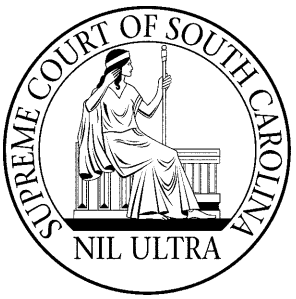

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17
April 17, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Teresa Blakely, Appellant.

Appellate Case No. 2011-196627

Appeal From Laurens County
Eugene C. Griffith Jr., Circuit Court Judge

Opinion No. 5114
Heard March 12, 2013 – Filed April 10, 2013
Withdrawn, Substituted, and Refiled April 11, 2013

AFFIRMED

C. Rauch Wise, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William M. Blitch Jr., both of Columbia, for Respondent.

PIEPER, J.: This appeal arises out of Appellant Teresa Blakely's[1] conviction for accessory after the fact to a felony. Blakely was initially acquitted of murder. She

[1] Blakely's name is listed as Teresa Blakely on the indictment for accessory after the fact to a felony but is listed as Teresa Fuller on the indictment for murder. We refer to her as Blakely throughout this opinion.

was subsequently tried for accessory after the fact to a felony. On appeal, Blakely raises multiple claims arising under the due process clauses of the Fourteenth Amendment to the U.S. Constitution and Article I, § 3 of the South Carolina Constitution, including: (1) the vindictive prosecution in this matter is barred; (2) the indictment for accessory after the fact to a felony following Blakely's acquittal of murder violates due process; and (3) the State's inconsistent positions in two separate criminal proceedings against the same defendant is prohibited. We affirm.

FACTS

Blakely and Kim Alexander were involved in a relationship before and during Blakely's marriage to Houston Fuller, the victim herein. Paul Morris, Alexander's brother, claimed he became aware of derogatory statements Fuller made in reference to Alexander. As a result, Morris vowed to avenge those statements by physically accosting Fuller. Morris arrived at the residence of Fuller and Blakely, began a physical altercation with Fuller, and ultimately killed Fuller during the course of the altercation. Blakely's fourteen-year-old daughter and her daughter's fourteen-year-old boyfriend were in the house during the altercation. Blakely pretended to call 911, told the teenagers to stay down, and further told the teenagers Morris' fight with Fuller involved the "Mexican Mafia." After checking Fuller and finding no pulse, Blakely helped Morris load Fuller's body into Fuller's truck. Morris drove Fuller's truck to a steep bank and rolled the truck with the body down the embankment. Morris got into the vehicle driven by Blakely and Blakely dropped Morris off at a convenience store.

The State indicted Blakely for murder based on the theory that she aided and abetted Morris in killing Fuller. After a four-day trial, the jury rendered a not guilty verdict. After Blakely's acquittal, Morris pled guilty to voluntary manslaughter. Subsequently, Blakely was indicted for accessory after the fact to a felony and tried without a jury. Blakely moved the trial court to quash the indictment due to multiple violations of due process.[2] The trial court denied Blakely's motion to quash the indictment. After a bench trial, the court convicted Blakely and sentenced her to eight years, suspended upon the service of four years with three years' probation. This appeal followed.

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[2] In her motion to quash the indictment, Blakely advanced the same arguments that she now argues to this court on appeal.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous. *State v. McEachern*, 399 S.C. 125, 135, 731 S.E.2d 604, 609 (Ct. App. 2012). This court simply determines whether the trial court's factual findings are supported by any evidence. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). Appellate courts review questions of law de novo. *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

First, Blakely argues the prosecution for accessory after the fact to a felony is the result of vindictive prosecution when the State could have originally indicted Blakely for both murder and accessory after the fact but, instead, only proceeded on the second indictment after Blakely exercised her right to a trial by jury and was acquitted of murder. We disagree.

The felony of murder is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10 (2003). In a murder case, the corpus delicti consists of two elements: (1) the death of a human being; and (2) the criminal act of another in causing that death. *State v. Weston*, 367 S.C. 279, 293, 625 S.E.2d 641, 648 (2006). Before an accused may be found guilty of being an accessory after the fact to a felony, the following elements must exist: (1) the felony has been completed; (2) the accused must have knowledge that the principal committed the felony; and (3) the accused must harbor or assist the principal felon. *State v. Legette*, 285 S.C. 465, 466, 330 S.E.2d 293, 294 (1985). "The assistance or harboring rendered must be for the purpose of enabling the principal felon to escape detection or arrest." *Id.* at 467, 330 S.E.2d at 294.

"The common law traditionally categorized the participants in a felony as accessory before the fact, principal first, principal second, and accessory after the fact." WILLIAM SHEPARD MCANINCH, W. GASTON FAIREY, AND LESLEY M. COGGIOLA, THE CRIMINAL LAW OF SOUTH CAROLINA 410 (5th ed. 2007). Generally, under the common law, liability as an accessory essentially "shadowed" that of the principal. *See State v. Massey*, 267 S.C. 432, 443, 229 S.E.2d 332, 338 (1976) ("At common law an accessory could not be convicted unless his principal had been convicted."). In modern jurisprudence, principals and accessories have generally merged, with an exception for an accessory after the fact. *See* S.C. Code Ann. § 16-1-40 (2003) ("A person who aids in the commission of a felony or is an

accessory before the fact in the commission of a felony . . . is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon."). This means that, upon proper notice and proof, an accessory who provides any assistance may be treated the same as if he was the principal of the crime, but the accessory may not be convicted as both. *See State v. Sheriff*, 118 S.C. 327, 328, 110 S.E. 807, 807 (1922) (noting the common law and the criminal code recognize the "distinction between principals and accessories before the fact and, while the punishment is the same for each, that does not change the essential distinction or relieve the necessity of the appropriate allegations in an indictment"). Today, the accessory's culpability no longer shadows that of the principal. Accordingly, an accessory may be convicted even if the principal is not charged, is acquitted, or is not yet prosecuted. *See Massey*, 267 S.C. at 444, 229 S.E.2d at 338 (noting "the conviction of the principal is no longer a condition precedent to the conviction of an accessory").

An exception to these modern notions of criminal liability applies to an accessory after the fact. While an accessory before the fact may be treated like a principal upon proper proof, an accessory after the fact is not generally treated like a principal of the crime. *See* S.C. Code Ann. § 16-1-55 (2003) (outlining lower classifications of punishment for persons convicted of the offense of accessory after the fact to a felony as compared to punishment for the principal felon); *State v. Good*, 315 S.C. 135, 139, 432 S.E.2d 463, 466 (1993) (holding there was no error in refusing to charge accessory after the fact because "there is no exclusionary situation which eliminates one [defendant] or the other from having participated in the murder as a principal."); *State v. Fuller*, 346 S.C. 477, 481, 552 S.E.2d 282, 284 (2001) (finding the defendant was not entitled to a jury instruction on accessory after the fact to murder, as the evidence did not eliminate the defendant as a principal first); *Vergara v. State*, 695 S.E.2d 215, 218 (Ga. 2010) ("A person cannot be both a party to a crime and an accessory after the fact." (internal quotation marks omitted)). Moreover, accessory after the fact to a felony is not a lesser-included offense of murder. *Fuller*, 346 S.C. at 481, 552 S.E.2d at 284; *see Good*, 315 S.C. at 138-39, 432 S.E.2d at 465-66 (noting accessory after the fact is not a lesser-included offense of any of the offenses with which the defendant was charged, including murder, armed robbery, grand larceny of a motor vehicle, and criminal conspiracy). Accordingly, double jeopardy does not attach under these facts.[3] *See State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801

[3] On appeal, Blakely does not assert a double jeopardy claim.

(2011) ("Under the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal, a conviction, or an improvidently granted mistrial." (emphasis added) (internal quotation marks omitted)).

Next, we review the claim of vindictive prosecution. In *State v. Fletcher*, 322 S.C. 256, 258-59, 471 S.E.2d 702, 704 (Ct. App. 1996), this court was presented with a question regarding whether prosecutorial vindictiveness was indicated by the actions of the solicitor. "It is a due process violation to punish a person for exercising a protected statutory or constitutional right." *Id.* at 259, 471 S.E.2d at 704 (citations omitted). However, "punishment of the offender is recognized as a proper motivation for a sentencing trial judge or a prosecutor." *Id.* at 260, 471 S.E.2d at 704. The presence of a punitive motivation "does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity." *Id.* "[A]n initial decision by the prosecutor should not freeze future conduct, because the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution." *State v. Dawkins*, 297 S.C. 386, 389, 377 S.E.2d 298, 300 (1989). A prosecutor "has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain." *State v. Langford*, 400 S.C. 421, 435 n.6, 735 S.E.2d 471, 479 n.6 (2012).

Our court in *Fletcher* noted that "the United States Supreme Court has fashioned certain rules as a protection against vindictive action in response to a criminal defendant's exercise of a statutory or constitutional right." *Fletcher*, 322 S.C. at 260, 471 S.E.2d at 704. Only "certain limited circumstances pose a realistic likelihood of vindictiveness by a prosecutor" and, therefore, warrant the application of a presumption of vindictiveness. *Id.* (internal quotation marks omitted). "The inquiry . . . is not focused solely on the presence or absence of actual vindictive motive, but includes whether the action taken, which exposes the accused to an increased punishment, poses such a reasonable likelihood of vindictiveness as to require a presumption of vindictiveness." *Id.* at 260-61, 471 S.E.2d at 704 (internal quotation marks omitted).

South Carolina courts have not answered the exact question regarding whether prosecution on a new indictment after a defendant was acquitted on a separate charge following that defendant's exercise of his or her right to a jury trial gives

rise to a presumption of vindictiveness. In *Fletcher*, we considered prosecutorial vindictiveness alleged by a defendant who had successfully asserted her right to appeal. Fletcher was arrested and charged with assault and battery and discharging a firearm, both municipal charges. *Id.* at 259, 471 S.E.2d at 704. At the same time, Fletcher was also charged with pointing a firearm, a general sessions charge. *Id.* at 261 n.3, 471 S.E.2d at 705 n.3. After she was convicted in her absence on both of the municipal charges, she successfully appealed her convictions and the general sessions court reversed the municipal court for failure to provide proper notice of the trial. *Id.* at 259, 471 S.E.2d at 704. While the new trial on the municipal charges was pending, the solicitor directly indicted Fletcher for assault with intent to kill. *Id.* Fletcher requested the circuit court force the solicitor to elect between assault with intent to kill and pointing a firearm, arguing the two charges covered the same offense. *Id.* The circuit court ultimately dismissed the charge of assault with intent to kill. *Id.* The circuit court refused to dismiss the pointing a firearm charge despite Fletcher's motion to do so on the grounds of prosecutorial vindictiveness. *Id.* Fletcher was convicted of pointing a firearm. *Id.*

In its analysis regarding Fletcher's claim that the circuit court erred by not dismissing the pointing a firearm charge based on prosecutorial vindictiveness, this court determined the actions of the solicitor did not warrant the application of the presumption of prosecutorial vindictiveness even though "Fletcher exercised a procedural right to appeal the conviction arguably emanating from the same conduct which provided the basis for the greater charges." *Id.* at 261, 471 S.E.2d at 705. We emphasized the fact that "the decision to charge Fletcher with the offense of pointing a firearm was initiated at the same time the municipal charges were brought" and, therefore, it was not an action the solicitor took against Fletcher "after the exercise of a legal right." *Id.* (internal quotations omitted).

After determining insufficient evidence of a reasonable likelihood of prosecutorial vindictiveness existed to warrant application of the presumption, this court noted that in order to succeed on her claim of prosecutorial vindictiveness, Fletcher was "required to prove actual prosecutorial vindictiveness." *Id.* at 262, 471 S.E.2d at 705. "The only evidence presented to the trial court in support of the allegation of actual vindictiveness [was] the timing of the direct indictment." *Id.* In response to Fletcher's allegations of prosecutorial vindictiveness, "the solicitor represented to the court that he was unaware of the pending municipal charges until the week prior to trial" and "argued the direct indictment was precipitated by a review of the file, revealing to him that the situation was more violent than just pointing a

firearm because Fletcher actually fired the weapon at the alleged victim." *Id.* at 262, 471 S.E.2d at 705-06. We concluded that any inference of vindictiveness derived from the timing of the direct indictment was insufficient to prove an improper motivation because the evidence established probable cause to believe the crime had occurred; accordingly, we held Fletcher did not prove actual prosecutorial vindictiveness. *Id.* at 262-63, 471 S.E.2d at 706.

Blakely asserts our supreme court's holding in *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002), is applicable to the instant case. Patrick was originally indicted for burglary, two counts of armed robbery, assault and battery with intent to kill, and the use of a motor vehicle without the owner's consent. *Id.* at 205, 562 S.E.2d at 610. "All the indictments, except the burglary indictment, were *nol prossed* prior to trial." *Id.* Patrick was ultimately convicted of burglary and sentenced to life in prison. *Id.* Seventeen years after his conviction, Patrick was successful in obtaining a reversal through post-conviction relief (PCR). *Id.* at 205-06, 562 S.E.2d at 610. The State then indicted Patrick for all five original charges, and the jury convicted Patrick on all counts. *Id.* at 206, 562 S.E.2d at 610. Patrick's application for PCR was denied. *Id.* However, our supreme court granted Patrick's petition for certiorari. *Id.* at 205, 562 S.E.2d at 610.

In its analysis regarding Patrick's claim of prosecutorial vindictiveness, the supreme court cited *North Carolina v. Pearce*, 395 U.S. 711 (1969), for the proposition that "the Due Process Clause of the Fourteenth Amendment prevent[s] a trial court from penalizing a defendant for choosing to exercise his right to appeal." *Patrick*, 349 S.C. at 209, 562 S.E.2d at 612. The supreme court found that in order for a presumption of prosecutorial retaliation to apply, Patrick would need to show a reasonable likelihood that retaliation was a motive behind bringing the additional charges. *Id.* If no such reasonable likelihood existed, the court determined Patrick would have the burden to prove actual retaliation. *Id.* The court found a presumption of prosecutorial vindictiveness applied because the facts presented a reasonable likelihood that the solicitor brought the additional charges in retaliation for Patrick's exercise of his right to appeal. *Id.* at 210, 562 S.E.2d at 612. The court specifically noted that seventeen years passed between the trials, but no new evidence was discovered and none of the facts or witnesses available to the prosecution had changed. *Id.* at 209-10, 562 S.E.2d at 612. In analyzing whether the State rebutted the presumption, the court noted that the solicitor's reasons for prosecuting the previously *nol prossed* charges included: (1) it was in the interest of the State of South Carolina; and (2) it was common practice not to

prosecute additional charges once a solicitor had a life sentence on one charge. *Id.* at 210, 562 S.E.2d at 612. The supreme court held the State had not rebutted the presumption of prosecutorial vindictiveness with these "fairly weak reasons for bringing the charges, especially considering the length of time between the original trial and the retrial." *Id.*

Though informative, *Fletcher* and *Patrick* are not directly applicable to the instant matter because Blakely did not exercise her right to appeal or file an application for PCR; instead, Blakely was acquitted on one charge after she exercised her right to a jury trial, and then indicted on another. We find persuasive the decisions of several federal circuit courts of appeals that have considered the exact issue at bar and have held a new prosecution following an acquittal by a jury on separate charges does not, without more, give rise to a presumption of vindictiveness. Most recently, the Eleventh Circuit decided no presumption of prosecutorial vindictiveness existed when the government brought a second indictment for alien smuggling following the defendant's acquittal after a jury trial on drug and firearm charges when "the second indictment did not follow a successful appeal . . . nor did it seek heightened charges." *United States v. Kendrick*, 682 F.3d 974, 983 (11th Cir. 2012). The Second Circuit found the prosecution of a defendant on federal weapons charges after an acquittal following a jury trial on Racketeer Influenced and Corrupt Organizations Act (RICO) charges was entirely legitimate "and certainly cannot be considered vindictive." *United States v. Johnson*, 171 F.3d 139, 141 (2d Cir. 1999). The Eighth Circuit held the filing of additional charges after an acquittal by the jury did not evoke the presumption of vindictive prosecution because the "exercise of one's choice to proceed with a jury trial rather than a bench trial does not compel a special presumption of prosecutorial vindictiveness whenever additional charges are brought after a jury trial is demanded." *United States v. Rodgers*, 18 F.3d 1425, 1430-31 (8th Cir. 1994) (internal quotation marks omitted). Additionally, the Third Circuit found:

> We will not apply a presumption of vindictiveness to a subsequent criminal case where the basis for that case is justified by the evidence and does not put the defendant twice in jeopardy. Such a presumption is tantamount to making an acquittal a waiver of criminal liability for conduct that arose from the operative facts of the first prosecution. It fashions a new constitutional rule that requires prosecutors to bring all possible charges in an

> indictment or forever hold their peace. . . . We reject such a proposition for it undermines lawful exercise of discretion as well as plain practicality.

United States v. Esposito, 968 F.2d 300, 306 (3d Cir. 1992).

While we recognize Blakely exercised her constitutional right to a jury trial on the first charge, we also recognize none of the cases we have cited find a presumption of vindictiveness arises solely from the prosecutor's decision to proceed on a new charge after a defendant's acquittal by the jury on a previous charge. Blakely argues a presumption of vindictiveness exists here because the State could have originally indicted her for both murder and accessory after the fact but, instead, the State elected to indict her for accessory after the fact only after she was acquitted for murder. Blakely asserts the State failed to provide an explanation regarding why the charges were not tried together and argues the indictment for accessory after the fact was retaliatory because the State was unsuccessful in securing a conviction for murder. However, Blakely admitted to the trial court that if the State originally pursued a two-count indictment, the State would have been required to take somewhat inconsistent positions as to each crime. The second indictment was issued after Blakely was acquitted of murder and not after Blakely filed an appeal or an application for PCR. The State did not seek a heightened charge or increased punishment. The fact that Blakely exercised her right to a jury trial on the first charge is, standing alone, insufficient to prove such a reasonable likelihood of vindictiveness as to require a presumption of vindictiveness. Blakely makes no allegations of actual vindictiveness other than the fact that the State issued a second indictment after an acquittal by the jury. We conclude a presumption of vindictiveness does not arise and that Blakely has not presented sufficient evidence of actual prosecutorial vindictiveness. Therefore, based upon our review of applicable jurisprudence, we find the record supports the trial court's denial of Blakely's motion to quash the indictment.

Second, Blakely argues the indictment for accessory after the fact to a felony after she had been acquitted of murder violates due process where the American Bar Association's (ABA) standards for prosecutors involving joinder and severance of cases prohibit prosecution in the instant matter. We disagree.

Though the ABA standards for criminal justice are a useful point of reference, these standards are only guides and do not establish the constitutional baseline.

Rompilla v. Beard, 545 U.S. 374, 400 (2005). The U.S. Constitution does not codify the ABA's model rules. *Montejo v. Louisiana*, 556 U.S. 778, 790 (2009). South Carolina does not require mandatory joinder of indictments in one trial but instead, leaves the decision of whether to join charges to the discretion of the trial court after motion by one party. *See State v. Hinson*, 253 S.C. 607, 613, 172 S.E.2d 548, 551 (1970); *State v. Evans*, 112 S.C. 43, 45, 99 S.E. 751, 751 (1919). Federal courts have rejected the argument that the initial choice to withhold certain charges and then later proceed on those charges after an acquittal amounts to a constitutional violation. *See Paradise v. CCI Warden*, 136 F.3d 331, 336 (2d Cir. 1998) ("Accepting this contention would encourage prosecutors to overcharge defendants, by charging both a greater number of crimes and the most severe crimes supported by the evidence. This is a result we do not wish to promote. Instead, the validity of a pretrial charging decision must be measured against the broad discretion held by the prosecutor to select the charges against the accused." (internal quotations omitted)); *Johnson*, 171 F.3d at 141 (finding no error in the prosecution of new charges after an acquittal even when knowledge of the new charges existed prior to the first trial).

Although Blakely argues the ABA standards involving joinder and severance of cases preclude prosecution, we believe these standards are not controlling or dispositive. While our supreme court and this court have, on occasion, referred to ABA standards,[4] our jurisprudence has not adopted the standards as a rule of court.

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[4] *See Council v. State*, 380 S.C. 159, 172-73, 670 S.E.2d 356, 363 (2009) (noting that trial counsel's conduct fell below the standards set by the ABA for the appointment and performance of counsel in death penalty cases); *Ard v. Catoe*, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007) (citing the ABA's standards for defense counsel's performance regarding investigation of a capital case in support of its decision to affirm the PCR court's finding of ineffective assistance of counsel); *Matter of Goodwin*, 279 S.C. 274, 277, 305 S.E.2d 578, 580 (1983) (noting the ABA standards' suggested procedure for a trial court's handling of a conflict between counsel and a criminal defendant client intending to commit perjury); *Harden v. State*, 276 S.C. 249, 253-56, 277 S.E.2d 692, 694-95 (1981) (finding the rationale in ABA standard 14-3.3 regarding whether to accept guilty pleas and plea agreements persuasive); *State v. Way*, 264 S.C. 280, 285, 214 S.E.2d 640, 642 (1975) (Bussey, J., dissenting) (referencing the ABA standards' provision regarding the function of the trial judge); *State v. Stanley*, 365 S.C. 24, 39, 615 S.E.2d 455, 463 (Ct. App. 2005) (citing, among other authorities, the ABA

Furthermore, we find Chief Justice Toal's cautionary dissent in *Ard v. Catoe* instructive as to the weight of the reliance South Carolina courts should place on the ABA standards:

> Additionally, I note that in support of their conclusion that trial counsel were deficient, the majority cites extensively to American Bar Association (ABA) guidelines on the prevailing norms of practice. The majority justifies their reliance on ABA guidelines by pointing to an endorsement of ABA standards in *Strickland v. Washington.* In my opinion, however, the *Strickland* court makes it clear that the ABA standards, although helpful, are "only guides" for assessing reasonableness. . . . This Court has never adopted the ABA guidelines as the standard for prevailing professional norms in South Carolina.

372 S.C. 318, 338 n.19, 642 S.E.2d 590, 600 n.19 (2007) (Toal, C.J., dissenting, and Burnett, J., concurring with the dissent); *see also Medlin v. State*, 276 S.C. 540, 544, 280 S.E.2d 648, 650 (1981) (Littlejohn and Gregory, JJ., concurring in part and dissenting in part) (noting "no other state and no other jurisdiction has adopted the ABA Standards as a rule of court"). Accordingly, while the ABA standards may be useful or may offer assistance in the analysis of an issue, these standards are not controlling or dispositive. Moreover, with respect to Blakely's specific claim, we note the ABA standards do not create a due process right; instead, due process rights emanate from the U.S. Constitution and the South Carolina Constitution. Therefore, we find Blakely's second argument is without merit.

Third, Blakely argues the State took inconsistent positions in the two separate criminal proceedings against Blakely and, therefore, violated due process. We disagree.

Standards for Criminal Justice, § 6-1.1 (2d ed. 1980), for the premise that a judge has a responsibility for safeguarding both the rights of the accused and the rights of the public in the administration of criminal justice).

In support of her argument, Blakely cites to *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000). However, the *Groose* court held the state violated the defendant's due process rights when it used one of a codefendant's two factually contradictory versions of events surrounding the murders to convict the defendant, and then relied on another version at a later trial to convict someone else of the same murders. *Id.* at 1051-52. In the instant matter, the State merely pursued two different legal theories. Blakely cites no other authority prohibiting the State from asserting two different legal theories based on the facts presented. Accordingly, we affirm as to this issue.

CONCLUSION

For the aforementioned reasons, the judgment of the trial court is hereby

AFFIRMED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cynthia Heather Schultze, Appellant,

v.

John Robert Schultze, Respondent.

Appellate Case No. 2011-197293

Appeal From York County
Henry T. Woods, Family Court Judge

Opinion No. 5115
Heard March 6, 2013 – Filed April 17, 2013

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED IN PART

Thomas F. McDow and Erin K. Urquhart, Law Office of Thomas F. McDow, of Rock Hill, for Appellant.

Tony M. Jones and Barrett W. Martin, Jones & Martin, of Rock Hill, for Respondent.

FEW, C.J.: Heather Schultze appeals the family court's decree of divorce that (1) equitably divided a portion of her retirement account to John Schultze, (2) equitably divided the parties' debts, and (3) awarded Heather $3,750 in attorney's fees. She argues the family court erred in apportioning both her retirement account and the parties' debts because those issues were not properly before the court. She also contends John presented insufficient evidence regarding both the amount and

purpose of the debts. Finally, she argues if this court alters the decree of divorce in her favor, she is entitled to additional attorney's fees. We reverse the court's finding regarding Heather's retirement account, affirm the finding regarding marital debts, and remand the award of attorney's fees.

I. Facts and Procedural History

Heather commenced this action for divorce in 2008, seeking custody of the parties' children, child support, alimony, equitable apportionment of property, and attorney's fees. The family court held a temporary hearing, and both parties submitted affidavits. In his affidavit, John stated, "To the best of my knowledge, my wife and I have already divided all of our personal property, as we have been separated for over three years."

The family court also held a pretrial conference and contemporaneously issued a form order that contained a list of issues to be addressed at trial. The issues listed on the pretrial order contained corresponding boxes for the court to check. Presumably, if the box next to an issue was checked, that issue was to be resolved at trial. According to the list, the issues for trial were limited to "divorce," "custody uncontested," "visitation uncontested," "child support guidelines," "equitable apportionment of real property," and "other retroactive child support/alimony." The order did not contain checks in the corresponding boxes for "equitable apportionment of personal property" or "marital debt." Below that list within the same order, paragraph four was checked, which read, "The parties stipulate that all marital personal property has been divided to their mutual satisfaction." However, paragraph five was checked, which provided,

> Each party shall prepare a list of marital debts reflecting the balance as of, or as near to, the date of trial. These lists shall be exchanged between counsel. Upon the trial of the case, counsel should be prepared to present the Court with a stipulated balance of the marital debts.

In compliance with the court's pretrial order, both parties submitted pretrial briefs. Heather addressed the issue of personal property in her brief, stating,

> The pretrial order checks paragraph four (a) stating that "the parties stipulate that all marital personal property has

> been divided to their mutual satisfaction." This is consistent with [John's] affidavit . . . . The pretrial order specifically does not check paragraph four (b) stating "Within ___ days of this Order the parties shall exchange personal property lists reflecting a per-item value or auction date of all personal property, **including retirement accounts** . . . ." This strongly suggests that the division of personal property included the retirement accounts of the parties.

(emphasis in original). In his pretrial brief, John represented, "The personal property has been agreed upon and divided between the parties."

At trial, John introduced evidence of both parties' retirement accounts and debts. However, neither party specifically asked the court to consider the retirement accounts in the equitable apportionment of the marital property. As to the marital debts, Heather agreed on cross-examination that a "fifty/fifty division of [the marital debts] would be fair in this case."[1]

The family court's decree of divorce divided both Heather's retirement account and the marital debts. The court ordered Heather to pay John fifty percent of her retirement account—$21,463 plus any passive gains or losses—and twenty-five percent of the marital debts—$8,234. Finally, the court awarded Heather $3,750 in attorney's fees.

II. Personal Property

The first issue before this court is whether it was error to include Heather's retirement account in the equitable division of the marital estate. In her complaint, Heather sought equitable division of the marital property. Thus, the issue of equitable apportionment of personal property, which includes retirement accounts, was initially before the family court. *See* S.C. Code Ann. § 20-3-620(A) (Supp. 2012) (providing the family court has the authority to equitably divide marital

[1] Heather made this statement while being questioned about the parties' debts and her knowledge regarding those debts. We find from the context of the testimony that she was referring to a division of the parties' debts and not the marital estate as a whole.

property "upon request by either party in the pleadings"); *see also Jenkins v. Jenkins*, 357 S.C. 354, 361, 592 S.E.2d 637, 641 (Ct. App. 2004) (holding Wife's retirement account was marital property).

The parties agreed before trial, however, that the division of personal property was no longer an issue for the court to decide. John informed the court by pretrial brief and affidavit that personal property had been agreed upon and divided between the parties. Also, the pretrial order did not list equitable division of personal property as an issue for trial. The order stated, "The parties stipulate that all marital personal property has been divided to their mutual satisfaction." A pretrial order "limits the issues for trial to those not disposed of by admissions or agreements of counsel" and "controls the subsequent course of the action . . . ." Rule 16(b), SCRCP. Thus, both parties and the court considered the issue of equitable division of personal property to have been resolved before trial.

After representing to the court that all issues regarding personal property were resolved, John was required to take formal action to bring the issue back before the court. *See id.* (explaining the pretrial order "controls the subsequent course of the action, *unless modified on motion, or at the trial* to prevent manifest injustice" (emphasis added)). If John wanted the court to disregard the parties' agreement and consider personal property in its equitable division, he was required to make a motion or otherwise ask the family court to do so. John did neither. Instead, he merely introduced evidence of the retirement accounts, which was relevant to other contested issues, such as attorney's fees[2] and alimony.[3]

Therefore, the issue of dividing Heather's retirement account was not before the family court. We reverse the court's decision to rule on this issue.

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[2] "In deciding whether to award attorney's fees and costs, the court should consider the following factors: . . . (3) the financial conditions of the parties . . . ." *Lewis v. Lewis*, 400 S.C. 354, 372, 734 S.E.2d 322, 331 (Ct. App. 2012).

[3] "In making an award of alimony or separate maintenance and support, the court must consider and give weight in such proportion as it finds appropriate to all of the following factors: . . . (8) the marital and non-marital properties of the parties, including those apportioned to him or her in the divorce or separate maintenance action; . . . (13) such other factors the court considers relevant." S.C. Code Ann. § 20-3-130(C) (Supp. 2012).

III. Marital Debts

Heather contends the issue of marital debts was also not before the court, and thus, the family court erred in requiring her to pay a portion of John's debts. She also argues the family court erred because there was no evidence the debts were incurred for marital purposes and no evidence of the balance of the debts on the date of separation or filing. We disagree.

As to whether the issue of marital debts was before the family court, the family court has the authority to equitably divide the marital estate "upon request by either party in the pleadings." § 20-3-620(A). In dividing the marital estate, the family court must consider "existing debts incurred by the parties or either of them during the course of the marriage." § 20-3-620(B)(13). Marital debt, like marital property, must be specifically identified and apportioned in equitable distribution. *Barrow v. Barrow*, 394 S.C. 603, 610, 716 S.E.2d 302, 306 (Ct. App. 2011).

Heather pled equitable apportionment of property in her complaint, thus the issue of dividing the marital debts was presented to the court. Even though the family court left the issue of "marital debts" unchecked on the pretrial order, paragraph five was checked, which required the parties to exchange a list of marital debts before trial. Unlike the issue of personal property discussed above, the division of marital debts was still at issue prior to trial. Therefore, the issue was properly before the family court, and the court did not err in addressing it.

Heather next argues John presented insufficient evidence as to the marital purpose of the debts or their balance on the date of separation or filing. "For purposes of equitable distribution, a marital debt is a debt incurred for the joint benefit of the parties regardless of whether the parties are legally liable or whether one party is individually liable." *Wooten v. Wooten*, 364 S.C. 532, 546, 615 S.E.2d 98, 105 (2005) (internal quotation marks omitted). There is a rebuttable presumption that a debt of either spouse incurred prior to the beginning of marital litigation is marital and must be factored in the totality of equitable apportionment. *Thomson v. Thomson*, 377 S.C. 613, 624, 661 S.E.2d 130, 136 (Ct. App. 2008). Therefore, when a debt is proven to have accrued before the commencement of marital litigation, the burden of proving the debt is non-marital rests on the party who makes such an assertion. *Wooten*, 364 S.C. at 547, 615 S.E.2d at 105.

We first note that the appellant bears the burden of providing a record on appeal sufficient for intelligent review and from which an appellate court can determine whether the trial court erred. *Taylor v. Taylor*, 294 S.C. 296, 299, 363 S.E.2d 909, 911 (Ct. App. 1987). The record in this case provided little of the trial transcript, making it difficult to know the context of the testimony. Heather's brief and reply brief include citations to testimony that were not included in the record on appeal. For this court to evaluate the merits of a disputed issue, the appellant must provide the court with a sufficient record pertaining to that issue; otherwise, there is nothing for this court to review. *Porter Bros., Inc. v. Specialty Welding Co.*, 286 S.C. 39, 42, 331 S.E.2d 783, 784-85 (Ct. App. 1985).

We know from the record, however, that Heather filed her complaint July 11, 2008. The record also establishes John introduced at trial a marital assets addendum reflecting the debts that existed at the time the action was filed, which included credit card statements dated 2005. Moreover, John presented proof that payments were made on these credit cards from the joint bank account during the marriage. Thus, because John showed proof of the existence of debts that accrued before Heather filed the lawsuit, Heather had the burden to prove the debts were not incurred for the joint benefit of the parties. *See Wooten*, 364 S.C. at 547, 615 S.E.2d at 105.

According to the record on appeal, the only evidence Heather put forth to prove the debts were non-marital is limited to three short lines of testimony. This testimony shows she knew John had *some* credit card debt when they separated, though she did not know how much or for what purpose the credit cards were used. Heather argues her lack of knowledge regarding these debts suggests they were incurred for a non-marital purpose. We disagree. Heather had the burden to prove the debts were non-marital in nature, and pleading ignorance to the nature of debts that accrued during the marriage is insufficient to sustain that burden. Therefore, we find the court properly apportioned the debts because Heather did not sustain her burden of showing the debts were non-marital.

IV. Attorney's Fees

Finally, Heather argues if this court modifies any portion of the decree of divorce in her favor, there should be an upward modification in her attorney's fees. When a party obtains beneficial results on appeal, the attorney's fee award may be modified. *Mallett v. Mallett*, 323 S.C. 141, 154, 473 S.E.2d 804, 812 (Ct. App.

1996). Because Heather obtained beneficial results on appeal with regard to the apportionment of her retirement account, we remand the issue of attorney's fees to the family court to decide if any modification is warranted.

V. Conclusion

Accordingly, we (1) reverse the court's finding regarding personal property because the issue was not properly before the court, (2) affirm the court's finding regarding marital debts because Heather did not sustain her burden of showing the debts were non-marital in nature, and (3) remand the award of attorney's fees to the family court in light of this court's reversal of the apportionment of Heather's retirement account.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED IN PART.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles A. Hawkins, Appellant,

v.

Angela D. Hawkins, Respondent.

Appellate Case No. 2011-195506

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

Opinion No. 5116
Heard February 5, 2013 – Filed April 17, 2013

AFFIRMED

Donald Bruce Clark, of Charleston, and Sabrina R. Grogan, of Mount Pleasant, for Appellant.

J. Mark Taylor, of Moore Taylor & Thomas, PA, of West Columbia, Katherine Carruth Goode, of Winnsboro, and Sally Anna King-Gilreath, of Mount Pleasant, all for Respondent.

LOCKEMY, J.: Charles A. Hawkins (Father) appeals the family court's determination that he was not entitled to a termination or reduction of his child support payments. Specifically, he argues the family court erred by using an improper burden of proof; or in the alternative, the family court erred in its failure to properly recalculate his child support payments. Lastly, Father contends the

family court erred in awarding Angela D. Hawkins (Mother) attorney's fees, but failing to award his attorney's fees. We affirm.

FACTS

Father and Mother were divorced by a final decree on February 3, 2004. Prior to the divorce, the family court approved a property settlement and support agreement (Settlement Agreement) which had been entered by the parties. Pursuant to that order, the parties were awarded joint custody of their two minor children with Mother having primary custody. Father was required to pay child support in the amount of $1,300.00 per month, pursuant to the Department of Social Services Child Support Guidelines (Child Support Guidelines). The order further provided that the amount of child support would be revisited on an annual basis:

> The [Father] shall pay, pursuant to the [Child Support Guidelines], as for the child support the sum of $1,300.00 Dollars per month, due the first of each month, said sum to be paid directly to the [Mother]; that should the payment ever be more than five (5) days late, the [Mother] may present her Affidavit to the Court and all future payments shall be made thereafter through the Charleston County Family Court, together with the 3% administrative fee.
>
> For the period of time until the marital home is sold and a closing has taken place, the [Father] has agreed to pay the mortgage, taxes and insurance on the marital home, water, home repair bills, the rent on the apartment and the power and utility bills for both the apartment and marital home. The [Father] further agrees to pay the automobile payments, automobile insurance coverages and gas for both cars. The cost of carrying these expenses will constitute child support during this period of time. At such time as the marital home is sold, the parties agree to calculate child support based on the shared [Child Support Guidelines]. Based on the gross income of each party at this time and the amount of parenting time of both party, the calculated child support

> is $1,300.00. This payment of child support shall begin the first month following the closing from the sale of the marital home. The parties agree to recalculate child support when the [Mother] begins full-time work, which is expected to be no later than September 2005. Child support will be revisited on an annual basis thereafter.

Around three years later, on May 22, 2006, the parties filed a consent order, noting a change in their respective incomes, and they recalculated Father's child support obligation pursuant to the Child Support Guidelines. That order provided in pertinent part:

> The parties have experienced changes in their respective incomes such that a modification of child support is now warranted. Based upon the parties' respective current incomes, the Plaintiff presently earns $11,500.00 per month and the Defendant presently earns $2,750.00 per month (see attached as Exhibit C, the financial declarations of the parties), and pursuant to the [Child Support Guidelines] (a copy of which is attached hereto as Exhibit D), the Plaintiff's monthly child support obligation should be set at $1,077.00. The parties have therefore, based upon the foregoing, agreed to a modification of the Plaintiff's child support obligation, such that said obligation shall be reduced from $1,300.00 per month to $1,077.00 per month.

On October 8, 2007, a second consent order was entered, noting another change in the parties' respective incomes, as well as the fact Father would begin having 156 overnights per year with the children. The parties recalculated Father's child support obligation pursuant to the Child Support Guidelines. The second consent order provided in pertinent part:

> The parties have experienced changes in their respective incomes such that a modification of child support is now warranted. The parties have therefore, based upon the foregoing, agreed to a modification of the Plaintiff's child support obligation, such that said obligation shall be

> reduced from $1,077.00 to $800.00 per month beginning September 1, 2007, and shall remain in effect through the end of May 2008, at which time the parties anticipate a substantial change in the Defendant's income, which will at that time warrant a recalculation of child support.
>
> As referenced above, the parties shall in May of 2008 revisit and recalculate child support, and the parties further agree that said calculation shall be based, in part, upon the Plaintiff having 156 overnight visitations with the children, although their custody/visitation arrangement is, in fact, a shared (50/50) schedule, as referenced in Dr. Tyroler's attached as Exhibit D. The parties shall however, continue to comply, through December of 2007, with the visitation which was agreed upon by the parties through Dr. Tyroler.

On January 22, 2009, a third consent order was entered, granting Father 182 overnights per year with the children, and again recalculating Father's child support pursuant to the Child Support Guidelines. This was the fifth time in approximately six years Father's child support had been modified, including the two times an automatic recalculation was required pursuant to the initial Settlement Agreement. At the time of the third consent order, Father's income was stated as $9,833.00 per month and Mother's income was $2,900.00 per month. Father had been terminated from his job as a senior executive sales representative for GlaxoSmithKline. His income was derived from $130,000.00 received from his severance. The third consent order stated in pertinent part:

> The parties agree that the Mother shall have the children 183 overnights per year and the Father shall have the children 182 overnights per year. Based upon the various child support guideline figures examined by the parties, they have agreed that the Father shall pay the Mother the sum of $640.00 per month as child support. The parties further agree that the Mother shall have to have a reported income in excess of $43,000[.00] before her income can be the basis for a modification of child

> support. The foregoing child support was calculated based on the following:
>
> a. The Mother having 183 overnight and $2900[.00] per month income;
> b. The Father having 182 overnights and $9833[.00] per month income and paying $150 in health care.
> c. The parties have agreed that their current child care expenses have not been included in these support calculations.

On February 16, 2010, Father filed the present action requesting a termination of his child support payments and an award of child support in the amount of $98.00 from Mother. This fourth action was the first action in which Mother did not consent to Father's requested relief. On April 12, 2010, Mother filed her answer and counterclaim denying Father was entitled to a reduction of child support and further requesting attorney's fees and costs. Father filed a reply to Mother's counterclaim, and the trial was held on January 18-19, 2011.

At the time of trial, Father was fifty-one years old and claimed he made $0.00 income. He stated after his termination in 2008, he immediately commenced his job search, and assumed his severance package would support him until he found his next job. GlaxoSmithKline paid for a company to assist Father in finding a job, and the company told Father the odds of finding another pharmaceutical job were low and to anticipate making less money in his next job. Father admitted he did not investigate certain jobs because he spent most of his time searching for one that would provide a six-figure income. He was finally employed with a real estate company, Carolina One, and obtained his real estate license. His income was based on commission, and he claimed he had not yet made any sales or income from his new job.

Father stated his new spouse, a radiologist at a local hospital, financially supported him during his unemployment. Otherwise, he would have used his savings for support, which included an IRA account valued at $596,000.00. Father lived in a home measuring 3,400 square feet with an approximate $7,000.00 monthly mortgage payment. Father claimed he and his spouse had economized due to their decreased income in many ways, including cutting their second telephone landline, ending their TiVo subscription, forgoing yard work such as laying pine straw, and

reducing their sprinkler usage. While he was unemployed, he paid costs of $1,250.00 for a KAPLAN course and $1,600.00 for auditing classes to possibly obtain jobs in a certain profession, and he admitted those costs equaled three months of child support. Further, he admitted he, his spouse, and his two children took several vacations during 2009 and 2010 to destinations including the Virgin Islands, Grove Park Inn located in North Carolina, and Park City, Utah. He explained those trips were paid from a continuing education budget his spouse was given, but she no longer received that budget. He also testified he owned a 19-foot Key West boat, a life insurance policy in the amount of $500,000.00, a lot at Pawley's Island, and he further conceded he paid $200.00 a month for a maid to clean their primary home.

Mother was employed as a kindergarten teacher for Berkeley County School District, but during the summer she worked several jobs to maintain her income. She made approximately $48,000.00 a year, which totaled $4,666.24 per month in gross income. Her home was 1,400 square feet with a $1,1158.25 monthly mortgage payment. She testified her assets were valued at a little less than $123,000.00, and that amount consisted of her home, car, IRA's, and money in her checking account. She had not remarried and was the sole wage earner for her household, and she testified if the current level of child support was reduced or terminated, she would not be able to maintain the home and meet the family's other expenses. To meet her current expenses, including attorney's fees, Mother had withdrawn funds from her IRA as needed.

The family court found Father knew of his lack of employment and the economic climate in the country when he signed the third consent order on January 22, 2009. Father had $532,606.00 in retirement assets, which the family court found he could utilize to pay his child support. The family court noted Father had remarried but did not consider his current spouse's income in its decision. However, the family court held it would be "inequitable . . . to ignore the fact that the Father has not experienced a significant change in lifestyle despite losing his job." Father's spouse paid all of his expenses, and his marital situation has afforded him "the ability to consider his options and begin a new career as a real estate agent where he hopes to again earn the income he had before, rather than taking a significantly lower paying job as a medical technologist." The family court found Father's reduction of income alone was not enough to warrant a modification of child support and ruled he was capable of making his child support payments as evidenced by his continued high standard of living. The family court maintained

he failed to show he could no longer make the child support payments required by the third consent order. In conclusion, the family court denied Father's request for a modification or termination of his child support payments and awarded Mother attorney's fees, which totaled $23,477.95.

Father filed a Rule 59(e), SCRCP motion to alter or amend the final order. The family court denied the motion but issued a revised final order, altering the language to conform with the intervening decision of our supreme court in *Miles v. Miles*, 393 S.C. 111, 711 S.E.2d 880 (2011). The family court further awarded Mother additional attorney's fees incurred in connection with the Rule 59(e) motion, which totaled $971.00. Father appealed both the revised final order and the denial of his Rule 59(e) motion.

STANDARD OF REVIEW

"'The family court is a court of equity.'" *Holmes v. Holmes*, 399 S.C. 499, 504, 732 S.E.2d 213, 216 (Ct. App. 2012) (quoting *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011)). "In appeals from the family court, the appellate court reviews factual and legal issues de novo." *Id.* (citing *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011)). "'De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the [family] court's findings.'" *Id.* (quoting *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654-55). "However, this broad standard of review does not require the appellate court to disregard the factual findings of the family court or ignore the fact that the family court is in the better position to assess the credibility of the witnesses." *Id.* (citing *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001)). "Moreover, the appellant is not relieved of the burden of demonstrating error in the family court's findings of fact." *Id.* (citing *Pinckney*, 344 S.C. at 387-88, 544 S.E.2d at 623). "Accordingly, we will affirm the decision of the family court in an equity case unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by this court." *Id.*

LAW/ANALYSIS

Automatic Annual Recalculations

Father argues the Settlement Agreement in 2003 provided child support payments would be recalculated automatically every year pursuant to the Child Support Guidelines, and, thus, Father did not have to establish the traditional standard of an unforeseen, substantial change in circumstances. We disagree.

"We encourage litigants in family court to reach extrajudicial agreements on marital issues." *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011). "The interpretation of such agreements is a matter of contract law." *Id.* (citing *Hardee v. Hardee*, 348 S.C. 84, 91-92, 558 S.E.2d 264, 267 (Ct. App. 2001)). "Where an agreement is clear on its face and unambiguous, 'the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement.'" *Id.* (quoting *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001)). If "the agreement is silent as to the family court's power to modify it, it remain[s] modifiable by the court." *Id.* at 118, 711 S.E.2d at 883; *see Moseley v. Mosier*, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983) ("[U]nless the agreement unambiguously denies the court jurisdiction, the terms will be modifiable by the court . . . .").

The Settlement Agreement addressed future annual modifications in child support by stating, "Child support will be revisited on an annual basis thereafter." The parties used the Child Support Guidelines to establish the initial child support payment of $1,300.00, and the Settlement Agreement ordered an automatic recalculation based on two events occurring: (1) the selling of the marital home and (2) Mother obtaining a full-time position. The specific language requiring a recalculation based on the occurrence of two events, followed by the language stating child support will be "revisited" annually, indicates the parties' intent was not to have automatic annual recalculations. While Father argues this interpretation would render the sentence meaningless, we disagree. The sentence simply leaves open the possibility of future recalculations should they be necessary.

Father then asserts that because the Settlement Agreement required automatic recalculations using the Child Support Guidelines for the two events previously mentioned, it implicitly showed the parties' intentions to use the Child Support

Guidelines for all future modifications as well, dispensing of the traditional burden of proof. Again, we disagree with his assertion. The parties specifically delineated two events that would require modification pursuant to the Child Support Guidelines, and then left absent any language as to future modifications. They had the opportunity to agree to an automatic yearly calculation according to the Child Support Guidelines, but they did not.

As to Father's burden of proof for a modification, the Settlement Agreement did not mention a change in the required burden of proof for receiving a modification. Father is correct that Mother has previously consented to modifications based upon the Child Support Guidelines; however, the prior consent of Mother does not obligate the family court to now grant Father a modification without any burden of proof when Mother does not consent. The absence of an agreement regarding the burden of proof for future modifications permitted the family court to place the traditional burden of proof upon Father. Thus, we affirm the family court.

Unforeseen, Substantial Change in Circumstances

Father argues even if the traditional burden of proof applies, he has proven an unforeseen, substantial change in circumstances. We disagree.

"A family court has authority to modify the amount of a child support award upon a showing of a substantial or material change of circumstances." *Miller v. Miller*, 299 S.C. 307, 310, 384 S.E.2d 715, 716 (1989) (citing *Thornton v. Thornton*, 294 S.C. 512, 516, 366 S.E.2d 37, 39 (Ct. App. 1988); *Calvert v. Calvert*, 287 S.C. 130, 137, 336 S.E.2d 884, 888 (Ct. App. 1985); S.C. Code Ann. § 20-3-160 (1985)). "The burden is upon the party seeking the change to prove the changes in circumstances warranting a modification." *Id.*; *see Garris v. Cook*, 278 S.C. 622, 623, 300 S.E.2d 483, 483-84 (1983) (failure to prove changed circumstances supports the denial of request for increased support).

"A substantial or material change in circumstances might result from changes in the needs of the children or the financial abilities of the supporting parent to pay among other reasons." *Miller*, 299 S.C. at 310, 384 S.E.2d at 717 (citing *Smith v. Smith*, 275 S.C. 494, 497, 272 S.E.2d 797, 798 (1980). "Generally, however, changes in circumstances within the contemplation of the parties at the time the initial decree was entered do not provide a basis for modifying a child support

award." *Id.* (citing *Calvert*, 287 S.C. at 139, 336 S.E.2d at 889; *Nelson v. Merritt*, 281 S.C. 126, 130, 314 S.E.2d 840, 842 (Ct. App. 1984)).

Father admitted he was terminated from his employment before he signed the third consent order, and thus, he was aware of the potential to remain unemployed. Prior to signing the third consent order, he was told it would be difficult to find a job in his former pharmaceutical field, and he should expect a decreased income with any future employment. Further, Father has since obtained employment with Carolina One, and while it is a commission based position, he has the potential to make an income. We believe his claimed current economic situation was within contemplation when the third consent order was executed. However, even if it was not within the parties' contemplation, Father has not proven a material and substantial change of circumstances warranting a reduction in alimony.

"The mere fact that a supporting spouse's salary or income has been reduced does not of itself require a reduction of . . . child support." *Calvert*, 287 S.C. at 138, 336 S.E.2d at 888-89. "'Whether termed voluntary underemployment, imputation of income, or the failure to reach earning potential, the case law is clear that when a payor spouse seeks to reduce support obligations based on his diminished income, a court should consider the payor spouse's earning capacity.'" *Marchant v. Marchant*, 390 S.C. 1, 9, 699 S.E.2d 708, 712-13 (Ct. App. 2010) (quoting *Gartside v. Gartside*, 383 S.C. 35, 44, 677 S.E.2d 621, 626 (Ct. App. 2009)). "Likewise, it is proper to consider a supported spouse's earning capacity and impute income to a spouse who is underemployed or unemployed." *Id.* at 9, 699 S.E.2d at 713; *see Patel v. Patel*, 359 S.C. 515, 532, 599 S.E.2d 114, 123 (2004) (affirming the family court imputing minimum wage income to wife, who had been out of the workforce for twenty years but was capable and energetic). "'However, courts are reluctant to invade a party's freedom to pursue the employment path of their own choosing or impose unreasonable demands upon parties.'" *Marchant*, 390 S.C. at 10, 699 S.E.2d at 713 (quoting *Kelley v. Kelley*, 324 S.C. 481, 489, 477 S.E.2d 727, 731 (Ct. App. 1996)). "'Nonetheless, even otherwise unreviewable career choices are at times outweighed by countervailing considerations, particularly child support obligations.'" *Id.* (quoting *Kelley*, 324 S.C. at 489, 477 S.E.2d at 731).

In *Bennett v. Rector*, the family court granted a father's request to receive child support payments from the non-custodial mother, despite mother's claim she made only $2,000.00 a month. 389 S.C. 274, 279-80, 697 S.E.2d 715, 718 (Ct. App.

2010). The family court found the mother not credible and imputed income to mother based on her testimony that she has the ability to earn and believes she will earn between $149,000.00 and $252,000.00 a year. *Id.* On appeal, this court determined the family court is allowed to take into account the mother's access to a large amount of money judging from her monthly expenses, expensive properties, savings accounts, and shopping habits. *Id.* at 283, 697 S.E.2d at 720. The court stated "[a]llowing [the mother] to receive the benefit of such an extravagant lifestyle while only paying child support based on income of $23,000[.00] a year would be inequitable." *Id.*

In *Kielar v. Kielar*, this court reversed the family court's decision to modify the divorce decree and award child support to the custodial father. 311 S.C. 466, 469, 429 S.E.2d 851, 853 (Ct. App. 1993). The father argued his involuntary resignation from a hospital which resulted in a reduced income along with the increase in the mother's earned income was a sufficient change of circumstances to warrant modifying the alimony and child support provisions of the divorce decree. *Id.* This court found that under the specific facts of the case, father's reduced income was not a material change of circumstances warranting modification because his income was still enough that he was able to pay alimony and support his children without reducing the standard of living he enjoyed during his prior marriage. *Id.* "In contrast, [the mother's] standard of living, although quite comfortable, is less than it was during the marriage. If she were required to pay child support, it would be diminished even more." *Id.* The court recognized that since the divorce, the father found it "difficult to maintain his accustomed lifestyle, meet his alimony and child support obligations, and pay [the mother] her share of the equitable distribution." *Id.* However, the father's reduced net worth resulted primarily from the equitable distribution of the marital estate consequent on the divorce, not a changed circumstance unconnected with the divorce or not contemplated by the divorce decree. *Id.* at 469-70, 429 S.E.2d at 853. We noted "the normal consequence of divorce is a straitened financial situation for one or both parties . . . [but] [w]ithin the scope of their authority, . . . the courts must achieve, as nearly as practical, equity between the parties." *Id.* at 470, 429 S.E.2d at 853. We found it would be neither "consistent with the law nor consonant with equity to burden [the mother] with a child support payment to [the father], whose earned income and assets are several multiples of hers, when he has the ability to support the children fully from his own resources without reducing the standard of living he enjoyed during the marriage." *Id.* at 470, 429 S.E.2d at 853-54.

Father's lifestyle is reminiscent of the mother in *Rector*. He continues to take high-end vacations, lives in a large home that requires $7,000.00 monthly mortgage payments, owns a property with his spouse on Pawley's Island, and owns a 19-foot boat. Moreover, he has an IRA account containing an estimated $500,000.00. While he says he and his spouse have "economized," his economizing included cutting a second telephone line, ending their TiVo subscription, and reducing their sprinkler usage. Father admitted he did not devote much time looking for jobs that would not yield a six-figure salary and also did not give much interest to jobs outside of the pharmaceutical field. In comparison to Father, Mother has not remarried and lives in a 1,300 square foot home with an estimated $1,300.00 monthly mortgage payment. She works as a kindergarten teacher for the public school system, and during the summer, she worked several jobs to sustain her income. We do not see a huge change in Father's standard of living, especially when comparing it to Mother's standard of living. As in *Kielar*, it would be inequitable to allow Father to claim a $0 income and base a termination of child support payments on that income. We further note Father has taken a job with Carolina One as a real estate agent, with the potential to begin making an income. We find the preponderance of the evidence supports the family court's decision; thus, we affirm its decision.

Father's IRA Account

Father contends the family court erred in considering funds in his IRA account as income for purposes of computing child support, and further erred in implicitly considering Father's wife's income. We disagree.

Here, the family court mentioned the IRA account, "which he [could] utilize to pay his child support." The family court did not require Father to pay child support from his IRA account, and we view the order as merely noting another one of Father's assets in comparison to Mother's assets in determining whether he was able to pay the child support from his own resources. *See Kielar*, 311 S.C. at 468, 429 S.E.2d at 852 (noting the father's two retirement accounts along with other assets and then concluding he had the ability to support the children fully from his own resources without reducing the standard of living he enjoyed during the marriage). Accordingly, we find the court did not err in considering Father's IRA account in determining whether to modify Father's child support payments.

As to Father's spouse's income, the family court had the discretion to consider the income of Father's new spouse in determining whether a substantial or material change of circumstances had occurred that warranted a reduction in his child support. *See Fischbach v. Tuttle*, 302 S.C. 555, 557, 397 S.E.2d 773, 774 (Ct. App. 1990). In the present case, the family court was given a sealed envelope containing Father's new spouse's salary; however, the family court never opened it, and made its determination without considering the exact salary she may have made. It appears the family court properly considered it as an additional source of income for Father's household when determining whether he presented evidence sufficient to show a substantial or material change of circumstances warranting a reduction in his child support.

Attorney's Fees

Father argues the family court erred in awarding Mother attorney's fees. We disagree.

"Before awarding attorney's fees, the [f]amily [c]ourt should consider: (1) each party's ability to pay his or her own fee; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fee on each party's standard of living." *Bowers v. Bowers*, 349 S.C. 85, 99, 561 S.E.2d 610, 617 (Ct. App. 2002) (citing *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992); *Heins v. Heins*, 344 S.C. 146, 160, 543 S.E.2d 224, 231 (Ct. App. 2001)). "In determining the amount of attorney's fees to award, the court should consider: (1) the nature, extent, and difficulty of the services rendered; (2) the time necessarily devoted to the case; (3) counsel's professional standing; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services." *Id.* (citing *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991); *Shirley v. Shirley*, 342 S.C. 324, 341, 536 S.E.2d 427, 436 (Ct. App. 2000)).

Here, the family court considered the proper factors in determining attorney's fees and gave a thorough explanation of its decision. Father argues litigation would have been unnecessary had Mother followed their Settlement Agreement, but we disagree. The Settlement Agreement merely allowed for child support payments to be revisited annually and did not specifically require an automatic annual recalculation pursuant to the Child Support Guidelines. Because we affirm the family court's decision regarding the issues above, there has been no change in the

outcome of the trial, and we find the preponderance of the evidence supports the family court. Accordingly, we affirm the family court.

CONCLUSION

For the foregoing reasons, the family court is

AFFIRMED.

FEW, C. J., concurs in separate opinion.

GEATHERS, J., concurs.

FEW, C.J., concurring: I agree with the result reached by the majority to affirm the family court's decision to deny a reduction in child support payments. I disagree, however, with the majority's interpretation of the parties' settlement agreement. In my opinion, the phrase "Child support will be revisited on an annual basis" clearly and unambiguously indicates the parties intended that child support would be recalculated annually without the need for either party to demonstrate a substantial change in circumstances. *See Gaffney v. Gaffney*, 401 S.C. 216, 221-22, 736 S.E.2d 683, 686 (Ct. App. 2012) ("The interpretation of [marital litigation] agreements is a matter of contract law. When an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." (citation omitted)). To that extent, I respectfully disagree with the majority.

In my opinion, however, the family court correctly denied the request to decrease child support. Even accepting the father's contention that his current income is close to zero, his income earning capacity is substantial. *See Marchant v. Marchant*, 390 S.C. 1, 9, 699 S.E.2d 708, 712-13 (Ct. App. 2010) ("[T]he case law is clear that when a payor spouse seeks to reduce support obligations based on his diminished income, a court should consider the payor spouse's earning capacity." (citation omitted)); *Spreeuw v. Barker*, 385 S.C. 45, 62, 682 S.E.2d 843, 851 (Ct. App. 2009) ("[T]he common thread in cases where actual income versus earning capacity is at issue is that courts are to closely examine the payor's . . . reasonable explanation for the decreased income." (citation omitted)). Moreover, while the

father's new wife's income does not enter the analysis of child support, *see* S.C. Code Ann. Regs. 114-4720 (A)(1) (2012) (defining "income as the actual gross income of the parent"), the fact that she is completely supporting him means he lives essentially expense free and has the ability to continue to support his children at the current level, even if his actual income has substantially decreased.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Loida Colonna, Appellant,

v.

Marlboro Park Hospital, Employer, and Gallagher Bassett Services, Inc., Carrier, Respondents.

Appellate Case No. 2011-196407

Appeal From Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 5117
Heard October 18, 2012 – Filed April 17, 2013

AFFIRMED

Stephen Benjamin Samuels, of Samuels Law Firm, LLC, of Columbia, for Appellant.

Weston Adams, III, and Helen F. Hiser, of McAngus Goudelock & Courie, LLC, of Columbia, for Respondents.

WILLIAMS, J.: In this workers' compensation appeal, Loida Colonna (Colonna) claims the circuit court erred in affirming the Appellate Panel of the Workers' Compensation Commission (the Commission) when it: (1) held Colonna's recovery was limited to scheduled disability under section 42-9-30 of the South Carolina Code (Supp. 2012) as opposed to total disability under section 42-9-10 of the

South Carolina Code (Supp. 2012); (2) held Colonna did not suffer from any additional permanent partial disability; (3) held Colonna had reached maximum medical improvement (MMI); and (4) failed to explicitly hold Marlboro Park Hospital (Marlboro Park) responsible for lifetime maintenance of the spinal cord stimulator implanted in Colonna's back. We affirm.

FACTS/PROCEDURAL HISTORY

Colonna sustained an admittedly compensable injury to her right ankle and foot on February 21, 2004, when she slipped on a wet floor and twisted her right ankle and foot while working as a geriatric nurse for Marlboro Park. Marlboro Park accepted her claim and began providing medical treatment and compensation. However, Colonna continued to experience pain and ceased working as a result of her injury. Colonna claimed she required surgery; in response, Marlboro Park sought a determination of whether Colonna had reached MMI and was entitled to additional medical treatment.

The single commissioner held a hearing and subsequently issued an order on August 22, 2005 (2005 Order), finding Colonna sustained "a right lower extremity (ankle) injury," was entitled to additional medical treatment and temporary total disability benefits, and had not reached MMI. In addition, the single commissioner found Colonna "had some aggravation of pre-existing psychological problems because of this injury, but she . . . failed to prove her need for psychological treatment [wa]s the sole result of this accidental injury."

Because of her continuing medical issues, Colonna underwent surgery shortly after the initial hearing in May 2005. In March 2006, her attending surgeon, Dr. Mark Easley, of Duke University Medical Center, opined her condition had stabilized, assigned an impairment rating of 40% to her right lower extremity, and released her from his care. Based on Dr. Easley's report, Marlboro Park sought an order terminating temporary compensation, awarding permanent disability, and requesting a credit for overpayment of temporary compensation. In response, Colonna contended she had not reached MMI and requested additional medical treatment for her injuries.

After a hearing, the single commissioner issued an order on May 8, 2007 (2007 Order), and found Colonna reached MMI in March 2006, sustained a 50% permanent partial disability to her right lower extremity, and was entitled to all causally-related medical treatment for her injuries. The single commissioner

terminated her temporary compensation and found Marlboro Park was entitled to a credit for overpayment of temporary compensation, which would be deducted from her permanent partial disability award of 97.5 weeks. In addition, the single commissioner held the compensability of any psychological injury was not before him based on the parties' prior stipulation in the 2005 Order that Colonna had not sustained a compensable psychological injury. The Commission upheld the single commissioner's order in full, and Colonna did not appeal this order.

Thereafter, Colonna complained of continued problems with her right ankle and foot and filed a change of condition claim, seeking additional medical treatment, including a second surgery. Marlboro Park authorized the additional treatment and reinstated her temporary total disability compensation. Colonna underwent a second surgery with Dr. Easley on her right ankle. From an orthopedic standpoint, Dr. Easley concluded Colonna had reached MMI for her right ankle and foot in July 2008 and assessed a 35% impairment rating.

Colonna then sought medical treatment from Dr. Sonia Pasi, a pain management and neurology specialist, at Duke University Medical Center. Dr. Pasi diagnosed her with Reflex Sympathetic Dystrophy (RSD),[1] which caused chronic pain to Colonna's right foot and ankle, resulting from her compensable right foot and ankle injury. In August 2008, Dr. Pasi implanted a trial spinal stimulator to help alleviate her RSD. Following a successful trial period, Dr. Pasi and Dr. Peter Grossi implanted a permanent spinal cord stimulator in Colonna's back in December 2008. Dr. Pasi opined she was at MMI for her right leg and foot in March 2009.

Colonna subsequently underwent a functional capacity evaluation (FCE) in April 2009, which found she was able to work at a light physical demand level for an eight-hour day and was "most likely limited to simple, or unskilled, or at most, detailed, or semi-skilled clerical administrative and similar work activities . . . ." In conducting the FCE, the evaluator noted, "The combination of symptom exaggeration and submaximal effort is thought to represent a voluntary effort to demonstrate a greater level of disability than is actually present."

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[1] Our supreme court defined RSD as follows in *Mizell v. Glover*, 351 S.C. 392, 397 n.1, 570 S.E.2d 176, 178 n.1 (2002): "Reflex Sympathetic Dystrophy ('RSD') is a rare condition affecting the sympathetic nervous system, usually in an extremity, resulting in ongoing cycles of extreme pain. It is often triggered by an accident, surgery, or other injury."

Marlboro Park again filed a Form 21 to stop payment of temporary total disability benefits and sought a determination for permanent impairment as well as a credit for overpayment of temporary compensation. In response, Colonna alleged additional injuries to her right knee, left knee, back, neck, and right shoulder and sought a finding of compensability and additional medical treatment. In support of her claim, Colonna testified she could not exercise, suffered from constant stiffness and chronic pain in her right ankle, was unable to drive, and was receiving Social Security disability benefits because of her injury.

The single commissioner held a hearing and issued an order on March 1, 2010. In his order, he held Colonna failed to prove she sustained compensable injuries to her right knee, left knee, back, neck, or right shoulder. He further found Colonna had reached MMI for her right foot and ankle injury, and Marlboro Park was entitled to stop temporary disability benefits. He also concluded she had not suffered any additional permanent partial disability but was entitled to ongoing medical treatment as recommended by her authorized treating physician, Dr. Pasi.

The Commission upheld the single commissioner's decision, adopting the single commissioner's findings of fact and conclusions of law in full. Colonna appealed to this court, and we transferred her case to the circuit court pursuant to Rule 204, SCACR, because this case accrued prior to July 1, 2007. *See Pee Dee Reg'l Transp. v. S.C. Second Injury Fund*, 375 S.C. 60, 62, 650 S.E.2d 464, 465 (2007) (holding that all workers' compensation cases in which the injury occurred on or after July 1, 2007, should be made directly to the Court of Appeals).

After two hearings, the circuit court upheld the Commission's decision in full. In doing so, the circuit court held the following: (1) the surgery to implant the spinal cord stimulator to treat Colonna's RSD did not constitute a separate injury to her back that would bring her within the "two-body part" rule, but her spine was, instead, "merely the site for treatment modality"; (2) the 2007 Order holding that she had not sustained a compensable psychological condition was law of the case and, because Colonna had not raised this issue to the Commission, she was barred from arguing it on appeal; (3) Colonna was limited to recovery under section 42-9-30 because she only suffered a compensable injury to a single scheduled member; (4) Colonna had not suffered any additional permanent partial disability to her right ankle/foot; (5) Colonna reached MMI for her right ankle/foot injury; and (6) Colonna was entitled to additional medical treatment as recommended by Dr. Pasi, including lifetime maintenance and treatment of her spinal cord stimulator. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) governs appeals from decisions of an administrative agency. S.C. Code Ann. § 1-23-380 (Supp. 2012); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the APA, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error of law. § 1-23-380(5). If the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record[,]" a reviewing court may reverse or modify. *Id.* Substantial evidence is not a mere scintilla of evidence, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004).

LAW/ANALYSIS

1. Permanent and Total Disability Pursuant to Section 42-9-10.

Colonna contends her work-related injury affected more than one body part; thus, she is entitled to a permanent, total disability award pursuant to section 42-9-10. Specifically, Colonna claims she satisfied the "two-body part" rule in section 42-9-10 because: (1) the implantation of the spinal cord stimulator affected her back; and (2) her right foot/ankle injury aggravated her preexisting psychological problems. We address each argument in turn.

South Carolina provides three methods to receive disability compensation: (1) total disability under section 42-9-10; (2) partial disability under South Carolina Code section 42-9-20 (Supp. 2012); and (3) scheduled disability under section 42-9-30. *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 105, 580 S.E.2d 100, 102 (2003). The first two methods are based on the economic model in most instances, while the third method conclusively relies upon the medical model with its presumption of lost earning capacity. *Id.*

As stated in *Singleton v. Young Lumber Company*, 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960), "Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation [pursuant to section 42-9-30] . . . . To obtain compensation in addition to that scheduled for the injured member,

claimant must show that some other part of his body is *affected*." (emphasis added).

As reflected by the foregoing language, *Singleton* stands for the exclusive rule that a claimant with one scheduled injury is limited to recovery under section 42-9-30 alone. The case also stands for the rule that an individual is not limited to scheduled benefits under section 42-9-30 if he or she can show additional injuries beyond a lone scheduled injury. *See Wigfall*, 354 S.C. at 106, 580 S.E.2d at 103. The principle espoused in *Singleton* recognizes "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." *Id.* at 106-07, 580 S.E.2d at 103 (internal citation omitted). Accordingly, the question of whether Colonna is totally and permanently disabled, and thus entitled to recover under section 42-9-10, turns on whether her initial injury had a "disabling effect" on other parts of her body.

a. Back Injury

Colonna first argues her claim is within the ambit of section 42-9-10 as a matter of law because the implantation of the spinal cord stimulator affected her back. We disagree.

Colonna relies on the portion of *Singleton*, wherein the supreme court held, "To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is *affected*." *Singleton*, 236 S.C. at 471, 114 S.E.2d at 845 (emphasis added). Because her right foot/ankle injury necessitated the implantation of a spinal cord stimulator, Colonna claims her back was affected, thus triggering the "two-body part" rule.[2]

[2] In support of her argument that the implantation of a spinal cord stimulator is conclusive proof of an indirect injury to the back, Colonna cites to *Haley v. ABB, Inc.*, 621 S.E.2d 180 (N.C. Ct. App. 2003). In *Haley*, the North Carolina Court of Appeals stated that "[Haley's] back condition resulted from the implantation of the spinal cord stimulator [to treat RSD] and was a natural and probable result of the compensable injury by accident and resulting pain." *Id.* at 185. However, we find *Haley* distinguishable because in that case, the *unsuccessful implantation* caused Haley to experience severe back pain at the site of the insertion. *Id.* at 182. As a result of the unsuccessful implantation, the court held her back condition was the

No South Carolina case directly addresses whether the implantation of a spinal cord stimulator constitutes an indirect injury to the back. However, we find that a more thorough reading of *Singleton* and subsequent cases demonstrates that a claimant must prove not only that another body part was affected by the insertion of the treatment device, but that another body part was impaired or injured for section 42-9-10 to apply. *See id.* at 471, 114 S.E.2d at 845 ("Where the injury is confined to the scheduled member, and there is no *impairment* of any other part of the body because of such injury, the employee is limited to the scheduled compensation . . . ." (emphasis added)); *see also Wigfall*, 354 S.C. at 106, 580 S.E.2d at 103 (finding the *Singleton* court intended for "impairment" to encompass a physical deficiency and concluding a claimant is not limited to scheduled benefits under section 42-9-30 if he or she can show "additional injuries beyond a lone scheduled injury"); *Bixby v. City of Charleston*, 300 S.C. 390, 397, 388 S.E.2d 258, 262 (Ct. App. 1989) (analyzing whether the claimant's injury to a scheduled member "affected" another body part by analyzing whether the claimant "suffer[ed] a residual *disability* as a result" of the compensable injury (emphasis added)).

We find Colonna's argument flawed because she failed to demonstrate that the implantation of the spinal cord stimulator injured her back or caused additional back impairment. We concur with the circuit court's conclusion:

> The only relationship between [Colonna's] foot and ankle injury and her spine is that the spine was merely the site for a treatment modality that would serve to improve the functioning in her right leg. The spinal cord stimulator was implanted for the sole purpose of deriving a benefit to nerve deficits in her right leg. The spinal cord stimulator was not implanted to diagnose, remedy or treat any condition in her spine. . . .
>
> . . . .

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natural and probable result of the work-related injury. Unlike in *Haley*, Colonna has failed to sufficiently demonstrate that her initial injury or the resulting surgery caused Colonna back pain or impairment. Thus, we find *Haley* is distinguishable from the instant case.

> . . . Implantation of a spinal cord stimulator, without evidence of causally-related symptoms, pain or ill effects in the spine, does not render the body part "affected" under the Act and therefore, there are no additional body parts, including the back, which were affected by [Colonna's] work injury or subsequent treatment for same.

Furthermore, we find substantial evidence in the record to support the circuit court's decision that Colonna did not suffer additional injury or impairment to her back as a result of the spinal cord implantation. Dr. Pasi's medical notes reflect Colonna complained of pain in her right foot, toes, ankle, knee, and leg. In addition, Dr. Pasi noted Colonna complained of pain in her left leg, back, neck, and shoulder, but only diagnosed Colonna with RSD of "the lower limb" and concluded her implantation surgery was successful. Upon examination, Dr. Pasi concluded Colonna's cervical, thoracic, and lumbar regions of her spine were all stable and her range of motion in those areas was also normal. We recognize Colonna's testimony before the single commissioner conflicted with Dr. Pasi's conclusions. Specifically, she stated, "I can't lift twenty pounds without straining and hurting my right foot and right ankle as well as my back. Since I have a spinal cord stimulator in my back[,] I can't lift twenty pounds." Colonna also testified she could only drive short distances after the implantation of the spinal cord stimulator, and her husband typically drove her everywhere. However, when faced with conflicting testimony, we are constrained by our limited standard of review. *See Stokes v. First Nat'l Bank*, 306 S.C. 46, 50, 410 S.E.2d 248, 251 (1991) ("Regardless of conflict in the evidence, either of different witnesses or of the same witness, a finding of fact by the Commission is conclusive."). Therefore, we defer to the Commission on this issue.

b. Preexisting Psychological Injury

Next, Colonna contends she is entitled to benefits pursuant to section 42-9-10 because her injury aggravated her preexisting psychological problems. We disagree.

Claims for psychological injury are compensable only if the claimant proves by a preponderance of evidence they are caused by physical injury or by extraordinary

and unusual conditions of employment. *Pack v. State Dep't of Transp.*, 381 S.C. 526, 538, 673 S.E.2d 461, 467 (Ct. App. 2009).

In the 2005 Order, the single commissioner held, "[Colonna] has had some aggravation of pre-existing psychological problems because of this injury, but she has failed to prove her need for psychological treatment is the sole result of this accidental injury." In the 2007 Order, Colonna stipulated that "[she] did not sustain [a] compensable psychological injury per prior Order of the Commission." As a result, the single commissioner noted compensability of any psychological injury was not before him in light of the 2005 Order that found Colonna did not sustain a compensable psychological injury. Colonna never appealed this ruling; therefore, it is law of the case. *See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche,* 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling is law of the case and should not be reconsidered by the appellate court). Accordingly, we find the compensability of any preexisting psychological problems, and thus whether those problems constitute a second injury under section 42-9-10, are not properly before this court.[3]

c. Requirement to Apply Section 42-9-10

Last, Colonna contends the circuit court erred in failing to award her benefits under section 42-9-10 because she is entitled to recover under whichever statute provides the greatest benefits. We disagree.

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[3] We note Colonna attempts to distinguish what she is now arguing on appeal from the prior rulings of the Commission and circuit court. She contends that while the parties stipulated her psychological injury was not compensable, i.e., she was not entitled to receive medical treatment, the single commissioner's statement in the 2005 Order that "she had some aggravation of pre-existing psychological problems because of this injury" conclusively proves that her injury produced a psychological injury or overlay, which would entitle her to recover under section 42-9-10. However, if Colonna's preexisting mental injury is not compensable as a matter of law, we find it cannot be an "affected" or injured member for purposes of triggering benefits under section 42-9-10.

Generally, an injured employee *may* proceed under either the general disability statutes, i.e., sections 42-9-10 and 42-9-20, or under the scheduled member statute, i.e., section 42-9-30, to maximize recovery under the South Carolina Workers' Compensation Act. *See Brown v. Owen Steel Co.*, 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994) (proceeding under the general disability sections for an injury to a scheduled member gives the claimant "the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section"). However, the scheduled recovery is exclusive only when a scheduled loss is not accompanied by additional complications affecting another part of the body. *See id.* (citing *Singleton*, 236 S.C. at 471, 114 S.E.2d at 845).

Although Colonna *may* proceed under the general disability statutes to maximize her recovery, we find Colonna's argument that the Commission is "required" to make an award for permanent and total disability under section 42-9-10 misplaced. As the aforementioned case law demonstrates, Colonna's ability to recover under section 42-9-10 is premised on her ability to establish an additional injury or impairment to a second body part. *See id.*, 316 S.C. at 280, 450 S.E.2d at 58 (holding commission properly required employee to proceed under the scheduled member section when employee failed to prove back injury affected other body parts or contributed to an impairment beyond a single scheduled member); *cf. Simmons v. City of Charleston*, 349 S.C. 64, 76, 562 S.E.2d 47, 482 (Ct. App. 2002) (finding a firefighter was not limited to recovery under the scheduled member statute when he presented substantial evidence that he suffered additional complications to another part of his body, thus entitling firefighter to recover under the general disability statute). Because Colonna failed to sustain her burden of proof on this issue, we find the circuit court properly limited Colonna's recovery to section 42-9-30.

2. Permanent Partial Disability

In the alternative, Colonna claims she is entitled to additional permanent, partial disability benefits for her left leg and back following her admitted change of condition for the worse. We disagree.

Initially, we note that Colonna captioned her entitlement to additional permanent partial disability benefits as it relates to "her left leg and back." However, the circuit court's order addresses her entitlement to additional permanent partial disability benefits only in reference to her "right lower extremity for the compensable injury suffered to the right ankle/foot." Neither the single

commissioner, the Commission, nor the circuit court addressed Colonna's entitlement to additional permanent partial disability benefits as it related to her left leg and back. Because an issue must be properly raised below before we may address it on appeal, we find this issue is not properly preserved for appellate review. *See Pratt*, 353 S.C. at 352, 577 S.E.2d at 481-82 (stating an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the single commissioner or in a request for commission review of the single commissioner's order to be preserved for appellate review).

Even if we assume Colonna intended to reference her right ankle/foot injury, we find substantial evidence exists to support the circuit court's decision to uphold the Commission on this issue. First, Colonna had already received permanent partial disability for the injury she sustained to her right ankle and foot. The medical evidence shows that Colonna's impairment rating for her right ankle and foot decreased from 40% to 35% between her first surgery in 2006 and her second surgery in 2008, which indicates her disability would have decreased as well. Further, despite Dr. Pasi's diagnosis of RSD and acknowledgement of Colonna's complaints of chronic pain, she did not assign Colonna with an impairment rating for her RSD. Rather, once Colonna underwent the surgery to implant the spinal cord stimulator, Dr. Pasi concluded the implantation was "successful," and as of March 18, 2009, she opined Colonna was at MMI for her right leg and foot pain. In view of the foregoing, we hold Colonna failed to establish the requisite facts to entitle her to additional disability benefits. *See Smith v. Michelin Tire Corp.*, 320 S.C. 296, 298, 465 S.E.2d 96, 97 (Ct. App. 1995) ("The claimant has the burden to prove such facts as will render the injury compensable.").

3. Maximum Medical Improvement

Next, Colonna claims the circuit court erred in upholding the Commission's decision that she had attained MMI. We disagree.

"[MMI] is a term used to indicate that a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment." *O'Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995). "MMI is a factual determination left to the discretion of the [Commission]." *Gadson v. Mikasa Corp.*, 368 S.C. 214, 224, 628 S.E.2d 262, 268 (Ct. App. 2006).

Colonna conceded before the circuit court that she attained MMI for her right ankle and foot injury but claims on appeal that she has not been medically released for her alleged back injury stemming from the implantation of the spinal cord stimulator. Therefore, without a finding of MMI for her back, she asserts termination of temporary total disability benefits was premature. We disagree.

We find there is substantial evidence in the record to support the circuit court's conclusion that Colonna did not sustain a compensable back injury. Likewise, a finding of MMI for the back is unnecessary before Colonna's temporary total disability benefits could be properly terminated. The only required MMI determination was for Colonna's injury to her right ankle and foot, which we find was proper based on Dr. Easley's and Dr. Pasi's conclusions that Colonna had attained MMI.

Moreover, the only medical evidence documenting Colonna's care after her spinal cord surgery was that of Dr. Pasi. Dr. Pasi saw Colonna three times after her surgery for follow-up visits and concluded the implantation was successful. Dr. Pasi's records do not document any back pain after the surgery; to the contrary, Dr. Pasi notes that Colonna's cervical, thoracic, and lumbar regions of her spine were all stable and her range of motion in those areas was also normal.

Despite Colonna's argument to the contrary, we find the circuit court's mandate to continue medical treatment does not negate our conclusion as the Commission may continue to award additional medical treatment if it tends to lessen Colonna's period of disability despite the fact that she has reached MMI for her right ankle and foot injury. *See Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 583, 514 S.E.2d 593, 598 (Ct. App. 1999) (holding "an employer may be liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability despite the fact the claimant has returned to work and has reached [MMI]"); *see also Cranford v. Hutchinson Constr.*, 399 S.C. 65, 78, 731 S.E.2d 303, 310 (Ct. App. 2012) (holding a finding of MMI was proper when treating physician's report coupled with prescription was evidence from which single commissioner could conclude the medication would help alleviate claimant's remaining symptoms, but his medical condition would not further improve); *Scruggs v. Tuscarora Yarns, Inc.*, 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App. 1987) (holding substantial evidence supported a finding of MMI despite the claimant continuing to receive physical therapy). Based on the foregoing, we

affirm the circuit court's conclusion that Colonna attained MMI and was no longer entitled to temporary total benefits.

4. Lifetime Maintenance of Spinal Cord Stimulator

Last, Colonna contends the circuit court erred in failing to order Marlboro Park to provide lifetime maintenance of the spinal cord stimulator. We decline to address this issue.

The Commission's order provided that Colonna was "entitled to ongoing medical treatment for her right ankle/foot as recommended by her authorized, treating physician, Dr. Pasi." On appeal to the circuit court, the court specifically addressed the issue of lifetime maintenance to the spinal cord stimulator when it concluded, "Pursuant to section 42-15-60, [Colonna] is entitled to ongoing medical treatment for her right ankle/foot as recommended by her authorized, treating physician, Dr. Pasi, *to include lifetime maintenance of the spinal cord stimulator*." (emphasis added). Marlboro Park concedes this issue in its brief, stating, "There is no dispute over this issue. . . . This is not a contested issue and this Court need not address it." Accordingly, we decline to address this issue. *See Leatherwood v. Leatherwood*, 293 S.C. 148, 150, 359 S.E.2d 89, 90 (Ct. App. 1987) (finding parties' concessions on issues negated necessity of addressing those issues on appeal).

CONCLUSION

Based on the foregoing, the circuit court's order is

AFFIRMED.

FEW, C.J., and CURETON, AJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gregory W. Smith and Stephanie Smith, Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., and Myers Landscaping, Inc., Defendants,

Of whom D.R. Horton, Inc. is the Appellant.

Appellate Case No. 2011-204347

Appeal From Dorchester County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5118
Heard February 14, 2013 – Filed April 17, 2013

AFFIRMED

Matthew Kinard Johnson and W. Kyle Dillard, both of Ogletree Deakins Nash Smoak & Stewart, PC, of Greenville, for Appellant.

John T. Chakeris, of Chakeris Law Firm, of Charleston; Phillip Ward Segui, Jr., of Segui Law Firm, of Mount Pleasant; and Michael A. Timbes, of Thurmond Kirchner Timbes & Yelverton, PA, of Charleston, all for Respondents.

SHORT, J.: D.R. Horton, Inc. (Horton) appeals the circuit court's order denying its motion to compel arbitration in this construction defects action filed by Gregory and Stephanie Smith. Horton argues the circuit court erred in finding the arbitration clause unenforceable: (1) under the South Carolina Uniform Arbitration Act (SCUAA); (2) as unconscionable; (3) under an unequal-bargaining-power theory; (4) under a lack-of-consideration theory; (5) under the Federal Arbitration Act (FAA); and (6) under a merger-by-deed theory. We affirm.

I. FACTS

The Smiths purchased a house built by Horton in Summerville, South Carolina. The arbitration clause was included in the purchase agreement in Section 14, entitled "Warranties and Dispute Resolution." Section 14(a) provided for a warranty from Residential Warranty Corporation (RWC), which purported to be the only warranty extended by Horton, except for such warranties as cannot be disclaimed by law. Section 14(b) provided that validation of the RWC warranty was conditioned on Horton's compliance with all RWC's enrollment procedures and upon Horton remaining in good standing in the RWC program. Section 14(c) purported to disclaim all other warranties, express or implied, as to quality, fitness for a particular purpose, merchantability, and habitability. Section 14(c) further provided all disputes under the RWC warranty were subject to binding arbitration. Sections 14(d)-(f) provided exclusions to the warranty for landscaping. Section 14(g) addressed arbitration and provided the following:

> **Mandatory Binding Arbitration:** [The Smiths] and [Horton] each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of [Horton's] construction of the home; (2) [Horton's] performance under any Punch List or Inspection Agreement; (3) [Horton's] performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which [the Smiths and Horton] agree to arbitrate.

Section 14(h) provided that if a dispute arose prior to the closing date, Horton had the right to terminate the agreement, return the earnest money, and "no cause of action shall accrue on behalf of [the Smiths] because of such termination." Section 14(i), prefaced "Limitation of Liability," disclaimed warranties except for those specifically provided or imposed by law, including "as to merchantability or fitness for a particular purpose, either expressed or implied. . . . [Horton] shall not be liable for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages." The final clause in the "Warranties and Dispute Resolution" section of the purchase agreement, section 14(j), provided the method of notice for requests of warranty service.

Alleging extensive defects in the home, the Smiths filed this action against Horton and numerous subcontractors, asserting claims for negligence, breach of contract, breach of warranties, and unfair trade practices. Horton moved to compel arbitration. After a hearing, the circuit court denied the motion, finding the following: (1) the arbitration provision was unconscionable; (2) the purchase agreement was merged into the deed, which did not contain an arbitration provision; and (3) the arbitration provision failed to meet the SCUAA. In an order denying Horton's motion for reconsideration, the court also found the parties were not of equal bargaining power, and there was no consideration given in exchange for the Smiths' sacrifice of certain rights. This appeal follows.

II. STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citing *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005)). However, the trial court's "factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* (citing *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003)). "The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 393-94, 498 S.E.2d 898, 901 (Ct. App. 1998) (citation omitted). "In an action at law, the appellate court's jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence." *Id.* at 394, 498 S.E.2d at 901 (citation omitted).

III. APPLICABLE LAW

A. Unconscionability

Horton argues the circuit court erred in denying the motion to compel arbitration based on unconscionability. We disagree.

"Arbitration is a matter of contract and controlled by contract law." *S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993) (citation omitted). "[A] party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including fraud, duress, and unconscionability." *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (quoting S.C. Code Ann. § 15-48-10(a) (2005)). When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look to the state law that ordinarily governs the formation of contracts in determining whether a valid arbitration agreement arose between the parties. *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 610 (D.S.C. 1998), *aff'd and remanded*, 173 F.3d 933, 941 (4th Cir. 1999); *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668.

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668 (citing *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit [Court of Appeals] has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Id.* at 25, 644 S.E.2d at 668. Our supreme court adopted the Fourth Circuit's view, and noted "[i]t is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

In *Simpson*, the plaintiff sued the defendant auto dealer for alleged violations of the South Carolina Unfair Trade Practices Act, among other causes of action. *Id.* at 21, 644 S.E.2d at 666. The plaintiff signed a contract that included an arbitration clause, and the auto dealer sought to stay the court proceeding and compel

arbitration. *Id.* at 19-21, 644 S.E.2d at 666. Our supreme court upheld a denial of the auto dealer's motion to compel arbitration finding, *inter alia*, a lack of mutuality of remedy because the defendant had the right to proceed in court while "completely disregard[ing] any pending consumer claims that require[d] arbitration." *Id.* at 31, 644 S.E.2d at 672. The court emphasized that lack of mutuality of remedy alone does not make an arbitration agreement unconscionable. *Id.* The court noted, "there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability. . . . Instead, we emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Id.* at 36, 644 S.E.2d at 674.

In this case, the circuit court viewed the Warranties and Dispute Resolution Section 14 as a whole, finding it "referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies . . . ." The court found the attempts to disclaim implied warranty claims were oppressive and unconscionable. The court also found "perhaps even more stark are the provisions in the Limitations of Liability in sub-section [14](i) . . . in addition to the attempted waiver of various important remedies" in which Horton claimed it could not be liable for monetary damages of any kind. The court concluded the relevant arbitration provision was "wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions."

Relying on the supreme court's analysis in *Simpson*, we affirm the trial court's finding of unconscionability, particularly in light of the lack of mutuality of remedy imposed by Section 14(i), which purported to exempt Horton from liability for monetary damages.

B. Severability

Horton next argues the arbitration clause is not made unconscionable by the other allegedly unconscionable provisions in the agreement, and it should be severed from any unconscionable terms of the agreement. We disagree.

"[A]n arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364

(2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). However, "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." *Great W. Coal (Kentucky), Inc.*, 312 S.C. at 562-63, 437 S.E.2d at 24. Our supreme court acknowledged that "in light of the state and federal policies favoring arbitration, many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause." *Simpson,* 373 S.C. at 35 n.9, 644 S.E.2d at 674 n.9. However, the court found invalidation of the arbitration clause in its entirety was the appropriate remedy because there were three unconscionable provisions, and two of the provisions were unconscionable because they contravened state and federal consumer protection law. *Id.* The court concluded, "The sheer magnitude of unconscionability present in a provision that prevents a party from vindicating the party's statutory rights, along with the fact that such a grossly unconscionable provision occurred not once, but *twice,* requires that we give significant consideration to a remedy in this situation that best serves the interests of public policy." *Id.* The supreme court also stated the following:

> [L]egislation permits this Court to "refuse to enforce" any unconscionable clause in a contract or to "limit its application so as to avoid an unconscionable result." S.C. Code Ann. § 36-2-302(1) (2003).
>
> At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker v. Robert Half Int[]'l Inc.*, 413 F.3d 77, 84-85 (D.C. Cir. 2005) (citations omitted). Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for

> parties. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

Id. at 34, 644 S.E.2d at 673-74; *see also Hooters of Am., Inc.*, 173 F.3d at 940 (finding rescission to be the appropriate remedy where Hooters promulgated so many biased arbitration rules that the contract created "a sham system unworthy even of the name of arbitration").

We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly Horton's attempt to waive any seller liability for "monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages." Because we affirm the finding of unconscionability and find the provision should not be severed, we need not reach the issue of whether the SCUAA or the FAA applies. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal).

IV. CONCLUSION

Because we affirm the circuit court's finding of unconscionability and find the arbitration clause should not be severed from the purchase agreement, we decline to address Horton's arguments regarding unequal bargaining power, lack of consideration, and merger-by-deed. *See id.* (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal).

AFFIRMED.

THOMAS and PIEPER, JJ., concur.