OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 18

May 9, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: Capital U-Drive-It, Inc., Respondent.

In Re:

Michelle Wallace, f/k/a Michelle Beaver,

v.

Rhett Alexander Beaver, Appellant.

Appeal From Lexington County
Richard W. Chewning, III, Family Court Judge

Opinion No. 26147
Heard February 15, 2006 – Filed May 8, 2006

AFFIRMED

John D. Delgado and Kathrine H. Hudgins, both of Columbia, for Appellant.

Todd R. Ellis and Jonathan M. Milling, both of Smith Ellis & Stuckey, P.A., of Columbia, for Ellis, of Columbia, for Respondent.

JUSTICE BURNETT: In this appeal, we are asked to decide (1) whether an order unsealing a court record is immediately appealable and (2) whether the family court judge properly unsealed the record of a divorce

proceeding in a limited manner at the request of a litigant in an unrelated civil action who is seeking information about the financial affairs of one of the divorce litigants.

In April 2002 the record of the divorce proceeding between Michelle W. Beaver and Rhett A. Beaver was sealed with the consent of the parties. A month later, Rhett Beaver (Beaver) pled guilty to an indictment charging him with mail fraud and agreed to forfeit certain personal property and cooperate with government officials investigating the matter. The indictment stemmed from Beaver's participation in an embezzlement scheme which defrauded Capital-U-Drive-It, Inc. (Capital), his employer, of some $551,864.

Capital brought a civil action in Lexington County Court of Common Pleas in 2002 against Beaver and his parents, Sylvia Beaver and the Estate of George Beaver, in an effort to recover embezzled funds. Capital moved before the family court to unseal the record of Beaver's divorce proceeding, asking for permission to review and copy all information in the file pertaining to Beaver's financial affairs. Another family court judge granted Capital's motion and unsealed the record. The judge granted permission for Capital to inspect and copy all documents "wherein representations are made regarding money and assets earned, received or obtained by Rhett Beaver during the marriage, including but not limited to, representations regarding the amount and sources of income and what funds were obtained from Capital that were made in the divorce proceeding by Rhett Beaver, George Beaver, Sylvia Beaver or any other party making such declarations."

Beaver appealed. We certified this case for review from the Court of Appeals pursuant to Rule 204(b), SCACR.

ISSUES

I. Is the order unsealing the record of a family court proceeding immediately appealable in this case?

II. Did the family court judge err in unsealing the record of a divorce proceeding in a limited manner at the request of a litigant in an unrelated civil action who is seeking information about the financial affairs of one of the divorce litigants?

STANDARD OF REVIEW

A trial court order pertaining to the sealing or unsealing of the record of a court proceeding is reviewed for abuse of discretion. See Nixon v. Warner Communications, Inc., 435 U.S. 589, 599, 98 S.Ct. 1306, 1312-13, 55 L.Ed.2d 570 (1978); Virginia Dept. of State Police v. Washington Post, 386 F.3d 567, 575 (4th Cir. 2004); Siedle v. Putnam Investments, Inc., 147 F.3d 7, 10 (1st Cir. 1998); Providence Journal Co. v. Clerk of the Family Court, 643 A.2d 210, 211 (R.I. 1994); A.P. v. M.E.E., 821 N.E.2d 1238, 1245 (Ill. App. 1 Dist. 2004). An abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case. Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987); S.E.C. v. TheStreet.Com, 273 F.3d 222, 229 n.6 (2d Cir. 2001).

In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and -330 (1976 & Supp. 2005), and S.C. Code Ann § 14-8-200 (Supp. 2005)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same).

LAW AND ANALYSIS

I. APPEALABILITY OF ORDER UNSEALING FAMILY COURT RECORD

Beaver argues the order to unseal the record of a divorce proceeding is immediately appealable because, under the facts of this case, it is a final order issued by the family court which stands separate and apart from the civil lawsuit pending in circuit court between Capital and Beaver. Beaver relies on S.C. Code § 14-3-330(1) (1976). We agree.

The right of appeal arises from and is controlled by statutory law. N.C. Fed. Sav. and Loan Assn. v. Twin States Dev. Corp., 289 S.C. 480, 347 S.E.2d 97 (1986). An appeal ordinarily may be pursued only after a party has obtained a final judgment. Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780-81 (1993); S.C. Code Ann. § 14-3-330(1) (1976); Rule 72, SCRCP; Rule 201(a), SCACR.

The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330 (1976 & Supp. 2005). Absent a specialized statute, an order must fall into one of several categories set forth in Section 14-3-330 in order to be immediately appealable. Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005); Baldwin Constr. Co. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004); Woodard v. Westvaco Corp., 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995), overruled on other grounds, Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002); Mid-State Distributors, 310 S.C. at 333 n.3, 426 S.E.2d at 780 n.3.

An order "involves the merits," as that term is used in Section 14-3-330(1)[1] and is immediately appealable when it finally determines some

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[1] Section 14-3-330(1) provides:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original

continued . . .

substantial matter forming the whole or part of some cause of action or defense. Peterkin v. Brigman, 319 S.C. 367, 461 S.E.2d 809 (1995); Mid-State Distributors, 310 S.C. at 334, 426 S.E.2d at 780; Knowles v. Standard Savings & Loan Assn., 274 S.C. 58, 261 S.E.2d 49 (1979). The phrase "involving the merits" is narrowly construed in modern precedent. An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties' rights. Mid-State Distributors, 310 S.C. at 334-335, 426 S.E.2d at 780 (order denying motion to dismiss case based on lack of personal jurisdiction was not immediately appealable, as the litigant had "not arrived at the end of the road"); Peterkin, 319 S.C. 367, 461 S.E.2d 809 (order denying motion to enforce alleged settlement agreement was not immediately appealable); Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002) (order denying motion to amend pleadings to assert third party claims was not immediately appealable because the order did not determine a substantial matter forming the whole or part of some cause of action).

In the present case, the order issued by the family court unsealing the record determined a substantial matter forming the whole or part of the family court proceeding in which Capital sought access to the record of the Beavers' divorce. No further action is required in the family court to determine the parties' rights; therefore, the order is immediately appealable under Section 14-3-330(1).

Moreover, we agree with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any

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> process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided,* that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from[.] (Emphasis in original.)

damage done by an improper disclosure. "Compelling a party that disputes an unsealing order to forgo an appeal until the conclusion of the underlying litigation would let the cat out of the bag, without any effective way of recapturing it if the district court's directive was ultimately found to be erroneous." Siedle v. Putnam Investments, Inc., 147 F.3d 7, 9 (1st Cir. 1998) (quoting Irons v. FBI, 811 F.2d 681, 683 (1st Cir. 1987)). These courts also explain that the usual method of reaching an appellate court – being held in contempt for refusal to comply – is not available to a litigant when the court chooses to unseal its own records. See Virginia Dept. of State Police v. Washington Post, 386 F.3d 567, 574 n.4 (4th Cir. 2004) (order unsealing district court documents may be immediately appealed under collateral order doctrine applicable in federal courts); S.E.C. v. TheStreet.com, 273 F.3d 222, 228 (2d Cir. 2001) (same); Siedle, 147 F.3d at 9 (same).[2]

Beaver also argues that, if the family court order is viewed as a discovery-related order issued in connection with the civil action in circuit court, then it is immediately appealable because it affects a substantial right pursuant to S.C. Code Ann. § 14-3-330(2) (1976). It is unnecessary to address this argument under the facts of this case.

We conclude the order to unseal the record of the family court proceeding, under the facts of this case, is immediately appealable pursuant to Section 14-3-330(1).

II. UNSEALING RECORD OF DIVORCE PROCEEDING

Appellant argues the family court judge erred in unsealing the record of his divorce proceeding at the request of Capital, which seeks financial information about Appellant for potential use in an unrelated civil action Capital has filed against him. Appellant argues the family court judge who initially sealed the record acted properly and his decision should remain in effect. Although Appellant concedes court records usually are open and

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[2] Although the federal collateral order doctrine is not applied in our state courts, we believe the reasoning of these cases is sound.

public, he contends the privacy rights of family court litigants outweigh the presumption of access to their files. We disagree.

Initially, we note this case does not directly raise the broader issue of unfettered public access to an entire family court file previously sealed by a judge. The order unsealed the file only to allow Capital to review it and Capital will be allowed to copy and retain only specified information related to Appellant's financial affairs.

Public access to judicial proceedings and court records, in both criminal and civil trials, was commonplace and proper when the Bill of Rights was adopted in 1791, and was a right long enjoyed in England in preceding centuries. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-80, 100 S.Ct. 2814, 2821-29, 65 L.Ed.2d 973, 981-92 (1980); Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 386 n. 15, 99 S.Ct. 2898, 2908 n.15, 61 L.Ed.2d 608, 625 n.15 (1979); In re Oliver, 333 U.S. 257, 266-72, 68 S.Ct. 499, 504-07, 92 L.Ed. 682, 690-94 (1948); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1066-71 (3d Cir. 1984). The Supreme Court stated in Nixon v. Warner Commun., Inc., 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) that, under the common law,

> [i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. . . . American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies . . . and in a newspaper publisher's intention to publish information concerning the operation of government.
>
> It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied

> where court files might have become a vehicle for improper purposes."

Id. at 597-98, 98 S.Ct. at 1312, 55 L.Ed.2d at 579-80 (citations omitted); Davis v. Jennings, 304 S.C. 502, 505, 405 S.E.2d 601, 603 (1991).

Judicial proceedings and court records are presumptively open to the public under the common law, the First Amendment of the federal constitution, and the state constitution. S.C. Const. art. I § 9 ("[a]ll courts shall be public"); Davis, 304 S.C. at 505, 405 S.E.2d at 603; Nixon, 435 U.S. at 597-98, 98 S.Ct. at 1312, 55 L.Ed.2d at 579-80; Virginia Dept. of State Police v. Washington Post, 386 F.3d 567, 575 (4th Cir. 2004); Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986).

Public access to court records may be restricted in certain situations, such as matters involving juveniles, legitimate trade secrets, or information covered by a recognized privilege. Restrictions may be based on a statute or the court's inherent power to control its own records and supervise the functioning of the judicial system. See *e.g.* S.C. Code Ann. § 20-7-755 (Supp. 2005) (excluding general public from hearings which involve neglected, abused, or delinquent children); Ex parte Greenville News, 326 S.C. 1, 482 S.E.2d 556 (1997) (post-trial allegations of juror misconduct during murder trial may be publicly disclosed, but jurors' names and identifying information would be redacted to preserve juror privacy, thus satisfying requirement that closure be narrowly tailored to preserver higher values); Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002) (when there is a compelling interest in secrecy, as in case of trade secrets, identity of confidential informants, and privacy of children, portions, and in extreme cases the entirety, of trial record may be sealed); Doe v. Ashcroft, 317 F. Supp. 2d 488 (S.D.N.Y. 2004) (ordering limited sealing of documents filed with court in a lawsuit challenging the constitutionality of a federal statute authorizing the government to obtain certain intelligence-related information in possession of communications service providers due to national security concerns, but establishing procedure by which public would have timely access to all non-sensitive information in the lawsuit).

Public access to courts and their records serves several fundamental interests which are crucial to the proper functioning of judicial and government systems. Public access discourages perjury and encourages bringing the truth to light because participants are less likely to testify falsely in a sunlit courtroom before their neighbors than in a private room before court officials. Public access promotes free discussion of governmental affairs by imparting a more complete understanding to the public of the judicial system and issues resolved by that system. Public access serves as a check on inappropriate or corrupt practices by exposing the judicial process to public scrutiny. Lawyers, witnesses, and judges may perform their duties in a more conscientious manner, knowing their conduct will be subject to public scrutiny either at the time of the proceeding or later through disclosure of court records. See *e.g.* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505-10, 104 S.Ct. 819, 821-24, 78 L.Ed.2d 629, 635-38 (1984); Richmond, 448 U.S. at 564-80, 100 S.Ct. at 2821-29, 65 L.Ed.2d at 981-92; Jessup, 277 F.3d at 927-28; Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 203 F.3d 291, 303 (4th Cir. 2000).

Litigants who carry disputes to a publicly funded forum for resolution must necessarily expect to surrender a good measure of their right to privacy. "A claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of the file. Likewise, prospective injury to reputation, an inherent risk in almost every civil lawsuit, is generally insufficient to overcome the strong presumption in favor of public access to court records." Doe v. Heitler, 26 P.3d 539, 544 (Colo. App. 2001); accord Siedle, 147 F.3d at 10 ("mere fact that judicial records may reveal potentially embarrassing information is not in itself a sufficient reason to block public access"); In re Fibermark, Inc., 330 B.R. 480, 508 (Bankr. D. Vt. 2005) (Bankruptcy Code's exclusion to public disclosure of bankruptcy court records was never intended to save debtors or creditors from embarrassment, or to protect their privacy in light of countervailing statutory, constitutional, and policy concerns); Doe v. New York Univ., 786 N.Y.S.2d 892, 902 (N.Y. Sup. 2004) (embarrassment, damage to reputation, and general desire for privacy do not constitute good cause to seal court records).

In deciding whether to seal or unseal a court record, the court must make specific factual findings, on the record, which weigh the need for secrecy against the right of access. The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption. Davis, 304 S.C. at 506, 405 S.E.2d at 603.

The court must consider the following factors, pursuant to recently enacted Rule 41.1, SCRCP: (1) ensuring the parties' right to a fair trial or hearing; (2) the need for witness cooperation; (3) the reliance of the parties upon expectations of confidentiality of the proceeding; (4) the public or professional significance of the proceeding; (5) the perceived harm to the parties from disclosure; (6) why alternatives other than sealing the documents are not available to protect legitimate private interests; and (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

In addition, the court may consider (8) public interest in the proceeding; (9) the private or public status of the litigants and case generally; (10) whether release would enhance the public's understanding of an important historical event; (11) whether the public already has access to information contained in the records; (12) whether a particular decision will sustain or offend the fundamental interests of public access, and any other relevant factors. See Davis, 304 S.C. at 505-06, 405 S.E.2d at 603-04 (requiring court to make specific factual findings, on the record, when deciding whether to seal court records); Ex parte Columbia Newspapers, Inc., 286 S.C. 116, 333 S.E.2d 337 (1985) (vacating order closing transfer hearing because family court judge erred in failing to make specific findings that closure was necessary to protect rights of juveniles charged with murder); Steinle v. Lollis, 279 S.C. 375, 307 S.E.2d 230 (1983) (vacating magistrate's order excluding members of press from preliminary hearing in criminal case without specific findings upon the record to justify closing the proceeding); Virginia Dept. of State Police, 386 F.3d at 575 (listing factors).

As a general proposition, the records of the family court should be treated no differently than court records in any other case when considering whether to seal or unseal such records. In re Marriage of

Lechowick, 77 Cal. Rptr. 2d 395, 400 (Cal. App. 1 Dist. 1998). However, in family court matters, Rule 41.1(c), SCRCP, requires the judge to "also consider whether the settlement: 1) contains material which may expose private financial matters which could adversely affect the parties; and/or 2) relates to sensitive custody issues, and shall specifically balance the special interests of the child or children involved in the family court matter."

We conclude the family court judge properly unsealed the record to allow Capital access to information it may contain about Beaver's financial affairs. Applying the above factors, several weigh in favor of unsealing the record as ordered by the family court judge. The record contains no evidence pertaining to the parties' reliance upon expectations of confidentiality of the proceeding. Beaver has not shown a perceived harm from disclosure, other than asserting a general right to privacy. Capital seeks access to the records for a legitimate purpose in connection with its unrelated civil action against Beaver. Unsealing the record will serve the fundamental interests of public access, especially the goal of bringing the truth to light.

Weighing in favor of keeping the record sealed are the fact that the Beavers' divorce proceeding, as is usually the case, has little public or professional significance to anyone except the parties involved in the divorce proceeding and Capital's lawsuit. Similarly, disclosure is not likely to enhance the public's understanding of an important historical event and there is little or no public interest in the Beavers' case. The litigants are private parties, not celebrities or public officials. The Beavers' file contains material which may expose private financial matters which could adversely affect the parties, but this is of no concern because access to the file is limited only to Capital.[3]

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[3] Two factors, the right to a fair hearing and need for witness cooperation, are not relevant because the divorce proceeding has ended. Another factor, the impact on sensitive child custody issues, is not implicated.

In sum, Beaver has not overcome the presumption of access to family court records by demonstrating that his interest in secrecy or privacy outweighs the presumption of access. We conclude the family court judge did not abuse his discretion in unsealing the record of Beaver's divorce proceeding to allow Capital to review and copy information about Beaver's financial affairs.

CONCLUSION

The family court order to unseal the record of the family court proceeding, under the facts of this case, is immediately appealable pursuant to Section 14-3-330(1). The family court did not abuse its discretion in unsealing the record of Beaver's divorce proceeding to allow Capital to review and copy information about Beaver's financial affairs.

AFFIRMED.

TOAL, C.J., MOORE, J., and Acting Justice David W. Beatty, concur. PLEICONES, J., concurring in part, dissenting in part in a separate opinion.

JUSTICE PLEICONES: I concur in the majority's conclusion that the order of the family court unsealing the divorce record is immediately appealable, but only because this is a final judgment of the family court. As the majority observes, "No further action is required in the family court to determine the parties' rights ...." In my opinion, no further discussion is necessary.

I respectfully dissent from the majority's holding that the family court properly ordered the unsealing of the record in this case. I agree with the test formulated in the majority opinion for determining whether a record should be unsealed. I differ with the majority opinion's placement of the burden of persuasion on Appellant, the opponent of the motion to unseal the record. In my opinion, the proponent of the motion, Capital, is the party that should bear the burden of persuasion. The burden of persuasion for sealing the record was met in the first instance before the family court. Imposing on Appellant a perpetual burden of keeping the record sealed is inappropriate. See, e.g., Welch v. Welch, 828 A.2d 707 (Conn. Super. Ct. 2003) (holding that "if the court determines that the papers and records should be kept confidential, the burden to show good cause would be upon the party requesting to unseal or open the documents"); but see, e.g., Ark. Best. Corp. v. Gen. Elec. Capital Corp., 878 S.W.2d 708 (Ark. 1994) (holding that "[a]lthough the decision we review is that of declining to unseal the records, the issue is whether the records should have been sealed in the first place," and the "[o]ne who seeks to overcome the expectation of access bears the burden of establishing the requisite important state interest") (internal quotation omitted).

Because the family court placed the burden of persuasion on Appellant, I would reverse the decision and remand the case to the family court for a new hearing, with Capital bearing the burden of persuasion.

The Supreme Court of South Carolina

In re: Amendments to South Carolina Rules of Civil Procedure

ORDER

By order dated January 5, 2006 (copy attached), this Court adopted amendments to the South Carolina Rules of Civil Procedure and these amendments were submitted to the General Assembly pursuant to Art. V, § 4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, these amendments are effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
May 3, 2006

The Supreme Court of South Carolina

In re: Amendments to South Carolina Rules of Civil Procedure

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, the South Carolina Rules of Civil Procedure are hereby amended as provided in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Art. V, § 4A of the South Carolina Constitution.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Waller, J., not participating.

Columbia, South Carolina
January 5, 2006

AMENDMENTS TO THE SOUTH CAROLINA RULES OF CIVIL PROCEUDRE

Rule 68, SCRCP, is hereby amended as follows:

(a) Offer of Judgment. Any party in a civil action, except a domestic relations action, may file, no later than twenty days before the trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or to allow judgment to be taken against the offeror for a sum stated therein, or to the effect specified in the offer. Service of the offer of judgment shall be made as provided in these rules. Within twenty days after service of the offer of judgment or at least ten days prior to the trial date, whichever date is earlier, the offeree or his attorney may file a written acceptance of the offer of judgment. Upon the filing, the court shall immediately issue the judgment and the clerk shall enter the judgment as provided in the offer of judgment. If the offer of judgment is not accepted within twenty days after notification, or prior to or on the tenth day before the actual trial date, whichever date occurs first, the offer shall be considered rejected and evidence thereof is not admissible except in a proceeding after trial to fix costs, interest, attorney's fees, and other recoverable monies. Any offeror may withdraw an offer of judgment prior to its acceptance or prior to the date on which it would be considered rejected by giving notice to the offeree or his attorney as provided in these rules. Any offeror may file a subsequent offer of judgment in any amount which supersedes any earlier offer that was rejected by the offeree or withdrawn by the offer or, and, on filing and service, terminates any rights to interest or costs under the superseded offer. An offer is not considered rejected by a counter offer and shall remain effective until accepted, rejected, or withdrawn as provided in this subsection. All offers of judgment and any acceptance of offers of judgment must be included by the clerk in the record of the case.

(b) Consequences of Non-Acceptance. If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until the entry of the

judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of judgment; or (3) if the offeror is a defendant, reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of the judgment.

(c) This rule shall not abrogate the contractual rights of any party concerning the recovery of attorney's fees or other monies in accordance with the provision of any written contract between the parties to the action.

Note to 2006 Amendment:

This amendment makes this provision consistent with S.C. Code Ann. Section 15-35-400, which became effective July 1, 2005.

The Supreme Court of South Carolina

In re: Amendments to Rule 34, Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR.

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 34 of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, is amended as provided on the attachment herein. This amendment shall be effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
May 3, 2006

RULE 34
EMPLOYMENT OF DISBARRED OR SUSPENDED LAWYERS

A lawyer who is disbarred, suspended or transferred to incapacity inactive status shall not be employed directly or indirectly by a member of the South Carolina Bar as a paralegal, investigator or in any other capacity connected with the practice of law, nor be employed directly or indirectly in the State of South Carolina as a paralegal, investigator or in any capacity connected with the practice of law by a lawyer licensed in any other jurisdiction. Additionally, a lawyer who is disbarred, suspended or transferred to incapacity inactive status shall not serve as an arbitrator, mediator or third party neutral in any Alternative Dispute Resolution proceeding in this state nor shall any member of the South Carolina Bar directly or indirectly employ a lawyer who has been disbarred, suspended or transferred to incapacity inactive status as an arbitrator, mediator or third party neutral in any Alternative Dispute Resolution proceeding. Any member of the South Carolina Bar who, with knowledge that the person is disbarred, suspended or transferred to incapacity inactive status, employs such person in a manner prohibited by this rule shall be subject to discipline under these rules. A disbarred or suspended lawyer who violates this rule shall be deemed in contempt of the Supreme Court and may be punished accordingly.

The Supreme Court of South Carolina

In re: Amendments to Rules 408, 419, and 504 of the South Carolina Appellate Court Rules

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ORDER

The Commission on Continuing Legal Education (CLE) has proposed amending the South Carolina Appellate Court Rules concerning the dates for reporting compliance with CLE requirements.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rules 408(a), 419, and 504(b), South Carolina Appellate Court Rules, to change the date for members of the South Carolina Bar to file annual compliance reports with the Commission from January 1 to March 1. Furthermore, the amendments change the reporting periods for both judges and lawyers from the current calendar year system. For CLE credit hours for 2006, the annual reporting period shall begin January 1, 2006, and end February 28, 2007. Thereafter, the annual reporting period shall run from March 1 through the last day in February. This amendment does not affect the reporting period or compliance deadlines for magistrates and municipal judges, and does not affect the deadlines for judges to file their compliance

reports pursuant to Rule 510, South Carolina Appellate Court Rules.

The amendments are effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
May 3, 2006

RULE 408
CONTINUING LEGAL EDUCATION AND SPECIALIZATION

(a) Continuing Legal Education Requirements. All persons admitted to the South Carolina Bar shall be required to attend at least fourteen (14) hours of approved continuing legal education (CLE) courses each year. The annual reporting period for purposes of this Rule shall run from March 1 through the last day in February. At least two (2) of the fourteen (14) hours required annually shall be devoted to legal ethics/professional responsibility. Failure to meet these requirements will result in suspension from the practice of law pursuant to Rule 419, SCACR. Only in cases involving extraordinary hardship or extenuating circumstances may this requirement be waived or modified. The following members of the South Carolina Bar shall be exempt from these requirements:

(1) specialists certified pursuant to this Rule who satisfy the continuing legal education (CLE) requirements of their specialty; provided, however, that at least two (2) hours of the CLE credits completed by certified specialists shall be devoted to legal ethics/professional responsibility;

(2) lawyers at least 60 years old who have been admitted to practice law for thirty (30) or more years, and who apply to the Commission on Continuing Legal Education and Specialization for this exemption. (Exemptions granted prior to June 23, 1994 remain in effect). Provided, however, that if a lawyer who receives an exemption or is entitled to an exemption under this provision is suspended for a definite period of more than six (6) months under Rule 413, SCACR, this exemption shall not apply or be granted during the suspension period;

(3) lawyers, including members of the judiciary, who are not enrolled as "active members" of the Bar. Provided, however, that except in the case of federal judges (including federal magistrates and federal administrative law judges), all judicial members of the Bar not required to fulfill the judicial continuing legal education requirements of Rule 504, SCACR, shall be considered "active members" for the purpose of satisfying the continuing legal education requirements of this Rule and shall not be

entitled to an exemption therefrom based upon their status as “judicial members” of the Bar.

RULE 419
ADMINISTRATIVE SUSPENSIONS

(a) Applicability. This rule governs suspensions by the South Carolina Bar, pursuant to the Bylaws of the South Carolina Bar, for failure to pay annual license fees, including the Lawyers’ Fund for Client Protection assessment, and/or by the Commission for Continuing Legal Education and Specialization, pursuant to the Regulations for Mandatory Continuing Legal Education for Judges and Active Members of the South Carolina Bar, for failure to file a report establishing compliance with mandatory continuing legal education requirements and failure to pay the annual filing fee.

(b) Due Date of Fees and Reports.

(1) Annual license fees and assessments required by the Bylaws of the South Carolina Bar and Rule 411(d)(1), SCACR, shall be due not later than January 1. A lawyer who has failed to pay the annual license fees and assessments, including payment of any penalty established by the Bar, by January 31 will be automatically suspended by the Bar. With the exception of retired members, the Bar shall not accept a license fee or assessment unless the lawyer provides the Bar with a current e-mail address.

(2) Reports of compliance with continuing legal education requirements required by the Regulations for Mandatory Continuing Legal Education for Judges and Active Members of the South Carolina Bar shall be due not later than March 1. A lawyer who has failed to file a report of compliance and pay the annual filing fee, including payment of any penalty by the Commission, by March 31 will be automatically suspended by the Commission. The reporting period for lawyers and judges shall run from March 1 through the last day in February, annually.

(c) Failure to Comply.

(1) Promptly after January 31, the Bar shall notify the lawyers who have failed to pay the annual license fees and assessments, including payment of any penalty established by the Bar, that they have been suspended and that, if they have not complied and been reinstated by the Bar by March 1, their names will be published in the Advance Sheets.

(2) Promptly after March 31, the Commission shall notify the lawyers who have failed to file a report of compliance and pay the annual filing fee, including payment of any penalty by the Commission, that they have been suspended and that, if they have not complied and been reinstated by the Commission by May 1, their names will be published in the Advance Sheets.

(d) Reinstatement by Bar and Commission.

(1) The Bar shall forward a list of the lawyers who remain suspended after March 1 for failure to pay the annual license fees and assessments, including payment of any penalty established by the Bar, to the Clerk of the Supreme Court. The names of those lawyers shall be published in the Advance Sheets. The suspended lawyers shall have until April 1 to comply and seek reinstatement through the Bar.

(2) The Commission shall forward a list of lawyers who remain suspended after May 1 for failure to file a report of compliance and pay the annual filing fee, including payment of any penalty by the Commission, to the Clerk of the Supreme Court. The names of those lawyers shall be published in the Advance Sheets. The suspended lawyers shall have until June 1 to seek reinstatement through the Commission.

(e) Suspension by Supreme Court.

(1) Promptly after April 1, the Bar shall forward a list of the lawyers who remain suspended for failure to pay annual license fees to the Clerk of the South Carolina Supreme Court. Those lawyers shall be suspended by order of the South Carolina Supreme Court and shall thereafter forward their certificate of

admission to practice law in this state to the Clerk of the South Carolina Supreme Court.

(2) Promptly after June 1, the Commission shall forward a list of the lawyers who remain suspended for failure to file reports of compliance with continuing legal education requirements to the Clerk of the South Carolina Supreme Court. Those lawyers shall be suspended by order of the South Carolina Supreme Court and shall thereafter forward their certificate of admission to practice law in this state to the Clerk of the South Carolina Supreme Court.

(f) Reinstatement by Supreme Court. Any lawyer seeking reinstatement after April 1, in the case of a lawyer suspended for failing to pay license fees, and June 1, in the case of a lawyer suspended for failing to file reports of Continuing Legal Education compliance must petition the South Carolina Supreme Court. The petition for reinstatement shall comply with the requirements of Rule 32, RLDE, Rule 413, SCACR, to include a filing fee of $200. The Court may take such action as it deems appropriate in acting on the petition for reinstatement, including, but not limited to, requiring the lawyer to appear before the Court for a hearing, referring the petition to the Committee on Character and Fitness or referring the petition to the Commission on Lawyer Conduct for investigation and a recommendation as to the propriety of reinstatement.

(g) Termination. If a lawyer fails to seek reinstatement within three (3) years of being suspended by the Court, the lawyer's membership in the South Carolina Bar shall be terminated and the lawyer's name shall be removed from the roll of attorneys. The lawyer must thereafter comply with Rule 402, SCACR, to be readmitted to the practice of law in this state.

RULE 504
CONTINUING LEGAL EDUCATION OF THE JUDICIARY

(b) Continuing Legal Education Requirement. A judge shall complete a minimum of 15 hours of continuing legal education approved by the Commission on Continuing Legal Education and Specialization (Commission) each year. The annual reporting period for purposes of this Rule shall run from March 1 through the last day in February. A judge may be given credit in one or

more succeeding reporting periods, not exceeding 3 such periods, for completing more than 15 hours of approved education during any one reporting period.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Samuel Clint Thompson, Appellant/Respondent,

v.

South Carolina Steel Erectors, Employer, American Interstate Insurance, Carrier, Respondents/Appellants.

Appeal From Georgetown County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 4109
Heard March 8, 2006 – Filed May 1, 2006

AFFIRMED IN PART AND REVERSED IN PART

Thomas W. Greene, of Charleston, for Appellant-Respondent.

Stanford E. Lacy and Suzanne C. Boulware, of Columbia, for Respondents-Appellants.

KITTREDGE, J.: We are presented with cross-appeals from a workers' compensation claim filed by Samuel Clint Thompson against his employer, South Carolina Steel Erectors and its insurance carrier, American Interstate Insurance (collectively referred to as American Interstate). Thompson was paralyzed in a work-related accident and awarded benefits. Thompson sought a partial lump sum payment from his lifetime benefits to construct a house, as well as additional payments for exercise equipment and modifications to this house necessitated by his injuries. The modifications would make the proposed home habitable for a paraplegic. The single commissioner awarded Thompson relief on all counts. An appellate panel of the Workers' Compensation Commission (the Commission) affirmed the award of the partial lump sum payment and the funds for exercise equipment but denied the payment for the modifications. The circuit court affirmed the Commission. Both parties appeal. We affirm the Commission to the extent it awarded Thompson relief, and we reverse the Commission's denial of Thompson's request for funds to modify the house to accommodate his paraplegia.

FACTS

Thompson worked as a welder with Steel Erectors. While Thompson was hanging a 3000 pound beam, its rigging broke. The beam hit Thompson, knocking him to the concrete floor 30 feet below. Thompson suffered a spinal cord injury resulting in paraplegia. Steel Erectors admitted liability for the accident and American Interstate began paying weekly benefits of $507.34, as well as $1,000 per month to Thompson's wife to aid with his care.

Thompson is married with two children, ages five and six. At the time of the accident, the Thompson family rented a home from Thompson's uncle for $200.00 per month, well below the monthly market rate of approximately $600.00. American Interstate paid approximately $35,000 for modifications to the rental home to accommodate Thompson's special needs.

Thompson filed a claim with the Workers' Compensation Commission for total general disability with lifetime benefits based upon his paraplegia pursuant to section 42-9-10 of the South Carolina Code (Supp. 2005). He also requested a partial lump sum payment from his lifetime benefits for the construction of a new home for the family. Thompson sought additional money to upfit the new home to render it habitable for a paraplegic.

American Interstate admitted the facts of Thompson's injury and his disability, but opposed the requests for a partial lump sum payment and other funds. As the hearing commenced, American Interstate stipulated to Thompson's entitlement to lifetime benefits under section 42-9-10.

The single commissioner awarded Thompson lifetime benefits of $507.34 per week. The commissioner also ordered American Interstate to pay $150,300 as a lump sum for the new home, to be deducted from the "back end" of Thompson's future benefits. The commissioner found he was empowered to make an award of a partial lump sum pursuant to Glover v. Suitt Construction Company, 318 S.C. 465, 458 S.E.2d 535 (1995), and Cox v. BellSouth Telecommunications, 356 S.C. 468, 589 S.E.2d 766 (Ct. App. 2003), cert. denied, (Apr. 7, 2005). Next, the commissioner awarded Thompson $83,700.00 for upfitting the new home to accommodate his special needs. Finally, the commissioner ordered American Interstate to provide therapeutic and exercise equipment prescribed by Thompson's neurologist.[1]

The Commission affirmed the single commissioner's partial lump sum payment award, and also found that the amount should be deducted "from the 'back end' of Claimant's lifetime monetary benefits." Specifically, the Commission found the award: (1) was in the best interest of Thompson and his family; (2) represented approximately 13% of his future benefits given his life expectancy according to the South Carolina mortality tables; (3) did not constitute a hardship to American Interstate; and (4) was a reasonable amount. The Commission also affirmed the award requiring American Interstate to provide the equipment as prescribed.

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[1] Neither the upfitting award nor the funds for the therapeutic and exercise equipment are to be deducted from Thompson's lifetime benefits.

The Commission, however, reversed the single commissioner's award of $83,700 for modifications. The Commission found that because American Interstate previously spent $35,000 to upfit Thompson's rented residence, "[u]p-fitting a new residence would be duplication and an abuse of discretion on the part of this Commission."

The circuit court affirmed the Commission's order. On appeal, Thompson challenges the Commission's denial of his request for funds for upfitting the new home, while American Interstate challenges the partial lump sum payment award.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). "In workers' compensation cases, the Full Commission is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). In a typical appeal from the Commission, we review facts based on the substantial evidence standard. Under this approach, the appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(6) (2005). The appellate court may reverse or modify the Commission's decision only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Id. "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Shealy, 341 S.C. at 455, 535 S.E.2d at 442.

The Workers' Compensation Act sets forth a special standard for review of lump sum payments: "Upon a finding by the commission that a lump sum payment should be made, the burden of proof as to the abuse of discretion in such finding shall be upon the employer or carrier in any appeal

proceedings." S.C. Code Ann. § 42-9-301 (1985). Therefore, we review the partial lump sum award for an abuse of discretion. An abuse of discretion occurs if the Commission's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999).

LAW/ANALYSIS

Thompson appeals the Commission's denial of his request for the funds needed to upfit the new home to accommodate his paraplegia. American Interstate's cross-appeal raises numerous issues challenging the partial lump sum payment award, payment for the prescribed equipment, and the requirement that the lump sum payment be deducted from the "back end" of Thompson's lifetime benefits. We first consider American Interstate's appeal.

I.

American Interstate's Appeal

A. Partial Lump Sum Award

American Interstate contends the Commission erred in awarding Thompson a partial lump sum payment from his lifetime benefits. It maintains the award: (1) should not be permitted until Thompson has been conclusively determined to be totally and permanently disabled; (2) is prohibited by the Workers' Compensation Act; and (3) is not in Thompson's best interest.

1. Finding of Disability

Section 42-9-10 governs the payment of workers' compensation benefits for total disability. It allows "any person determined to be totally and permanently disabled who as a result of a compensable injury is a

paraplegic, . . . [to] receive the benefits for life." S.C. Code Ann. § 42-9-10 (Supp. 2005).

American Interstate contends the Commission erred in awarding a partial lump sum from Thompson's lifetime benefits when it has not been conclusively proven that Thompson is entitled to lifetime benefits. This issue is not preserved for review on appeal, as it was not raised before the Commission or the circuit court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Not only did American Interstate fail to challenge Thompson's entitlement to lifetime benefits, American Interstate stipulated to Thompson's entitlement to the lifetime benefits award at the hearing before the single commissioner:

> **Thompson's Counsel:** First of all, since . . . there's not a contest about this I'm sure, but since there's no order in place confirming Mr. Thompson's entitlement to lifetime benefits under [42-9-10] by reason of the fact that he is a paraplegic as a result of his job accident, I'd like any order . . . to establish that for the record . . . .
>
> **American Interstate's Counsel:** We can address that now. We won't have an objection to that.
>
> . . . .
>
> **American Interstate's Counsel:** We'll stipulate to that.
>
> **Commissioner:** So stipulated.

Because American Interstate stipulated to the award of lifetime benefits under section 42-9-10, it may not complain about the award on appeal. "A stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations, of course,

are binding upon those who make them." Kirkland v. Allcraft Steel Co., Inc., 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998) (citations omitted).

2. Partial Lump Sum Payment from Lifetime Benefits

American Interstate next maintains the payment of a partial lump sum from Thompson's lifetime benefits award violates section 42-9-10 and is impossible to calculate or liquidate because it is contingent upon his survival.

Section 42-9-301 empowers the Commission to order lump sum payments:

> Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, when the employee so requests and the commission deems it not to be contrary to the best interest of the employee or his dependents, or when it will prevent undue hardship on the employer or his insurance carrier, without prejudicing the interest of the employee or his dependents, be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the commission . . . .

S.C. Code Ann. § 42-9-301 (1985). However, section 42-9-10 provides: "Notwithstanding the provisions of § 42-9-301, no *total* lump sum payment may be ordered by the commission in any case under this section where the injured person is entitled to lifetime benefits." (Emphasis added).

In Glover v. Suitt Construction Company, our supreme court determined that section 42-9-10 does not prohibit recovery of attorney's fees in a partial lump sum payment from a claimant's lifetime benefits. 318 S.C. 465, 469-70, 458 S.E.2d 535, 538 (1995). The court noted:

> Employer contends our interpretation of § 42-9-10 will permit the Commission to order partial lump sum **benefits** to a claimant awarded lifetime benefits,

> a result clearly not intended by the legislature. The sole issue presently before this Court is lump sum payment of **attorney's fees** and, accordingly, we decline to address Employer's contention. In any event, if, as Employer suggests, the statute and Regulation may be so construed, the matter is one for the General Assembly.

Id. at 470 n.4, 458 S.E.2d at 538 n.4 (emphasis in original).

The court in Glover reasoned that the contingent nature of lifetime benefits—the fact they are only paid during the life of the claimant—should not prohibit the award of a partial lump sum for attorney's fees. Id. at 469-70, 458 S.E.2d at 538. The court explained that "the mortality tables provide an adequate basis upon which to determine the present day value." Id. at 467 n.3, 458 S.E.2d at 537 n.3.

This court had occasion to specifically address the question before us today, that is, whether section 42-9-10's prohibition against a "total lump payment" from the injured person's lifetime benefits precludes partial lump sum payments of lifetime benefits. Cox v. Bellsouth Telecommunications, 356 S.C. 468, 589 S.E.2d 766 (Ct. App. 2003), cert. denied, (Apr. 7, 2005). In Cox, we held this provision was "not intend[ed] to prohibit *partial* lump sum payments of lifetime benefits." Cox, 356 S.C. at 472, 589 S.E.2d at 768 (emphasis in original). We stated that "[p]ermitting partial lump sum payments provides the commission needed flexibility in lifetime benefits cases, flexibility it regularly exercises with respect to all other compensation awards, to ensure the best interests of the injured worker are protected." Id. at 472-73, 589 S.E.2d at 768-69.

We discern no reason to deviate from this court's prior holding allowing partial lump sum payments to lifetime benefits recipients. As found in Cox: "Had the General Assembly desired to eliminate all lump sum payments in lifetime benefits cases, it could have omitted the word 'total'

from the provision, or it could have specifically provided that 'all' lump sum payments were prohibited." Id. at 472, 589 S.E.2d at 768.[2]

We hold the Commission was empowered to award a partial lump sum payment from Thompson's lifetime monetary benefits award.[3]

3. Best Interest of Thompson

American Interstate next contends the payment of the lump sum award is not in the best interest of Thompson or his family. We find the Commission did not abuse its discretion in making the award to Thompson.

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[2] American Interstate argues that the supreme court has effectively reversed our Cox precedent in Stone v. Roadway Express, Op. No. 26113 (Sup. Ct. filed Feb. 13, 2006) (Shearouse Adv. Sh. No. 7 at 29). In Stone, the court held that an employee's widow is not entitled to continue receiving benefits after the employee's death when the employee was receiving compensation under the first paragraph of section 42-9-10. Id. at 38. The holding in Stone is grounded in a statute that governs the "payment of the unpaid balance of compensation" when the employee dies. S.C. Code Ann. § 42-9-280 (1985). Section 42-9-280 permits the payment of the unpaid balance of compensation to the "next of kin dependent" when the compensation was "for an injury covered by the second paragraph of § 42-9-10 or § 42-9-30." Stone has no application here, for Thompson is receiving lifetime benefits, and there is no claim of entitlement by a third party to Thompson's benefits. We believe the holding in Cox—authorizing the Commission under § 42-9-10 to award partial lump sum payments of lifetime benefits—remains binding precedent on this court.

[3] American Interstate's policy arguments—that allowing a partial lump sum payment is tantamount to creating a life insurance account or a savings account for the claimant—were not specifically raised to nor ruled on by the Commission and are not preserved for our review on appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

In determining whether to award a lump sum payment to a claimant, the Commission must consider whether the award will cause a hardship to the employer or carrier and whether the payment would be in the best interest of the claimant and his family. S.C. Code Ann. § 42-9-301 (1985). "Upon a finding by the commission that a lump sum payment should be made, the burden of proof as to the abuse of discretion in such finding shall be upon the employer or carrier in any appeal proceedings." Id.

The Thompsons were living in the uncle's rental home to save money, in hopes of ultimately purchasing their own home. The rental home was not intended to be a permanent home for the Thompsons. The Thompsons had saved approximately $8,000 at the time of the accident. Further, there is evidence supporting the view that by moving to an adjoining county, the Thompson children would attend better schools. American Interstate provides no evidence indicating the award would be detrimental to Thompson or his family.

We find the record supports the Commission's determination that American Interstate failed to provide credible evidence to show the funds would be squandered or that the purpose for which Thompson sought the funds was wasteful or unreasonable. We conclude there is ample evidence to support the finding that a partial lump sum award is in Thompson's best interest. We affirm the finding that Thompson is entitled to lifetime benefits, that the Commission has authority to order the partial lump sum from this award for construction of the new home, and that American Interstate has failed to demonstrate that the Commission abused its discretion.

B. Deduction from the "Back End"

American Interstate contends the Commission erred in finding the partial lump sum payment should be deducted from the "back end" of Thompson's lifetime monetary benefits award. This issue is not properly preserved for review on appeal.

American Interstate raised the issue as an exception to the Commission in its appeal from the single commissioner's ruling. However, the Commission never specifically addressed the issue of "how . . . payments are

to be 'deducted from the back end' as stated in the single commissioner's order." The Commission simply reiterated the requirement that the partial lump sum be deducted from the "back end" of Thompson's lifetime benefits. This reference fails to show that the Commission made a ruling sufficient for preservation. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding an issue was not preserved for appellate review when the trial court did not explicitly rule on the appellant's argument). Beyond this, nothing in the record demonstrates the issue was raised to the circuit court on appeal. See, e.g., United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 107, 413 S.E.2d 866, 869 (Ct. App. 1992) (finding that when the circuit court sitting in an appellate capacity does not address an issue and the party makes no motion pursuant to Rule 59(e), SCRCP, the alleged error is not preserved for further appellate review).

C. Exercise and Therapeutic Equipment

American Interstate's final contention is that the Commission erred in requiring it to provide the equipment prescribed by Thompson's doctor. This issue is not preserved for appellate review. The circuit court found the award to be law of the case, specifically stating:

> The Single Commissioner ordered, [and] the Commission on Appeal sustained[,] [the finding that] "[t]he Employer shall provide or cause to be provided the exercise equipment and aquatic therapy prescribed by Dr. Bailey[.]" The Full Commission upheld this provision of [the single commissioner's] order. [American Interstate's] Specifications of Error do not take exception to this portion of the Order and, therefore, it is the law of the case. [American Interstate] must provide this equipment.

Finding nothing in the record to the contrary, we affirm this portion of the circuit court's order pursuant to Rule 220(b)(2), SCACR.

II.

Thompson's Appeal

A. Refusal to Award Modifications to New Home

Thompson asserts the Commission erred in denying his request for the funds needed to upfit the new home to accommodate his special needs. We agree.

Initially, we address the applicable standard of review for this award. The initial award by the single commissioner for the upfit to the new home expressly provided that the "cost of these construction features shall not be deducted from Claimant's monetary benefits." Because the Commission cited an abuse of discretion standard when addressing the request for funds to upfit the home, it appears the Commission considered this request as one for a partial lump sum award. S.C. Code Ann. § 42-9-301. Here, however, the amount for the upfit, while a lump sum in common parlance, is not part of (and is not to be deducted from) the benefits award. The statutory abuse of discretion standard, therefore, may not be applicable on this issue. Review of the Commission's decision here may fall under the general substantial evidence standard. We need not resolve this standard of review question, for we find the Commission committed legal error—the Commission's decision may not be sustained under either standard of review. We conclude that the Commission erred as a matter of law in awarding the lump sum payment for construction of the home, yet refusing to award funds sufficient to upfit the home to meet Thompson's special needs resulting from his paraplegia. See Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999) (holding that an abuse of discretion occurs if the trial court's findings are wholly unsupported by the evidence or its conclusions are controlled by an error of law); Stephen v. Avins Constr. Co., 324 S.C. 334, 337, 478 S.E.2d 74, 76 (Ct. App. 1996) ("On appeal from the Workers' Compensation Commission, the court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law.").

The Workers' Compensation Act authorizes the Commission to order an employer to pay for reasonably necessary medical costs. S.C. Code Ann. § 42-15-60 (1985). The contractor's estimate specifies that the $83,700 includes the cost of necessary accommodations such as a handicapped-accessible shower and bath, wider halls and door openings, and handicap ramps. Additionally, it includes building modifications necessary for the exercise and therapeutic equipment. The modifications are necessitated *solely* by Thompson's admittedly compensable injury. The bottom line is that Thompson cannot live in the proposed home without the modifications to accommodate his paraplegia. Under these circumstances, the effort by the Commission to "split the baby" cannot stand. Because neither the new home nor the exercise equipment would benefit Thompson without these additional modifications, we hold the Commission erred in denying the award to modify and upfit the proposed home.

We are not unmindful that this award may involve some duplication of the previous upfit of the rental home, but this fact, standing alone, is not dispositive. Moreover, while we acknowledge the understandable opposition of an employer or insurance carrier to the prospect of paying for multiple moves, the present posture of this case does not warrant those concerns. The result we reach today is influenced by two factors.

First, the Thompsons never intended to reside permanently in the uncle's rental home. Prior to Thompson's disabling injury, the family planned to move to a permanent home, a move that would be in response to the best interests of the Thompson children, particularly their education. That move was to be accomplished through Thompson's income from work and family savings, as evidenced by the $8,000 saved as of the time of the accident. The devastating blow of Thompson's paraplegia should not be compounded by a legal decree that would effectively preclude the dream of home ownership. No reasonable person could expect the Thompsons to live permanently in the uncle's rental home and completely abandon their hopes for some semblance of a normal life.

Second, American Interstate's claim of "duplication" is only partially true, for substantial additional modifications to the uncle's rental home would be required were the Thompsons to remain there. The contractor who

performed the original modifications to the Thompsons' rental home indicated that between $37,750 and $39,250 in further modifications would be necessary for the installation and use of the prescribed exercise and therapy equipment. American Interstate knew at the time of the prior upfit to the rental home that the Thompsons could not be expected to remain there for the rest of their lives. Accordingly, we reverse this portion of the Commission's order and reinstate the award of $83,700 for upfitting the new home.

CONCLUSION

We hold the Commission did not abuse its discretion in awarding Thompson a partial lump sum payment from his lifetime benefits award. We additionally affirm the Commission's award of the exercise equipment and therapy equipment. We reverse the Commission's denial of Thompson's request for the funds necessary to upfit the new home. The decision of the Commission is

AFFIRMED IN PART AND REVERSED IN PART.

HEARN, C.J., and ANDERSON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

A Fast Photo Express, Inc., f/k/a Devine Street Camera, Inc., d/b/a American Fast Photo & Camera, Jay Specter, and Barbara Specter,	Plaintiff,

v.

First National Bank of Chicago, M.P.H. Holdings, Inc., Thomas J. Russell and John Doe,	Defendants,
AND	
M.P.H. Holdings, Inc.,	Third-Party Plaintiff,

v.

Barbara Specter,	Third-Party Defendant.
M.P.H. Holdings, Inc.,	Respondent,

v.

Jay Specter and Barbara Specter,	Appellants.

Appeal From Richland County
Joseph M. Strickland, Master-in-Equity

Opinion No. 4110
Submitted December 1, 2005 – Filed May 8, 2006

AFFIRMED IN PART
AND REVERSED IN PART

Jay and Barbara Specter, both of Columbia, Pro Se, for Appellants.

Suzanne Taylor Graham Grigg, of Columbia, for Respondent.

BEATTY, J.: Jay and Barbara Specter appeal the master-in-equity's order transferring property in partial satisfaction of a judgment.[1] We affirm in part and reverse in part.[2]

FACTS

On September 30, 1994, M.P.H. Holdings, Inc., obtained a personal judgment against Jay and Barbara Specter for $62,730, and a writ of execution was filed on March 20, 1996. An attempt was made to execute the judgment, but the sheriff's office returned the execution against property to the clerk marked "nulla bona" on August 14, 1996. M.P.H. Holdings dissolved in 2002, and it surrendered its authority to do business in South Carolina.

[1] Respondent M.P.H. Holdings has not filed a final brief in this case.

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

In the summer of 2002, Jay Specter inherited one-fifth of the personal property from his father's estate, and his portion of the personal property was valued at $31,000.[3] On August 25, 2004, the attorney for M.P.H. Holdings petitioned the master for a supplemental proceeding in an attempt to execute the judgment. Accompanying the petition was an affidavit from the attorney alleging that she was the attorney for petitioner M.P.H. Holdings. The master issued a rule to show cause and scheduled a hearing.

A hearing was held on September 23, 2004, to determine whether the Specters had any assets that could be used to satisfy the judgment. Jay Specter initially appeared with counsel, but counsel was relieved during the hearing after revealing a conflict of interest. The attorney who had filed the request for supplemental proceedings on behalf of M.P.H. Holdings informed the court that the corporation's assets were transferred to its successor in interest, Bank One, and she was authorized to execute the judgment on behalf of Bank One.[4] During the hearing, Jay Specter asserted his Fifth Amendment privilege against self-incrimination in response to every question asked of him, and he requested a continuance in order to obtain new counsel. M.P.H. Holdings provided evidence of the $31,000 in assets Specter inherited from his father's estate.

The master granted M.P.H. Holdings' request to execute judgment as to the $31,000 Specter inherited, and he also granted Specter's request for a continuance. An order was signed by the master and filed on September 23, 2004, directing the personal representative of Specter's father's estate to distribute Jay Specter's interest in the personal property to M.P.H. Holdings.

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[3] The will further instructed that the house in which Jay and Barbara lived, valued at over $200,000, and any remainder of the $1,000,000 estate should be placed in the "Jay M. Specter Trust."

[4] The master overruled Specter's objection that Bank One did not have standing to file the supplemental proceedings to enforce M.P.H. Holdings' judgment. Because the standing question is also an issue on appeal, we will continue to refer to the moving party in the underlying supplemental proceedings as "M.P.H. Holdings" in accordance with the caption.

The order further directed that any property owned by the Specters, above any homestead exemption, should be transferred. The Specters filed a notice of appeal from the September 23, 2004 order on September 27, 2004.

On September 28, 2004, the continued matter was heard before the master, and the Specters appeared pro se. The attorneys for M.P.H. Holdings requested that the master issue a supplemental order transferring title of two cars in the Specters' possession. The master declined to issue an order transferring title of the two cars pending disposition of the appeal. However, the master restrained the Specters from disposing of the cars. The written order, entitled "Order Restraining Damage, Concealment, Transfer, or Removal of Property," was filed November 3, 2004. The Specters filed a motion to reconsider this order on November 8, 2004. Nothing in the record indicates this motion has ever been heard or ruled upon. Further, the Specters have not filed a notice of appeal from the November 3, 2004 restraining order.

STANDARD OF REVIEW

"Supplementary proceedings are equitable in nature." Ag-Chem Equip. Co. v. Daggerhart, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct. App. 1984). In an equitable matter referred to a master for final judgment with direct appeal to the supreme court, the appellate court may determine the facts in accordance with its own view of the preponderance of the evidence. Friarsgate, Inc., v. First Fed. Sav. & Loan Ass'n, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct. App. 1995). The appellate court is not required, however, to disregard the findings of the master. Id.

LAW/ANALYSIS

I. Preservation (Issues 2, 3, and 4)

The Specters argue the master erred in ordering the transfer of Jay Specter's interest in his father's estate because: (1) M.P.H. Holdings should not have been allowed to bring the action to examine the Specters if it sold or transferred its interest in the judgment; (2) M.P.H. Holdings failed to take

possession of Jay Specter's interest in his father's estate prior to the September 30, 2004 expiration of the judgment; and (3) it was error for the master to issue the November 8, 2004 restraining order more than thirty days after the expiration of the judgment as an attempt to extend the judgment past the ten-year deadline. These arguments are not preserved for appellate review.

A. Transfer of M.P.H. Holdings' Interest

The Specters argue that it was error for the master to allow M.P.H. Holdings to bring an action to examine them if it transferred its interest in the judgment to Bank One.

Before he was relieved due to a conflict of interest, the Specters' attorney argued at the September 23, 2004 hearing that the action could not properly be brought because it was not clear who was bringing the action, there was a question concerning whether M.P.H. Holdings had standing to bring the action as a dissolved corporation, and there was a question concerning whether the action had been authorized. The master overruled the objection. No arguments were raised concerning whether M.P.H. Holdings could still maintain an action in its name after transferring its assets, and the master did not address this question in his order. Further, the Specters failed to raise this issue in a motion for reconsideration pursuant to Rule 59(e), SCRCP. Because this issue was not raised to or ruled upon by the master, it is not preserved for appellate review. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (noting that issues not raised to or ruled upon by the trial court are not preserved for appellate review).

B. Failure to take possession prior to expiration of the judgment

The Specters assert the judgment against them has now expired, and thus, M.P.H. Holdings is not now entitled to distribution of the proceeds from Jay Specter's father's estate.

Judgments are enforced through writs of execution. Rule 69, SCRCP. Executions may issue upon a final judgment "at any time within ten years

from the date of the original entry thereof." S.C. Code Ann. § 15-39-30 (2005); see Home Port Rentals, Inc. v. Moore, 359 S.C. 230, 234, 597 S.E.2d 810, 812 (Ct. App. 2004) (noting that the statutory ten-year enforcement period cannot be tolled, and thus the judgment is "utterly extinguished" ten years from the date of the entry of judgment), cert. granted (Sept. 22, 2005).

The Specters are correct in asserting that the ten-year enforcement period expired on September 30, 2004. However, the master issued an order on September 23, 2004, directing the personal representative of Paul Specter's estate to distribute Jay Specter's interest to M.P.H. Holdings. The Specters filed their notice of appeal on September 27, 2004. Thus, the order transferring Specter's inheritance and the Specters' notice of appeal were both filed prior to the expiration of the judgment. The issue of whether the judgment had expired was never raised to the master prior to the filing of the Specters' appeal. Thus, this matter is being raised for the first time on appeal. Because the issue was not raised to or ruled upon by the master, it is not preserved for appellate review. Staubes, 339 S.C. at 412, 529 S.E.2d at 546.

C. November 8, 2004 restraining order

The Specters argue the duration of the judgment could not have been extended by the November 8, 2004 restraining order because it was filed over thirty days after the September 30, 2004 expiration of the judgment. Thus, they argue, it was error for the master to issue the restraining order, and the order should be "cancelled."

The Specters' notice of appeal, filed September 27, 2004, indicates they were only appealing from the master's September 23, 2004 order. Therefore, any concerns regarding the November 8, 2004 restraining order are not before this court. Further, the record does not indicate that the issue of whether the restraining order would improperly extend the duration of the judgment was ever raised before or ruled upon by the master. Because this issue is raised for the first time on appeal, it is not properly preserved for appellate review. Staubes, 339 S.C. at 412, 529 S.E.2d at 546.

II. Standing (Issue 1)

The Specters argue it was improper for M.P.H. Holdings, a dissolved corporation, to maintain the supplemental action in South Carolina against them because it no longer had a certificate of authority from the Secretary of State.

Foreign corporations seeking to conduct business in this state must obtain a certificate of authority from the Secretary of State. S.C. Code Ann. § 33-15-103 (1990 & Supp. 2004) (outlining the procedures for obtaining a certificate of authority); S.C. Code Ann. § 33-15-105(a) (1990) (noting that a certificate of authority allows a foreign corporation to transact business in this state). A foreign corporation may withdraw from conducting business in this state by obtaining a certificate of withdrawal from the Secretary of State. S.C. Code Ann. § 33-15-200 (1990). However, corporations that do not have a certificate of authority may not initiate proceedings in the courts of this state until a certificate of authority is obtained. See S.C. Code Ann. § 33-15-102(a), (e) (1990) (noting that a foreign corporation may not initiate a judicial proceeding in this state without a certificate of authority, but this requirement does not prevent a foreign corporation from defending an action in this state). Nevertheless, a dissolved corporation may continue to conduct limited business as necessary to collect its assets. See S.C. Code Ann. § 33-14-105(a)(1) (1990) ("A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business affairs, including . . . collecting its assets . . . ."). Dissolved corporations must wind up business affairs as "expeditiously as possible." S.C. Code Ann. § 33-14-105 (b) (1990).

M.P.H. Holdings applied to surrender its authority to do business in South Carolina on June 28, 2002. The corporation also issued its certificate of dissolution on July 30, 2002. M.P.H. initiated the supplemental proceeding on August 25, 2004, two years after dissolution. Nothing in the record indicates that M.P.H. Holdings applied for another certificate of authority.

At the September 23rd hearing, the Specters' attorney raised issues before the master concerning: (1) whether the supplemental proceeding could be properly brought by M.P.H. Holdings, a dissolved corporation; (2) whether Bank One had standing where there was no indication that it was assigned M.P.H. Holdings' assets; or (3) whether the filing attorney had any authority to bring the supplemental action. In arguing the issue of whether M.P.H. Holdings had standing as a dissolved corporation to bring the action, the Specters' attorney noted that South Carolina law provides dissolved corporations cannot bring actions in the state. The attorney submitted copies of the surrender of authority, and he noted that no one had made an application for a certificate of authority. The master noted that dissolved corporations could conduct business to collect their assets. The master later overruled the attorney's objections just prior to relieving him from his representation of the Specters due to a conflict. The master did not address whether M.P.H. Holdings had standing to bring the supplemental action or whether M.P.H. Holdings could maintain the action without a certificate of authority in the September 23, 2004 written order.

Initially, we note this issue appears to be preserved. Although the master referred to section 33-14-105 in his discussions with the attorneys, the Specters' attorney continued to argue the standing issue and specifically noted that no one had made an application for a certificate of authority. The master overruled the objections. Thus, despite the fact that the issue was not addressed by the written order, the issue was raised to and ruled upon by the master. Staubes, 339 S.C. at 412, 529 S.E.2d at 546 (noting that an issue must be raised to and ruled upon by the trial court in order to be preserved for appellate review).

As to the merits, we are troubled by the lack of evidence in the record regarding the authority of M.P.H. Holdings to initiate the supplemental proceedings. A plain reading of section 33-15-102(a) requires a foreign corporation to have a certificate of authority prior to initiating any action in this state. See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning."); see also

Chet Adams Co. v. James F. Pederson Co., 307 S.C. 33, 37, 413 S.E.2d 827, 829 (1992) (holding the failure of a foreign corporation to obtain a certificate of authority prior to bringing an action to recover monies owed on an account affected the corporation's capacity to sue but did not affect the court's subject matter jurisdiction). Although the master referred to section 33-14-105 as allowing a dissolved corporation to pursue its assets, nothing in that section appears to indefinitely relieve a dissolved foreign corporation from obtaining a certificate of authority prior to bringing actions in South Carolina courts pursuant to section 33-15-102(a). Because there was no evidence in the record that M.P.H. Holdings applied for another certificate of authority in order to initiate the supplemental proceedings, we agree with the Specters that the master erred in failing to find M.P.H. Holdings did not have standing to bring the underlying action.[5]

Further, we do not believe the action could have been properly maintained by Bank One, the alleged successor in interest. Certainly, a successor in interest may maintain a supplemental action to examine a judgment debtor in order to execute a judgment. See Rule 69, SCRCP (allowing a judgment creditor, or the "successor in interest when that interest appears of record," to examine judgment debtors in aid of execution of a judgment). However, the supplemental proceeding below was filed in the name of M.P.H. Holdings, not Bank One, no documents were produced evidencing that Bank One was the successor in interest, and nothing was produced to show that Bank One had a certificate of authority to bring an action in South Carolina. Moreover, section 33-15-102(a) would prohibit a successor in interest from maintaining an action without obtaining a certificate of authority.

Although M.P.H. Holdings' attorney asserted to the master that Bank One was the successor in interest, was the real entity bringing the action, and

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[5] Despite the master's reliance on section 33-14-105(a) as allowing a dissolved corporation to wind up its affairs, we note that the two year delay before M.P.H. Holdings brought the underlying action does not comport with the statutory mandate that winding up shall be accomplished as "expeditiously as possible." S.C. Code Ann. § 33-14-105(b) (1990).

had a certificate of authority, there was no evidence presented to support these assertions. We find there was no evidence of record to support a finding that Bank One was the successor in interest with authority to initiate the supplemental proceedings below. Accordingly, the master erred in issuing the September 24, 2004 order.

III. Attorney Authority (Issue 5)

The Specters argue that a law firm or its associates may not "bring an action . . . on behalf of a dissolved corporation that they knew was dissolved and then at trial claim that they . . . were representing a third party not mentioned or referenced in the Petition or accompanying Affidavit . . . ."

As discussed above, the attorney's affidavit filed in support of the underlying action alleged that she was the attorney for M.P.H. Holdings, the petitioner, in the request for the supplemental proceedings. Prior to being relieved, the Specters' attorney objected to going forward with the action merely on the representation of an attorney that there was an assignment of the judgment to Bank One. The Specters' attorney argued the action could not go forward because M.P.H. Holdings was a dissolved corporation and there was no evidence of an assignment. The master overruled the objection.

There is nothing in the record showing that Bank One was a successor in interest to this action or that the attorney represented Bank One. Thus, the record before us would indicate that the attorney filed the matter without authority from a client. See Dunkley v. Shoemate, 515 S.E.2d 442, 445 (N.C. 1999) (finding the trial court erred in allowing a law firm to represent a client in a matter where the firm had no contact with the client and had not been authorized by the client to act on his behalf). Accordingly, we find the master erred in issuing the September 24, 2004 order when there was no indication that the moving attorney had proper authority to bring the action.

CONCLUSION

There is no evidence in the record before us showing that M.P.H. Holdings had a certificate of authority to bring the underlying supplemental action, no evidence showing that Bank One was the successor in interest to M.P.H. Holdings with a certificate of authority to bring the action, and no evidence that the attorney was authorized to bring the supplemental proceedings. Accordingly, the master erred in issuing the September 24, 2004 order. The master's order is

AFFIRMED IN PART and REVERSED IN PART.

HEARN, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

LandBank Fund VII, LLC., Respondent,

v.

Kent D. Dickerson, Dickerson & Sons, Inc., and Phoenix Land and Development Company, LLC, Appellants.

Appeal From Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 4111
Heard March 7, 2006 – Filed May 8, 2006

AFFIRMED

C. Mitchell Brown, William C. Wood, Jr., Elizabeth Herlong Campbell, of Columbia, for Appellants.

J. Jackson Thomas, of Myrtle Beach, for Respondent.

WILLIAMS, J.: Kent D. Dickerson, Dickerson & Sons, Inc., and Phoenix Land and Development Company, LLC,[1] appeal a decision of the Horry County Master-in-Equity concluding Dickerson was not entitled to additional compensation for certain work performed on behalf of LandBank Fund VII, LLC. We affirm.

FACTS

In 1995, Joe C. Garrell, a Myrtle Beach resident and licensed realtor, recruited investors from among his family and friends for the purpose of acquiring and reselling a large tract of land in Horry County. The group of investors formed LandBank, LLC, a South Carolina limited liability company, to facilitate the transaction. Garrell received a real estate commission on the land sale and a membership interest in the company for his efforts in forming the entity and acquiring the land.

The initial LandBank transaction proceeded smoothly and was financially beneficial to the company and its members. Accordingly, the transaction was followed by several other purchases, most from the same seller as the initial transaction, International Paper. To facilitate these subsequent purchases, four additional limited liability companies were formed. The companies were ultimately dubbed Landbank II, LandBank Fund III, LandBank Fund IV, and Landbank Fund V. LandBank entities II through V were each concerned with separate purchases, and the subsequent sale of, different tracts of land, but were virtually identical in membership and operation to the original LandBank, LLC.

In 1999, LandBank Resource Management, LLC, ("LRM") was formed to provide management services to all the LandBank entities. According to

[1] This appeal and the underlying action involve the employment of Kent D. Dickerson, acting both individually and, in some instances, on behalf of the aforementioned companies. Because the differing roles of Dickerson as both individual and head of these companies are not at issue, this opinion will collectively refer to all appealing entities as "Dickerson" for the remainder of this opinion.

the respondent, LRM was a board managed entity owning no property. Its function was to manage the LandBank entities, review and consider additional LandBank investor opportunities, and meet the service needs of the various LandBank entities, including the procurement of surveying, engineering, land planning, legal, zoning, utilities, and environmental services. LRM's operational funds came from reimbursements by the other LandBank entities. Though under the direction of the LRM board, Garrell handled the day-to-day management of LRM.

In 2000, Garrell began feeling somewhat overwhelmed by the extent of his LandBank responsibilities and requested that the LRM board allow him to seek professional assistance. In March 2000, Garrell engaged the professional consulting services of Dickerson, a non-practicing attorney from Arizona who was knowledgeable and experienced in the acquisition and marketing of real estate. These services were initially intended to be temporary and Dickerson's agreement with LandBank anticipated completion by around September 2000.

LRM was pleased with the initial services provided by Dickerson. In April 2001, Garrell, after again receiving the full consent of the LRM board, entered into a modification of Dickerson's consulting agreement. In addition to the compensation called for in Dickerson's initial agreement, the modification called for a $30,000 "performance based fee" to be paid to Dickerson in appreciation of his prior efforts. The modification also secured Dickerson's future services for an indefinite period of time, terminable upon six months notice by either party. As compensation for his continued non-exclusive services, the modification called for Dickerson to receive $15,000 per month, $2,000 per month in home rental expenses, a sport utility vehicle, cell phone, computer, office, and company credit card. The modification agreement also called for future "transaction/performance-based compensation when justified and agreed to in advance."

In February 2002, Dickerson proposed a venture to the LRM board that was substantially different than LandBank's prior business activities. Dickerson envisioned a "beach club" concept for the benefit of the end purchasers of all the LandBank properties. Because the properties were

landlocked, he felt the purchase and development of a beachfront club and restaurant could be used to enhance the marketability of the LandBank properties. The proposed beach club was to be acquired and developed by a separate LandBank entity, LandBank Fund VI. This proposal was different from the previous LandBank entities in that it contemplated continued ownership and operation of a facility, rather than the simple acquisition, marketing, and sale of a tract of undeveloped land.

Dickerson pitched this new business concept to the LRM board on several occasions and submitted an official "summary proposal" in July 2002. Due to the higher risk involved in this sort of business venture, the proposal was not as well received by the LandBank members as prior business opportunities. In order to make LandBank Fund VI a more attractive investment for the members of the previous LandBank entities, the beach club plan (LandBank Fund VI) was coupled with a low-risk investment with a promising possibility of quick profit. Named LandBank Fund VII, LLC, this business proposal was to fit the traditional mold of the LandBank through LandBank V entities. It involved another purchase of a large tract of land from International Paper at $15,000 an acre and a potentially quick resell to homebuilder D.R. Horton for $20,000 an acre. It was understood among the members of the prior LandBank entities that LandBank Fund VI and VII were a "package deal" and membership in the lower risk LandBank Fund VII meant membership in the higher risk LandBank Fund VI. Ultimately, about sixty-five percent of the LandBank members joined LandBank Fund VI and VII.

By September 2002, LandBank Fund VII's purchase of the International Paper ("IP") tract was under contract with Garrell. The sales agreement with IP provided for the assignment of Garrell's contract rights to LandBank Fund VII prior to closing. On December 6, 2002, LandBank Fund VII purchased the IP property. Due largely to complications concerning environmental issues, the desired simultaneous sale to D.R. Horton was delayed.

During several meetings leading up to the purchase of the IP tract, Dickerson did not disclose to the LRM board that, beginning as early as

September 2002, he was attempting to obtain a very large "asset placement fee" of three and one-half percent of the total D.R. Horton sales price payable to him by LandBank Fund VII upon closing. According to Dickerson, this fee was openly discussed and fully approved by Garrell as early as the summer of 2002. Richard Lovelace, an attorney for the LandBank entities who performed a substantial amount of work on the LandBank Fund VII transaction, supports Dickerson's claims regarding the fee, at least to the extent that the fee was discussed among Dickerson, Garrell, and himself.

Garrell does not dispute the fact that Dickerson's fee was discussed between them. According to Garrell, however, he made it very clear to Dickerson that he did not have the authority to approve such a large payment and the matter would first have to be approved of by the LRM board. To this end, Garrell entered Dickerson's fee by hand on a draft closing statement just before a meeting between board chairman Lyle Ray King, Dickerson and himself on January 12, 2003. According to both Garrell and King, the fee was unequivocally discussed at this meeting and King told Dickerson in unmistakable terms that the proposed fee was not acceptable and would not be approved by the board.

Dickerson claims that the fee discussions with King were "non-committal" and that he left the meeting believing he still had a binding agreement regarding his additional fee due to his prior discussions with Garrell. Nevertheless, two days after the meeting with King, Dickerson instructed attorney Lovelace's staff to change the signature block on all future proposed contracts with D.R. Horton to reflect that it would be signed on behalf of LandBank Fund VII by "Kent D. Dickerson, its Representative." Dickerson's specific written instructions concerning the signature page included the phrase "No Joe Garrell or Lyle Ray King."

On January 20, 2003, Dickerson signed and delivered (as LandBank Fund VII's "Representative") to D.R. Horton a contract which included the payment of the "asset placement and assignment fee" by LandBank Fund VII to Dickerson. The negotiations with D.R. Horton concerning the contract's terms were handled exclusively by Dickerson and Lovelace and finalized on January 30, 2003. There is a factual dispute between the parties as to the

extent Garrell was kept abreast of these negotiations, including a heated disagreement as to when he first received a draft of the contract including Dickerson's disputed fee. Garrell claims he was kept in the dark as to the specific terms of the contract drafts passing between Dickerson and D.R. Horton.

On February 21, 2003, Dickerson attended a meeting of the LandBank VI and VII Board of Managers. At this meeting, Dickerson discussed the imminent closing of the D.R. Horton transaction and the board reviewed a sales and cash flow analysis for the upcoming sale. Conspicuously absent from this presentation was any mention of the fee sought by Dickerson.

The closing of LandBank Fund VII's sale to D.R. Horton took place on March 13, 2003. According to Garrell, he received a copy of the proposed final contract approximately ten days prior to the closing date.[2] Upon noticing Dickerson's fee was included in this draft, Garrell told Dickerson the fee had not been approved by the board and must be removed from the final closing statement. Nevertheless, Dickerson's desired fee appeared on the closing statement prepared by Lovelace on the day of closing. When Garrell noticed the fee remained in the documents, he struck Dickerson's fee from the contract and refused to sign until a new closing statement was prepared that did not call for the payment of Dickerson's "asset placement fee." The revised closing statements were prepared and the LandBank Fund VII sale to D.R. Horton was finalized.

Dickerson continued to claim entitlement to the $373,998 fee in conjunction with the 445-acre land sale to D.R. Horton. LandBank Fund VII filed a complaint on May 2, 2003, seeking a declaratory judgment that Dickerson was not owed the disputed fee. Dickerson counterclaimed, asserting he was entitled to the fee based on breach of contract or, alternatively, in quantum meruit for services provided. The matter was referred by consent to the Horry County Master-in-Equity. By order filed July 14, 2004, the Master-in-Equity granted LandBank Fund VII's requested

[2] There is a factual dispute between the parties as to when Garrell actually received this draft of the "final" contract.

relief and dismissed Dickerson's counterclaims with prejudice. Dickerson's motion to alter or amend the order was denied. This appeal followed.

DISCUSSION

I. Breach of Contract

An action alleging breach of contract is an action at law. Airfare, Inc. v. Greenville Airport Comm'n, 249 S.C. 265, 269, 153 S.E.2d 846, 848 (1967); Foxfire Village, Inc. v. Black & Veatch, Inc., 304 S.C. 366, 369, 404 S.E.2d 912, 914 (Ct. App. 1991). "In an action at law, an appellate court will correct errors of law but must defer to the trial court's factual findings and affirm unless there is no evidence reasonably supporting those findings." Crafton v. Brown, 346 S.C. 347, 351, 550 S.E.2d 904, 905-906 (Ct. App. 2001).

In the present case, the Master-in-Equity, after reviewing the evidence presented and considering the testimony and credibility of the witnesses, found that Dickerson "failed to establish by a preponderance of the evidence that there was a meeting of the minds as to the payment of a fee or commission . . . in connection with the sale of land to D.R. Horton." Upon review of the record on appeal, we conclude the Master's finding is supported by the evidence.

The burden of establishing the existence of an oral contract and its terms between Dickerson and LandBank Fund VII rests upon Dickerson. See Jackson v. Frier, 146 S.C. 322, 329, 144 S.E. 66, 68 (1928) ("The burden is on a party pleading a fact to prove it.") In order to establish the existence of an oral fee agreement, Dickerson must prove by a preponderance of the evidence that there was a meeting of the minds as to all of the essential and material terms of the alleged agreement. See Player v. Chandler, 299 S.C. 101, 104-105, 382 S.E.2d 891, 893-894 (1989).

Despite Dickerson's relative sophistication in business and legal matters, no written agreement to pay the fee signed by LandBank Fund VII

was ever obtained (excluding the D.R. Horton contract signed by Dickerson as a "Representative" of LandBank Fund VII). Accordingly, the Master was confronted with highly conflicting testimony and evidence concerning the presence or absence of a verbal agreement. Although Garrell does not dispute the fact that he discussed payment of the disputed fee with Dickerson as early as the summer of 2002, he maintains, and the Master-in-Equity agreed, that he made clear to Dickerson any compensation in addition to that called for in his lucrative consulting agreement with LRM could only be obtained with board approval. This understanding between LandBank Fund VII and Dickerson is further bolstered by the testimony of King, the board chairman, concerning the meeting of January 12, 2003, during which King explained to Dickerson the board would not approve such a large payment. Dickerson was aware Garrell first sought and received board approval in every prior dealing concerning his compensation.

Conversely, Dickerson's own evidence and testimony tend to reflect the fluid nature of his alleged "asset placement fee" agreement. In several contract drafts present in the record on appeal, the percentage fee first appears in a document dated January 13, 2003, the day after Dickerson was told of the board's probable denial of the proposed fee. All previous drafts call for either no fee, a fee paid by D.R. Horton, a fee of $2000 per acre, or a fee of an indeterminate amount. The testimony of Lovelace, LandBank Fund VII's attorney, supporting Dickerson's claims goes only as far as to back up that Dickerson's fee was, in fact, discussed among Garrell, Dickerson, and Lovelace. It does not refute Garrell's claims that Dickerson was made well aware of the need for board approval before any agreement concerning additional compensation would be binding on LandBank Fund VII.

If Garrell made clear to Dickerson that any fee agreement was not valid until approved by the board, then clearly no meeting of the minds occurred between Garrell and Dickerson regarding the finality of Dickerson's fee agreement, regardless of Garell's actual or apparent authority to bind LandBank Fund VII. The Master-in-Equity, considering conflicting evidence, determined that Dickerson was, in fact, made aware of the necessity for board approval. Accordingly, he concluded Dickerson failed to carry his burden of proof establishing a binding fee agreement between the

parties. Because there is evidence reasonably supporting his conclusion, we affirm the Master on this basis.[3]

II. Quantum Meruit

Dickerson argues on appeal that the Master-in-Equity erred in dismissing his counterclaim for quantum meruit recovery based on Dickerson's receipt of compensation under his consulting agreement with LRM. We disagree.

An action based on a theory of quantum meruit recovery sounds in equity. Columbia Wholesale v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). When reviewing an action in equity, an appellate court "reviews the evidence to determine facts in accordance with [its] own view of the preponderance of the evidence." Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

In order to establish a valid claim for recovery in quantum meruit, the plaintiff must establish "(1) benefit conferred by [the] plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying it value." Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000) (emphasis added). Under his modified consulting agreement, Dickerson was compensated at over $250,000 per year by LRM, the managing entity of all the LandBank companies. The modified agreement secured Dickerson's service to LRM, an entity with the stated goal of considering additional LandBank investor opportunities, for an indefinite period of time. Furthermore, Dickerson's consulting agreement expressly states that future "[t]ransaction/performance based compensation" will be granted only "when justified and agreed to in advance."

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[3] Because we affirm the Master's finding that there was no meeting of the minds between Garrell and/or LandBank Fund VII and Dickerson concerning Dickerson's fee agreement, we need not address Dickerson's arguments regarding Garrell's presumptive authority to bind LandBank Fund VII.

Considering Dickerson's lucrative contract with LRM, we agree with the Master-in-Equity's conclusions on this matter. We find nothing in the record on appeal that would make recovery by Dickerson on his quantum meruit claims appropriate or equitable. The fact that LandBank Fund VI and VII were not in existence when Dickerson entered his consulting contract with LRM does not persuade this court such ventures were not contemplated when Dickerson's future services were secured.

For the foregoing reasons, the Master-in-Equity's decision is

AFFIRMED.

BEATTY and SHORT, J.J., concur.