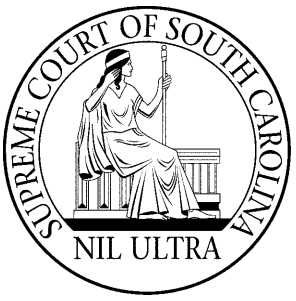

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 18
June 6, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

None

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

4705-Hudson v. Lancaster Convalescent	Denied 06/01/11
4764-Walterboro Community Hosp. v. Meacher	Denied 05/26/11
4773-Consignment Sales v. Tucker Oil	Dismissed 06/02/11
4792-Curtis v. Blake	Denied 04/22/11
4794-Beaufort Cty. Schl. v. United	Denied 05/25/11
4799-Trask v. Beaufort County	Pending
4802-Bean v. SC Central	Denied 05/25/11
4805-Limehouse v. Hulsey	Denied 06/01/11
4810-Menezes v. WL Ross & Co.	Denied 06/01/11
4818-State v. Randolph Frazier	Pending
4819-Columbia/CSA v. SC Medical Malpractice	Pending
4824-Lawson v. Hanson Brick	Pending
4826-C-Sculptures LLC v. Brown	Pending
4828-Burke v. Anmed Health	Pending
4831-Matsell v. Crowfield Plantation	Pending
4832-Crystal Pines v. Phillips	Pending
2011-UP-007-Barrett v. Flowers	Denied 06/02/11
2011-UP-109-Dippel v. Fowler	Denied 04/22/11
2011-UP-117-State v. E. Morrow	Denied 06/02/11

2011-UP-136-SC Farm Bureau v. Jenkins	Pending
2011-UP-137-State v. I. Romero	Pending
2011-UP-140-State v. P. Avery	Denied 06/01/11
2011-UP-152-Ritter v. Hurst	Pending
2011-UP-156-Hendricks v. SCDPPPS	Denied 06/01/11
2011-UP-157-Sullivan v. SCDPPPS	Denied 06/01/11
2011-UP-161-State v. R. Hercheck	Pending
2011-UP-162-Bolds v. UTI Integrated	Denied 06/02/11
2011-UP-173-Fisher v. Huckabee	Denied 06/02/11
2011-UP-203-Witt General Contractors v. Farrell	Pending
2011-UP-208-State v. Leroy Bennett	Pending
2011-UP-210-State v. Kevin Chase	Pending
2011-UP-218-Squires v. SLED	Pending
2011-UP-219-Bank of New York v. Salone	Pending
2011-UP-233-Jarmuth v. The International	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

4367-State v. J. Page	Pending
4474-Stringer v. State Farm	Denied 05/06/11
4510-State v. Hoss Hicks	Pending
4526-State v. B. Cope	Pending

4529-State v. J. Tapp	Pending
4548-Jones v. Enterprise	Pending
4588-Springs and Davenport v. AAG Inc.	Pending
4592-Weston v. Kim's Dollar Store	Pending
4599-Fredrick v. Wellman	Pending
4605-Auto-Owners v. Rhodes	Pending
4609-State v. Holland	Pending
4610-Milliken & Company v. Morin	Granted 05/05/11
4614-US Bank v. Bell	Pending
4616-Too Tacky v. SCDHEC	Pending
4617-Poch v. Bayshore	Pending
4619-State v. Blackwill-Selim	Pending
4631-Stringer v. State Farm	Denied 05/06/11
4633-State v. G. Cooper	Pending
4635-State v. C. Liverman	Pending
4637-Shirley's Iron Works v. City of Union	Pending
4641-State v. F. Evans	Pending
4654-Sierra Club v. SCDHEC	Pending
4659-Nationwide Mut. V. Rhoden	Pending
4661-SCDOR v. Blue Moon	Pending

4670-SCDC v. B. Cartrette	Pending
4673-Bailey, James v. SCDPPPS	Pending
4675-Middleton v. Eubank	Pending
4680-State v. L. Garner	Pending
4682-Farmer v. Farmer	Pending
4687-State v. D. Syllester	Pending
4688-State v. Carmack	Pending
4691-State v. C. Brown	Pending
4692-In the matter of Manigo	Pending
4697-State v. D. Cortez	Pending
4698-State v. M. Baker	Pending
4699-Manios v. Nelson Mullins	Pending
4700-Wallace v. Day	Pending
4702-Peterson v. Porter	Pending
4706-Pitts v. Fink	Pending
4708-State v. Webb	Pending
4711-Jennings v. Jennings	Pending
4716-Johnson v. Horry County	Pending
4721-Rutland (Est. of Rutland) v. SCDOT	Pending
4725-Ashenfelder v. City of Georgetown	Pending

4728-State v. Lattimore	Granted	05/05/11
4732-Fletcher v. MUSC	Pending	
4737-Hutson v. SC Ports Authority	Pending	
4738-SC Farm Bureau v. Kennedy	Pending	
4742-State v. Theodore Wills	Pending	
4746-Crisp v. SouthCo	Pending	
4747-State v. A. Gibson	Pending	
4752-Farmer v. Florence Cty.	Pending	
4753-Ware v. Ware	Pending	
4755-Williams v. Smalls	Pending	
4756-Neeltec Enterprises v. Long	Pending	
4761-Coake v. Burt	Pending	
4763-Jenkins v. Few	Pending	
4765-State v. D. Burgess	Pending	
4769-In the interest of Tracy B.	Pending	
4770-Pridgen v. Ward	Pending	
4779-AJG Holdings v. Dunn	Pending	
4781-Banks v. St. Matthews Baptist Church	Pending	
4789-Harris v. USC	Pending	
4790-Holly Woods Assoc. v. Hiller	Pending	

4792-Curtis v. Blake	Pending
4808-Biggins v. Burdette	Pending
2009-UP-266-State v. McKenzie	Denied 04/08/11
2009-UP-322-State v. Kromah	Pending
2009-UP-336-Sharp v. State Ports Authority	Pending
2009-UP-564-Hall v. Rodriquez	Pending
2010-UP-080-State v. R. Sims	Denied 05/25/11
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-138-State v. B. Johnson	Pending
2010-UP-140-Chisholm v. Chisholm	Pending
2010-UP-141-State v. M. Hudson	Pending
2010-UP-182-SCDHEC v. Przyborowski	Pending
2010-UP-196-Black v. Black	Pending
2010-UP-232-Alltel Communications v. SCDOR	Pending
2010-UP-251-SCDC v. I. James	Pending
2010-UP-253-State v. M. Green	Pending
2010-UP-256-State v. G. Senior	Pending
2010-UP-273-Epps v. Epps	Pending
2010-UP-281-State v. J. Moore	Pending

2010-UP-287-Kelly, Kathleen v. Rachels, James	Pending
2010-UP-289-DiMarco v. DiMarco	Pending
2010-UP-302-McGauvran v. Dorchester County	Pending
2010-UP-303-State v. N. Patrick	Pending
2010-UP-308-State v. W. Jenkins	Pending
2010-UP-317-State v. C. Lawrimore	Pending
2010-UP-330-Blackwell v. Birket	Pending
2010-UP-331-State v. Rocquemore	Pending
2010-UP-339-Goins v. State	Pending
2010-UP-340-Blackwell v. Birket (2)	Pending
2010-UP-352-State v. D. McKown	Pending
2010-UP-355-Nash v. Tara Plantation	Pending
2010-UP-356-State v. Robinson	Pending
2010-UP-362-State v. Sanders	Pending
2010-UP-369-Island Preservation v. The State & DNR	Pending
2010-UP-370-State v. J. Black	Pending
2010-UP-372-State v. Z. Fowler	Pending
2010-UP-378-State v. Parker	Pending
2010-UP-406-State v. Larry Brent	Pending

2010-UP-425-Cartee v. Countryman	Pending
2010-UP-427-State v. S. Barnes	Pending
2010-UP-437-State v. T. Johnson	Pending
2010-UP-440-Bon Secours v. Barton Marlow	Pending
2010-UP-437-State v. T. Johnson	Pending
2010-UP-448-State v. Pearlie Mae Sherald	Pending
2010-UP-449-Sherald v. City of Myrtle Beach	Pending
2010-UP-450-Riley v. Osmose Holding	Pending
2010-UP-461-In the interest of Kaleem S.	Pending
2010-UP-464-State v. J. Evans	Pending
2010-UP-494-State v. Nathaniel Noel Bradley	Pending
2010-UP-504-Paul v. SCDOT	Pending
2010-UP-507-Cue-McNeil v. Watt	Pending
2010-UP-525-Sparks v. Palmetto Hardwood	Pending
2010-UP-533-Cantrell v. Aiken County	Pending
2010-UP-547-In the interest of Joelle T.	Pending
2010-UP-552-State v. E. Williams	Pending
2011-UP-005-George v. Wendell	Pending
2011-UP-017-Dority v. Westvaco	Pending

2011-UP-024-Michael Coffey v. Lisa Webb	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-041-State v. L. Brown	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-059-State v. R. Campbell	Pending
2011-UP-071-Walter Mtg. Co. v. Green	Pending
2011-UP-076-Johnson v. Town of Iva	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-095-State v. E. Gamble	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-110-S. Jackson v. F. Jackson	Pending
2011-UP-112-Myles v. Main-Waters Enter.	Pending
2011-UP-115-State v. B. Johnson	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Larry Lee Boiter, Appellant,

v.

South Carolina Department of Transportation and South Carolina Department of Public Safety, Respondents.

and

Jeannie Boiter, Appellant,

v.

South Carolina Department of Transportation and South Carolina Department of Public Safety, Respondents.

Appeal From Spartanburg County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 26981
Heard January 6, 2011 – Filed June 6, 2011

AFFIRMED IN PART AND REVERSED IN PART

James Fletcher Thompson, of Spartanburg, for Appellants.

Andrew F. Lindemann, of Davidson & Lindemann, of Columbia and Ronald H. Colvin, of Spartanburg, for Respondents.

JUSTICE HEARN: Two issues are presented in this appeal: (1) whether the two-tier statutory cap in the South Carolina Tort Claims Act is constitutional, and (2) whether two separate governmental entities' negligent acts, which resulted in severe injuries to Larry Lee and Jeannie Boiter (collectively, the Boiters) constitute one or two occurrences under the Tort Claims Act. The circuit court found the statutory caps constitutional and that only one occurrence was presented by the facts. We affirm in part and reverse in part.

FACTS

The Boiters were injured when the motorcycle they were riding collided with a car driven by Nancy Kochenower at an intersection near Inman, South Carolina. The red signal light bulbs for the road that Kochenower was traveling had burned out earlier that day. The Boiters suffered significant injuries as a result of being thrown from the motorcycle, requiring lengthy hospital stays and incurring $888,756 in medical bills and

$203,897 in lost wages. They settled with Kochenower for her policy limits of $50,000.

The Boiters filed four separate lawsuits against South Carolina Department of Transportation (SCDOT) and South Carolina Department of Public Safety (SCDPS) (collectively, Respondents), alleging negligence in their failure to prevent the accident. With respect to SCDOT, the Boiters alleged SCDOT failed to implement an appropriate re-lamping policy to replace bulbs in traffic signals before they burn out. With respect to SCDPS, the Boiters alleged that a citizen's call one hour and twenty-seven minutes prior to the accident reporting the outage should have resulted in SCDPS notifying a trooper to report to the scene and direct traffic. The negligence of both agencies is undisputed in this appeal. At trial, the jury found in favor of the Boiters and awarded each of them a total of 1.875 million dollars.

Thereafter, Respondents filed motions for judgment notwithstanding the verdict, a new trial, and to reduce the verdict amount pursuant to the Tort Claims Act. In response, the Boiters filed a motion challenging the constitutionality of the two-tier cap in the Tort Claims Act, and in the alternative, asserted that Respondents' negligence constituted two separate occurrences under the Act. The circuit court denied Respondents' motions for judgment notwithstanding the verdict and a new trial as well as the Boiters' motion challenging the cap's constitutionality, but the court found there was only one occurrence and granted Respondents' motion to reduce the verdict pursuant to the Act. Therefore, the Boiters' verdict was reduced to $300,000 each, for a total of $600,000. This appeal followed.

ISSUES

The Boiters raise two issues on appeal:

(1) Did the circuit court err in failing to find that the two-tier cap on damages under the Tort Claims Act is unconstitutional as a violation of equal protection?

(2) Did the circuit court err in failing to find that two separate occurrences gave rise to the Boiters' injuries?

ANALYSIS

I. CONSTITUTIONALITY OF CAP

Section 15-78-120 of the South Carolina Code (2005) states the following, in pertinent part:

> (1) Except as provided in Section 15-78-120(a)(3), no person shall recover . . . a sum exceeding three hundred thousand dollars because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved.
>
> (2) Except as provided in Section 15-78-120(a)(4), the total sum recovered hereunder arising out of a single occurrence shall not exceed six hundred thousand dollars regardless of the number of agencies or political subdivisions or claims or actions involved.
>
> (3) No person may recover in any action or claim . . . caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, a sum exceeding one million two hundred thousand dollars because of loss arising from a single occurrence . . . .
>
> (4) The total sum recovered hereunder arising out of a single occurrence of liability of any governmental entity for any tort caused by any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, may not exceed one million two hundred thousand dollars regardless of the number of agencies or political subdivisions or claims or actions involved.

Therefore, a two-tier statutory cap on damages exists based on who allegedly committed the act. For state-employed physicians and dentists, the cap is 1.2 million dollars per person and per occurrence. For all other state entities, the cap is $300,000 per person and $600,000 per occurrence. The Boiters allege this disparate treatment based solely on the identity of the tortfeasor violates their constitutional right to equal protection of the laws.

Because no fundamental right has been infringed, we focus our analysis on the rational basis test. *See Wright v. Colleton County School Dist.*, 301 S.C. 282, 291, 391 S.E.2d 564, 570 (1990). Under this framework, the Equal Protection Clause is satisfied if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. *Samson v. Greenville Hospital System*, 295 S.C. 359, 368 S.E.2d 665 (1988). "Those attacking the validity of legislation [under the rational basis test of the Equal Protection Clause] have the burden to negate every conceivable basis which might support it." *Lee v. SC Dept. of Natural Resources*, 339 S.C. 463, 470 n.8, 530 S.E.2d 112, 115 n.8 (2000) (citing to *Fed'l Commc'ns Comm'n v. Beach Comm'n, Inc.*, 508 U.S. 307 (1993)). The Boiters argue the two-tier cap's different treatment of injured plaintiffs based on the identity of the tortfeasor does not have a rational basis sufficient to withstand constitutional scrutiny. Respondents counter that this Court has consistently upheld the constitutionality of the monetary caps, and the Boiters have not put forth sufficient evidence to depart from this precedent.

This Court has upheld the constitutionality of the statutory caps in three prior cases. In *Wright*, the Court upheld the general existence of statutory caps. *Wright*, 301 S.C. at 292, 391 S.E.2d at 570. There, a child was injured while working with a product on the school district's premises. *Id.* at 284, 391 S.E.2d at 566. Wright, who was the child's mother, and the child filed actions against the school district, among other entities. *See id.* The circuit court granted judgment to Wright and the child in the amount of $750,000. *Id.* at 285, 391 S.E.2d at 566. Wright and the child appealed, arguing numerous constitutional challenges, including equal protection. *See id.* at

290, 391 S.E.2d at 569. This Court upheld the constitutionality of the statute, finding:

> The limitation on damages as set forth in the statute bears a reasonable relationship to the legislative objectives as expressed in Section 15-78-20(a) of relieving the government from hardships of unlimited and unqualified liability and preserving the finite assets of governmental entities which are needed for an effective and efficient government. The limitations set forth in the statute rest on a reasonable basis and are not arbitrary in that the legislature has balanced the needs for services and demand for reasonable taxes against the fair reimbursement of injured tort victims. Finally, we find that the damage limitation provisions apply to similar plaintiffs in a similar manner.

Id. at 291, 391 S.E.2d at 570.

In *Foster v. South Carolina Department of Highways & Public Transportation*, 306 S.C. 519, 413 S.E.2d 31 (1992), the Court had an opportunity to examine the two-tier cap at issue in this case. Foster sued the Highway Department after she was involved in a car accident, claiming the Highway Department failed to give proper warning of a low shoulder and failed to maintain the highway. Foster was awarded three million dollars, and the circuit court reduced the verdict amount to $250,000. *Id.* at 522, 413 S.E.2d at 33-34. Foster appealed, claiming the two-tier cap was unconstitutional as a violation of her right to equal protection. *Id.*

This Court found Foster, as the party asserting the unconstitutionality of the statute, failed to meet her burden of proof to show that the classification was arbitrary and without any reasonable basis. *See id.* at 526-27, 413 S.E.2d at 36. The Court noted that it affords great deference to a legislative classification and will uphold a classification if it is "not plainly arbitrary and there is any reasonable hypothesis to support it." *Id.* at 526, 413 S.E.2d at 36. In finding against Foster, we said, "The fact that the classification results in some inequity does not render it in violation of the

Constitution." *Id.* at 527, 413 S.E.2d at 36 (citing *State v. Smith*, 271 S.C. 317, 247 S.E.2d 331 (1978)). The Court also articulated a specific basis found in the statute for the two tiers: "These higher limits and mandated coverages are recognition by the General Assembly of significantly higher damages in cases of medical malpractice." In regards to Foster's burden of proof, the Court instructed,

> Foster must offer evidence that the legislative finding of higher awards in actions of medical malpractice was unfounded and thus no rational basis for the classification existed. She has not met her burden of proof by the bare assertion that her damages are as high as damages that might be assessed against a physician or dentist.

Id.

Sixteen years after *Foster*, this Court decided *Giannini v. South Carolina Department of Transportation*, 378 S.C. 573, 664 S.E.2d 450 (2008). There, a car hydroplaned and crossed into the other lane of traffic, striking two cars; one person was killed and two others suffered serious bodily injuries. *Id.* at 578, 664 S.E.2d at 452. After citing to both *Wright* and *Foster*, this Court found the "[l]egislature's aggregate limitation on liability is supported by a rational basis such that there is no equal protection violation." *Id.* at 584, 664 S.E.2d at 456. This Court noted the legislation was in line with the purposes of preserving finite governmental assets and treating similar plaintiffs in a similar manner. *See id.* This Court then cited to cases from other jurisdictions which have also held that general liability caps do not violate equal protection. *See id.* at 585, 664 S.E.2d at 456 (citing *Wilson v. Gipson*, 753 P.2d 1349 (Ok. 1988) and *Lee v. Colorado Dep't of Health*, 718 P.2d 221 (Colo. 1986)).

With these three cases in mind, we now turn to the Boiters' argument. At the hearing before the circuit court on the constitutionality of the two-tier system, the Boiters produced substantial evidence in the form of national and state studies designed to establish that there is no empirical evidence to

justify the difference in the respective caps. The Boiters submitted the following in support of the cap's unconstitutionality: (1) Three U.S. Department of Justice Bulletins detailing the number of trials and verdicts in large counties for civil cases, tort cases, and medical malpractice cases; (2) U.S. Department of Justice report on Medical Malpractice Insurance Claims in Seven States[1]; (3) South Carolina Legislative Audit Council Report in 2000 and 2004, reviewing the Medical Malpractice Compensation Fund; (4) SCDOT and SCDPS budgets for 2007- 2008; and (5) correspondence from the State Budget and Control Board, Boiters' counsel, and Respondents' counsels regarding the above reports. The Boiters argue that consistent with the degree of proof suggested by the Court in *Foster*, they introduced sufficient evidence to demonstrate the constitutional infirmity in the two-tier system. However, even taking all of their evidence into account, it cannot overcome the great deference this Court must give to the General Assembly's stated classification. Under settled principles, we will sustain such classifications if *any* reasonable hypothesis exists to support them. *Samson*, 295 S.C. at 367, 368 S.E.2d at 665; *Foster*, 306 S.C. at 526, 413 S.E.2d at 36.

Two reasonable hypotheses exist in the code to substantiate section 15-78-120: (1) relieving the government from the hardships of unlimited liability; and (2) furthering accountable and competent healthcare while promoting affordable medical liability insurance. S.C. Code Ann. § 15-78-20(a), (g) (2005). The evidence submitted by the Boiters before the circuit court does not overcome these two reasonable hypotheses, and we are not persuaded that the General Assembly's two-tier classification is arbitrary or without rational basis. Moreover, our precedent in this area, although perhaps not as compelling from a factual or evidentiary standpoint as this case, convinces us that the Boiters' constitutional challenge should be denied. Therefore, we find that the two-tier cap meets the rational basis test, and we affirm the circuit court's finding of constitutionality.

[1] South Carolina was not one of the seven states discussed in this report.

II. OCCURRENCE

The Boiters argue that the circuit court erred in failing to find two separate occurrences in the two separate acts of negligence committed by SCDOT and SCDPS. We agree.

Under Section 15-78-30(g) of the South Carolina Code (2005), "occurrence" is defined as an "unfolding sequence of events which proximately flow from a single act of negligence." In its order denying the Boiters' arguments that there were two separate occurrences, the circuit court stated:

> The Plaintiffs present a logical argument as to the statutory construction of the term 'occurrence,' but under the facts of this case, where the jury's verdict has to be read as finding both Defendants as concurrently at fault in bringing about the damages to the Plaintiffs, the definition of occurrence limits the award to the statutory cap.

We disagree and find the facts here present a classic case of two occurrences.

Questions of statutory construction are a matter of law. *Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it reasonably can be discovered in the language used, and the language must be construed in the light of the intended purpose of the statute." *Sumter Police Dep't v. Blue Mazda Truck*, 330 S.C. 371, 375, 498 S.E.2d 894, 896 (Ct. App. 1998). "In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998).

Only one appellate case[2] in South Carolina has considered the issue of occurrence under section 15-78-30. In *Chastain v. AnMed Health Foundation*, 388 S.C. 170, 694 S.E.2d 541 (2010), the plaintiff suffered severe and permanent injuries as a result of the poor care given to her by six nurses at AnMed, a charitable institution. *Id.* at 171-72, 694 S.E.2d at 542. The jury returned a general verdict against AnMed for 2.2 million dollars, and the trial judge reduced it to the $300,000 statutory cap based on his finding of one occurrence. *Id.* at 172-73, 694 S.E.2d at 542-43. In affirming the verdict reduction, this Court noted that the burden to prove more than one occurrence rested on the plaintiff and that from the general verdict rendered, it was impossible to conclude that the jury had found more than one occurrence. *Id*. at 174, 695 S.E.2d at 543. Because the facts presented here are so different than those involved in *Chastain*, that case provides little guidance to us.

Cases from other jurisdictions are similarly inapposite because they involve a single governmental entity which committed multiple acts of negligence, a completely different situation than the one before us. *See Tex. Dep't of Mental Health & Mental Retardation v. Petty By & Through Kauffman*, 848 S.W.2d 680 (Tex. 1992) (one occurrence after department committed multiple acts of negligence); *Folz v. State*, 797 P.2d 246 (N.M. 1990) (negligence by highway department which resulted in truck striking five separate vehicles in collision was only one occurrence under statute); *cf. Brooks v. Memphis & Shelby County Hosp. Auth.*, 717 S.W.2d 292 (Tenn. App. 1986) (finding two occurrences when one employee negligently let patient fall off stretcher and a second employee negligently gave an overdose

---

[2] In *Williamson v. South Carolina Insurance Reserve Fund*, two different physicians examined a mother during childbirth and failed to take necessary steps, at different times during the delivery, to prevent harm to the child. *See* 355 S.C. 420, 422, 586 S.E.2d 115, 116 (2003). The circuit court found two occurrences had been established for purposes of the Tort Claims Act because neither doctor's actions was the result of the other's. *See id.* at 423, 586 S.E.2d at 116. On appeal, this Court declined to address whether two occurrences existed. *See id.* at 426, 586 S.E.2d at 118.

of medication, resulting in patient's death). Accordingly, we determine the issue before us based solely on the peculiar facts of this case.

In order to determine the number of occurrences, the Boiters urge this Court to focus on the number of negligent acts; in contrast, Respondents contend we should look to the number of injuries caused by those acts. The circuit court specifically found in its order that "each of [the Respondents] committed a separate wrongful act that led to the damages," and that "[t]he wrongful acts [of Respondents] were separate and distinct." Nevertheless, the circuit court found that each act of negligence was "a part of the same 'unfolding sequence of events' that resulted in the Boiters' damages." Therefore, the circuit court accepted Respondents' argument and equated occurrence with the number of injuries sustained by the Boiters. While we do not adopt a bright-line test based on the existence of multiple acts of negligence, we find the circuit court erred in tying the number of occurrences to the number of injuries sustained by the Boiters.

We are persuaded that two independent and separate acts of negligence occurred here – one by SCDOT and one by SCDPS. There is no indication that the Respondents' actions combined to form a single act of negligence. Unlike the situation presented in *Chastain*, we have two separate and distinct acts of negligence involving two separate and distinct entities together with separate verdicts against each of them. As found by the jury, SCDOT was negligent in not having a re-lamping policy in place, and SCDPS was negligent in not following its own policy to notify a SCDOT technician when a light had burned out. Based on the facts presented here, we cannot see how SCDOT's negligent act "unfolded" into SCDPS' negligent act. SCDPS only became involved due to a citizen call regarding the burned-out light bulb; SCDOT never called SCDPS regarding the light, and SCDPS never informed SCDOT about the citizen call. We can find no causal connection between the actions of SCDOT and SCDPS; had the jury not found SCDOT negligent, the verdict against SCDPS could still stand, and the converse is also true. Therefore, we do not believe that these two separate and independent acts of negligence constituted an unfolding sequence of events which injured the Boiters.

Respondents cite to language found in section 15-78-120(2),[3] arguing that it demonstrates the General Assembly's recognition that the number of governmental entities involved in a particular occurrence does not increase the statutory limits on liability. While we do not disagree with Respondents' view, we do not believe this ends the inquiry. In many situations, negligent acts from more than one entity would still equal but one occurrence. However, under these facts, there were two separate entities which committed two separate and independent acts of negligence, and we do not believe the General Assembly's intent was to limit recovery in such situations based on there being only one occurrence. Accordingly, we hold each Respondent's act of negligence was a separate occurrence entitling the Boiters to a combined verdict of 1.2 million dollars, and we reverse the circuit court.

CONCLUSION

We hold that the two-tier statutory cap on damages is constitutional against an equal protection challenge. However, we also hold that more than one occurrence existed in this situation. Therefore, we affirm in part and reverse in part the circuit court's order.

TOAL, C.J., BEATTY and KITTREDGE, JJ., concur.
PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

[3] The subsection notes that liability is limited to $600,000 regardless of the number of agencies or political subdivisions involved.

JUSTICE PLEICONES: I concur in part and dissent in part. I agree with the majority that the differential caps created by the Tort Claims Act (TCA) are constitutional. I disagree, however, with the majority's conclusion that there was more than one occurrence here. I would therefore affirm the circuit court's order.

In my opinion, the majority errs when it focuses on the number of acts of negligence rather than on the TCA's definition of occurrence: "an unfolding sequence of events which proximately flow from a single act of negligence." S.C. Code Ann. § 15-78-30(g) (2005). Under the TCA, an occurrence is not defined by the number of individual acts of negligence, nor does it require, as would the majority, a "causal connection" between these independent acts. Here, appellants' theory was that as the result of the SCDOT's negligent failure to have a replacement bulb policy a traffic light was not functioning properly, and when a concerned citizen notified SCDPS of the dangerous situation, that agency negligently failed to send a trooper to the scene to direct traffic. This unfolding sequence of events proximately led to the accident and appellants losses.

In my view, an occurrence is not defined by the number of agencies involved, or by the acts of negligence committed, nor by temporal proximity. Instead, the occurrence ends when the unfolding sequence of events is broken by an unnatural or intervening cause. Here, there was no such break, and thus appellants each suffered only one compensable loss as the result of a single occurrence.

I would affirm.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lawton Limehouse, Sr., Respondent,

v.

Paul H. Hulsey and The Hulsey Litigation Group, LLC, Appellants.

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

Opinion No. 4805
Heard April 13, 2010 – Filed March 10, 2011
Withdrawn, Substituted and Refiled June 2, 2011

AFFIRMED

A. Camden Lewis, Ariail E. King, of Columbia; Robert H. Hood, Deborah Harrison Sheffield, James B. Hood, and John K. Weedon, of Charleston, for Appellants.

Frank M. Cisa, of Mt. Pleasant, for Respondent.

THOMAS, J.: This is an appeal from an entry of default and the subsequent default damages trial based on a slander action against Paul Hulsey and the Hulsey Litigation Group, LLC (collectively Hulsey). Damages (actual and punitive) were found in excess of $7.3 million. Hulsey now appeals, alleging the trial court erred in (1) granting entry of default without subject matter jurisdiction, (2) failing to grant a motion to set aside the entry of default, (3) allegedly depriving Hulsey of due process in the default damages trial, and (4) allowing an award of $5 million in punitive damages. We affirm.

FACTS

In 2004, Hulsey filed a class action suit against Lawton Limehouse, Limehouse's son, and L&L Services, Inc., a staffing agency owned by the pair. The suit alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as other state and federal laws. Although the case eventually settled, during its pendency, Hulsey made allegedly slanderous statements that the "[Charleston] Post & Courier" published, including (1) Limehouse engaged in a classic racketeering scheme, (2) Limehouse's conduct set the community back 150 years, (3) Limehouse engaged in blatant indentured servitude, and (4) Limehouse created a perfect racketeering scheme just like Tony Soprano.[1]

In response, Limehouse filed suit against Hulsey on April 19, 2006. Service was perfected upon the Hulsey Litigation Group, LLC on April 20, 2006, and Paul Hulsey personally on April 21, 2006. On May 5, 2006, Hulsey filed a notice of removal to federal district court without filing an answer to the complaint. On June 2, 2006, Limehouse filed a motion to remand to state court. A federal district judge remanded the case to state court by an order dated July 19, 2006, for lack of federal subject matter jurisdiction.[2] The federal court electronically transmitted this order to

[1] Tony Soprano is a fictional television character involved in organized crime.

[2] Hulsey did not answer the complaint in federal court.

counsel on July 20. The Charleston County Clerk of Court also received an uncertified copy and filed the order on July 21. The Charleston County Clerk of Court mailed notice of the filing to all parties on July 27.

On August 21, 2006, Limehouse filed a request for entry of default. The Charleston County Clerk of Court entered default on August 21, and filed the same on August 22. Subsequently, the clerk mailed a Form 4 to all parties on August 24, 2006, noticing entry of default. On August 29, upon receipt of the Form 4, Hulsey filed an answer and motion to set aside entry of default pursuant to Rule 55(c), SCRCP.

In December, 2006, a circuit judge denied Hulsey's motion to set aside entry of default, and in February 2008, a different circuit judge presided over a jury trial on the issue of damages. On February 6, 2008, the jury returned a verdict for actual damages in the amount of $2.39 million and awarded punitive damages in the amount of $5 million. Nine days later, on February 15, 2008, Hulsey filed a motion to dismiss for lack of subject matter jurisdiction, after discovering there was no certified copy of the remand order on file with the Charleston County Clerk of Court. The trial court denied the motion, as well as the accompanying motion for a new trial. This appeal follows.

ISSUES ON APPEAL

I. Did the trial court err in exercising jurisdiction over the case after remand?

II. Did the trial court err in failing to set aside the entry of default?

III. Did the trial court err in the manner in which the default damages trial was conducted?

IV. Did the trial court err in allowing an award of punitive damages?

LAW/ANALYSIS

I. Jurisdiction

Hulsey argues the trial court was, and still is, without jurisdiction over this matter because the clerk of the federal court failed to mail a certified copy of the remand order to the Charleston County Clerk of Court. We disagree and find the mailing of the certified copy is not a jurisdictional requirement.

Upon removal, the federal court acquires jurisdiction over the case, for the limited purpose of determining jurisdiction. See Davis v. Davis, 267 S.C. 508, 511, 229 S.E.2d 847, 848 (1976). Once the federal court determines that federal jurisdiction is not appropriate, the case is remanded to state court, and the remand ends the federal court's jurisdiction. 28 U.S.C. § 1446(d) (1996).

Congress has provided for a federal court's jurisdiction in section 1446(d): "Promptly after the filing of such notice of removal . . . the defendant . . . shall give written notice thereof to . . . the clerk of such State court, which shall effect the removal and *the State court shall proceed no further unless and until the case is remanded*." (emphasis added).

In addition, 28 U.S.C. § 1447(c) (1996) provides for "Procedure[s] after removal generally," and states:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the

> State court. The State court may thereupon proceed with such case.

In interpreting section 1447(c), a majority of federal circuits take the position that the finality of the remand and the accompanying loss of federal jurisdiction requires both entry of the order with the federal clerk of court *and* a certified copy being mailed to the state court. See, e.g., Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 227 (3rd Cir. 1995); Hunt v. Acromed Corp., 961 F.2d 1079, 1081-82 (3rd Cir. 1992); Browning v. Navarro, 743 F.2d 1069, 1078-79 (5th Cir. 1984); Fed. Deposit Ins. Corp. v. Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979).

However, the Fourth Circuit takes a minority view, reasoning that because remands for lack of subject matter jurisdiction or defect in removal are unappealable, "the plain language of the statute[] . . . support[s] the conclusion that §1447 divests a district court of jurisdiction upon the entry of its remand order" despite the federal clerk's duty to send a certified copy. In re Lowe, 102 F.3d 731, 735 (4th Cir. 1996) (considering and declining the majority approach, holding "a federal court loses jurisdiction over [the] case as soon as its order to remand the case is entered[] . . . [f]rom that point on, it cannot reconsider its ruling even if the district court clerk fails to mail . . . a certified copy");[3] see also Bryan v. BellSouth Commc'ns, Inc., 492 F.3d 231, 235 n.1 (4th Cir. 2007) (recognizing "a remand is effective when the district court mails a certified copy . . . see [1447(c)] . . . *or* . . . if the remand is based on the lack of subject-matter jurisdiction . . . when the remand order is entered, see [Lowe]")[4] (emphasis added).

---

[3] The essence of our inquiry, as opposed to the federal court, is not whether the federal scheme provides for state court jurisdiction, but rather, whether it prohibits state court jurisdiction. See *infra*. Naturally, because a federal court does not determine state court jurisdiction, this distinction allays the dissent's concern that the question confronted in Lowe is different than the one we face here.

[4] We do not rely on Bryan as dispositive of this case, nor do we find any reason to interpret this purely explanatory note – which specifically cites Lowe – to imply that Lowe does not stand for what it explicitly holds, i.e., a

Accordingly, the South Carolina Federal District Court lost jurisdiction when the order of remand was entered.[5] We believe this ends the inquiry. However, because Hulsey's assertion that the state court also lacks subject matter jurisdiction seems to leave the case caught in jurisdictional limbo, or as other courts have dubbed it, on "a jurisdictional hiatus," for lack of the mailing, State v. City of Albuquerque, 889 P.2d 204, 207 (N.M. Ct. App. 1993) aff'd 889 P.2d 185 (N.M. 1994), we therefore address whether the mailing is required for the South Carolina Circuit Court to exercise jurisdiction.

We start with the premise that our state court's jurisdiction is general, derived exclusively from article V, section 11 of the South Carolina Constitution, not from federal law. S.C. Const. art. V, § 11; see, e.g., Fairfax Countywide Citizens Ass'n v. Fairfax County, 571 F.2d 1299, 1304 (4th Cir. 1978) (indicating that unlike federal courts, state courts are courts of general jurisdiction). On the other hand, the jurisdiction of federal courts is limited to

---

federal court loses jurisdiction upon entry of a remand for lack of subject matter jurisdiction.

Although the dissent agrees the note is purely dicta, to the extent it is suggested the footnote bears on this matter, we note that the dissenting opinion ignores the second clause of the note, in which the Fourth Circuit reiterates the Lowe holding; presumably because its interpretation of the first clause is irreconcilable with Lowe. Further, the interpretation of the first clause is premised on a presumption, allegedly from Bryan, that remands for reasons other than lack of subject matter jurisdiction or defect in removal are not subject to section 1447(c). However, neither the Fourth Circuit, nor any other circuit, has put forth such a ruling, and Bryan itself refutes this presumption by recognizing, in a case in which the remand was based upon a reason *other than* lack of subject matter jurisdiction or defect in removal, that the state court could continue upon receipt of the certified mailing, citing section 1447(c). See Bryan, 492 F.3d at 241.

[5] The exercise of mandamus power is, by its very nature, not an exercise of the court's jurisdiction over the case and controversy.

that expressly authorized by the United States Constitution or statute enacted by Congress pursuant thereto. Exxon Mobile Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 553 (2005); Victory Carriers Inc. v. Law, 404 U.S. 202, 212 (1971) ("The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution.") (internal citation and quotation marks omitted); U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); see The Federalist No. 82, at 515-16 (Alexander Hamilton) (Wright ed., 2002) (considering the federal government has only the power exclusively delegated to it, it stands as a "rule" that "the State courts will retain . . . jurisdiction[,] . . . unless it appears to have been taken away in one of the enumerated modes"); Thus, unless otherwise prohibited by statute, a state court's jurisdiction is limited only by the federal court's proper exercise of jurisdiction over a case pursuant to Congressional act – which according to Fourth Circuit jurisprudence in Lowe, ceased upon entry of the remand order.[6]

In this regard, the distinction between the majority and minority views becomes significant. Section 1446(d) provides a prohibition on state action in that once removal is properly effectuated, "the State court *shall proceed no further unless and until* the case is remanded." (emphasis added). Section 1447(c) states: "A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court *may* thereupon proceed." (emphasis added). Naturally, if a federal court takes the majority view, making the remand dependent upon the mailing, the case is remanded and the order is mailed at the same point in time. Therefore, the mailing forecloses state court jurisdiction not because a state court should interpret section 1447(c) to provide the state may *only* proceed upon the mailing but because section 1446(d) prohibits state action until remanded. However, under the minority view, this is not the case as a remand does not require the

[6] For this reason, we disagree with the dissent's indication that we must interpret section 1447(c), as to do so in light of Lowe's interpretation of when federal jurisdiction ends under that section, we must invariably presume that our jurisdiction is derived from that federal statute rather than limited by it.

mailing. Thus, in this circuit, a state court exercising jurisdiction over a case upon entry of remand neither imposes on federal jurisdiction nor violates these federal jurisdiction provisions.

Similarly, the states that have confronted this issue recognize the significance of the distinction between the majority and minority view.

In the cases applying the majority view, the revesting of jurisdiction occurs on the mailing because the finality of the remand and accompanying loss of federal jurisdiction requires the same. See, e.g., Nixon v. Moore, 108 S.W.3d 813, 817-18 (Mo. Ct. App. 2003) (adopting the majority approach that the mailing is the operative event at which jurisdiction switches, but recognizing the minority reaches a different result); Quaestor Invs., Inc. v. State of Chiapas, 997 S.W.2d 226, 228 (Tex. 1999) (noting that "[i]n answering the question of when a jurisdictional transfer occurs between federal and state court, most courts[] . . . interpret[Section 1447(c)] . . . to mean that the federal court loses jurisdiction once the federal court clerk has mailed a certified copy" but others, particularly the Fourth Circuit in Lowe, take an opposite view). However, the same rationale compels a different result under the minority view. See Nixon, 108 S.W.3d at 817 (citing Lowe for the proposition that a "few federal [circuits] have reached [a minority approach] . . . holding that jurisdiction transfers back to the state as soon as an order of remand is entered"); Quaestor, 997 S.W.2d at 228 (stating that Lowe "hold[s] that jurisdiction returns to the state court when the district court enters the remand"). Thus, whether the mailing of the certified copy is required to revest jurisdiction is simply a product of what interpretation is employed to determine when the federal court loses jurisdiction.[7]

[7] We are aware of no jurisdiction that has taken the position that neither the state nor federal court has jurisdiction over a case. Further, it is not inconsistent with our federalist form of government to allow a state court to exercise its general jurisdiction when a federal court has finally decided its Congressionally authorized jurisdiction has ceased. See Lowe, 102 F.3d at 735 ("Removal in diversity cases, to the prejudice of state court jurisdiction, is a privilege to be strictly construed[.]") (quoting In re La Providencia Dev. Corp., 406 F.2d 251, 252 (1st Cir. 1969).

Thus, the minority view accepts that the "require[ment that] the clerk of the district court [] mail a certified copy of the remand order to the clerk of the state court, is *not jurisdictional*." Int'l Lottery, Inc. v. Kerouac, 657 N.E.2d 820, 823 (Ohio Ct. App. 1995) (emphasis added) (citing Van Ryn v. Korean Air Line, 640 F. Supp. 284 (C.D. Cal. 1985) (standing for the proposition that entry of remand divests the federal court of jurisdiction notwithstanding the failure of the clerk to send a certified copy)); see Albuquerque, 889 P.2d at 206 (holding "the actions of a federal judge in signing and entering a remand order authorize subsequent state court actions even when the federal court clerk fails to mail the remand order to the clerk of the state court"); see also Lowe, 102 F.3d at 735 ("'Logic also indicates that it should be the action of a court (entering the order of remand) rather than the action of a clerk (mailing a certified copy) of the order that should determine *vesting* of jurisdiction'") (quoting Van Ryn, 640 F. Supp. at 285) (emphasis added). In light of the Fourth Circuit having taken the minority approach, we must agree that the duty to send the mailing is not a jurisdictional requirement but a procedural one. Therefore, we find the South Carolina Circuit Court did not act without subject matter jurisdiction.

This is bolstered by the fact that even in jurisdictions requiring the mailing for finality of the remand, the same is not necessarily required for the state to exercise jurisdiction. For instance, in Nixon the Missouri Court of Appeals recognized:

> The state court may not be immediately notified by the federal court of the order of remand. Counsel, of course, are promptly notified of the order of remand, and often counsel will, in the interest of saving time, notify the state court and proceed in the interim with the state court action. *There is nothing in the federal statutory scheme prohibiting the parties from proceeding at that point.*

Nixon, 108 S.W.3d at 817 (emphasis added).[8] Thus, although requiring the mailing to make the remand order final, the same is not an indispensible jurisdictional requirement. See Bacon v. Dir. of Revenue, State of Mo., 948 S.W.2d 266, 267 (Mo. Ct. App. 1997) ("Subject matter jurisdiction cannot be conferred by . . . consent, and the lack thereof cannot be waived."). With nothing in the federal statutory scheme to prohibit this, the same would hold true in South Carolina, supporting our disinclination to see the mailing requirement as jurisdictional. See In re Nov. 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 636, 686 S.E.2d 683, 686 (2009) ("The lack of subject matter jurisdiction may not be waived, even by consent of the parties . . . .").

Because we find the mailing requirement is procedural not jurisdictional, the issue is not properly before this court as a result of Hulsey's failure to timely object. See Beaufort County v. Butler, 316 S.C. 465, 467, 451 S.E.2d 386, 387-88 (1994) (stating "a procedural right may be waived . . . [and a] party who fails to object to the trial of a case . . . cannot later assert the trial court erred in trying the case . . ."); Doe v. S.B.M., 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997) (stating that "[t]he duty is on the litigant to make a timely objection in order to preserve the right to review . . . [and] . . . [a] contemporaneous objection is required to properly preserve an error for appellate review"); In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.").[9]

---

[8] This statement recognizes that a state court, as opposed to a federal court, confronts whether the exercise of jurisdiction is prohibited by federal statute, not proscribed by it. Similarly it undermines the notion that the statement in section 1447(c): that once a certified copy is mailed "[t]he State court *may* thereupon proceed," operates as an absolute prohibition on state action. (emphasis added).

[9] The dissent posits that our distinction between a jurisdictional requirement and a procedural one is irrelevant and that we erroneously suggest the issue is not preserved for appeal because it was not raised before the judgment was entered. To the contrary, it is precisely because of the rules of issue preservation that the distinction is not only relevant but imperative. The only

Further, to warrant reversal a party must demonstrate the alleged procedural failure caused him prejudice. See Chastain v. Hiltabidle, 381 S.C. 508, 519, 673 S.E.2d 826, 831 (Ct. App. 2009) (stating in order to demonstrate prejudice from procedural non-compliance, a party must establish it "would have done something different" had procedure been followed). Hulsey has failed to demonstrate that he was prejudiced by the absence of the certified copy. Here, Hulsey cannot, and does not, maintain notice was insufficient. The record makes clear that the Charleston County Clerk of Court received notice of a final and unappealable order of remand on July 21, 2006, and that on July 27, 2006, she mailed notice that she received and entered this final and unappealable order to all parties, just as she would have done had she received of a certified copy of the order.

Moreover, Husley personally received notice. The notice sent to Hulsey from the Charleston County Clerk makes no indication of whether the notice of remand it received was certified or not. Consequently, Hulsey's notice was not impacted by the fact that the Charleston County Clerk did not receive a certified copy of the order. Further, pursuant to Section 5 of the Policies and Procedures for the electronic case filing system (ECF) employed

---

question we confront in this case is whether the action of the trial court is void for lack of jurisdiction, which can be raised at *any time*. However, the dissent elects not to squarely answer this question, instead finding the judgment void because the trial court lacked the "power to proceed" with the case under the federal statute. Because it is the only issue before this court, we must presume that this alleged powerlessness is due to a lack of subject matter jurisdiction. To the extent the dissent suggests the circuit court is powerless to proceed for any reason other than a lack of subject matter jurisdiction, the issue is not properly before this court. Further, the dissent's analogy to the bankruptcy code is misplaced. Notwithstanding the manifest dissimilarities between the realm of bankruptcy law and this case, the federal jurisdictional statutes at issue here do not provide for a stay. The concept is also not analogous to this case as a stay, by definition and nature, operates only as a suspension of jurisdiction, not a termination. Contra Davis, 267 S.C. at 511, 229 S.E.2d at 848 ("[O]nce removal proceedings to federal court are fulfilled and requisite notice accomplished, the State court loses all jurisdiction in the matter.").

in the federal court, by removing the case Hulsey agreed to receive notice of entry of any order or judgment through electronic transmittal. Thus, in addition to notice from the state court, Hulsey had notice from the federal court of the entry of the final and unappealable remand order and consequently was not prejudiced.

Accordingly, the South Carolina Circuit Court did not act without subject matter jurisdiction, and Hulsey was not otherwise prejudiced by the Federal Clerk's failure to send a certified copy of the order of remand.[10]

II. Entry of Default

Hulsey argues the trial court erred in failing to set aside entry of default because (a) the answer was timely or (b) good cause existed to set aside the entry of default under Rule 55(c), SCRCP. We disagree.

As to the issue of whether the answer was timely filed, Hulsey points out this is an issue of interpretation of a rule or statute and is therefore reviewed de novo. See Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (stating the interpretation of a statute is a question of law, which the appellate court is free to decide with no particular deference to the trial court). Further, our standard of review leaves the decision to set aside an entry of default within the sound discretion of the trial court, which we will not reverse absent an abuse of discretion. Stark Truss Co. v. Superior Const. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 101 (Ct.

[10] Respectfully, we disagree with the dissent's "summary of the rules that apply to remand in the Fourth Circuit." We find these conclusions irreconcilable with the holding of Lowe and contrary to the expressed rational of both Lowe and Bryan. Similarly, we find these rules to be contrary to the reasoning and holdings of the state courts that have confronted the issue. Finally, from a practical perspective, we find the summary illogical as it proposes to create (1) a scenario in which a state court is permitted to resume action on a case even though the remand order is appealable and remains subject to the federal court's jurisdiction, and (2) a scenario that denies a state court jurisdiction over a matter in which federal jurisdiction has been terminated, and a final and unappealable order has been issued.

App. 2004). Such an abuse of discretion occurs when the decision is based upon an error of law or when the order is without evidentiary support. Id.

a. Timeliness of the Answer

In order to find the August 29 answer was timely Husley urges this court to adopt a rule that the thirty-day time period in which to answer starts over upon remand.[11] We are not inclined to adopt such a rule.

Rule 12(a), SCRCP, provides: "A defendant shall serve his answer within 30 days after the service of the complaint upon him[] . . . ." However, federal rules provide "[a] defendant who did not answer [in state court] before removal must answer . . . within the longest of . . . :" (A) twenty days after being served or otherwise receiving the initial pleading or (B) within five days after notice of removal is filed. Rule 81(c)(2), FRCP.

In this case, Hulsey removed fourteen days after being served. Thus, although under Rule 12(a), SCRCP, he was entitled to another sixteen days to answer, by choosing to remove the case to federal court, he willfully subjected himself to the shortened time period of Rule 81(c)(2), FRCP – providing he must answer within six days (twenty days after being served). However, in the seventy-six days between removal and the entry of remand, Husley neglected to answer.

Initially, we find no authority in this state to support the position that a removing party is entitled to a fresh thirty days to answer a complaint upon remand. Neither did the trial court. Rather, looking at both the federal rules and state rules, in the exceptionally rare circumstance in which a case would be remanded to the state court before an answer was due pursuant to Federal Rule 81(c)(2), a plain reading of South Carolina Rule 12(a) would require an answer within thirty days of service. However, seemingly giving Hulsey the benefit of the doubt, the trial court determined that because the state court is to proceed as if no removal had been attempted, removal to federal court tolls

[11] Hulsey avers jurisdiction has not yet revested in the state court and maintains this as an alternative position.

the thirty day time period and therefore, upon remand Hulsey should be allowed the remainder of any unexpired time.[12] See State v. Columbia Ry., Gas & Elec., 112 S.C. 528, 537, 100 S.E. 355, 357 (1919) (stating that upon remand it is the duty of the state court to proceed as if no removal had been attempted).

In this case, because Hulsey failed to answer under the plain reading of either Rule 12(a), SCRCP, or Rule 81(c)(2), FRCP; or under the more liberal approach provided by the trial court, it is of no consequence which approach we would adopt. Therefore, we are not occasioned to opine on the more acceptable method.[13] It suffices that we find no indication that a party is entitled to a fresh thirty-day period upon remand. Accordingly, we are disinclined to adopt a rule allowing the same. Such action is not the province of this court, but that of our legislature or supreme court.

b. Rule 55(c)

Hulsey next argues the trial court erred in failing to set aside the entry of default under Rule 55(c), SCRCP. We disagree.

The issue before this court is not whether we would find good cause, but whether the decision to deny the motion to set aside default is supportable by the evidence and not controlled by an error of law. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). A motion to set aside entry of default under Rule 55(c) is addressed to the sound discretion of the trial court. Id.

Under Rule 55(c), the entry of default may be set aside for "good cause shown," which is a less stringent standard than the excusable neglect standard

---

[12] This amounted to sixteen days after the remand because fourteen days had elapsed prior to removal.

[13] The inquiry of whether failure to comply with Rule 81(c)(2), FRCP, would support entry of default in state court if the case is remanded unanswered appears novel in this state. However, we need not address it.

of Rule 60(b). Sundown Operating Co. v. Intedge Indus. Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).[14] The good cause standard of Rule 55(c) requires, as a threshold burden, a party to put forth "an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Id. "Once a party has put forth a satisfactory explanation . . . the trial court must also consider [the Wham[15] factors]: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Id. at 607-08, 681 S.E.2d at 888. However, a trial court need not make specific findings of fact for each factor if sufficient evidence supports a trial court's determination that no reasonable explanation exists for vacation of default. Id.

In this case, the trial court held that because "there appears . . . to be no reasonable basis for [Hulsey's] assumption that the [thirty] day time to file an answer starts completely anew upon remand[,] . . . no good cause has been demonstrated . . . ." While we appreciate the trial court did not have the benefit of the Sundown opinion, we find Sundown did nothing to abate the discretion to which a trial court is entitled in ruling on a Rule 55(c) motion. Nor did it change the standard this court applies when reviewing such a decision. What constitutes a satisfactory explanation that serves the interests of justice remains within the sound discretion of the trial court.[16]

---

[14] Although the South Carolina Supreme Court decided this case during the pendency of this appeal, Hulsey notified this court via writing of the intent to rely on this authority.

[15] Wham v. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989).

[16] As our colleague in the dissent points out and the trial court's ruling indicates: in practice, both the bench and bar have been aware that the explanation for the default is significant. See New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993) (indicating the reason for failure to act is relevant under a Rule 55(c) analysis).

In South Carolina, negligence on the part of an attorney is imputable to the client and will not be the basis of finding good cause to set aside entry of default. See Vanvolkenburg, 312 S.C. at 375, 440 S.E.2d at 410 (indicating, prior to Sundown, that the imputed negligence of an attorney to a defaulting litigant is not good cause). Similarly, our supreme court has recognized subsequent to Sundown that the good cause standard of Rule 55(c), encompasses a degree of reasonableness. See Richardson v. P.V., Inc., 383 S.C. 610, 618-19, 682 S.E.2d 263, 267 (2009) (finding, after Sundown, that negligence on the part of an insurance company or attorney will be imputed to a defaulting litigant and negligence does not constitute good cause to relieve an appellant from entry of default); see also Black's Law Dictionary 1133 (9th ed. 2009) (defining negligence as the failure to act reasonably under a specific set of circumstances). It stands, therefore, that because unreasonable conduct does not amount to good cause, an unreasonable explanation for defaulting is not a satisfactory explanation that serves a sufficient interest of justice.[17]

In the case at bar, although the supreme court had not yet issued the Sundown opinion, the trial court nonetheless addressed Hulsey's explanation of default and specifically found it unreasonable. We find the record supports the finding that Husley's explanation for default is unreasonable.[18]

---

[17] We recognize the dissent's position that reasonableness is not required of the excuse itself but merely a factor to be considered in a "broader inquiry" of whether the vacation serves the interests of justice. While this is certainly a mode of analysis within the trial court's discretion, in light of our standard of review, whether the trial court finds vacation does not serve an interest of justice because the excuse is unreasonable or finds the excuse is unreasonable because vacation does not serve an interest of justice, so long as supported by the evidence, is a distinction without a consequence.

[18] Notwithstanding, we respectfully disagree that good cause likely existed in this case. Hulsey's contempt for the rules of procedure both in federal court and state court, indicates this was not a "failure at an attempt" but rather a "failure to attempt" an answer. This issue would not have arisen had the rules been followed. Thus, we suggest there is ample "guidance" for Hulsey to know a party is not entitled to 130 days to answer.

Vanvolkenburg, 312 S.C. at 375, 440 S.E.2d at 409 (stating the "issue before this [c]ourt . . . is not whether we believe good cause existed . . . [but] whether the trial court's determination is supported by the evidence"). Further, we are aware of no authority either prior to or after Sundown that compels this court to find it is not within the trial court's discretion to deny a Rule 55(c) motion for an unreasonable failure to answer. Accordingly, we find the trial court did not abuse its discretion.

III. Default Damages Trial

Hulsey's allegation of error as to the damages trial is threefold. He argues (a) the process employed by South Carolina courts is unconstitutional and deprives a default defendant of due process; (b) specifically as to this case, the trial court erred in allowing introduction of new allegations during the damages hearing, in the form of testimony about a link on Hulsey's website to the slanderous article; and (c) the trial court erred by improperly commenting on the facts.

This court's standard of review for the grant or denial of a motion for a new trial extends substantial deference to the trial court. Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). The trial court's decision will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law. Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999).

a. South Carolina's default damages procedure

Hulsey argues the process employed by the State of South Carolina during a default damages hearing is unconstitutional. We must disagree.

During a default damages trial, the defendant's participation shall be limited to cross-examination and objection to the plaintiff's evidence. Roche v. Young Bros. of Florence, 332 S.C. 75, 81-82, 504 S.E.2d 311, 314 (1998); Howard v. Holiday Inn, Inc., 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978); Doe v. SBM, 327 S.C. 352, 356, 488, S.E.2d 878 881 (Ct. App. 1997); Ammons v. Hood, 288 S.C. 278, 282, 341 S.E.2d 816, 818 (Ct. App. 1986).

On appeal, Hulsey provides no controlling authority[19] for his position that this court can, or should, diverge from longstanding rules established by our supreme court. Accordingly, we cannot and do not find the default damages hearing to be unconstitutional.

b. Introduction of testimony about the website link

Hulsey maintains that the entry of default is tantamount to admission of the allegations of the complaint, but nothing more. See Wiggins v. Todd, 296 S.C. 432, 435, 373 S.E.2d 704, 705-06 (Ct. App. 1988) (stating that when a defendant is in default, the plaintiff's right to recover is circumscribed by the complaint drafted). Therefore, Hulsey alleges the trial court erred in allowing Limehouse to testify to new allegations outside the confines of the complaint, particularly about a link on Hulsey's website to the slanderous newspaper article. However, an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection. SBM, 327 S.C. at 356, 488 S.E.2d at 881.

Here, Hulsey failed to object to any testimony regarding the publication or link on the website. Accordingly, this allegation of error is not preserved for our review.

c. Trial court commenting on the facts

Generally a "trial [court] should not intimate to the jury any opinion on the facts of a case, whether intentionally or unintentionally." Sierra v. Skelton, 307 S.C. 217, 225, 414 S.E.2d 169, 174 (Ct. App. 1992).

In this case, during deliberations, the jury sent out a question inquiring whether "the link to the April 24, 2004, article [was] still on . . . Hulsey's

[19] Hulsey cites Mathews v. Eldridge, 424 U.S. 319, 333-34 (1976), for the proposition that due process requires a meaningful opportunity to be heard. Hulsey also cites to two appellate decisions from the foreign jurisdictions of Florida and North Carolina to support his argument to change the default damages procedure in South Carolina, specifically as to punitive damages.

website? [And i]f not, when was it removed?" The trial court responded by informing the jury that there was testimony that as of the Monday of trial, the link remained on the website.

Hulsey argues this "constitute[s] an improper comment on the facts." Further, Hulsey argues "even more inexplicably, Limehouse was allowed to testify that the link on the website was a violation of a court order while Hulsey was precluded from introducing the very court order . . . which indisputably evidences that there was no prohibition from mentioning the case on the firm website." Initially, Hulsey made no objection to the testimony regarding the court order, and under the default damages procedure, would have been free to cross-examine Limehouse on this matter. Furthermore, Hulsey does nothing to demonstrate how the trial court's answer to the jury's inquiry demonstrated an imparting of opinion on the facts of the case. Accordingly, we find no error.

IV. Punitive Damages

Hulsey argues the award of punitive damages was founded on trial court error and constituted a denial of due process. Hulsey presents four separate arguments on this issue: (a) due process demands a default litigant be given an opportunity to defend punitive damages, (b) the jury should have been instructed that it could return an award of no punitive damages, (c) the trial court allowed and actually invited the jury to consider matters not proper for their consideration in awarding punitive damages, and (d) the trial court erred in confirming the award.

Generally, the trial court's decision on a motion for a new trial will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law. Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999).

a. Due Process

Hulsey maintains employing South Carolina's procedures for a default damages hearing in a case in which punitive damages are sought amounts to a constitutional due process violation. Hulsey further argues this due process

violation was compounded by the facts that the trial court failed to exercise its obligation to independently make a threshold determination of whether the defendants' conduct rose to the level of warranting punitive damages, and that Limehouse was allowed to go into matters beyond the bounds of the complaint.

Initially, Hulsey cites no authority to support the proposition that South Carolina should employ a different default damages procedure for punitive damages than for actual damages. See Roche, 332 S.C. 75, 504 S.E.2d 311 (making no distinction on appeal between punitive damages and actual damages during a default damages trial).

As to the trial court's failure to make a threshold determination that Hulsey's conduct warranted punitive damages, this issue was specifically addressed when the trial court denied Hulsey's motion for a directed verdict on punitive damages. Although it is unclear from the briefs on appeal whether Hulsey challenges this ruling on appeal, to the extent that he may be alleging the trial court improperly denied the directed verdict on the issue of punitive damages, we briefly address the issue.

In reviewing the denial of a motion for a directed verdict, this court applies the same standard as the trial court, viewing the evidence and the inferences in the light most favorable to the non-moving party, and will not reverse the denial unless there is no evidence to support the ruling. All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C., 385 S.C. 428, 441-42, 685 S.E.2d 163, 170 (2009).

When viewed in the light most favorable to Limehouse, there exists evidence which supports submitting the issue of punitive damages to the jury for consideration, including the intentional nature of the action, Hulsey's degree of culpability, and his awareness of the conduct. Accordingly, to the extent Hulsey may be challenging this ruling, we find no error.

b. Instruction on punitive damages

Hulsey next argues the trial court erred by telling the jury it was required to award punitive damages. We find no such instruction.

Punitive damages may be awarded, in the interest of society in punishing or deterring the conduct, or vindicating a private right, when the plaintiff proves entitlement to such damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135 (2005) (stating punitive damages must be proved by clear and convincing evidence); Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004) (indicating punitive damages may be awarded for various reasons).

Generally, this court will not reverse the decision of the trial court as to a particular jury instruction absent a prejudicial abuse of discretion. Cole v. Raut, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008). A trial court abuses its discretion in this regard when the ruling is not supported by the evidence or is based on an error of law. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2009).

Hulsey argues the trial court instructed the jury it had to award punitive damages and submitted a jury verdict form that required an award of punitive damages. However, upon review of the verdict form we see nothing that required the jury to return punitive damages. Furthermore, Hulsey does not cite, or otherwise bring to this court's attention, any specific language used by the trial court to support that it instructed the jury it *had* to award punitive damages.

Initially, the trial court instructed the jury: "Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence that the defendant's actions were willful, wanton, malicious, or in reckless disregard for the plaintiff's rights." Although not specified, the basis for Hulsey's allegation of error is presumably premised upon the use of the word "duty" in a single statement in an otherwise lengthy and thorough instruction in which the trial court stated: "Under proper allegations, a [sic] plaintiff proves by clear and convincing evidence a willful, wanton, reckless, and malicious violation of his rights. It is not only the right, but the duty of the jury to award punitive damages." However, the trial court's very next sentence clarified the use of this term, stating: "Accordingly, *if* you should find that the plaintiff is entitled to recover punitive damages in addition to actual damages, it would be your duty to include such damages in your

verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances." (emphasis added).

Upon review of the record we find the trial court properly instructed the jury on the law. See S.C. Code Ann. § 15-33-135 (2005) (stating punitive damages must be proved by clear and convincing evidence). The trial court did not instruct the jury it *had* to award punitive damages, but simply instructed the jury that *if* it found the plaintiff entitled to punitive damages it was their duty to determine the amount to which the Limehouse was entitled. Therefore, we find no error.

c. Matters not appropriate for consideration of punitive damages

Next, Hulsey alleges his constitutional due process rights were violated because of the trial court's and Limehouse's repeated references to the default, arguing this referencing insinuated that the jury should punish Hulsey for his failure to follow the procedural rules. Further, Hulsey alleges this error was compounded by the trial court allowing Limehouse's wife to testify as to the link on Hulsey's website, as well as to statements about how the ordeal affected Limehouse's family. Finally, Hulsey argues the trial court erred in allowing the jury to consider the settlement of the RICO case, and admitting testimony as to Hulsey's net worth. We disagree.

First, Hulsey does not cite any authority to support the position that discussion of the default would support a finding that due process had been denied. Further, we find no indication on the record that the trial court suggested or otherwise implied that Hulsey's failure to answer should support the imposition of punitive damages.

Second, as to the allegations pertaining to the website link, as noted Hulsey made no objection to this during the damages trial and consequently the issue is not preserved for our review. See SBM, 327 S.C. at 356, 488 S.E.2d at 881 (indicating an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection to the same).

Third, Hulsey contends it was error to allow Limehouse's wife to mention the impact of the slander on his family because pursuant to Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007), punitive damages cannot be imposed to punish a defendant for harm visited upon others. However, at trial, this argument was specifically presented as one of relevance.

Evidence is relevant, and generally admissible, if it has any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. Rules 401, 402, SCRE. The introduction of evidence is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Richardson v. Donald Hawkins Const., Inc., 381 S.C. 347, 352, 673 S.E.2d 808, 811 (2009); Jamison v. Ford Motor Co., 373 S.C. 248, 268, 644 S.E.2d 755, 765 (Ct. App. 2007). In this case, the trial court found the testimony to be relevant because it was "within the scope of how it affected [Limehouse], and his family relationships." We agree that the impact on Limehouse's immediate family bears on the extent of the impact he suffered, and accordingly we find no abuse of discretion.

Finally, Hulsey argues the trial court erred in allowing the jury to consider the settlement of the prior RICO case as well as erroneous testimony that Hulsey's net worth was in excess of $81 million. Initially, contrary to Hulsey's position that Limehouse was able to paint him as a "greedy hotshot lawyer," Limehouse's own witness, John Massalon, conceded he was aware Hulsey was pro bono counsel on the previous RICO case. Furthermore, the record does not indicate any objection was made to the testimony of Bank of America employee Bernadette DeWitt when she testified as to Hulsey's net worth. The evidence bears out the financial declaration on which she relied was certified as a true, complete, and accurate statement of Hulsey's financials and as such, any misinformation presented on this issue was the result of Hulsey's own misrepresentation. Accordingly, we find no error.

d. Confirmation of punitive damages.

Finally, Hulsey argues the trial court erred in confirming the award of punitive damages. We disagree.

Our supreme court recently indicated an appellate court's scope of review to be de novo. Mitchell v. Fortis Ins. Co., 385 S.C. 570, 583, 686 S.E.2d 176, 185, 183 (2009).

The Fortis, court consolidated the post judgment due process analysis for punitive damages. In reviewing an award of punitive damages, we consider (1) the reprehensibility of the conduct, (2) the disparity or "ratio" between actual harm and the punitive damage award, and (3) the comparative penalties. Fortis, 385 S.C. at 587-89, 686 S.E.2d at 185-86.

1. Reprehensibility

In considering reprehensibility, a court should consider whether:

> (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Id. at 185, 686 S.E.2d at 587. This encompasses the defendant's culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct. Id. at 185, n. 7, 686 S.E.2d at 587, n. 7.

Although the harm here was not physical, and posed no threat to health or safety, the evidence indicates Hulsey, through involvement in the underlying RICO action, was aware of the nature and vulnerability of Limehouse's business. Also, although the statements were made in a single incident, because the statements were made to the press, the evidence shows that the circumstances clearly indicated that the statements would be publicly reported and widely disseminated. Finally, this conduct was not the result of

accident or inadvertence. The statements were contemplated, intentionally made, and coincided precisely with a filing of a lawsuit against Limehouse. Accordingly, our review of the evidence convinces us that Hulsey's conduct was sufficiently reprehensible to support punitive damages.[20]

2. Ratio

The courts of this state have affirmed punitive damage awards in excess of six times actual damages. See James v. Horace Mann Ins. Co., 371 S.C. 187, 196, 638 S.E.2d 667, 672 (2006) (affirming an award of punitive damages of 6.82 times actual damages); Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 11, 466 S.E.2d 727, 733 (1996) (affirming an award of punitive damages roughly twenty-eight times actual damages). Similarly, the supreme court has modified awards to reflect a 9.2:1 ratio. See Fortis, 385 S.C. at 594, 686 S.E.2d at 188. Here, the punitive damage award was slightly above twice actual damages. Accordingly, we do not find such an award to violate due process.

3. Comparative Penalty

In looking to comparative cases, we find that in similar matters, our supreme court has upheld punitive damages which were over ten times that of actual damages. See, e.g., Weir v. Citicorp Nat'l Servs. Inc., 312, S.C. 511, 518, 435 S.E.2d 864, 869 (1993) (affirming an award of $275,000 in punitive damages, in a slander case, where actual damages were found to be $25,000). Accordingly, we find no error here.

[20] The trial court specifically noted the statements were intentionally made, the award would deter similar conduct in the future, the award was just over twice actual damages and was thus reasonably related to the actual harm suffered. The trial court also noted Hulsey was of the rare few who can afford to pay the award, and although South Carolina's procedure did not permit Hulsey to put forth evidence, the verdict remained reasonable.

CONCLUSION

For the reasons above, the ruling of the trial court is

AFFIRMED.

HUFF, J., concurs.

FEW, C.J., dissents.

FEW, C.J., dissenting: I disagree with the majority's analysis of Issues I and II, and therefore dissent. Because my position on either Issue I or II would resolve this appeal, I would not reach Issues III and IV.

I. Jurisdiction

Hulsey moved for a new trial and for relief from judgment on the ground that jurisdiction never re-vested in the state court after removal, and therefore federal law prohibited the state court from proceeding with the case. The plain language of 28 U.S.C. §§ 1446(d) and 1447(c) required that the motion be granted.

a. The Plain Language of Sections 1446(d) and 1447(c)

Section 1446(d) provides that after an action has been removed to federal court "the State court shall proceed no further unless and until the case is remanded." A remand order based on a lack of subject matter jurisdiction, such as the remand order in this case, is governed by section 1447(c),[21] which requires that "[a] certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court." The next sentence of section 1447(c)—"The State court may thereupon proceed with such case"—is the key to this case. The word "thereupon" sets the point in time when the

[21] Section 1447(c) states: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

case is "remanded." Before a certified copy of the remand order is mailed, the state court may not proceed; afterwards, it may. The section 1446(d) prohibition of "shall proceed no further" remains in effect until the section 1447(c) requirement that a "certified copy of the order of remand shall be mailed" has been met. This plain language is all that is necessary to resolve this appeal. A certified copy of the order of remand was never mailed to the state court clerk. Under 28 U.S.C. §§ 1446(d) and 1447(c), therefore, the state court had no power to proceed. Because the state court acted when federal law prohibited it from doing so, the resulting judgment was void. The trial court's failure to grant relief from the judgment was error and must be reversed.

The majority takes the position that the mailing of a certified copy of the remand order does not determine the point in time when a state court may proceed after remand. Their position is based primarily on two grounds. First, the majority argues that the mailing of a certified copy of the remand order is not required in the Fourth Circuit under the authority of In re Lowe, 102 F.3d 731 (4th Cir. 1996). Second, the majority argues that to the extent the requirement is applicable, it is procedural, and the right to enforce it has been waived in this case.

b. In re Lowe

The question before the court in Lowe was different from the question we face. Thus, the rule announced there is not applicable here. The majority's argument that the mailing of a certified copy of the remand order is not required in the Fourth Circuit is based on the following passage from Lowe: "we hold that a federal court loses jurisdiction over a case as soon as its order to remand the case is entered. From that point on, it cannot reconsider its ruling even if the district court clerk fails to mail to the state court a certified copy of the remand order." 102 F.3d at 736. The majority has incorrectly framed the issue by relying on this passage.

The majority's argument begins by correctly recognizing that section 1446(d) allows the state court to proceed as soon as the case is "remanded." However, the majority incorrectly concludes that the above statement from Lowe answers the question of when that occurs. I agree that Lowe sets the

point in time when the federal court may not reconsider a remand order. However, that ruling is based on the Fourth Circuit's interpretation of section 1447(d), not section 1446(d). Therefore, the majority is mistaken that Lowe sets the point in time when the case is remanded, and that it is not necessary to interpret section 1447(c) in order to determine when the state court may proceed. Rather, we are required to enforce the section 1447(c) requirement that a certified copy of the remand order be mailed before the state court may proceed.

A careful analysis of Lowe demonstrates that the question it answered was different. The plaintiff sued her employer and two of its managers in the state court of North Carolina. 102 F.3d at 732. After the defendants removed the case to federal court, the plaintiff moved to remand. Id. A federal magistrate judge granted the motion on the grounds that the federal court lacked subject matter jurisdiction. 102 F.3d at 732-33, 736. The federal clerk mailed the order to the clerk of the state court, but the copy mailed was not certified. 102 F.3d at 733. Six months later, a different federal magistrate judge granted the defendants' motion to reconsider. Id. After the second magistrate denied two motions to remand, the plaintiff petitioned the Fourth Circuit for a writ of mandamus requiring the district court to return the case to the state court. Id. After concluding generally that remand orders issued for lack of subject matter jurisdiction are not reviewable, 102 F.3d at 733-34, the Fourth Circuit framed the specific issue before it as follows: "[t]he only question remaining, then, is to identify when a court's decision to remand becomes unreviewable." 102 F.3d at 734.

The court analyzed the question by focusing on 28 U.S.C. § 1447(d), and in particular the word "order."

> Subsection 1447(d) provides only that a remand "order" may not be reviewed; it does not condition reviewability on any other event. Thus, the plain language of subsection (d) indicates that a court may not reconsider its decision to remand, as soon as it formalizes that decision in an "order."

102 F.3d at 734. The Lowe decision thus turns on the court's interpretation of the word "order" in section 1447(d) and not, as the majority claims, on the timing of "remanded" under section 1446(d). In fact, Lowe does not even mention section 1446. The court clarifies its reliance on section 1447(d) with the language "[1447(d)] does not condition reviewability on any other event." Id. This statement makes it clear that Lowe is not based on sections 1446(d) or 1447(c), which refer respectively to the events of "remanded" and "mailed." Therefore, the majority's contention that Lowe defines "remanded" is not correct.

Moreover, Lowe contemplates that the section 1447(c) requirement of a mailing remains a part of the process of remand. Noting that it has read sections 1447(c) and (d) independently, 102 F.3d at 734 n.3, the court explains that section 1447(c) "directs the district court clerk to mail a 'copy' of the remand order to the state court, certainly implying that the order itself, the document § 1447(d) tells us is unreviewable, is in existence before the time of the mailing." 102 F.3d at 734. If the Fourth Circuit's "minority" approach made the mailing required by section 1447(c) unnecessary, the Lowe court would have had no reason to provide this explanation that the section comes into play after the event of an "order" contemplated in section 1447(d).

The majority and I agree that the plain language "shall proceed no further" in section 1446(d) prohibits a state court from acting on a removed case until the case is "remanded." The question we face is when federal law sets that point in time, and thus removes the "shall proceed no further" prohibition. The answer to that question is not found in Lowe's interpretation of section 1447(d), but in the plain language of sections 1446(d) and 1447(c).

c. Waiver

The majority's second ground for its position is that the section 1447(c) requirement of mailing a certified copy is a procedural requirement rather than a jurisdictional one. The distinction is irrelevant in this case. Congress enacted a statute providing that when a case is removed to federal court the state court is prohibited from further action "unless and until the case is remanded." 28 U.S.C. § 1446(d). This prohibition may not be avoided by

labeling the mailing requirement procedural. The prohibition is imposed by a federal statute and is likewise lifted only in accordance with federal statutes: 28 U.S.C. §§ 1446(d) and 1447(c). The question we face in this appeal requires us to interpret these statutes and apply their plain language to the facts of this case. See Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, . . . the court has no right to impose another meaning.").

The majority's ruling not only imposes another meaning on these statutes, but it also renders an entire sentence of the United States Code meaningless by eliminating the section 1447(c) requirement that the federal clerk mail a certified copy of the remand order. This court is not permitted to interpret a statute so as to render a part of it meaningless. See Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc., 102 F.3d 712, 715 (4th Cir. 1996) ("Absent clear congressional intent to the contrary, we will assume the legislature did not intend to pass vain or meaningless legislation."); Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008) ("The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act.").

By characterizing the mailing requirement as procedural, the majority has converted section 1447(c) to a notice statute, so that the requirement of mailing a certified copy can be ignored because, as the majority states, "Hulsey cannot, and does not, maintain notice was insufficient." I do not believe this court is free to be so loose with the requirements of federal law. If Congress intended that notice of a remand was sufficient to enable the state court to proceed, it could easily have drafted sections 1446(d) and 1447(c) accordingly.

The majority's waiver argument also suggests that the issue is not preserved for appellate review because it was not raised to the trial court before judgment was entered. The situation in which the federal removal statutes prohibit a state court from proceeding after a case is removed is analogous to the situation in which the federal bankruptcy stay prohibits a state court from taking action against a debtor who has filed a bankruptcy petition. See 11 U.S.C. § 362(a)(1) (2004 & Supp. 2010). In that instance, as

in this one, the validity of a judgment entered in state court during the time in which federal law prohibits it can be raised at any time. See Ex Parte Reichlyn, 310 S.C. 495, 498-99, 427 S.E.2d 661, 663-64 (1993) (declaring a judgment void when the judgment was entered during the pendency of the bankruptcy stay).

d. Bryan v. BellSouth Communications, Inc.

In support of their respective positions, Appellants and Respondent cite different clauses in the same footnote from the Fourth Circuit's second opinion in Bryan v. BellSouth Communications, Inc., 492 F.3d 231 (4th Cir. 2007) (Bryan II).[22] As I will explain, the footnote supports the position I have taken in this dissent. To understand Bryan II, however, it is important to note that the remand order was not made pursuant to section 1447(c).[23] Instead, after dismissing two federal claims on the merits, the district court determined a third claim was not federal, declined to exercise supplemental jurisdiction over it, and remanded it to state court. Bryan II, 492 F.3d at 234-35; Bryan I, 377 F.3d at 425. Because the Bryan remand was not based on the lack of subject matter jurisdiction and therefore was not made pursuant to section 1447(c), any statement in Bryan II interpreting that subsection is technically dictum. However, both parties have cited Bryan II as authoritative, as has the majority. Mindful therefore of the admonition of former Chief Judge Sanders that "those who disregard dictum, either in law

[22] The first opinion was Bryan v. BellSouth Communications, Inc., 377 F.3d 424 (4th. Cir. 2004) (Bryan I).

[23] Section 1447(c) applies to remands on the basis of a lack of subject matter jurisdiction or a defect in the removal procedure. As the Fourth Circuit pointed out in Bryan I, the district court "concluded that removal was proper because Bryan presented a federal question." 377 F.3d at 427. The Fourth Circuit's decision in Bryan I demonstrates that it agreed. "On appeal, we held that the remanded claim was a federal claim . . . ." Bryan II, 492 F.3d at 234 (citing Bryan I, 377 F.3d at 432). Because the federal court had subject matter jurisdiction over the federal claims, the remand was not made pursuant to section 1447(c).

or in life, do so at their peril," I will give due regard to the footnote from Bryan II. Yeager v. Murphy, 291 S.C. 485, 490 n.2, 354 S.E.2d 393, 396 n.2 (Ct. App. 1987).

The footnote states:

> A remand is effective when the district court mails a certified copy of the remand order to the state court, *see* 28 U.S.C.A. § 1447(c) (West 2006), *or*, if the remand is based on the lack of subject-matter jurisdiction or a defect in the removal process, when the remand order is entered . . . .

Bryan II, 492 F.3d at 235 n.1 (emphasis added). The disjunctive word "or" indicates that the purpose of the footnote is to differentiate between the two types of remand: those made pursuant to section 1447(c) and those made for some other reason. In particular, the footnote differentiates between the points in time when each is "effective" to allow the state court to proceed.[24] Citing to section 1447(c), which applies only to remand orders such as the one in this case, the first clause states the rule that the "remand is effective when the district court mails a certified copy of the remand order to the state court." The only situation in which the first clause of the footnote can be an accurate statement of law is when the statement is made to answer the precise question we face in this appeal–When does federal law remove the "shall proceed no further" prohibition so that a state court may proceed with a case after a remand made pursuant to 28 U.S.C. § 1447(c)?[25]

---

[24] The court makes this differentiation in order to explain how the remanded state court proceedings and the appeal of the remand order to the Fourth Circuit could proceed simultaneously. 492 F.3d at 235. In fact, the footnote appears at the end of this sentence in the text of the opinion: "While BellSouth's appeal was pending, Count A, which had been remanded to state court by the district court, was proceeding in state court." Id.

[25] It is not possible to interpret the clause to apply to anything other than a section 1447(c) remand, not only because the clause cites to the section, but

Finally, the text of Bryan II contains a statement that is contrary to the majority's interpretation of the footnote. Responding to a separate argument made by BellSouth, the court again described the point in time when the state court regained jurisdiction to proceed after the remand, and cited section 1447(c). In the parenthetical after the citation in which it explained the meaning of 1447(c), the court stated "providing that the state court may proceed with a case once the district court mails a certified copy of the remand order to the state court." 492 F.3d at 241. This is consistent with the plain language of the statutes and refutes the majority's interpretation of the footnote. Therefore, I interpret the footnote to include in its first clause the rule applicable to the issue we face in this appeal, and thereby to support my position that the federal clerk was required to mail a certified copy of the remand order to the state court clerk before the state court had jurisdiction to proceed.

e. Conclusion as to Jurisdiction

Limehouse argues that the result of a straightforward interpretation of sections 1446(d) and 1447(c) under the circumstances of this case "makes no sense." The majority refers to it as "jurisdictional limbo" and "jurisdictional hiatus." It is true that interpreting the statutes according to their plain meaning creates a scenario in which for some period of time neither the federal court nor the state court had the power to act. In most cases, however, this period is very brief; in any case it is a situation required by the plain language of federal statutes. Whenever the period becomes lengthy, as it did here, the federal court has the power to order its clerk to comply with the statute.[26]

---

also because the mailing referred to is not required except when the remand is made pursuant to section 1447(c).

[26] While the federal court's remand order becomes final and unreviewable upon its filing, that event does not deprive the federal court of the power to order its clerk to complete the ministerial task of mailing a certified copy of the order to the state court clerk. See Peacock v. Thomas, 516 U.S. 349, 354 (1996) ("[A] federal court may exercise ancillary jurisdiction . . . to enable a court to function successfully, that is, to manage its proceedings, vindicate its

I acknowledge that the result I propose appears at first to be harsh on the facts of this case. However, the section 1446(d) prohibition of "shall proceed no further" is absolute and contemplates no exceptions, even in the face of a harsh result. When the Legislative branch sets forth plain and unambiguous language in a statute, the Judicial branch is constrained to follow it. If the results are harsh, the Legislature may change the statute but the courts may not.[27] However, the result I would reach is not harsh, nor even unfair. Limehouse's motion to remand to state court cites 28 U.S.C. § 1447(c) in its first sentence. Presumably his lawyers read the subsection, in which the requirement of mailing a certified copy of the remand order is plainly and unambiguously stated. Having cited the subsection to his advantage, it is not at all unfair that Limehouse be bound by the subsection when its plain terms work to his disadvantage.

---

authority, and effectuate its decrees."). As a practical matter, an informal reminder to the federal clerk that a certified copy of the order had not been mailed would almost certainly have solved the problem. As a technical matter, the district court has mandamus power to compel its clerk to complete this ministerial task. This is, in fact, exactly what happened in Lowe. After the district court concluded there was no federal subject matter jurisdiction, the Fourth Circuit granted a writ of mandamus with instructions that the district court return the case to state court. 102 F.3d at 736. Given the substance of the Fourth Circuit's ruling that the district court's order remanding the case was unreviewable upon filing, the only task left to complete at that point was the ministerial task of sending a certified copy of the remand order to the state clerk.

[27] Neither Limehouse nor the majority contends this is a situation in which the court may ignore a statute's plain meaning because to do so would yield an absurd result. See Harris v. Anderson Cnty. Sheriff's Office, 381 S.C. 357, 363 n.1, 673 S.E.2d 423, 426 n.1 (2009) ("One rule of statutory construction allows the Court to deviate from a statute's plain language when the result would be so patently absurd that it is clear that the Legislature could not have intended such a result.").

In summary, the following rules apply to remand in the Fourth Circuit. A remand order based on some ground other than a lack of subject matter jurisdiction or a defect in the removal procedure, such as the decision not to exercise supplemental jurisdiction in Bryan, is reviewable, but the remand is effective allowing the state court to proceed as soon as the order is entered. On the other hand, a remand order which is based on a lack of subject matter jurisdiction, such as the order in this case and in Lowe, is unreviewable as soon as it is entered. However, this type of remand is effective such that the state court may proceed only after the federal clerk has complied with 28 U.S.C. § 1447(c) by mailing a certified copy of the remand order to the state court clerk. Because the federal clerk never complied with this requirement, the case was never "remanded," the state court had no power to proceed, and the resulting judgment entered in violation of federal law is void.

II. Rule 55(c)

Hulsey moved for relief from default, which the trial court denied in an order filed February 7, 2007. In the subsequent decision of Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), our supreme court explained how the reasons for the default are to be analyzed in determining the existence of "good cause" under Rule 55(c). In light of Sundown, the analysis used by the trial court was controlled by an error of law. I would remand to the circuit court to reconsider the question of good cause under the standard set forth in Sundown.

a. Good Cause under Rule 55(c) before Sundown

Our appellate courts have stated that Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits. See, e.g., In re Moore, 342 S.C. 1, 5 n.7, 536 S.E.2d 367, 369 n.7 (2000); Melton v. Olenik, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008). In addition to this general guidance, our appellate courts have consistently listed three factors, which have become known as the Wham factors, that a trial court should consider in deciding whether good cause exists. See Wham v. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). These factors, (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of

prejudice to the plaintiff if relief is granted, have been cited as the only factors to be considered in almost every opinion since Wham addressing good cause under Rule 55(c). See, e.g., Richardson v. P.V., Inc., 383 S.C. 610, 616, 682 S.E.2d 263, 266 (2009) (decided after Sundown); Melton, 379 S.C. at 55, 664 S.E.2d at 492.

Neither the general guidance to liberally construe Rule 55(c) in order to promote justice and dispose of cases on the merits nor the Wham factors instruct a trial court to require, or even to consider, the reason the party went into default. Nevertheless, trial courts and practicing lawyers have been generally aware that some explanation for the default is important to the analysis of good cause under Rule 55(c). In fact, in New Hampshire Insurance Co. v. Bey Corp., 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993), this court quoted Dean Lightsey and Professor Flanagan in listing four factors "relevant under" Rule 55(c), including "the reasons for the failure to act promptly." 312 S.C. at 50, 435 S.E.2d at 379 (quoting Harry M. Lightsey & James F. Flanagan, South Carolina Civil Procedure 82 (1985)). Until Sundown, Bey Corp. was the only South Carolina appellate decision interpreting Rule 55(c) to have addressed the reasons for the default. However, other than to state it is a relevant factor, Bey Corp. gives no explanation as to how this fits into the analysis of good cause.

Therefore, at the time of the hearing and order on Hulsey's motion for relief from default, South Carolina law provided that the party seeking relief from the default must show good cause, and that in deciding the motion the judge should consider four relevant factors in light of the general guidance that Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits. The factors were (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, (3) the degree of prejudice to the plaintiff if relief is granted, and (4) the reasons for the failure to act promptly.

b. The Impact of Sundown

In Sundown, the supreme court began its analysis by discussing the reasons for the default. However, the Sundown court elevated that factor to a *requirement*, stating that the good cause standard "requires a party seeking

relief from an entry of default under Rule 55(c) to provide an explanation for the default." 383 S.C. at 607, 681 S.E.2d at 888. The court went even further and also required that the moving party "give reasons why vacation of the default entry would serve the interests of justice." Id. Thus, the standard of good cause is now interpreted in two ways that are different from the law available to the trial court. First, the reason for the default is no longer merely a factor to be considered. Rather, the party seeking relief from default is required "to provide an explanation for the default." Second, the party seeking relief must give "reasons why vacation of the default would serve the interests of justice." The circuit court must consider all of this in determining whether or not the explanation for the default is satisfactory.[28]

c. The Sundown Analysis Applied to These Facts

In this case, Hulsey has complied with the requirement of providing an explanation for the default: an attorney miscalculated the due date of the answer. The next question posed by Sundown was never considered by the trial court. Instead of considering whether vacating the default would serve the interests of justice, the trial court focused on whether the explanation was reasonable. The court found "no good reason" was presented. It also stated that there was "no reasonable basis" for the "assumption that the 30 day time to file an answer starts completely anew upon remand." (emphasis omitted). At one point the trial court called this "confusion." The reasonableness of the explanation is certainly a valid factor to consider. However, Sundown requires a broader inquiry, namely that the reasonableness of the explanation be considered as a part of the analysis of whether vacating the default would serve the interests of justice.

The facts of this case demonstrate the importance of the broader inquiry. The conduct of the lawyer in this case was not "reasonable." First, he should have filed an answer in federal court before the remand order was entered. See Rule 81(c)(2), FRCP. Second, when he learned of the

[28] The court went on to explain that the Wham factors come into play after the explanation is accepted by the court. "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider [the Wham factors]." 383 S.C. at 607-08, 681 S.E.2d at 888.

remand order, he should have raced to the county courthouse to file it. A trial judge must consider the attorney's unreasonable failure to do this. However, as to the specific question of whether excusing the unreasonable failure in this case serves the interests of justice, there are additional factors that are important to consider. First, the lawyer was apparently attempting to correctly calculate the deadline for his answer. Second, South Carolina law provides no guidance as to when the answer was actually due in state court. Even the majority declines to define the due date for the answer, stating only that Hulsey failed to meet it, whatever it was.

The fact that the lawyer was trying to correctly follow the rules is particularly relevant to "the interests of justice." Many of our appellate decisions have stated the principle that a lawyer's negligence in failing to file an answer is imputable to the defaulting litigant, and thus weighs against granting relief from default. See generally Richardson, 383 S.C. at 618-19, 682 S.E.2d at 267. In each of the cases citing this principle, the negligence was in *failing to attempt* to answer the complaint, not in *failing at an attempt* to serve a timely answer. This distinction is important to the interests of justice. Justice should not relieve a lawyer or litigant who makes no attempt to comply with the rules, or who negligently fails to comply with a rule that is clear. However, the interests of justice should protect a lawyer who attempts to comply with the rules, particularly when the lawyer is attempting to meet a deadline which is so *un*clear that no rule or court has ever defined it.

In my opinion, applying the newly-defined standard for good cause under Sundown is likely to yield a different result. In reaching this conclusion, I am influenced by the reasoning of our supreme court in affirming the trial court's order granting relief for a late answer in Lee v. Peek, 240 S.C. 203, 125 S.E.2d 353 (1962). Though Lee is not controlling because it was decided before the Rules of Civil Procedure based on a standard other than good cause, the facts of Lee are strikingly similar to the facts presented here, and the court's analysis seems particularly relevant in light of Sundown.

Davis Lee sued the NAACP and six residents of Anderson County in the Court of Common Pleas of Abbeville County. 240 S.C. at 204, 125

S.E.2d at 353. Three of the Anderson County residents retained a lawyer, who made a motion to change venue to Anderson. 240 S.C. at 205, 125 S.E.2d at 353. Before the motion to change venue could be heard, the NAACP removed the case to federal court. Id. The three Anderson residents represented by the lawyer filed a motion to remand, which was granted. Id. The same attorney then refiled the motion to change venue. Id. During all of this time, the lawyer did not file an answer because "he was under the erroneous impression that it was not necessary for him to answer or demur in the State Court until the motion for change of venue had been decided." 240 S.C. at 205, 125 S.E.2d at 354.

The Lee attorney's failure to answer was unreasonable. The circuit judge "found as a matter of fact that counsel had misconceived the applicable procedural law." 240 S.C. at 206, 125 S.E.2d at 354. That finding is much like that of the trial court here that "there was no good reason presented by the defendants for their failure to file a timely answer, other than attorney confusion about the deadline for when an answer was due." However, the trial judge in Lee did not focus on the reasonableness of the lawyer's action. Rather, focusing on what the Sundown court has now instructed trial courts to consider, the circuit judge in Lee held "that it was *in the furtherance of justice* that the respondents be relieved of any default." Id. (emphasis added).

d. Conclusion as to Rule 55(c)

Sundown changed the analysis of good cause by requiring for the first time that the trial court focus on "reasons why vacation of the default entry would serve the interests of justice." I believe that if the trial court had analyzed this question, rather than whether the attorney was reasonable in failing to file a timely answer, the outcome might have been different. The supreme court recognized in Lee that the decision as to what is "in the furtherance of justice" is for the circuit court. It is not the task of this court to answer the question posed by Sundown. However, it is the duty of this court to see that the question gets answered. I would reverse the judgment of the lower court, and remand the case for a determination of whether good cause exists under Sundown.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marcus Adrien James and Leon P. James, Appellants,

v.

South Carolina Department of Transportation, a body politic, and the City of Marion, a body politic, Defendants,

Of whom
South Carolina Department of Transportation is Respondent.

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

Opinion No. 4835
Submitted March 1, 2011 – Filed June 1, 2011

REVERSED AND REMANDED

Lisa Poe Davis, of Surfside Beach, for Appellants.

Douglas Charles Baxter, of Myrtle Beach, and Jerome Scott Kozacki, of Florence, for Respondent.

CURETON, A.J.: After their expert witness traveled from Ohio to South Carolina for his deposition, Appellants moved to compel the South Carolina Department of Transportation (the Department) to pay the expert's bill for $6,021.10. The circuit court ordered the Department to pay only $2,125. On appeal, Appellants argue the circuit court's decision ignores the mandates of Rules 26(b)(4)(C) and 30(b)(7) of the South Carolina Rules of Civil Procedure and constitutes an impermissible judicial correction of the Department's mistake. We reverse[1] and remand for a determination of a reasonable fee for the expert's travel time and travel expenses.

FACTS

Following an automobile accident involving a pothole, Marcus James and Leon James (collectively "Appellants") filed an action against the Department and the City of Marion (City) for negligence. Appellants retained James Scherocman of Cincinnati, Ohio, as an expert witness. During discovery, the Department contacted Appellants to schedule Scherocman's telephonic deposition. Scherocman refused to appear telephonically.[2] Subsequently, the Department served a notice of deposition for Scherocman indicating his deposition would proceed at the office of Appellants' counsel. In view of Scherocman's refusal to appear by telephone, Appellants advised the Department that it and the City would be responsible for all fees and costs associated with producing Scherocman in South Carolina. Scherocman appeared and testified for six hours.

A week later, Scherocman provided Appellants with an invoice totaling $6,021.10 for his deposition. The invoice included itemized travel expenses

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

[2] See footnote 10.

of $631.10 and hourly charges totaling $5,390.[3] When Appellants received Scherocman's bill for his deposition, they transmitted it to the Department and to the City with a request that each pay one-half the amount of the invoice. The Department declined to pay.[4]

Appellants filed a motion to compel the Department to pay Scherocman's bill. Following a hearing, the circuit court ordered the Department to pay $2,125 toward the bill. This figure included $2,100 for the six hours of Scherocman's time that were spent in the deposition at a rate of $350 per hour, plus the $25 witness fee provided in Rule 30(a)(2), SCRCP. The circuit court specifically found Scherocman's refusal to be deposed by telephone caused him to incur the additional fees and costs and Appellants failed to demonstrate good cause why they should recover any additional fees or costs. Accordingly, the circuit court concluded that $2,125 was a "reasonable" amount and that requiring the Department to pay any additional fees or costs "would not be fair, just, reasonable, or equitable." After additional arguments, the circuit court denied Appellants' motion to reconsider. This appeal followed.

STANDARD OF REVIEW

An issue regarding statutory interpretation is a question of law. S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control, 390 S.C. 418, 425, 702 S.E.2d 246, 250 (2010). "When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors of law." Epworth Children's Home v.

[3] Scherocman's fee request included 15.4 hours of his time at a rate of $350 per hour. His expenses included approximately $363 for air fare, $120 for ground transportation, $50 for meals, and $96 for one night's lodging.

[4] Although the record is unclear on this point, it appears the City also did not pay but was no longer a party to this case by the time Appellants filed their motion to compel. The motion to compel sought to recover the full amount of Scherocman's bill from the Department and did not mention the City. The City did not appear at either hearing.

Beasley, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). The award of costs and fees relating to testimony by an expert witness is a matter within the discretion of the circuit court. Black v. Roche Biomed. Labs., 315 S.C. 223, 230, 433 S.E.2d 21, 25 (Ct. App. 1993).

LAW/ANALYSIS

Appellants argue the circuit court erred in (1) finding Scherocman's travel expenses were not reasonable when Rule 26(b)(4)(C), SCRCP, requires an expert witness to be produced for deposition within South Carolina; (2) ignoring the provision of Rule 30(b)(7), SCRCP, that a deposition may proceed by telephone only if the parties so stipulate or if the court orders it; and (3) impermissibly correcting the Department's contention that Scherocman was entitled to only the $25 per diem witness fee provided in Rule 30, SCRCP. We address these issues together and reverse.

I. Law Concerning Interpretation of Procedural Rules

Courts interpreting the South Carolina Rules of Civil Procedure apply the same rules of construction used to interpret statutes. Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). "[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . . . ." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004). However, "[t]he language [of a statute] must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

"Statutes in apparent conflict should be construed, if possible, to allow both to stand and give effect to each." Adoptive Parents v. Biological Parents, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994). Generally, when a general statute and a specific statute conflict, the specific statute prevails. Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995).

II. Law Concerning Rules of Civil Procedure

Rule 26(b)(4) governs the discovery of the opinions of expert witnesses:

> Upon the request of the party seeking discovery, unless the court determines otherwise for good cause shown, or the parties agree otherwise, a party retaining an expert who is subject to deposition shall produce such expert in this state for the purpose of taking his deposition, and the party seeking discovery shall pay the expert a reasonable fee for time and expenses spent in travel and in responding to discovery and upon motion the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Rule 26(b)(4)(C), SCRCP.

Rule 30 governs depositions generally and provides depositions conducted by telephone are permitted in South Carolina:

> The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), a deposition taken by telephone is taken at the same place where the deponent is to answer questions propounded to him. The notary before whom the deposition is taken shall be at the same place as the deponent during the taking of the deposition.

Rule 30(b)(7), SCRCP.

III. Analysis

We find the circuit court's award fails to give effect to both Rules 26(b)(4)(C) and 30(b)(7) and unduly burdens Appellants with costs the Department, under the facts of this case, should pay.[5] Initially, we note Rule 26(b)(4)(C) provides two different scenarios, each with a unique payee, in which a deposing party may be required to pay an expert witness's fees. The first provision obligates the party initiating the deposition to pay the expert a reasonable fee for time and expenses spent in traveling and the taking of the deposition.[6] The second vests the circuit court with discretion to find the initiating party liable to the producing party for "a fair portion of the fees and expenses reasonably incurred" by the producing party during its own communications with the expert witness.[7] Id. Only the former provision,

---

[5] This ruling addresses the merits of Appellants' issues concerning Rules 26 and 30. Reversal on those issues makes it unnecessary to reach Appellant's contention concerning judicial correction of the Department's mistake. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

[6] See Peirson v. Calhoun, 308 S.C. 246, 255, 417 S.E.2d 604, 609 (Ct. App. 1992) (wherein this court held the trial court had authority under Rule 26(b)(4)(C) to order the deposing party to pay a reasonable expert witness fee).

[7] We note our version of Rule 26(b)(4)(C) is similar to the pre-1993 version of the federal rule. According to Wright & Miller:

> [U]ntil 1993 Rule 26(b)(4)(C) provided the court discretion to order the discovering party to pay the other party a fair share of the fees and expenses that party incurred in obtaining facts and opinions from a testifying expert. . . . In 1993 this power was eliminated with respect to testifying witnesses.

requiring payment to the expert of "reasonable fees and expenses," is at issue here.

The circuit court based its decision to limit the Department's liability for Scherocman's fees and expenses solely upon the expert's refusal to give his deposition by telephone. What is "reasonable," then, depends largely upon the expert's and the parties' obligations to one another. Rule 26(b)(4)(C) specifically governs the depositions of expert witnesses and mandates that an expert witness "shall" be produced in South Carolina.[8] Therefore, under Rule 26(b)(4)(C), Appellants were required to produce Scherocman in South Carolina. However, the occurrence of either of two events could override this mandate. Id. If the parties agree to an alternate arrangement, the expert witness need not be deposed in South Carolina. In

---

* * *

> The provisions about payment . . . are subject to the condition "unless manifest injustice would result."

8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure: Civil § 2034 (3d ed. 2010). South Carolina's rule retains the pre-1993 federal rule language regarding the authority of the court to require the "party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the [other] party in obtaining facts and opinions from the expert." However, we conclude that portion of the rule does not apply to this case because Appellants are not attempting to recover fees and expenses they incurred in obtaining facts or opinions from Scherocman.

[8] But see Rule 30(a)(2), SCRCP ("A witness may be compelled to attend [his deposition] in the county in which he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court. A party may be compelled to attend in the county in which the subject civil action is pending, or in the county in which he resides or is employed or transacts business, or at such other convenient place as is fixed by an order of the court." (emphasis supplied)).

this case, the parties were unable to reach such an agreement. Similarly, the circuit court may issue an order overriding the location requirement if either party moves for a deviation and demonstrates good cause for not deposing the witness in South Carolina. Id. Neither party so moved, and the circuit court issued no such order in this case. Because neither of these events occurred in the case at bar, the requirement that Scherocman appear in person in South Carolina remained intact.

The two rules at issue here do not conflict with regard to the fact that a telephonic deposition is an exception rather than the rule. Consequently, with respect to an in-person deposition versus a telephonic one, we may give effect to both rules without diminishing the coverage of either. See Adoptive Parents, 315 S.C. at 543, 446 S.E.2d at 409 ("Statutes in apparent conflict should be construed, if possible, to allow both to stand and give effect to each."). Rule 30(b)(7) offered the parties the option of conducting Scherocman's deposition by telephone as an alternative to conducting it in person, but in no manner did it obligate Appellants to produce Scherocman by telephone without their agreement. Rule 26(b)(4)(C) required Appellants to produce Scherocman in South Carolina and further required that the Department "shall pay [Scherocman] a reasonable fee for time and expenses spent in travel and in responding to discovery." If the Department did not wish to pay the expert witness for his travel time and expenses, it bore the burden of securing another arrangement, either with Appellants or by order of the circuit court.[9] Because the Department's offer to conduct the deposition by telephone failed to result in either an agreement or a court order, the location requirement remained intact. Accordingly, the parties' arguments concerning the motivation for Scherocman's refusal to be deposed by

[9] We note the record does not indicate the Department pursued either of these options after Appellants' counsel informed it of Scherocman's refusal to appear telephonically. Instead, at the hearing on Appellants' motion to compel, the Department adopted the position that it owed Scherocman no payment at all beyond the $25 per diem witness fee provided in Rule 30(a)(2). Moreover, the Department dismisses the fact that it might have deposed Scherocman in Ohio and incurred expenses in doing so.

telephone is not dispositive of whether or not the expert is entitled to recover for travel time and expenses.[10]

Rules 26 and 30 do conflict with regard to the payment a witness receives for his time. Rule 30(a)(2) fixes the rate for witnesses in general at $25 per day. Rule 26(b)(4)(C) entitles an expert witness to "a reasonable fee" for his time and travel. However, when a general statute and a specific statute conflict, the specific statute prevails. Atlas Food, 319 S.C. at 558, 462 S.E.2d at 859. Rule 26 specifically governs only expert witnesses, while Rule 30 concerns all witnesses. In the case at bar, neither party denies Scherocman was an expert witness. Consequently, the reasonable time and expense provision of Rule 26(b)(4)(C) controls here, and the circuit court's award of the $25 daily witness fee provided in Rule 30 was improper and an abuse of discretion.

With the Department's obligation to pay Scherocman "a reasonable fee for time and expenses spent in travel and in responding to discovery" in mind, we arrive at the question of whether the circuit court erred in its determination of the reasonableness of the bill. The language of the rule is unclear as to whether both travel time and travel expenses are compensable, or whether only deposition time and travel expenses are compensable. The construction of the sentence suggests the expert witness should be paid for both time and expenses he "spent in travel and in responding to discovery."

---

[10] Appellants contend in their brief that the reason Scherocman refused the telephonic deposition was because "the subject matter was complex and involved numerous exhibits." The Department argued at both hearings that Scherocman refused because he wanted a paid vacation to South Carolina or wanted to discuss another case with Appellants' counsel. However, at the reconsideration hearing the court asked Appellants' counsel specifically whether the expert had "other matters to tend to in South Carolina." Counsel's response was, "No, your honor, just this deposition." He responded further that while he and the expert discussed another case while the expert was in South Carolina, there was no reason for the expert to come to South Carolina to discuss that case.

If "spent in travel and in responding to discovery" modified "expenses" alone, the expert witness would not be entitled to payment for the time he spent testifying at his deposition. Compensating the witness for the time he spends rendering his expert opinion, then, also requires compensating him in some manner for the time he spends traveling.[11]

The circuit court found Scherocman's hourly rate for the six hours he spent in deposition was reasonable but specifically excluded his travel time and travel expenses from consideration because Scherocman refused to give his deposition by telephone. As discussed above, it was incumbent upon the Department to secure either an agreement or a court order requiring Scherocman's deposition by telephone. In failing to do so, the Department accepted its responsibility under Rule 26(b)(4)(C) to pay Scherocman's reasonable travel time and travel expenses. Consequently, the circuit court erred in not considering that portion of the expert witness's bill because he refused to testify by telephone. We reverse the circuit court's exclusion of Scherocman's travel time and travel expenses, as well as the circuit court's imposition of the $25 witness fee, and remand for the circuit court to review Scherocman's bill and determine reasonable amounts for Scherocman's travel time and travel expenses.

CONCLUSION

We find Rule 30 does not require a party to present its expert witness for deposition by telephone, absent either an agreement by the parties or a court order. We further find the party seeking a deviation from this general rule bears the burden of securing it, either by agreement or by court order. Because the Department failed to seek a court order for a telephonic deposition when Scherocman did not agree, the circuit court erred in

[11] However, no provision commands that the hourly rate an expert receives for the time he spends in travel must match the hourly rate he receives for testifying. The determination of a reasonable hourly rate for each activity lies within the circuit court's discretion.

considering Scherocman's refusal as the sole basis for denying a reasonable sum for his travel time and travel expenses.

In addition, we find Rule 26 establishes the general rule that the producing party must present its expert witness for deposition in South Carolina unless the parties agree or the court orders otherwise. We further find the same rule commands the deposing party to "pay the expert a reasonable fee for time and expenses spent in travel and in responding to discovery" and that this provision supersedes the general rule providing for a $25 per diem payment for a witness's deposition testimony.[12] Accordingly, this matter is

REVERSED AND REMANDED.

THOMAS, J., concurs.

FEW, C.J., dissenting: I believe the circuit judge's decision should be affirmed in accordance with the well-established rule that "[a] trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion." Hollman v. Woolfson, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009); see also Arthur v. Sexton Dental Clinic, 368 S.C. 326, 333, 628 S.E.2d 894, 898 (Ct. App. 2006). In my opinion, the circuit judge committed no error of law, and his ruling is supported by the facts. He therefore ruled within his discretion. Arthur, 368 S.C. at 333, 628 S.E.2d at 898 ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support."). I respectfully dissent.

Rule 26(b)(4)(C), SCRCP, provides that "unless the court determines otherwise for good cause shown, . . . the party seeking discovery shall pay the expert a reasonable fee for time and expenses spent in travel . . . ." The rule

[12] This opinion in no way suggests that parties should not fully cooperate in the area of discovery to ensure that it is obtained in the most efficient, most convenient, and least expensive manner.

requires the circuit court to consider: (1) whether the party opposing payment has shown "good cause," and (2) what is "reasonable," and grants the court discretion to fairly allocate the costs of expert discovery based on the circuit judge's determination of good cause and reasonableness.[13]

The circuit judge did that in this case. Two key facts support his ruling. First, the Department asserted and Appellants conceded that the only reason the deposition took place in South Carolina was the expert unilaterally and without explanation refused to do the deposition over the telephone, insisting instead that he be paid to travel here. At the initial hearing before the circuit court, the judge asked Appellants' lawyer: "What benefit would you have making him come to South Carolina?" The lawyer's answer was simply that "I didn't really have a dog in that fight" and "I had no way to force my expert to do it by phone." Neither statement is true. The lawyer, not the expert, is in charge of the case. Appellants' lawyer was unable to give any reason related to her client's case that the expert needed to travel to South Carolina for the deposition. The only reason given was the expert's unsubstantiated personal preference.

Second, the Department's lawyer stated to the circuit judge at the initial hearing that the expert "indicated to me that he was here not only on this case

---

[13] See 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure: Civil § 2034 (3d ed. 2010) (stating the comparable federal rule "seeks a fair allocation of expert expenses between the retaining party and the one seeking discovery."). Rule 26(b)(4), SCRCP, is "based on the comparable Federal Rule." Rule 26(b)(4), SCRCP notes. The federal rule provides: "Unless manifest injustice would result, the court must require that the party seeking discovery: (1) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) . . . ." Rule 26(b)(4)(E), Fed. R. Civ. P. The South Carolina rule originally incorporated the "manifest injustice" standard, but was amended in 1986, replacing manifest injustice with "good cause." Rule 26(b)(4), SCRCP notes to 1986 Amendment. Thus, the federal rule allows even less discretion to the trial judge than the South Carolina rule.

but also in connection with another case that he had been retained for." Appellants' lawyer did not respond to refute that assertion.[14] At the hearing on Appellants' motion for reconsideration, the Department's lawyer stated: "Mr. Scherocman told me that he had discussed [the other case] in South Carolina with [Appellants' lawyer's] partner." Appellants' lawyer then conceded the accusation was true, stating: "He just happened to do that while he was there. It wasn't like he came specifically for that. He just happened to talk to him while he was there, Your Honor." The circuit judge immediately denied the motion for reconsideration.

At the initial hearing on Appellants' motion, the judge stated "I'm not inclined to grant the travel given the facts and circumstances of this case." The written order indicates the expert's refusal to participate by telephone is the primary circumstance the judge considered. However, the judge went beyond the simple refusal by the expert and considered the reasons for the refusal. He considered that Appellants' lawyer could offer no valid reason for the expert's refusal, and that the Department's lawyer demonstrated an invalid reason. This second point is critical. When the circuit judge denied the motion for reconsideration, he had before him information that the expert had insisted on travelling to South Carolina, at least in part, so that he could work on another, unrelated case while he was here. This obviously resulted in a financial benefit to both the expert and to Appellants' lawyer's firm; both received the benefit of the expert's consult on the other case without having to bear the cost of the expert's travel. Under these circumstances, there are facts to support the circuit judge's consideration of good cause and what is reasonable, and thus his determination of how to fairly allocate the expert's expenses.

The circuit judge also committed no error of law. In the beginning of its analysis, the majority states "the circuit court's award fails to give effect to both Rules 26(b)(4)(C) and 30(b)(7) and unduly burdens Appellants with

[14] The bill submitted by the expert supports this assertion, as it includes plane fare after the deposition from Myrtle Beach to Atlanta, not back to Cincinnati.

costs the Department should pay." This statement does not describe an error of law. Moreover, the analysis of Rule 30(b)(7) is misplaced. Rule 30(b)(7) does nothing more than permit a deposition to be taken by telephone upon agreement or court order. Rule 30(b)(7), SCRCP notes ("This section permits a deposition by telephone. Although such a deposition is permissible under present rules, this section makes the procedure explicit."). The text of the rule specifically acknowledges its relationship with four other rules of civil procedure, but does not mention Rule 26(b)(4)(C).[15] Rule 30(b)(7) has nothing to do with a circuit court's determination of good cause and what is reasonable and fair under Rule 26(b)(4)(C).

I am concerned that the majority's holding that the two rules must be read together conflicts with the practical reality of litigation, and places a tool for abuse into the hands of obstructive lawyers. Plans to depose out-of-state experts are frequently made or revised at the last minute—even days before trial. Requiring lawyers who wish to conduct the deposition by phone to get a court order beforehand or face the payment of an unreasonable expense is likely to encourage abuse and delay trials. It is a common and acceptable occurrence in modern litigation, for example, that an expert's opinion will change slightly or even substantially in the weeks before trial. Lawyers often conduct follow-up depositions by telephone in order to explore these revised opinions and the new or refined evidence upon which they are based. A party seeking to gain a tactical advantage might insist the expert travel to South Carolina for this follow-up despite no legitimate reason for the travel. The approach taken by the majority would require the opposing party to get a court order for a telephone deposition or pay the travel expenses of the expert, regardless of whether the travel is justified. In the weeks before trial it may be difficult or even impossible to schedule a hearing before a circuit judge on such short notice. Knowing this, an obstructionist party may raise the telephone issue in such a manner as to force an opposing party to make a difficult choice on how, or whether, to proceed with a deposition.

[15] Rule 30(b)(7), SCRCP ("For the purposes of this rule and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), ...").

In most cases, the circuit court will find at least some of an expert's "expenses spent in travel" to be reasonable. In all cases that decision should be made by a circuit judge, not by this court. In those relatively rare situations in which a circuit judge gives sound reasons for finding that none of the expert's travel expenses are reasonable, as the circuit judge did here, the decision should be upheld.

I would affirm.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marsha Holt Wilson, Respondent,

v.

Wallace McDonald, Appellant.

Appeal From Anderson County
Tommy B. Edwards, Family Court Judge

Opinion No. 4836
Submitted July 1, 2010 – Filed June 1, 2011

AFFIRMED

Peter George Currence, of Columbia, for Appellant.

Nancy J. Thomason, of Anderson, for Respondent.

Carolyn Elaine Galloway, of Anderson, Guardian ad Litem.

FEW, C.J.: Wallace McDonald[1] appeals the family court's order denying his request to change his daughter's last name from Wilson to Wilson-McDonald. We affirm.[2]

FACTS/PROCEDURAL HISTORY

McDonald and Marsha Holt Wilson conceived a child together, but never married. When Wilson learned she was pregnant, McDonald ended the relationship. He did not support Wilson during the pregnancy and was not present for their daughter's birth on June 6, 2005. Wilson named their daughter without McDonald's input, giving the daughter the last name "Wilson."

On July 5, 2005, Wilson filed a complaint requesting full custody of her daughter, child support, and reimbursement for medical expenses associated with the pregnancy. McDonald filed an answer and counterclaim requesting joint custody and visitation. Additionally, McDonald requested the family court change his daughter's last name to Wilson-McDonald. Wilson and McDonald subsequently agreed on all issues except changing their daughter's last name. The family court conducted a hearing on that issue alone.

McDonald testified at the hearing that a hyphenated surname would be in his daughter's best interest because the change would (1) allow her to feel part of his family unit, (2) enhance her reputation in the community, and (3) prevent her from losing her identity with him. McDonald explained that under the visitation agreement, the child spent six out of every fourteen days in his home with her half-siblings, and the hyphenation would help her identify more with his family.

---

[1] We changed the names of the parents to protect the privacy of the child.

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

Wilson disagreed that the proposed name change would further her daughter's best interest. Wilson explained that just as McDonald was intentionally absent from their daughter's birth, she intentionally excluded him from the birth certificate because she did not want her daughter to share the last name of a father who was not involved in the daughter's life. Wilson testified that she had been hurt by the fact that McDonald abandoned her during the pregnancy and provided her no support other than offering to pay for an abortion. In addition, Wilson considered that McDonald had relinquished his parental rights to twin boys years earlier. After Wilson explained these initial reasons for choosing not to name her daughter "McDonald," she went on to explain that a name change now, when daughter was three years old and knew her last name, would be stressful for the child.

The guardian ad litem also testified at the hearing. When the guardian met with the daughter, the little girl was wearing monogrammed clothes and carried a monogrammed purse. The guardian asked if she knew her name, and the daughter "proudly said" her current full name. According to the guardian, the daughter identified with both parents and recognized she had two family units. The guardian did not articulate any reason why the proposed name change would promote the child's best interest.

After hearing from both parents, the guardian, and other witnesses, the family court issued an order denying the name change. McDonald appeals, arguing the proposed hyphenation of the child's last name promotes her best interest. We review the family court's decision de novo. Lewis v. Lewis, Op. No. 26973 (S.C. Sup. Ct. filed May 9, 2011) (Shearouse Adv. Sh. No. 16 at 41, 44).

LAW/ANALYSIS

Section 15-49-10(B) of the South Carolina Code (2005) permits a parent to petition the family court to change the name of a minor child. "The court shall grant the petition if it finds that it is in the best interest of the child." S.C. Code Ann. § 15-49-10(B). The parent seeking a name change bears the burden of proving the change furthers the child's best interests.

Stradford v. Wilson, 378 S.C. 300, 303-04, 662 S.E.2d 491, 493 (Ct. App. 2008) (citing Mazzone v. Miles, 341 S.C. 203, 210, 532 S.E.2d 890, 893 (Ct. App. 2000)).

In Mazzone, this court identified nine factors to consider when determining whether a child's name should be changed. 341 S.C. at 210-11, 532 S.E.2d at 893-94. These factors, which are not exclusive, are as follows:

> (1) the length of time that the child has used the present surname; (2) the effect of the change on the preservation and development of the child's relationship with each parent; (3) the identification of the child as part of a family unit; (4) the wishes of the parents; (5) the stated reason for the proposed change; (6) the motive of the parents and the possibility that the use of a different name will cause insecurity or a lack of identity; (7) the difficulty, harassment, or embarrassment that the child may experience when the child bears a surname different from the custodial parent; (8) the preference of the child if the child is of an age and maturity to express a meaningful preference; and (9) the degree of community respect associated with the present and proposed surname.

Id.; see also Stradford, 378 S.C. at 303-04, 662 S.E.2d at 493 (applying the Mazzone factors in determining it was not in a child's best interest to change child's surname from that of her mother's to her father's).

With regard to the first factor, the child was three years old at the time of the hearing and is now almost six years old. "Wilson" has been her last name since birth. The child knew her name even at the time of the hearing, and according to the guardian, announced it with pride. We recognize that McDonald requested the name change when the child was an infant. However, his failure to support Wilson during her pregnancy, his choice not

to attend his daughter's birth, and his failure to take any action on his daughter's behalf until after he was served with a lawsuit from Wilson,[3] all invited the difficulty he now faces in proving she would be better off with a different last name.

With regard to the second and third factors (relationship with each parent and identification as a family unit), the hyphenation arguably better preserves her relationship with each parent and identity with each family unit. However, according to the guardian, the daughter recognizes both family units already, despite bearing only her mother's last name.

The fifth and sixth factors (reason for the change and motives of the parties), warrant discussion. McDonald's stated reason for wanting the change was that he believed the daughter would better identify with his family and that she would benefit in the community from sharing a name similar to his. As noted in the analysis of the first factor, McDonald could have championed these reasons when the birth certificate was filled out, but he chose not to participate. Wilson's initial motive for excluding "McDonald" from the birth certificate—her fear that McDonald would not be present in her daughter's life—was legitimate considering McDonald's history with his twin sons and his absence during the pregnancy and birth here.

Regarding the seventh factor (the difficulty, harassment, or embarrassment the child may experience if the child bears a surname different from the custodial parent), Wilson expressed concern that a hyphenated name was unusual in Anderson County and the combination of names would result in a long, cumbersome surname for her daughter.[4] We

---

[3] See Mazzone, 341 S.C. at 211, 532 S.E.2d at 894 (discussing the importance of the fact the father did not request the name change until after the mother filed an action).

[4] Wilson also claimed the hyphenated name would prevent monogramming. However, we are not impressed with the monogramming argument. We can envision no scenario in which a child's monogram would be important

find there was little evidence that bearing the mother's last name alone would be any less embarrassing than having a hyphenated last name. In either event, the child has a name that is different from at least one of her parents. Indeed, when parents create a situation like this, it is beyond the power of the court system in a name-change case to eradicate all of the stigma that might be associated with it.

McDonald argues that the ninth factor—the degree of community respect associated with the present and proposed surname—weighs heavily in favor of hyphenation because he and his family are well known real estate agents in the community and have made significant contributions to charitable causes. Wilson disagreed that McDonald's last name is well-respected. Based on our review of the record, we find that both parties have good reputations in the community, and while a combination of their last names might better allow their daughter to benefit from the goodwill attached to each last name, this marginal benefit, when weighed against the length of time the child has had her present last name, is not significant enough to satisfy McDonald's burden of proving that a name change would promote the child's best interest.

Having considered the Mazzone factors, we agree with the family court's conclusion that changing the child's last name to Wilson-McDonald would not be in her best interest. Accordingly, the family court's order is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

---

enough to influence a court's decision about which last name best promotes her interests.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James Reed, Respondent,

v.

Jennifer Pieper, Appellant.

Appeal From Calhoun County
William J. Wylie, Jr., Family Court Judge

Opinion No. 4837
Heard November 3, 2010 – Filed June 1, 2011

AFFIRMED

Donald Bruce Clark, of Charleston; James A. Bell, of St. George; Robert N. Rosen, of Charleston, for Appellant.

J. Michael Taylor, of Columbia; Lewis C. Lanier, of Orangeburg, for Respondent.

WILLIAMS, J.: Jennifer Pieper (Mother) appeals from the family court's order awarding custody of the parties' minor child to James Reed (Father). Further, Mother claims the family court erred in failing to grant her attorney's fees and costs. We affirm.

FACTS/PROCEDURAL HISTORY

Father and Mother were never married, but they are the parents of one child, L.R., who was born on July 28, 2005. The relationship between Father and Mother began in December 2003 while Father was married to Renae Reed. In March 2004, while Father was separated from Ms. Reed, Mother began working at one of Father's companies, and she moved into an apartment owned by one of his companies. Mother and Father began living together soon thereafter, and in November 2004, Mother discovered she was pregnant. In February 2005, Father proposed to Mother, and the parties were engaged for a short period of time until Mother returned the ring and moved in with her parents. The couple experienced many separations and attempts at reconciliation.[1]

Shortly after L.R. was born, Father commenced this action seeking custody of the child. The family court issued a *pendente lite* order, granting joint custody of the child to the parties and requiring Father to pay Mother child support. Mother and Father continued dating one another. During the pendency of this action, maternal grandmother, Linda Pearson, signed an affidavit recommending Father be awarded custody of her grandchild, L.R., while Mother obtained treatment for her emotional condition.[2] Father once again proposed marriage to Mother, and she moved back in with Father in October 2006 when L.R. was a one-year old. After another dispute in December 2006, Mother permanently moved out of Father's home and returned to her parents' home.

At the final hearing on May 12-13, 2008, the family court received testimony from the parties, their witnesses, and the guardian ad litem. After

---

[1] Father and Mother were engaged a total of four times.

[2] Notably, Linda Pearson subsequently repudiated her affidavit as to her daughter's condition at the hearing.

carefully weighing the evidence, the family court found that "both parents have an obvious love for their son" and "have experience in caring for this child." Finding both parents to be fit, the family court considered the "totality of the circumstances" and concluded it was in the best interest of L.R. to grant Father sole custody with visitation to Mother consistent with the standard visitation schedule. In addition, the family court stated both parties were to pay their own attorney's fees and costs.

On September 25, 2008, Mother timely filed a Rule 59(e), SCRCP, motion seeking to alter or amend the final order. By order dated October 20, 2008, the family court denied Mother's motion to reconsider. This appeal followed.

STANDARD OF REVIEW

On appeal from the family court, this court reviews factual and legal issues de novo. Simmons v. Simmons, Op. No. 26970 (S.C. Sup. Ct. filed May 9, 2011) (Shearhouse Adv. Sh. No. 16 at 29); see Lewis v. Lewis, Op. No. 26973 (S.C. Sup. Ct. filed May 9, 2011) (Shearhouse Adv. Sh. No. 16 at 44). Although this court reviews the family court's findings de novo, we are not required to ignore the fact that the trial court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Lewis, Op. 26973 at 46-48. The burden is upon the appellant to convince this court that the family court erred in its findings. Id. at 49-51.

With respect to custody determinations, the appellate courts have consistently shown deference to the family court in electing between fit parents. Altman v. Griffith, 372 S.C. 388, 393, 642 S.E.2d 619, 621 (Ct. App. 2007). "In gauging between fit parents as to who would better serve the best interests and welfare of the child in a custodial setting, the family court judge is in a superior position to appellate judges who are left only to review the cold record." Altman, 372 S.C. at 393, 642 S.E.2d at 622. "For obvious and compelling reasons, as an appellate court, we are reticent to substitute our judgment on the custody determination between fit parents for that of the family court judge." Id.

LAW/ANALYSIS

A. Best Interests of L.R.

Mother's only challenge to the family court's decision to award Father sole custody of L.R. is that it was against the child's best interests.[3] We disagree.

In all child custody controversies, the controlling considerations are the child's welfare and best interests. Cook v. Cobb, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978). In determining custody, the family court "must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child." Woodall, 322 S.C. at 11, 471 S.E.2d at 157. In other words, "the totality of the circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed." Parris v. Parris, 319 S.C. 308, 310, 460 S.E.2d 571, 572 (1995) (emphasis added).

The family court properly considered evidence on the strengths and weaknesses of each parent and weighed the totality of circumstances in determining the child's best interests would be served by awarding custody to Father. After extensive testimony on the custody issue from the parties, mental health professionals, and the guardian ad litem, the family court made numerous in-depth findings to support its decision to award custody of the child to Father. We find ample support in the record for these findings.

Father has three children from a previous marriage that he has successfully raised with his ex-wife, Renae Reed. Father has had sole custody of his eldest child while sharing joint custody with his ex-wife of his other two children since their divorce in 2004. Ms. Reed testified on Father's behalf at the hearing, detailing Father's exemplary history as a parent and his continued role as a father to their three children. During the hearing, Ms. Reed stated that Father spends a significant amount of time with the children, coaching his sons' sports teams, staying involved in his daughter's life, and generally having a very close relationship with each of the children. Father

[3] Mother never challenges Father's fitness as a parent.

has also taken an active role in the children's educational pursuits, spending extra time studying with his eldest son and seeking a tutor for his son's algebra class. In addition, Ms. Reed described Father's role in the care of their daughter, who was born three months premature, as exceptional. In order to care for his daughter who suffered from heart and respiratory complications, Father promptly learned the necessary training including CPR, the proper use of a nebulizer machine, and how to administer her medications. Father took all of these precautions despite Ms. Reed's occupation as a nurse. Ms. Reed's testimony credited Father for his child rearing abilities and stated that his "parenting is perfect." In short, Ms. Reed believed Father exceeded all expectations as a parent.

In addition, Father's history demonstrates the importance he places on education for himself and his children. While Ms. Reed was pregnant with Father's first child, Father went back to college to support his family. Taking out a student loan and working a forty-hour work week while attending school, Father obtained a four-year degree in three years. This educational advancement allowed Father to become a successful businessman, operating several different corporations. See Davenport v. Davenport, 265 S.C. 524, 528, 220 S.E.2d 228, 230 (1975) (stating that education and parenting skills of a parent are legitimate factors to consider in custody determinations). By contrast, the family court found Mother has generally stated goals, but she does not have a demonstrable record of taking concrete steps to achieve those goals. Moreover, Mother appears to be more focused on what "having her child taken from her" will mean to her personally, rather than what is in L.R.'s overall best interests. See Routh v. Routh, 328 S.C. 512, 516, 492 S.E.2d 415, 418 (Ct. App. 1997) (holding that a change in custody was warranted due to guardian ad litem's and psychologist's concern that mother was immature and impulsive and at times did not act in the best interests of her daughter).

Finally, the family court emphasized the stability of Father's home environment in awarding custody to Father. As a result of Father's business success and the sale of the majority of his corporations, Father works from home and maintains a flexible work schedule, which allows him to spend more time with L.R. and adjust his schedule to accommodate L.R.'s needs. See Shainwald v. Shainwald, 302 S.C. 453, 460, 395 S.E.2d 441, 446 (Ct.

App. 1990) (upholding an award of custody based largely on the father's ability to spend time with the children). Although Mother is critical of Father's personal success, it is Father's financial well-being that actually allows him to have the everyday flexibility to provide a more stable environment than Mother. See Chastain v. Chastain, 381 S.C. 295, 305, 672 S.E.2d 108, 113 (Ct. App. 2009) (affirming custody award to a husband who had a flexible work schedule and worked from home, whereas the mother's work schedule was very inflexible). In addition to being able to spend more time with L.R. than Mother, Father's home provides many opportunities for recreation and interaction with L.R.'s three half-siblings, Jimmy, age 17, Elizabeth, age 13, and Matthew, age 11, at baseball games, family outings, and meals.[4] By contrast, Mother has had several employment changes, has shown no real direction as to her future employment, and L.R. would spend as much as forty hours per week in daycare were Mother to have custody. See Gandy v. Gandy, 297 S.C. 411, 413, 377 S.E.2d 312, 313 (1989) (remanding matter to family court to consider court-appointed expert testimony that the children should be placed with the parent who was willing to stay with them and not rely on babysitters, even relatives). Moreover, although noting Mother functions well and poses no threat of harm to the child, the family court order found Mother continues to be under a doctor's care for her mental health issues and emotional problems. Mother's continued treatment for depression was a significant factor in the family court finding Father would provide a more stable, healthy environment for L.R.

The family court's in-depth findings show it properly considered the fitness of each parent and the relevant factors that would affect L.R.'s best interests in making its custody determination. See Pirayesh v. Pirayesh, 359 S.C. 284, 296, 596 S.E.2d 505, 512 (Ct. App. 2004) ("When determining to whom custody shall be awarded, the court should consider all the circumstances of the particular case and all relevant factors must be taken into consideration.").

---

[4] The dissent comments that these circumstances are now insignificant because of the passage of time. Our review is limited to the record from the family court hearing and cannot include facts not presented to the family court, nor can we speculate about any changed circumstances that may exist today.

We note a majority of Mother's argument on appeal centers around the lengthy and dramatic history of the parties' relationship with little focus on why Mother is better suited to be L.R.'s primary caretaker. While much of both parties' testimony at the final hearing focused on the parties' relationship, Mother has failed to sufficiently present evidence proving that the family court's award of custody to Father was contrary to the child's best interests. See Jones v. Ard, 265 S.C. 423, 426, 219 S.E.2d 358, 359-60 (1975) (finding that when both parties are fit and proper to have custody, the family court must make the election, and [the appellate court] must defer to its decision when the family court's findings and conclusions are supported by the record).

On appeal, Mother asserts that as the primary caretaker of L.R., the child's best interests would be served by awarding her custody. Mother's argument is without merit. L.R. was born on July 28, 2005 and, shortly thereafter, Father filed this action seeking custody of the child. Not even six months later, on December 12, 2005, the family court issued a *pendente lite* order granting Father and Mother joint custody of L.R. Moreover, after the family court's final order on August 28, 2008, Father has had sole custody of L.R. Since L.R. was six months old, Father has either had joint or sole custody of his son. There is no evidence in the record establishing that the Mother has been the primary caretaker of L.R. and the family court did not make any finding to that effect. As a result, Mother's argument that her role as primary caretaker weighs in her favor in determining L.R.'s best interests is misplaced.

Mother argues and the dissent notes the underlying reason Mother should have custody is evidence in the record of Father's manipulative and controlling nature. In particular, the dissent argues L.R.'s maternal grandmother, Linda Pearson, was manipulated into signing an affidavit recommending Father be awarded custody of her grandchild, L.R., while Mother obtained treatment. It was only at trial that Mrs. Pearson recanted her affidavit, testifying she signed the affidavit because Father was going to use it to "force [Mother] to come back" to him and not to obtain custody of L.R. But the family court did not find the grandmother's extraordinary act of

submitting an affidavit unfavorable to her daughter to have been obtained through manipulation by Father.

Finally, Mother argues Father's "promiscuity actually has had and will have an adverse effect on [L.R.]." Mother asserts Father's promiscuity in having five children with three different women and his general lack of morals would not provide the best environment for L.R. This issue is not preserved for our review. Father's alleged promiscuity was not raised to or ruled upon by the family court. In addition, the issue was not addressed in the final order or raised in the motion for reconsideration. Therefore, this issue is not properly before this court for review. See S.C. Dep't. of Soc. Servs. v. Basnight, 346 S.C. 241, 252, 551 S.E.2d 274, 280 (2001) (holding an issue not raised to or ruled on by the family court should not be considered by the appellate court); see also Richland Cnty. v. Carolina Chloride, Inc., 382 S.C. 634, 656, 677 S.E.2d 892, 903 (Ct. App. 2009) (finding appellant waived issue by not arguing it in the initial appellate brief). We address this issue, however, because "procedural rules are subservient to the court's duty to zealously guard the rights of minors." Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 107, 536 S.E.2d 372, 374 (2000).

In South Carolina, a parent's morality, while a proper consideration in custody disputes, is "limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child." Davenport, 265 S.C. at 527, 220 S.E.2d at 230; see also Shainwald, 302 S.C. at 460, 395 S.E.2d at 445-46; Stroman v. Williams, 291 S.C. 376, 378, 353 S.E.2d 704, 705 (Ct. App. 1987). Thus, conduct that is immoral must also be shown to be detrimental to the welfare of a child before it is of legal significance in a custody dispute. Stroman, 291 S.C. at 379, 353 S.E.2d at 705. However, flagrant promiscuity inevitably affects the welfare of the child and establishes "a watershed in the court's quest to protect the best interests of a minor child." Boykin v. Boykin, 296 S.C. 100, 102, 370 S.E.2d 884, 886 (Ct. App. 1998).

Here, Mother asserts Father allowed his ex-girlfriend and the mother of his fifth child to stay overnight at his house while his other children were present. Mother did not present any evidence that L.R. observed the ex-girlfriend unclothed or that any sexual activity occurred in his presence. In essence, there is no evidence that L.R. was exposed to an adulterous

relationship or any other immoral conduct detrimental to his welfare. See Kisling v. Allison, 343 S.C. 674, 683, 541 S.E.2d 273, 277 (Ct. App. 2001) (finding a father's decision to not expose the minor child to his new relationship until it was six months old was a significant factor in determining custody of a child in South Carolina). Moreover, there is no evidence that Father's conduct rose to the level of flagrant promiscuity. See Chastain, 381 S.C. at 303, 672 S.E.2d at 112 (reversing the family court's finding of flagrant promiscuity when wife engaged in two extra-marital affairs, while husband engaged in one extra-marital affair). Finally, we note Mother's challenge to Father's lifestyle and the alleged detrimental effect it has on L.R. is in essence the same relationship and position Mother once occupied with regards to Father's children from his previous marriage.

Admittedly, neither parent is perfect. The record certainly does not reflect that the evidence is so clearly in Mother's favor to warrant a finding of an abuse of discretion by the family court, and Mother has failed to sustain her burden of convincing this court that the family court did not consider L.R.'s welfare and best interests in its custody decision. See Shorb v. Shorb, 372 S.C. 623, 628, 643 S.E.2d 124, 127 (Ct. App. 2007) ("The burden is upon the appellant to convince this court that the family court erred in its findings of fact."). Father appears to be more focused on the overall welfare and care of L.R. The record shows the family court's decision was buttressed by the fact Father has demonstrated very good parenting skills in raising three children. In our judgment, the record supports the view that L.R.'s best interest is served by an award of custody to Father.

B. Attorney's Fees and Costs

Mother maintains the family court abused its discretion in refusing to award her attorney's fees and costs.[5] Specifically, Mother argues the family court did not properly weigh the requisite factors to award attorney's fees because its decision was based entirely on the lack of a beneficial result. We disagree.

[5] Mother incurred $14,225 in attorney's fees and $506.50 in costs.

Section 20-3-130(H) of the South Carolina Code (Supp. 2010) authorizes the family court to order payment of litigation expenses, including attorney's fees, to either party in a divorce action. An award of attorney's fees rests within the sound discretion of the family court and should not be disturbed on appeal absent an abuse of discretion. Doe v. Doe, 319 S.C. 151, 157, 459 S.E.2d 892, 896 (Ct. App. 1995). The family court is given broad discretion in this area. Id. "The same considerations that apply to awarding attorney's fees also apply to awarding litigation expenses." Patel v. Patel, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004) (citing Nienow v. Nienow, 268 S.C. 161, 173, 232 S.E.2d 504, 510 (1977)).

In determining whether attorney's fees should be awarded, the following factors should be considered: (1) the party's ability to pay his or her own attorney's fees; (2) the beneficial results obtained by the attorney; (3) the parties' respective financial conditions; and (4) the effect of the attorney's fees on each party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992).

The family court did not abuse its discretion in declining to award either party attorney's fees in this matter. Although the family court did not delineate its consideration of the E.D.M. factors, this court may, through its own view of the preponderance of the evidence, find that the family court's decision regarding attorney's fees was proper. See Henggeler v. Hanson, 333 S.C. 598, 601, 510 S.E.2d 722, 724 (Ct. App. 1998) ("On appeal from the family court, this court has jurisdiction to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence."). Our review of the evidence is in accord with the family court's finding.

Because Father succeeded in obtaining custody of the child, the "beneficial results" factor from E.D.M. weighs in Father's favor. Moreover, we find the family court implicitly considered the financial disparity between the parties and the effect its decision would have on Mother's standard of living by requiring Father to be solely responsible for paying the guardian ad litem's outstanding fees, and in only requiring Mother to pay $100 per month in child support, despite being the noncustodial parent. Therefore, considering the E.D.M. factors under this court's view of the preponderance

of the evidence, we find the family court did not abuse its discretion in declining to award either party attorney's fees in this matter.

CONCLUSION

For the foregoing reasons, the family court's order is

AFFIRMED.

FEW, C.J., concurs. SHORT, J., dissents in a separate opinion.

SHORT, J. (dissenting):

I respectfully dissent. In my view, the best interests of L.R. would be served by awarding custody to Mother. See Simmons v. Simmons, Op. No. 26970 (S.C. Sup. Ct. filed May 9, 2011) (Shearouse Adv. Sh. No. 16 at 29) (finding on appeal from the family court, the appellate court reviews factual and legal issues de novo).

Mother raises numerous meritorious issues in her appeal. First, throughout the tumultuous time these parties were together, Mother was a stay-at-home mom and the primary caretaker of L.R.[6] The guardian ad litem found L.R. to be an active, healthy, and happy child. The guardian found both parents to be fit. I find Mother's role as primary caretaker weighs in her favor in determining custody.

The family court considered Father's additional time to devote to L.R., and that L.R. would be in daycare if living with Mother. However, Father admitted he intended to enroll L.R. in a pre-kindergarten program. I find this is not a factor weighing in Father's favor as L.R. will be in school now regardless of which parent is awarded custody.

The family court also considered that L.R. would have more opportunity for interaction with his half-siblings in the custody of Father. Furthermore, the family court found Father had demonstrated very good parenting skills in the care, education, and upbringing of his older children.

[6] L.R., born July 28, 2005, was almost three at the time of the hearing.

The only half-sibling living full-time with Father at the time of the hearing was Father's seventeen-year-old son. Father's other two children, aged thirteen and eleven at the time, lived either with their mother, or with Father part-time. The majority of Father's parenting skills at the time of the hearing were exercised as a part-time parent. At this time, all of these children have either completed high school, or are very close to completion, rendering this consideration relatively insignificant.

Finally, the family court relied on Father's financial means and education. As noted by Mother, Father's wealth will be equally available to support L.R. regardless of which parent is awarded custody. As to Father's education compared to Mother's education, the family court failed to consider that Mother was a stay-at-home mom while living with Father, and his influence in L.R.'s future education should, like his financial means, be available to L.R. regardless of whether or not Father has primary custody.

Based on the above factors, I find the parties in relative parity as to the best interests of L.R. in determining custody. Mother also raises the issue of the impact of Father's promiscuity on L.R.[7] Although certainly a concern, the primary issue underlying my view that Mother should have custody is the evidence in the record of Father's manipulative and controlling nature.

For instance, the psychologist[8] concluded the relationship between the parties was not balanced. Father required Mother submit to his control. Father informed the psychologist that he would prefer the child be in Mother's care as long as Mother was not irresponsible, abusive, or neglectful. According to the psychologist, Mother did not present a significant threat of harm of negligent or abusive parenting.

There are other instances of Father's controlling and manipulative nature in the record. For example, L.R.'s maternal grandmother (Grandmother) testified Father manipulated her into signing an affidavit that

---

[7] Father has children with three women, and in September 2008, he married a pregnant 27-year-old woman.

[8] Per order of the family court, Father and Mother were referred for psychological evaluation.

Father had drafted, in which Grandmother recommends Father receive custody, with Mother granted visitation supervised by Grandmother. At trial, Grandmother testified she signed the affidavit because Father manipulated her into believing he was going to use it to "force [Mother] to come back" to marry him, and that he would never use it to take L.R. from Mother. Another example of Father's need to control was reported at trial by a parent educator who worked with L.R. and Mother for two years to assess L.R.'s developmental progress. The educator testified Father threatened to report her to the State Department of Education because she worked with L.R. and Mother without his participation. In another manipulative act, Father reported Mother for criminal domestic violence based on an argument during which Mother slapped Father.[9] According to the Sheriff's Department Incident Report, Father wanted to file the report "for when [they] go to family court for custody of the baby." Father constantly threatened Mother with her loss of custody if she did not follow his directives, be they reconciling with him or other matters. During one reconciliation period, Father presented Mother with an agreement that would grant him custody in exchange for agreeing to marry Mother and have another child with her. This reconciliation did not last long and ended with Father moving all of Mother and L.R.'s belongings to Grandmother's house and posting a "no trespassing" notice at their house.

Based on my view of the preponderance of the record, I find no evidence to support the removal of L.R. from Mother, his primary caretaker.[10] See Patel v. Patel, 359 S.C. 515, 527, 599 S.E.2d 114, 120

[9] Mother reported Father goaded her into the slap, which she acknowledged was inappropriate.

[10] Although the family court made no specific finding as to which parent was L.R.'s primary caretaker, there is evidence that Mother was in actuality the primary caretaker: 1) Mother was sole caretaker for first two months of L.R.'s life; 2) for a period of time, L.R. visited Father only if Mother was also visiting Father; 3) the parties exercised the joint custody arrangement for only ten months before Mother moved back in with Father in October 2006; 4) Mother testified she kept L.R. numerous times at Father's house during his week; and 5) the parties did not separate for the last time until approximately nine months before the final hearing.

(2004) ("Although there is no rule of law requiring custody be awarded to the primary caretaker, there is an assumption that custody will be awarded to the primary caretaker."). Accordingly, I would reverse.