limitation on inheritance.

Furthermore, in Shealy, the supreme court held that the granting clause "grant, bargain, sell and release unto the said Lexington Water Power Company, its successors and assigns" was a definite grant of a fee simple estate. 278 S.C. at 134, 293 S.E.2d at 307. The court did so with no mention or record in its opinion of any words of perpetuity in the deed's granting clause such as "forever." We conclude, therefore, that the word "forever" is not required in the granting clause of a deed for the clause to constitute a definite grant of fee simple absolute.

When reading the 1937 deed in its entirety, it does appear that the grantor intended the property to revert on the occurrence of certain circumstances set forth in the deed. While it is a cardinal rule of deed construction that the intention of the grantor must be ascertained and effectuated, this intention cannot stand if it contravenes some well settled rule of law or public policy. Wayburn, 270 S.C. at 41, 239 S.E.2d at 892. In a "long and unbroken line of decisions," South Carolina courts have approved the rule that where the granting clause in a deed purports to convey title in fee

simple absolute, that estate may not be cut down by subsequent words in the same instrument. Stylecraft, 250 S.C. at 497, 159 S.E.2d at 47; accord Shealy, 278 S.C. at 135, 293 S.E.2d at 308; Knox, 267 S.C. at 40, 225 S.E.2d at 864. This court "will not undertake to overthrow a rule of property so long established." Purvis v. McElveen, 234 S.C. 94, 102, 106 S.E.2d 913, 917 (1959). This rule of construction must be adhered to even if it runs contrary to the express intentions of the grantor. Stylecraft, 250 S.C. at 497, 159 S.E.2d at 47. This contention is best expressed in Creswell v. Bank of Greenwood, 210 S.C. 47, 55, 41 S.E.2d 393, 397 (1947) (quoted in Wayburn, 270 S.C. at 43, 239 S.E.2d at 892-93), as follows:

> [I]ntention is unavailing to avoid [a rule of law] where words of settled legal import are used and contrary principles are encountered. In such cases the intention will be conclusively presumed to accord with the established meaning of the words and to conform to the fixed rules of construction. Otherwise, there would be little stability of land titles.

Upon finding that the granting clause of the 1937 deed constitutes a definite grant in fee simple, this court must hold that the purpose clause following the property description is ineffectual. The SCFC, therefore, owns the ten-acre parcel in fee simple absolute, notwithstanding any comments Mr. Bumble may care to make on the matter.[3]

Alternatively, were we to assume arguendo that the granting clause was indefinite, title in fee simple would still lie with the SCFC. It is the rule in this State that where an incomplete or indefinite estate is conveyed by the granting clause, as in the instance where no words of inheritance accompany the grant, resort may be had to the habendum clause for the purpose of ascertaining the intention of the grantor. Wayburn, 270 S.C. at 42, 239 S.E.2d at 892; Bean v. Bean, 253 S.C. 340, 343-44, 170 S.E.2d 654, 655-56 (1969). The habendum clause of the deed in question reads, "To Have and to

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[3] In discussing this rule of law, the trial judge referenced the character's quote "If the law supposes that, … the law's a ass – a idiot." Charles Dickens, *Oliver Twist*, Chapter 51.

Hold all and singular the premises before mentioned unto the said [SCFC] and their successors in office, and assigns **forever**." When a habendum clause contains the traditional words of inheritance, it has the effect of enlarging an indefinite granting clause into a fee simple. Id. Thus, any indefiniteness in the granting clause of the 1937 deed in question is cured by the language utilized in the deed's habendum clause.

Respondents assert, as an additional sustaining ground, that the SCFC is estopped from contesting Respondents' ownership of the land. We find that Respondents have abandoned this issue. Respondents' cite no authority to support their contention that the actions of the SCFC warrant a finding of estoppel. Issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal. See In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001).

CONCLUSION

For the forgoing reasons, the order of the trial court is

REVERSED.

HEARN, C.J., and BEATTY, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Joseph Michael Austin and Sandra Austin,

Respondents,

v.

Specialty Transportation Services, Inc.,

Appellant.

Appeal From Spartanburg County
Gary E. Clary, Circuit Court Judge

Opinion No. 3768
Submitted March 8, 2004 – Filed March 29, 2004

AFFIRMED

A. Todd Darwin, of Spartanburg, for Appellant.

Gene Adams and Robert E. Davis, of Spartanburg, for Respondents.

ANDERSON, J.: Joseph Michael Austin and Sandra Austin (collectively, "Respondents") brought an action against Specialty Transportation Services, Inc. (Appellant) and its employee, Walter Ray Bishop, in connection with an automobile accident. Respondents obtained an

entry of default against Bishop and Appellant.[1] The trial court awarded actual and punitive damages to Respondents. We affirm.[2]

FACTUAL/PROCEDURAL BACKGROUND

On November 18, 1999, Respondents were seriously injured in an automobile accident when a tractor-trailer truck driven by Appellant's employee hit their vehicle. Respondents were traveling south on U.S. 29, and the truck was approaching U.S. 29 from an Interstate 85 exit ramp. A stop sign controlled the truck's lane of traffic. However, the driver of the truck failed to yield the right of way to Respondents' vehicle. The truck entered U.S. 29 and struck Respondents' vehicle.

Joseph was trapped in the vehicle for more than an hour. While Joseph was in the car, he was in tremendous pain, his leg was broken in such a way that it was resting between his left shoulder and cheek, and he feared he would burn to death. Joseph sustained injuries to his lower back, neck, right shoulder, right elbow, right leg, and right ankle. Joseph was hospitalized until December 1, 1999. During his hospitalization, Joseph had surgeries on his leg and received counseling for depression. Joseph underwent two additional surgeries after his release from the hospital and endured painful rehabilitation. Joseph described his injuries and resulting pain, including how they have altered his life:

> [Respondents' Counsel]: Did you have immediate problems in all of those areas [right knee, right leg, neck, hands, and fingers] after the accident on November 18, 1999?
> [Joseph]: The leg was very evident that it was broken, and I had again a long period of that. I complained fairly early about my neck but everybody seemed to be more concerned about the leg healing and basically being bedridden. I wasn't using my arm so

[1] Respondents later voluntarily dismissed their claims against Bishop.

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

I assumed that back problem or the neck problem wasn't really apparent.

. . . .

[Respondents' Counsel]: Now, Joe what was the state of your fitness prior to the accident? Did you exercise regularly, walk, jog and things like that?

[Joseph]: Yes. My download, or my basically the way I—instead of other people have different ways of relieving stress. My stress reliever is to walk behind our house. We had a place about a mile and a half down to a dam, on your way you visit like hanging rock and then down to the dam, then you cross the river and then you basically backtrack a different trial [sic], which the about the same length, that was a daily ritual. Cutting the grass, cutting the bushes, pretty much—we built a deck on the back of our house, me and Sandra. We decided we wanted a deck so we built a deck.

Anything I wanted to do. We were going every weekend. If we wanted to go somewhere we would pack the car and just go. Jonathan was in the Grand Canyon at eight months. It just all changed.

[Respondents' Counsel]: Joe, have you made that walk down to the river since the accident occurred?

[Joseph]: No, sir.

[Respondents' Counsel]: Can you make that walk now?

[Joseph]: No, sir.

. . . .

[Respondents' Counsel]: When you came to [after the accident], Joe, what configuration were you in?

[Joseph]: Well, I was laying kind of over and I was looking basically at the sole of my shoe of my right leg and I was wondering, "Well, how in the heck was that there."

[Respondents' Counsel]: Where was that? Show the Judge with your hand.

[Joseph]: Basically, it was laying kind of here.

[Respondents' Counsel]: You're showing on your left shoulder between your left shoulder and your cheek.

[Joseph]: Yes, sir.

[Respondents' Counsel]: Were you able to move as if to get out of the car?
[Joseph]: No. Because the door had pressed in on me, and all I could see was my foot and what I thought was blood everywhere, it was coffee from my wife's coffee. And all of the sudden this blue flame shot in and smoke started rolling in and I looked at my wife and told her to get away from the car.
[Respondents' Counsel]: What were your thoughts when the blue flame rolled through?
[Joseph]: I thought I was going to burn to death.

. . . .

[Respondents' Counsel]: What goes through your mind? What went through your mind?
[Joseph]: It's just a lot of pain, discomfort, question and confusion what's happened. At time an EMS person hops in the back seat and they start basically taking my clothes off with the scissors and stabbing me with a needle. Again, it was—I was trying to get out with the good leg but the good leg was actually trapped underneath the console of the car and this leg just over here.

. . . .

[Respondents' Counsel]: . . . Were you on any pain medication? When did you first receive pain medication if you know?
[Joseph]: . . . And I remember a doctor [in the Emergency Room] saying, "Son, can I take a look at that leg please?"

And I let go and he basically pulled it out and I must have passed out from the pain because when I woke back up they were still doing similar things. I was trembling, it was cold and they wouldn't get me any medication because they thought I had internal bleeding.

. . . .

[Respondents' Counsel]: Tell us about your neck and back, Joe. What problems do you have with your neck and arm?
[Joseph]: Basically, it stiffens up. Like the tingles in the hands, if I drive long distances with arms elevated basically I lose my grip capability, ability of gripping or stiff gripping. I can still

grip like if the object is as big as this I can grab it but if it's as small as a steering wheel on my car it's hard.
[Respondents' Counsel]: Do you have pain in your neck and back?
[Joseph]: Yes, sir, there's pain. That's kind of become a thing that you have everyday. When you get up in the morning it's either the leg, it's the foot, it's the back it's the beck [sic], it's the arms, it's the fingers.

. . . .

[Respondents' Counsel]: And are you in pain on a daily basis in your leg?
[Joseph]: Yes, sir, neck and pack [sic].

Joseph's orthopedic surgeon, Dr. Michael Wayne Funderburk, estimates Joseph will require surgery on his knee every two to five years for the remainder of his life. Dr. Funderburk assessed a forty percent permanent impairment to Joseph's lower right extremity. Joseph has $170,010.62 in present and future medical bills. At trial, Dr. Funderburk discussed Joseph's present and future condition:

[Respondents' Counsel]: All right, sir. Tell us about his course of recovery after that, Doctor.
[Funderburk]: Well, he's done very well for this fracture in my opinion. He certainly has a painful situation as far as his kneecap, and this is because of extensive muscle trauma as well as the damage to the inside of the knee. There's a lot of scarring and limited mobility over that segment, which worsens the arthritic problem underneath that kneecap because there's so much tethering from the muscle damage and the damage to the kneecap proper.

We have subsequently performed arthroscopy surgery and debridement of this, with some benefit. I think that this is going to be a progressive problem for him unfortunately.
[Respondents' Counsel]: Well, will he require, in your professional judgment, debridement surgery in the future for that knee?
[Funderburk]: Yes, I do believe he will.

[Respondents' Counsel]: How often will he require that in your judgement, Doctor?
[Funderburk]: You know, I think that as the arthritis and as the debris within the knee builds up he may need this every two years to clean the knee out. The only other option you have is to replace the knee. And I think in someone this age you would hope that you could use conservative means to try to keep this knee as long as you could before you performed a replacement type surgery on him.
[Respondents' Counsel]: This condition that he has in the knee underneath the kneecap, is that a painful condition?
[Funderburk]: It is.

. . . .

[Respondents' Counsel]: Okay. Tell us about—you said [Joe has] pain in the neck and also some tingling or pain into the hands. Tell us what that comes from.
[Funderburk]: Well, anytime there's swelling or problems around the neck from degenerative changes or disk problems there can be neurological symptoms or nerve pain down into the hands with numbness being one of the common findings into the arms from the neck.
[Respondents' Counsel]: Okay. Are these permanent conditions?
[Funderburk]: They are. They can be progressive conditions that can worsen.
[Respondents' Counsel]: Is it fair to say they're not going to get any better?
[Funderburk]: I don't believe they are.
[Respondents' Counsel]: Okay. Now Doctor, do you believe that Joe has sustained a permanent injury to his leg—his lower right extremity?
[Funderburk]: Yes, sir.
[Respondents' Counsel]: Do you have an opinion as to the percent disability he sustained to his lower right extremity?
[Funderburk]: I've rated him at forty percent permanent impairment to this extremity.

> [Respondents' Counsel]: And that rating is based upon what consideration?
> [Funderburk]: That rating is based upon the consideration on limitation of motion, the arthritis I know is going to occur within this knee as well as the limitation of motion and pain in the right foot as well. I felt that with the progressive problems within the right knee as well as the permanency to the right foot that this was a rating that I gave to his leg.

Sandra suffered injuries to her breast, right hand, and neck. She incurred $57,460.58 in liquidated actual damages. Sandra detailed her injuries:

> Basically I had a large bruise over my left breast. I ended up having, just from the force of the accident, issues with my right hand. It made it hard to pick up things, I broke dishes, cookware, that kind of thing, and just issues with fine detail. I had trouble—actually when they asked me to sign the informed consent I was hurting signing the informed consent. I had difficulty holding the pen to do, that kind, plus I had some issues in the neck.

Sandra, who is a registered nurse, cared for Joseph twenty-four hours a day for many months. During this time, Sandra missed work and lost several bonuses. Sandra enunciated:

> [Respondents' Counsel]: In addition to the fact that you were under medical treatment, was there any other reason you had to be home during that period of time?
> [Sandra]: Yes. Part of the stipulation for Joe's dismissal at the hospital was that I would not work and be there for twenty-four hour care giver [sic]. That was the agreement that we made with the physician to discharge my husband.
> [Respondents' Counsel]: When Joe was discharged from the hospital, was he discharged bedridden?
> [Sandra]: Yes, sir.
> [Respondents' Counsel]: Was he discharged in traction?
> [Sandra]: Yes, sir.

[Respondents' Counsel]: Was that twenty-four hours a day?
[Sandra]: Yes, sir.
[Respondents' Counsel]: Was Joe able to get out of bed?
[Sandra]: No, sir.
[Respondents' Counsel]: Was Joe able to go to the bathroom?
[Sandra]: No, sir.
[Respondents' Counsel]: Was Joe even able to use a potty seat?
[Sandra]: No, sir.
[Respondents' Counsel]: Did you have to do all of that for him?
[Sandra]: Yes, sir.

Sandra testified the accident has substantially changed her family's lives:

[Respondents' Counsel]: Now, how is Joe doing now, Sandra?
[Sandra]: We learn to live with it. He's still depressed. He's not the same guy fourteen years ago.

On February 11, 2002, Respondents obtained an entry of default against the driver of the truck and Appellant. After a combined hearing on the issues of relief from default and damages, the trial court denied Appellant's motion for relief from default and awarded actual and punitive damages to Respondents. The trial judge awarded Joseph $850,000 in actual damages and $2,158,000 in punitive damages. He awarded Sandra $175,000 in actual damages and $442,000 in punitive damages. Appellant filed a motion to alter or amend the judgment. In response, Respondents filed a motion to open the judgment. The trial court denied Appellant's motion and granted Respondents' motion.

STANDARD OF REVIEW

The trial judge has considerable discretion regarding the amount of damages, both actual or punitive. Collins Entm't Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003); Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000). Because of this discretion, our review on appeal is limited to the correction of errors of law. Kuznik, 342 S.C. at 611, 538 S.E.2d at 32; Welch v. Epstein, 342 S.C.

279, 536 S.E.2d 408 (Ct. App. 2000). Our task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award. See Hutson v. Cummins Carolinas, Inc., 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984).

LAW/ANALYSIS

I. AMOUNT OF DAMAGE AWARDS

Appellant argues the evidence in the record does not support the trial court's excessive damage awards to Respondents. We review the damage awards separately and distinctly.

A. Actual Damages

Being mindful of the standard of review in the present case, which does not require this Court to weigh the evidence, but merely determine if there is any evidence to support the damage awards, we find the amounts of actual damages awarded to Joseph and Sandra were proper. See Hutson v. Cummins Carolinas, Inc., 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984).

Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. See Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000). Actual damages are awarded to a litigant in compensation for his actual loss or injury. Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964). Actual damages are such as will compensate the party for injuries suffered or losses sustained. Id. They are such damages as will simply make good or replace the loss caused by the wrong or injury. Actual damages are damages in satisfaction of, or in recompense for, loss or injury sustained. Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162 (1989). The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. Clark, 339 S.C. at 378, 529 S.E.2d at 533.

Actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant. See Rogers v. Florence Printing Co., 233 S.C. 567, 106 S.E.2d 258 (1958). The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury. See Rogers, 233 S.C. at 578, 106 S.E.2d at 264; Hutchison v. Town of Summerville, 66 S.C. 442, 45 S.E. 8 (1903).

The trial court awarded $850,000 in actual damages to Joseph. Joseph presented uncontested evidence of a total of $170,010.62 in present and future medical bills. He testified as to his extreme pain and suffering, impaired ability to work, and loss of enjoyment of life. Joseph underwent four surgeries and is expected to receive surgery every two years for the remainder of his life. In addition, his doctor rated Joseph as having a forty percent permanent impairment to his lower right extremity.

The trial court awarded $175,000 in actual damages to Sandra. Sandra presented uncontested evidence of $57,460.58 in liquidated actual damages. She testified as to the leave she took from her job as a registered nurse in order to care for Joseph twenty-four hours a day for many months.

We find Joseph and Sandra presented sufficient evidence to support the trial court's actual damage awards.

B. Propriety of Punitive Damages

Appellant contends the trial court erred in awarding any punitive damages, as they were not supported by the record and are based on improper considerations. We disagree.

Punitive damages, also known as exemplary damages, are imposed as punishment. Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000). Punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. Id. Moreover, they serve to

vindicate a private right by requiring the wrongdoer to pay money to the injured party. Id.

Punitive damages serve at least three important purposes: (1) punishment of the defendant's reckless, willful, wanton, or malicious conduct; (2) deterrence of similar future conduct by the defendant or others; and (3) compensation for the reckless or willful invasion of the plaintiff's private rights. Id. The paramount purpose for awarding punitive damages is not to compensate the plaintiff but to punish and set an example for others.

On the issue of punitive damages, the highest burden of proof known to the civil law is applicable. Section 15-33-135 of the South Carolina Code provides:

> In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence.

S.C. Code Ann. § 15-33-135 (Supp. 2003). Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996); Lister v. NationsBank of Delaware, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997).

There is no formula or standard that can be used as a measure for assessing punitive damages. However, factors relevant to consideration of punitive damages are:

(1) the character of the defendant's acts;
(2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause;
(3) defendant's degree of culpability;
(4) the punishment that should be imposed;
(5) duration of the conduct;
(6) defendant's awareness or concealment;
(7) the existence of similar past conduct;

(8) likelihood the award will deter the defendant or others from like conduct;
(9) whether the award is reasonably related to the harm likely to result from such conduct; and
(10) defendant's wealth or ability to pay.

See Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991); see also Welch v. Epstein, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct. App. 2000) ("Under Gamble, the trial court is not required to make findings of fact for each factor to uphold a punitive damage award.").

This Court must affirm the trial court's punitive damages finding for the Respondents if any evidence reasonably supports the judge's factual findings. See Carjow, LLC v. Simmons, 349 S.C. 514, 563 S.E.2d 359 (Ct. App. 2002). A factual question as to punitive damages is presented when there is evidence of a statutory violation. See Wise v. Broadway, 315 S.C. 273, 433 S.E.2d 857 (1993).

The trial court found Appellant's agent violated S.C. Code Ann. §§ 56-5-2330(b)[3] and -2740[4] (1991) by failing to stop and yield the right of way to

[3] S.C. Code Ann. § 56-5-2330(b) states:

> Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line but, if none, before entering the crosswalk on the near side of the intersection or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering it. After having stopped, the driver shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute an immediate hazard during the time when such driver is moving across or within the intersection or junction of roadways.

Respondents' vehicle. The evidence in the record, which shows Appellant's vehicle did not stop at the stop sign but entered the intersection and struck Respondents' car, clearly supports this finding. "The causative violation of a statute constitutes negligence per se and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury." Wise, 315 S.C. at 276, 433 S.E.2d at 859. Violation of a statute does not constitute recklessness, willfulness, and wantonness per se, but is some evidence the defendant acted recklessly, willfully, and wantonly. Id. The jury determines whether a party has been reckless, willful, and wanton. Id. at 277, 433 S.E.2d at 859. However, even in cases involving disputed liability, punitive damages are sustainable if there is any evidence supporting a violation of a statute. See, e.g., id. (evidence of a violation of an applicable statute is a proper basis for submitting punitive damages to the trial jury); Bethea v. Pedro Land, Inc., 290 S.C. 341, 350 S.E.2d 392 (Ct. App. 1986) (affirming finding of punitive damages in automobile accident where record contained evidence from which the jury could draw inferences of gross negligence). Because the evidence supports the trial judge's finding that Appellant's agent violated a statute, we find it was proper to award punitive damages to Respondents.

Appellant claims the punitive damage awards were based on improper considerations by the trial judge. Appellant did not raise this argument at trial. Instead, Appellant raised this issue for the first time on appeal. This Court cannot address an issue not raised to the trial court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that

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[4] S.C. Code Ann. § 56-5-2740 reads:

> Every driver of a vehicle approaching a stop sign shall stop before entering the crosswalk on the near side of the intersection or, in the event there is no crosswalk, shall stop at a clearly marked stop line but, if none, then at the point nearest the intersecting highway where the driver has a view of approaching traffic on the intersecting highway before entering the intersection except when directed to proceed by a police officer or traffic-control signal.

an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Therefore, we decline to address whether the punitive damage awards were based on improper considerations.

C. Punitive Damages

The trial court awarded $2,158,000 in punitive damages to Joseph and $442,000 to Sandra. We find the amount of punitive damages awarded to Sandra and Joseph was proper.

The Appellant, in its brief, does **NOT** analyze the issue of actual damages as compared to punitive damages. Rather, the Appellant, in a confusing and erroneous analysis states:

> Joseph Austin was ultimately awarded $850,000.00 in actual damages, as well as the sum of $2,158,000.00 in punitive damages. The testimony at the damages hearing averred that Mr. Austin had incurred total medical damages of $79,810.62 as of August 14, 2002. There was further testimony that future medical expenses could total as much as $90,200.00, for a total of $170,010.62.
>
> The award of $850,000.00 actual damages is approximately 5 times the total figure of present and future medical expenses. Taking the $2,158,000.00 in punitives per the trial court's order, the total damages awarded Joseph Austin are more than 17 times the total medicals (present and future).

The Respondents provide little clarity in their brief:

> Even if this Court were to analyze the Austins' punitive damage awards in terms of a multiple of their respective actual damages, this Court should still affirm the punitive damage awards. Joseph's punitive award is only 12.8 times his actual damages award and Sandra's punitive damage award is only a little over two times her actual damages award.

In contrariety to the mathematical comparisons presented by the Appellant and Respondents in their respective briefs, we calculate as follows:

(1) JOSEPH'S PUNITIVE DAMAGE AWARD IS 2.54 TIMES HIS ACTUAL DAMAGE AWARD.

(2) SANDRA'S PUNITIVE DAMAGE AWARD IS 2.5 TIMES HER ACTUAL DAMAGE AWARD.

In Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), this Court highlighted the case history regarding the determination of whether punitive damages comport with due process:

> The Due Process Clause of the Fourteenth Amendment prohibits states from imposing grossly excessive punishments on tortfeasors. BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). In Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the Supreme Court determined whether the Due Process Clause rendered a punitive damages award unconstitutional. The Court noted "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." Id. at 18, 111 S.Ct. at 1043, 113 L.Ed.2d at 20. In Haslip, the Court upheld the punitive damages award, finding Alabama's post-trial procedures for scrutinizing such awards and its appellate review "makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." Id. at 21, 111 S.Ct. at 1045, 113 L.Ed.2d at 22.
>
> In response to Haslip, the South Carolina Supreme Court, in Gamble, supra, developed an eight factor post-verdict review which trial courts are required to conduct to determine if a punitive damages award comports with due process. The Gamble factors are:

> (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in Haslip, "other factors" deemed appropriate.
>
> Gamble, 305 S.C. at 111-12, 406 S.E.2d at 354. Under Gamble, the trial court is not required to make findings of fact for each factor to uphold a punitive damage award. McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996).

Welch, 342 S.C at 305-06, 536 S.E.2d at 422.

The trial judge is vested with considerable discretion over the amount of a punitive damage award. See Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000). This Court's review of the amount of punitive damages is limited to correction of errors of law. South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc., 324 S.C. 149, 478 S.E.2d 57 (1996).

The trial court awarded Joseph punitive damages that are approximately 2.54 times his actual damages. In State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513 (2003), the United States Supreme Court, in discussing punitive damages, stated:

> [W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.

123 S.Ct. at 1524 (citation omitted). In Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), the Court found that an award greater than four times the amount of compensatory damages was approaching the line of constitutional impropriety. Id. at 23-24. Thereafter, the Court, in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), cited the 4-to-1 ratio again, looking to a long legislative history dating back 700 years that provided for sanctions of double, treble, or quadruple punitive damages. Id. at 581. The Campbell Court inculcated: "While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution . . . ." Campbell, 123 S.Ct. at 1524.

Utilizing Gamble, Welch, and Campbell, the punitive damage award in each instance is a single-digit multiplier and comports with due process.

The punitive damage award to Joseph, which was approximately 2.54 times his actual damage award, was **NOT** excessive. The punitive damage award to Sandra, which was approximately 2.5 times her actual damage award, was **NOT** excessive.

II. APPELLANT'S LIABILITY FOR AGENT'S TORTS

Respondents sued Appellant under a respondeat superior theory. Under the doctrine of respondeat superior, the employer is liable for the acts of an employee acting within the scope of employment. South Carolina Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986). Appellant never contested Respondents' allegation that the driver of Appellant's truck was an employee of Appellant and was acting within the scope of his employment when the accident occurred. In fact, Appellant admitted this allegation upon entry of default. "It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability." Roche v. Young Bros. Inc., 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998).

Additionally, Respondents were not required to sue both principal and agent to recover from the principal under respondeat superior. See Lane v.

Home Ins. Co., 190 S.C. 84, 2 S.E.2d 30 (1939). They had the choice to sue either the agent or principal or join both. See Lane, 190 S.C. at 91, 2 S.E.2d at 32. Because the truck driver was acting within the scope of his employment at the time of the accident, the trial judge properly found Appellant liable for the driver's torts.

Appellant maintains the trial court erred in awarding damages based on the actions of the driver because the driver was previously dismissed as a party to this action. Appellant cites two cases to support its argument—Kirby v. Gulf Ref. Co., 173 S.C. 224, 175 S.E. 535 (1934), and Collins v. Johnson, 245 S.C. 215, 139 S.E.2d 915 (1965). Appellant's reliance on these cases is misplaced. These cases only stand for the proposition that, when a principal and servant are sued together, a principal is not responsible for punitive damages under respondeat superior when the agent was exonerated from liability. In the instant case, the truck driver was dismissed as a party to the case, not exonerated from liability. Concomitantly, Appellant's argument fails.

III. APPLICATION OF RULE 54(c), SCRCP

Appellant asserts the trial court erred in refusing to alter or amend the damages award based on Rule 54(c), SCRCP. Rule 54(c) provides "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." Appellant argues Respondents' complaint limits the damages in the case, and therefore, the trial court erred when it granted Respondents' motion to open the judgment to amend the complaint to delete any prayer for a specific sum. We decline to address this issue. Appellant did not appeal the ruling by the trial judge that granted the motion to open the judgment. A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case. Greenville Cty. v. Kenwood Enters., Inc., 353 S.C. 157, 577 S.E.2d 428 (2003). Thus, allowing the complaint to be amended to delete any prayer for a specific sum is the law of the case.

CONCLUSION

We rule the trial court did not err in the amount of actual damages awarded to Respondents. We hold the amount of punitive damages awarded to Sandra and Joseph was proper. The trial court properly concluded Appellant was liable for the torts committed by its agent. Accordingly, the decision of the trial judge is

AFFIRMED.

HEARN, C.J., and BEATTY, J., concur.