The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499

N O T I C E
(AMENDED)

IN THE MATTER OF ARTHUR T. MEEDER, PETITIONER

Arthur T. Meeder, who was definitely suspended from the practice of law for a period of eleven (11) months and thereafter disbarred, has petitioned for readmission as a member of the Bar pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The Committee on Character and Fitness has scheduled a hearing in this regard on Friday, May 20, 2005, beginning at 2:00 p.m., in the Court Room of the Supreme Court Building, 1231 Gervais Street, Columbia, South Carolina.

Any individual may appear before the Committee in support of, or in opposition to, the petition.

Richard B. Ness, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina
April 15, 2005

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19

May 2, 2005

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UNPUBLISHED OPINIONS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

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2005-UP-301-Shirley J. Griffin and Henry R. Griffin and Jacquelyn G. Burke and Michael J. Burke v. White Oak Properties, LLC, Eugene Grissom McDonald, III, a/k/a Gris McDonald, and Home Shop Realty Company
(Richland, Judge L. Casey Manning)

2005-UP-302-In the interest of S., Damion, a juvenile under the age of seventeen
(Richland, Judge Marion D. Myers)

PETITIONS FOR REHEARING

3902-Cole v. Raut	Pending
3932-Nasser-Moghaddassi v. Moghaddassi	Pending
3941-State v. Green	Pending
3946-Conway v. Charleston Lincoln	Pending
3964-Jones v. State Farm	Pending
3965-State v. McCall	Pending
3966-Lanier v. Lanier	Pending
3968-Abu-Shawareb v. S.C. State University	Pending
3970-State v. Davis	Pending
2005-UP-025-Hill v. City of Sumter et al.	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending
2005-UP-067-Chisholm v. Chisholm	Pending
2005-UP-110-State v. Dudley	Pending
2005-UP-121-State v. Delesline	Pending
2005-UP-141-Byrd v. Byrd	Pending
2005-UP-156-In the interest of S., Damion	Granted 04/25/05

2005-UP-174-Suber v. Suber	Pending
2005-UP-191-Woodall v. Williamson	Pending
2005-UP-192-Mathias v. Rural Comm. Ins.	Pending
2005-UP-195-Babb v. Floyd	Pending
2005-UP-201-Brown v. McCray	Pending
2005-UP-203-Germeroth v. Thomasson Brothers	Pending
2005-UP-209-Lundstrom v. Lundstrom	Pending
2005-UP-216-Hiott v. Kelly et al.	Pending
2005-UP-219-Ralphs v. Trexler	Pending
2005-UP-224-Dallas v. Todd et al.	Pending
2005-UP-237-Williams v. New Century Investigation	Pending
2005-UP-240-International Union v. Local 273	Pending
2005-UP-255-Towne v. State Farm	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3676-Avant v. Willowglen Academy	Pending
3684-State v. Sanders	Pending
3714-State v. Burgess	Pending
3717-Palmetto Homes v. Bradley et al.	Pending
3720-Quigley et al. v. Rider et al.	Pending
3724-State v. Pagan	Pending
3730-State v. Anderson	Pending

3740-Tillotson v. Keith Smith Builders	Pending
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending
3747-RIM Associates v. Blackwell	Pending
3749-Goldston v. State Farm	Pending
3750-Martin v. Companion Health	Pending
3751-State v. Barnett	Pending
3755-Hatfield v. Van Epps	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3758-Walsh v. Woods	Pending
3759-QZO, Inc. v. Moyer	Denied 04/25/05
3762-Jeter v. SCDOT	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Pending
3767-Hunt v. S.C. Forestry Comm.	Pending
3772-State v. Douglas	Pending
3775-Gordon v. Drews	Pending
3776-Boyd v. Southern Bell	Pending
3777-State v. Childers	Pending
3778-Hunting v. Elders	Pending
3779-Home Port v. Moore	Pending
3780-Pope v. Gordon	Pending

3784-State v. Miller	Pending
3786-Hardin v. SCDOT	Pending
3787-State v. Horton	Pending
3790-State v. Reese	Pending
3794-State v. Pipkin	Pending
3795-State v. Hill	Pending
3800-Ex parte Beard: Watkins v. Newsome	Pending
3802-Roberson v. Roberson	Pending
3808-Wynn v. Wynn	Pending
3809-State v. Belviso	Pending
3810-Bowers v. SCDOT	Pending
3813-Bursey v. SCDHEC & SCE&G	Pending
3820-Camden v. Hilton	Pending
3821-Venture Engineering v. Tishman	Pending
3825-Messer v. Messer	Pending
3830-State v. Robinson	Pending
3832-Carter v. USC	Pending
3833-Ellison v. Frigidaire Home Products	Pending
3835-State v. Bowie	Pending
3836-State v. Gillian	Pending
3841-Stone v. Traylor Brothers	Pending

3842-State v. Gonzales	Pending
3843-Therrell v. Jerry's Inc.	Pending
3847-Sponar v. SCDPS	Pending
3848-Steffenson v. Olsen	Pending
3849-Clear Channel Outdoor v. City of Myrtle Beach	Pending
3850-SC Uninsured Employer's v. House	Pending
3851-Shapemasters Golf Course Builders v. Shapemasters, Inc.	Pending
3852-Holroyd v. Requa	Pending
3853-McClain v. Pactiv Corp.	Pending
3855-State v. Slater	Pending
3857-Key Corporate v. County of Beaufort	Pending
3858-O'Braitis v. O'Braitis	Pending
3860-State v. Lee	Pending
3861-Grant v. Grant Textiles et al.	Pending
3863-Burgess v. Nationwide	Pending
3864-State v. Weaver	Pending
3865-DuRant v. SCDHEC et al	Pending
3866-State v. Dunbar	Pending
3871-Cannon v. SCDPPPS	Pending
3877-B&A Development v. Georgetown Cty.	Pending
3879-Doe v. Marion (Graf)	Pending

3883-Shadwell v. Craigie	Pending
3884-Windsor Green v. Allied Signal et al.	Pending
3890-State v. Broaddus	Pending
3903-Montgomery v. CSX Transportation	Pending
3906-State v. James	Pending
3910-State v. Guillebeaux	Pending
3911-Stoddard v. Riddle	Pending
3912-State v. Brown	Pending
3914-Knox v. Greenville Hospital	Pending
3917-State v. Hubner	Pending
3919-Mulherin et al. v. Cl. Timeshare et al.	Pending
3924-Tallent v. SCDOT	Pending
3926-Brenco v. SCDOT	Pending
3936-Rife v. Hitachi Construction et al.	Pending
3943-Arnal v. Arnal	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-642-State v. Moyers	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-736-State v. Ward	Pending

2003-UP-757-State v. Johnson	Pending
2004-UP-098-Smoak v. McCullough	Pending
2004-UP-100-Westbury v. Dorchester Co. et al.	Denied 04/21/05
2004-UP-110-Page v. Page	Pending
2004-UP-119-Williams v. Pioneer Machinery	Pending
2004-UP-142-State v. Morman	Pending
2004-UP-147-KCI Management v. Post	Pending
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Pending
2004-UP-153-Walters v.Walters	Pending
2004-UP-200-Krenn v. State Farm	Pending
2004-UP-215-State v. Jones	Pending
2004-UP-219-State v. Brewer	Pending
2004-UP-221-Grate v. Bone	Pending
2004-UP-229-State v. Scott	Pending
2004-UP-237-In the interest of B., Justin	Pending
2004-UP-238-Loadholt v. Cribb et al.	Pending
2004-UP-241-Richie v. Ingle	Pending
2004-UP-247-Carolina Power v. Lynches River Electric	Pending
2004-UP-251-State v. Davis	Pending
2004-UP-256-State v. Settles	Pending

2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-289-E. Hathaway Const. v. Eli	Pending
2004-UP-306-State v. Lopez	Pending
2004-UP-319-Bennett v. State of S. C. et al.	Pending
2004-UP-336-Clayton v. Lands Inn, Inc.	Pending
2004-UP-344-Dunham v. Coffey	Pending
2004-UP-346-State v. Brinson	Pending
2004-UP-356-Century 21 v. Benford	Pending
2004-UP-359-State v. Hart	Pending
2004-UP-362-Goldman v. RBC, Inc.	Pending
2004-UP-366-Armstong v. Food Lion	Pending
2004-UP-371-Landmark et al. v. Pierce et al.	Pending
2004-UP-381-Crawford v. Crawford	Pending
2004-UP-394-State v. Daniels	Pending
2004-UP-397-Foster v. Greenville Memorial	Pending
2004-UP-407-Small v. Piper	Pending
2004-UP-409-State v. Moyers	Pending
2004-UP-410-State v. White	Pending
2004-UP-422-State v. Durant	Pending
2004-UP-427-State v. Rogers	Pending
2004-UP-430-Johnson v. S.C. Dep’t of Probation	Pending

2004-UP-439-State v. Bennett	Pending
2004-UP-460-State v. Meggs	Pending
2004-UP-482-Wachovia Bank v. Winona Grain Co.	Pending
2004-UP-485-State v. Rayfield	Pending
2004-UP-496-Skinner v. Trident Medical	Pending
2004-UP-500-Dunbar v. Johnson	Pending
2004-UP-504-Browning v. Bi-Lo, Inc.	Pending
2004-UP-505-Calhoun v. Marlboro Cty. School	Pending
2004-UP-513-BB&T v. Taylor	Pending
2004-UP-517-State v. Grant	Pending
2004-UP-520-Babb v. Thompson et al (5)	Pending
2004-UP-521-Davis et al. v. Dacus	Pending
2004-UP-537-Reliford v. Mitsubishi Motors	Pending
2004-UP-540-SCDSS v. Martin	Pending
2004-UP-542-Geathers v. 3V, Inc.	Pending
2004-UP-546-Reaves v. Reaves	Pending
2004-UP-550-Lee v. Bunch	Pending
2004-UP-554-Fici v. Koon	Pending
2004-UP-555-Rogers v. Griffith	Pending
2004-UP-556-Mims v. Meyers	Pending
2004-UP-560-State v. Garrard	Pending

2004-UP-596-State v. Anderson	Pending
2004-UP-598-Anchor Bank v. Babb	Pending
2004-UP-600-McKinney v. McKinney	Pending
2004-UP-605-Moring v. Moring	Pending
2004-UP-606-Walker Investment v. Carolina First	Pending
2004-UP-607-State v. Randolph	Pending
2004-UP-609-Davis v. Nationwide Mutual	Pending
2004-UP-610-Owenby v. Kiesau et al.	Pending
2004-UP-613-Flanary v. Flanary	Pending
2004-UP-617-Raysor v. State	Pending
2004-UP-627-Roberson v. State	Pending
2004-UP-632-State v. Ford	Pending
2004-UP-635-Simpson v. Omnova Solutions	Pending
2004-UP-650-Garrett v. Est. of Jerry Marsh	Pending
2004-UP-654-State v. Chancy	Pending
2004-UP-657-SCDSS v. Cannon	Pending
2004-UP-658-State v. Young	Pending
2005-UP-001-Hill v. Marsh et al.	Pending
2005-UP-002-Lowe v. Lowe	Pending
2005-UP-008-Mantekas v. SCDOT	Pending
2005-UP-014-Dodd v. Exide Battery Corp. et al.	Pending

2005-UP-016-Averette v. Browning	Pending
2005-UP-022-Ex parte Dunagin	Pending
2005-UP-023-Cantrell v. SCDPS	Pending
2005-UP-039-Keels v. Poston	Pending
2005-UP-046-CCDSS v. Grant	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony L. Miller, Jr., Plaintiff,

v.

Rashid Michael Aiken, Defendant.

CERTIFIED QUESTIONS

Opinion No. 25976
Heard April 5, 2005 – Filed May 2, 2005

CERTIFIED QUESTIONS ANSWERED

William G. Jenkins, Jr., of Hilton Head Island, for Plaintiff.

Max G. Mahaffee, of Grimball & Cabaniss, L.L.C., of Charleston, for Defendant.

JUSTICE BURNETT: Pursuant to Rule 228, SCACR, we accepted the following questions on certification from the United States District Court for the District of South Carolina:

I. Is an automobile insurer which provides only non-liability "collision and other named perils" coverage an "automobile insurance carrier" under S.C. Code Ann. § 38-77-160 (2002), and thus required to offer underinsured motorist (UIM) coverage?

II. If such an insurer is required to make an offer of UIM coverage, and no such offer was made, does the UIM coverage imposed by South Carolina law extend to the limits of a separate (though simultaneously obtained) liability policy?

FACTUAL/PROCEDURAL BACKROUND

The plaintiff was injured in an automobile accident. Plaintiff was a passenger in a car being driven by the defendant. Defendant was at fault in causing the accident. Plaintiff has suffered damages which exceed the extent of all coverages which could be applicable.

At the time of the accident, Plaintiff was residing with his father, who owned and operated a tractor-trailer that was not involved in the accident. Plaintiff's father obtained non-trucking insurance on the tractor-trailer from two separate companies, but through a single agent. The insurance consisted of: (1) liability coverage up to $500,000 from Connecticut Indemnity Co. and (2) collision coverage up to $18,000 from Occidental Fire & Casualty Company. Neither Connecticut nor Occidental offered UIM coverage to Plaintiff's father.

STANDARD OF REVIEW

In answering a certified question raising a novel question of law, the Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and -330 (1976 & Supp. 2004), and S.C. Code Ann § 14-8-200 (Supp. 2004)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same); Antley v. New York Life Ins. Co., 139 S.C. 23, 30, 137 S.E. 199, 201 (1927) ("In [a] state of conflict between the decisions, it is up to the court to

'choose ye this day whom ye will serve'; and, in the duty of this decision, the court has the right to determine which doctrine best appeals to its sense of law, justice, and right.").

LAW/ANALYSIS

Plaintiff argues an automobile insurer which provides only collision insurance, is an "automobile insurance carrier" under S.C. Code Ann. § 38-77-160, and is thus required to offer UIM coverage. Section 38-77-160 provides, in relevant part:

> **Automobile insurance carriers** shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed in Section 38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute.

(emphasis added).

The question we must decide is whether an insurer which provides only non-liability "collision and other named perils" coverage constitutes an "automobile insurance carrier" under Section 38-77-160.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In ascertaining the intent of the Legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole. Mid-State Automotive Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). However

plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect. Id.

The term "automobile insurance *carrier*" is not defined in the pertinent South Carolina statutes. South Carolina Code Ann. § 38-77-30(1) (2002) defines "automobile insurance" as follows:

> "Automobile insurance" means automobile bodily injury and property damage liability insurance, including medical payments, and uninsured motorist coverage, and automobile physical damage**, collision**, fire, theft, combined additional coverage, and similar automobile physical damage insurance and economic loss benefits as provided by this chapter written or offered by automobile insurers.

(emphasis added).

Plaintiff urges us to conclude that because Section 38-77-30(1) specifically includes "collision" and other perils insurance, an automobile insurer providing only non-liability "collision and other named perils" coverage is an "automobile insurance carrier" under S.C. Code Ann. § 38-77-160 and is required to offer UIM coverage.

Plaintiff also cites Davis v. Budget & Control Bd., 298 S.C. 135, 378 S.E.2d 604 (Ct. App. 1989). The issue in Davis was whether the State Insurance Reserve Fund must offer UIM coverage to those state agencies and political subdivisions to which it provides motor vehicle liability coverage. The Court of Appeals considered whether the State Insurance Reserve Fund is an "automobile insurance carrier" under Section 38-77-160 and stated the following:

> The term "automobile insurance carrier" is not defined by statute. However, read in the context of other statutes *in pari materia*, it is clearly synonymous with the terms "insurer" and "automobile insurer." . . . Section 38-77-30(2) . . . defines "automobile insurer" to mean "an insurer licensed to do business in South Carolina and authorized to issue automobile insurance policies." Section 38-1-20(25) . . . defines "insurer" to include
>
> > any corporation, fraternal organization, . . . other association, partnership, society, order, individual, or aggregation of individuals engaging or proposing or attempting to engage as principals in any kind of insurance or surety business . . . .

Davis, 298 S.C. at 137-138, 378 S.E.2d at 606-607.

The Court of Appeals concluded the State Insurance Reserve Fund did not fall under either definition and thus was not required to offer UIM coverage.[1] Plaintiff argues, that unlike the State Insurance Reserve Fund, Occidental is an automobile insurance carrier because Occidental admits it is an automobile insurer. Therefore, Occidental was required to offer UIM coverage. We agree Occidental is an automobile insurance carrier. However, we conclude an automobile insurer providing **only** collision insurance to its insured should not be required to make a meaningful offer of UIM.

First, to accept Plaintiff's argument requiring an insurer providing only collision insurance to make a meaningful offer of UIM would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature. Section 38-77-160 requires an offer of optional UIM

[1] The Court of Appeals concluded the State Insurance Reserve Fund is a special fund established and administered by the State Budget and Control Board under direct authority from the General Assembly and is thus not a corporation, fraternal organization, partnership, etc. Davis, 298 S.C. at 138, 378 S.E.2d at 606.

coverage "up to the limits of the liability coverage." If an automobile insurer providing only collision insurance to its insured falls within the UIM requirements of Section 38-77-160, then arguably under the statute, it must provide liability coverage up to the amount provided by another insurer despite the fact the collision insurer never contracted to provide liability insurance. If interpreted broadly, it would also require an insurer providing only collision insurance to the insured to make a meaningful offer of UIM to an insured who previously bought liability insurance from another carrier. This would be a far-reaching conclusion, which would require a subsequent insurer providing only collision insurance to determine what, if any, liability insurance the insured may have with another carrier. We do not believe the Legislature intended an insurer providing only collision coverage be subject to potential liability in amounts under a contract to which it was not a party.

Second, Davis provides limited guidance in this case. The only issue before the Court of Appeals was whether the State Insurance Reserve Fund, a unique entity, was an "automobile insurance carrier." It is undisputed in this case that Occidental is an automobile insurance carrier. The conclusion in Davis is inapposite under the facts of this case.

CONCLUSION

For the foregoing reasons, we conclude the "meaningful offer" provision under § 38-77-160 is triggered only when an insurer offers liability insurance and does not require an insurer providing only collision coverage to make an offer of UIM. Accordingly, we answer the first certified question: no. Our disposition of this issue makes it unnecessary to address the second certified question.

CERTIFIED QUESTIONS ANSWERED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas Durrette Wooten, Jr.,	Plaintiff,
v.	
Mona Rae Wooten,	Defendant and Third Party Plaintiff,
v.	
Pam Perry,	Third Party Defendant,
of whom Thomas Durrette Wooten, Jr., is	Petitioner/Respondent
and Mona Rae Wooten, is	Respondent/Petitioner.

AND

Thomas Durrette Wooten, Jr.,	Respondent,
v.	
Mona Rae Howell Wooten,	Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Judy C. Bridges, Family Court Judge

Opinion No. 25977
Heard March 2, 2005 - Filed May 2, 2005

AFFIRMED IN PART; REVERSED IN PART

Robert N. Rosen of Rosen Law Firm, LLC, of Charleston, and Donald B. Clark, of Charleston, for Mona Rae Wooten (Respondent/Petitioner and Petitioner).

James T. McLaren and C. Dixon Lee, III, both of McLaren & Lee, of Columbia; and Lon H. Shull, III, of Andrews & Shull, PC, of Mt. Pleasant, for Thomas Durrette Wooten, Jr. (Petitioner/Respondent and Respondent).

JUSTICE BURNETT: This divorce case raises issues related to equitable distribution and alimony. We granted both parties' petitions for a writ of certiorari in one appeal and a certiorari petition in the second appeal to review issues addressed in two opinions issued by the Court of Appeals. Wooten v. Wooten, 356 S.C. 473, 589 S.E.2d 769 (Ct. App. 2003); Wooten v. Wooten, 358 S.C. 54, 594 S.E.2d 854 (Ct. App. 2003). We consolidate the two appeals for review and resolution. See Rule 214, SCACR. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

Thomas D. Wooten, Jr. (Husband) and Mona Rae Wooten (Wife) were married in 1976. The couple met in Columbia while Husband was in medical residency training and moved to Johns Island in 1981, where they lived until Husband moved out of the marital home in 1999. Both parties had adulterous affairs in the mid-1980s, but admitted the affairs to each other, attended counseling sessions, and reconciled. Wife testified Husband's

decision to leave surprised her and she believed their marriage, while not perfect, was solid.

Husband, now age 56, is an anesthesiologist with a gross annual income of $217,000. Wife, a registered nurse by training, is a county deputy coroner with a gross annual income of $47,000. After moving to Johns Island, Wife stayed home for several years to care for the couple's three young children. The children were emancipated at the time of trial. Wife also managed the billing of Husband's patients to increase the family's income. Wife's business duties ended in 1987 when Husband hired a secretary to do the billing and then later merged his practice with other anesthesiologists.

The couple and their children lived an affluent lifestyle. They extensively renovated and expanded their home in the early 1980s and often entertained family and friends on weekends at the home and on their boat. Husband frequently went fishing and hunting. They belonged to a country club and regularly went out to dinner. Husband bought and sold several boats during the marriage, including at least one capable of deep-sea fishing trips, and kept two boats valued at $30,000 as part of his division of the couple's personal property.

Husband began a adulterous relationship before marital litigation commenced. Husband admitted his misconduct and has not appealed the family court's grant of a divorce to Wife on the ground of adultery.

The parties agreed on an equal division of the $1.3 million marital estate, which consisted primarily of the $675,000 marital home, which was subject to mortgages totaling $230,625; Husband's retirement and pension accounts of $844,026; the $41,000 valuation of Husband's interest in his medical practice; and Wife's retirement account of $11,077.

The family court, essentially adopting a proposal offered by Wife's accountant, divided the marital assets equally by awarding the marital home to Wife and the bulk of Husband's retirement accounts to him. Husband also was ordered to pay Wife $4,300 per month in alimony, with

Wife receiving $2,867 per month after taxes. The family court denied Wife's request Husband secure the alimony award by maintaining a life insurance policy naming her as beneficiary. The family court ordered Husband to pay Wife's attorney's fees of $52,917.

ISSUES

I. Did the Court of Appeals err in reversing the family court's decision to award the marital home to Wife in equitably distributing the marital estate?

II. Did the Court of Appeals err in reversing the family court's decision to award a credit card debt, incurred by Wife after marital litigation began, to Husband in equitably distributing the marital estate?

III. Did the Court of Appeals err in affirming the family court's decision not to require Husband to secure an alimony award to Wife with a life insurance policy naming Wife as beneficiary?

IV. Did the Court of Appeals err in affirming the family court's decision to require Husband to pay Wife's attorney's fees and costs, where the Court of Appeals reversed the family court's decision in favor of Wife on the primary issues in dispute?

STANDARD OF REVIEW

In appeals from the family court, an appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992); Owens v. Owens, 320 S.C. 543, 466 S.E.2d 373 (Ct. App. 1996). This broad scope of review does not, however, require the appellate court to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 279 S.E.2d 616 (1981). Neither is the appellate court required to ignore the fact that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight

to their testimony. Cherry v. Thomasson, 276 S.C. 524, 280 S.E.2d 541 (1981).

LAW AND ANALYSIS

I. MARITAL HOME

Testimony during the five-day trial focused primarily on the equitable division of the two major marital assets – the marital home and the retirement accounts. Husband sought to have the assets divided equally by awarding half the retirement accounts to each, selling the house to take full advantage of the $500,000 capital gains tax exclusion for married spouses, and dividing the sale proceeds so that each party could purchase a smaller house with no mortgage.

Husband and his accountant testified that, if Wife were awarded the home, Husband would suffer tax and withdrawal penalties equaling fifty-one percent of any funds he withdrew if required to liquidate his retirement accounts to satisfy the equitable division award and make a substantial down-payment on a home for himself. Wife sought to keep the house as part of her division of the marital estate.

The family court divided the primary marital property and debts in a manner which gave each party a net total of $664,078. Husband received assets of $590,087 in IRA retirement funds, $116,543 in his medical practice's retirement pension, the $41,000 value of his medical practice, and debt of $71,230 (representing 75 percent of the home equity line) and a credit card debt of $12,322. Wife received assets of the $675,000 marital home, $137,395 from Husband's IRA account, her retirement fund of $11,077, and debts of $135,651 for the first mortgage on the marital home and $23,743 (representing 25 percent of the home equity line).[1]

[1] Recognizing the potential difficulty of making joint payments, the family court ordered that Wife's portion of the home equity line ($23,743) be deducted from Wife's portion of the retirement accounts, and Husband would

continued . . .

The family court did not consider Husband's fault in awarding the home to Wife, but primarily considered the length of the marriage, Wife's needs, the parties' lifestyle during the marriage, and Husband's ability to pay. The family court did not award the home as an incident of support, but as an asset to be equitably divided, and did not consider the custody or interests of the children because they were emancipated. Further, the family court did not consider speculative tax ramifications related to either the potential sale of the home by Wife or potential early withdrawals from retirement accounts by Husband.

A divided Court of Appeals reversed, with the majority finding the family court abused its discretion by performing an inequitable "in-kind" distribution of dissimilar assets and by failing to consider the tax consequences of Husband's necessary liquidation of his retirement accounts. Wooten, 358 S.C. at 60-64, 594 S.E.2d at 858-60.

Wife argues the Court of Appeals' majority erred in reversing the family court's decision to award the marital home to her in equitably distributing the marital estate by incorrectly applying the standards for awarding a house as an incident of support. Furthermore, the Court of Appeals erred in concluding the division was inequitable or likely to result in tax consequences by forcing Husband to liquidate his retirement accounts to comply with the order. Husband contends the family court erred in failing to consider the tax consequences of its order.

The apportionment of marital property is within the discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. Morris v. Morris, 295 S.C. 37, 39, 367 S.E.2d 24, 24 (1988). In order to effect an equitable apportionment, the family court may require the sale of marital property and a division of the proceeds. Donahue v. Donahue, 299 S.C. 353, 360, 384 S.E.2d 741, 745 (1989). However, the court should

---

make all payments on that debt. Thus, Wife actually received $113,652 from Husband's IRA funds while Husband kept $613,830 in those funds.

first try to make an "in-kind" distribution of the marital assets, *i.e.*, award a share of each type of asset to each spouse. Id.

The family court may grant a spouse title to the marital home as part of the equitable distribution because it is not feasible to make an in-kind distribution of the home. Donahue, 299 S.C. at 360, 384 S.E.2d at 745; Brown v. Brown, 279 S.C. 116, 302 S.E.2d 860 (1983) (upholding family court's decision to award marital home to wife as part of equitable distribution of marital property), overruled on other grounds by Tiffault v. Tiffault, 303 S.C. 391, 401 S.E.2d 157 (1991); Josey v. Josey, 291 S.C. 26, 32, 351 S.E.2d 891, 895 (Ct. App. 1986) (reversing family court's decision not to award marital home to wife as part of equitable distribution because family court believed she could not afford it, where wife "love[d] the home dearly," husband did not object to award of house to wife so long as it did not result in increased alimony, and such a disposition under then-existing tax laws would minimize possibility of husband paying capital gains taxes).

The family court should give appropriate weight to the fifteen statutory factors in making an equitable distribution of marital property. S.C. Code Ann. § 20-7-472 (Supp. 2004). Such factors include the income and earning potential of each spouse, the opportunity for future acquisition of capital assets, the physical and emotional health of each spouse, and the desirability to award the family home as part of the equitable distribution. Section 20-7-472(4), (5) and (10).

The family court is required to consider the tax consequences to each party resulting from equitable apportionment. Section 20-7-472(11). However, if the apportionment order does not contemplate the liquidation or sale of an asset, then it is an abuse of discretion for the court to consider the tax consequences from a speculative sale or liquidation. Bowers v. Bowers, 349 S.C. 85, 97-98, 561 S.E.2d 610, 617 (Ct. App. 2002); Ellerbe v. Ellerbe, 323 S.C. 283, 289, 473 S.E.2d 881, 884 (Ct. App. 1996); Graham v. Graham, 301 S.C. 128, 131, 390 S.E.2d 469, 471 (Ct. App. 1990).

Husband relies in part on law relating to the award of exclusive use and possession of the marital home for a defined term as an incident of

support. *E.g.*, Whitfield v. Hanks, 278 S.C. 165, 293 S.E.2d 314 (1982) (discussing possession of residence for specified period as incident of support); Harlan v. Harlan, 300 S.C. 537, 541-42, 389 S.E.2d 165, 168 (Ct. App. 1990) (explaining family court, when awarding marital home for reasonable period as incident of support, must balance competing interests between claim of dependent spouse or children against claim of nonoccupying spouse for his share of marital home; court should consider factors such as need for adequate shelter for minors, suitable housing for handicapped or infirm spouse, and inability of occupying spouse to otherwise obtain adequate housing); Johnson v. Johnson, 285 S.C. 308, 311, 329 S.E.2d 443, 445 (Ct. App. 1985) (same); see also S.C. Code Ann. § 20-7-472(10) (Supp. 2004).

The incident-of-support cases are largely irrelevant in deciding whether the marital home should be awarded to one spouse in the equitable division of marital property. A decision on whether to award the marital home to one spouse for a defined period as an incident of support and a decision on whether to award the home permanently to one spouse in equitable distribution require different analyses. While it is proper for the family court to consider support-related facts in both settings, the lack of a support-related rationale should not necessarily prevent or reduce the likelihood of an award of the marital home to one spouse in equitable distribution.

Instead, as we have done in deciding these appeals, the family court should focus on a fair distribution of the entire marital estate. The family court should consider not only financial factors (including tax consequences, if any) affecting the distribution of the marital home, but also the physical and emotional well-being of each spouse as it relates to the marital home. In other words, decisions relating to the equitable distribution of the marital home should not always be based solely or primarily on a cold, rational calculation of dollars and cents. The family court is free to consider other, less tangible factors asserted by a spouse, weighing those in concert with the financial impact on the parties.

Applying the above principles, we reverse the Court of Appeals and affirm the family court's award of the marital home to Wife for four reasons.

First, the Court of Appeals' majority erred in concluding the family court was required to consider the tax consequences to Husband. The order neither contemplates nor requires, either explicitly or implicitly, the sale of the marital home by Wife or the liquidation of retirement funds by Husband. Such a conclusion is reached only by accepting at face value Husband's assertions he cannot afford to comply with the order and buy himself a home without liquidating his retirement accounts.

Second, the record shows Husband's income and earning potential far exceed Wife's; therefore, Husband's ability to purchase a home and acquire other capital assets in the future is also greater than Wife's.

Third, Wife's emotional attachment to the family home and her wish to keep it in the family in order for future generations to enjoy is a factor to be considered in awarding the home to her, as that likely will benefit her emotional and physical health. In contrast, Husband viewed the disposition of the marital home primarily only in financial terms.

Fourth, the record reveals Husband's claims of financial ruin are unfounded. Husband's gross monthly income exceeds $18,000, with a net spendable income exceeding $12,000 per month. We agree with the family court that, accepting Husband's expenses as enumerated in his financial declaration, including the alimony payment, home equity line payment, and a $2,000 mortgage payment to buy his own house, Husband's needs can be met from his income. Moreover, Husband's earning capacity is more than four times that of Wife's, with the potential to be even higher.

We are not persuaded by Husband's implication a total debt of $236,469 resulting from the order is immediately due and payable and thus requires liquidation of his retirement funds. The home equity line which was allocated to Husband includes the $30,000 borrowed for attorney's fees during litigation. The home equity line does not have to be paid in full

immediately and was accounted for by the family court as one of Husband's monthly expenses. Whether Husband's own attorney's fees are immediately payable is unknown. The only debt which is immediately due and payable is $52,917 for Wife's attorney's fees.

The family court properly effected an equitable division of the marital estate, and did not abuse its discretion in awarding the marital home to Wife.

II. CREDIT CARD DEBT

Husband vacated the marital home in February 1999. He continued paying the two mortgages and voluntarily gave money to Wife to pay household and child-related expenses until filing an action for separate support and maintenance in June 1999. From June to December 1999, when the pendente lite order required Husband to pay temporary alimony, Husband continued paying the mortgages but did not provide any additional funds to Wife.

Wife incurred a credit card debt of $12,322 from June to December 1999. Wife testified the expenditures were for groceries, dining out, veterinary bills, medications, gasoline, Christmas gifts, and tuition for their son. The record does not contain credit card bills listing the expenses.

The family court treated the credit card debt as marital debt and apportioned it entirely to Husband. The Court of Appeals reversed, holding the credit card debt was not presumed to be a marital debt because it was incurred after the date of commencement of marital litigation. Wife failed to carry her burden of proving the debt was incurred for the benefit of the marriage; therefore, the family court erred in apportioning it as a marital debt. Wooten, 358 S.C. at 59-60, 594 S.E.2d at 857-58.

"Marital property" is defined as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation. . . ."

S.C. Code Ann. § 20-7-473 (Supp. 2004). For purposes of equitable distribution, a "marital debt" is a debt incurred for the joint benefit of the parties regardless of whether the parties are legally liable or whether one party is individually liable. Hardy v. Hardy, 311 S.C. 433, 436-37, 429 S.E.2d 811, 813 (Ct. App. 1993).

Marital debt, like marital property, must be specifically identified and apportioned in equitable distribution. Smith v. Smith, 327 S.C. 448, 457, 486 S.E.2d 516, 520 (Ct. App. 1997). In equitably dividing the marital estate, the family court must consider "liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage." S.C. Code Ann. § 20-7-472 (13) (Supp. 2004). This statute creates a rebuttable presumption that a debt of either spouse incurred prior to the beginning of marital litigation is a marital debt and must be factored in the totality of equitable apportionment. Hickum v. Hickum, 320 S.C. 97, 102, 463 S.E.2d 321, 324 (Ct. App. 1995); Hardy, 311 S.C. at 436-37, 429 S.E.2d at 813-14. When the debt is incurred before marital litigation begins, the burden of proving a debt is nonmarital rests upon the party who makes such an assertion. Hickum, 320 S.C. at 103, 463 S.E.2d at 324.

When a debt is incurred after the commencement of litigation but before the final divorce decree, the family court may equitably apportion it as a marital debt when it is shown the debt was incurred for marital purposes, *i.e.*, for the joint benefit of both parties during the marriage. Jenkins v. Jenkins, 345 S.C. 88, 104-05, 545 S.E.2d 531, 540 (Ct. App. 2001) (remanding for family court to determine whether payments or debts incurred by husband after filing of litigation were marital debts); Peirson v. Calhoun, 308 S.C. 246, 252-53, 417 S.E.2d 604, 607-08 (Ct. App. 1992) (finding that a second mortgage and other loans obtained by husband post-separation were marital debts). When a debt is incurred after marital litigation begins, the burden of proving the debt is marital rests upon the party who makes such an assertion.

Wife argues the Court of Appeals erred because it failed to recognize a marital debt may arise after marital litigation is filed. Wife asserts the credit card debt was incurred for the benefit of both parties during the marriage and should be apportioned to Husband. We disagree.

The Court of Appeals correctly concluded Wife incurred the credit card debt after the marital litigation was filed and the record reveals the debt was not incurred for the joint benefit of the parties during the marriage. Wife failed to carry her burden of proving the credit card debt was a marital debt.[2]

III. LIFE INSURANCE TO SECURE AWARD OF ALIMONY

Husband maintained a $1 million life insurance policy during the marriage, paying an annual premium of $2,220. Although the beneficiary named in the policy was a trust, it was maintained for the benefit of Wife and the children. The family court rejected Wife's request Husband be ordered to maintain the policy, with Wife as the beneficiary, as security for Wife's alimony award. The family court found no "compelling reason" for such a requirement, reasoning Wife was employed in a relatively secure employment with a substantial income and benefits, there were no minor children, and neither Husband nor Wife suffered from any major or debilitating health problems.

The Court of Appeals affirmed, citing its own precedent and holding the family court correctly ruled that a "compelling reason" must exist to warrant the maintenance of life insurance by the payor spouse to secure an alimony award. The Court of Appeals explained it has required a showing of special circumstances or a compelling reason before requiring the purchase or maintenance of life insurance as security for alimony or child support

[2] Like the Court of Appeals, we express no opinion on whether the family court could have required Husband to reimburse Wife for some or all of these charges as an incident of support. Wooten, 358 S.C. at 60 n.2, 594 S.E.2d at 858 n.2.

obligations. Neither the alimony nor child support statutes set forth the requirement of special circumstances or compelling reason, but the Court of Appeals, adhering to its precedent, found the requirement exists in both statutes. Wooten, 356 S.C. at 476-77, 589 S.E.2d at 770-71. The Court of Appeals examined the record in light of the statutory factors and upheld the family court's denial of Wife's request for life insurance to secure the alimony award. Id. at 478, 589 S.E.2d at 771-72.

Wife, relying primarily on Gilfillin v. Gilfillin, 344 S.C. 407, 544 S.E.2d 829 (2001), argues the Court of Appeals erred by grafting the "compelling reason" requirement onto a statute which simply requires an analysis and balancing of statutory factors in deciding whether to secure an alimony award with life insurance. Wife further contends the Court of Appeals erred in upholding the family court's ruling after examining the record in light of the statutory factors.

It is a settled proposition of law that a former wife who is entitled to alimony has an insurable interest in her former husband's life. Shealy v. Shealy, 280 S.C. 494, 497, 313 S.E.2d 48, 50 (Ct. App. 1984). The parties in a divorce proceeding may agree, in a private agreement subsequently merged into the court's order, that a payor spouse shall maintain life insurance to secure an award of alimony or child support. Mitchell v. Mitchell, 283 S.C. 87, 93, 320 S.E.2d 706, 710 (1984); Carnie v. Carnie, 252 S.C. 471, 473, 167 S.E.2d 297, 298 (1969); Lane v. Williamson, 307 S.C. 230, 414 S.E.2d 177 (Ct. App. 1992).

At common law, the obligation to pay periodic alimony ended at death unless a spouse binds his or her estate for the payment of alimony by agreement. McCune v. McCune, 284 S.C. 452, 455, 327 S.E.2d 340, 341 (1985). This Court first approved the use of life insurance as security for a support award in Fender v. Fender, 256 S.C. 399, 182 S.E.2d 755 (1971). In that case, we affirmed a divorce decree requiring the husband to maintain a life insurance policy to assure funds would be available for the college education of his minor child. We relied on the grant of broad powers

contained in the child support statute,[3] finding the only limits are that court-ordered "provisions shall be just and equitable, considered in light of the circumstances of the parties, the nature of the case, and the best interests of the children." Fender, 256 S.C. at 409, 182 S.E.2d at 759; see also Jackson v. Jackson, 264 S.C. 599, 602-03, 216 S.E.2d 530, 531 (1975) (affirming divorce decree which did not require maintenance of life insurance by husband to secure college education of his children because circumstances showed it was not necessary); Brown v. Brown, 270 S.C. 370, 242 S.E.2d 422 (1978) (affirming divorce decree requiring maintenance of life insurance by husband to secure college education of child).

In 1985, the Court of Appeals, relying on Fender and the child support statute, S.C. Code Ann. § 20-3-160 (1985), held the family court has the authority to require a payor spouse to maintain a life insurance policy naming his child as beneficiary, provided the requirement is "based on justice, equity, and compelling reasons for this necessity." Ivey v. Ivey, 286 S.C. 315, 318, 334 S.E.2d 123, 125 (Ct. App. 1985) (finding no compelling reason requiring husband to secure child support with life insurance); see also Sutton v. Sutton, 291 S.C. 401, 353 S.E.2d 884 (Ct. App. 1987) (affirming divorce decree requiring husband to maintain life insurance to secure child support).

In Hardin v. Hardin, 294 S.C. 402, 365 S.E.2d 34 (Ct. App. 1987), the Court of Appeals in a case of first impression concluded the family court required either specific statutory authority or a finding of special circumstances before it could require a payor spouse to purchase life insurance to secure the payment of periodic alimony beyond the payor spouse's death. The family court lacked either form of authority in this instance and, thus, erred in requiring husband to purchase a policy. Id. at 404, 365 S.E.2d at 35-36.

[3] The language of the present child support statute, S.C. Code Ann. § 20-3-160 (1985), is identical to § 20-115 of the 1962 Code interpreted in Fender.

The Court of Appeals in subsequent cases imposed the requirement of a showing of special circumstances or a compelling reason before a payor spouse could be ordered to secure the payment of alimony or child support with a life insurance policy. Such special circumstances or compelling reasons include major health problems of the payor spouse. Hickman v. Hickman, 294 S.C. 486, 488, 366 S.E.2d 21, 23 (Ct. App. 1988) (finding no special circumstances requiring husband to secure periodic alimony award with life insurance); Shambley v. Shambley, 296 S.C. 405, 408, 373 S.E.2d 689, 690 (Ct. App. 1988) (finding no compelling reason requiring husband to secure child's future support and education expenses with life insurance); Ferguson v. Ferguson, 300 S.C. 1, 5, 386 S.E.2d 267, 269 (Ct. App. 1989) (finding no special circumstances requiring husband to secure periodic alimony award with life insurance); Harlan v. Harlan, 300 S.C. 537, 540, 389 S.E.2d 165, 167 (Ct. App. 1990) (finding no compelling reason requiring husband to secure child support with life insurance).

In 1990, the Legislature amended S.C. Code Ann. § 20-3-130 (Supp. 2004) to codify the common law rule that periodic alimony terminates at death, but provided an exception to this rule when alimony is secured pursuant to subsection 20-3-130(D). Gilfillin, 344 S.C. at 412, 544 S.E.2d at 831.

Section 20-3-130 now provides, in pertinent part:

> (B) Alimony and separate maintenance and support awards may be granted pendente lite and permanently in such amounts and for periods of time subject to conditions as the court considers just including, but not limited to:
>
> > (1) Periodic alimony to be paid but terminating on the remarriage or continued cohabitation of the supported spouse or upon the death of either spouse (except as secured in subsection (D)) and terminable and modifiable based upon changed circumstances occurring in the future. . . .

> (D) In making an award of alimony or separate maintenance and support, the court may make provision for security for the payment of the support including, but not limited to, requiring the posting of money, property, and bonds and may require a spouse, with due consideration of the cost of premiums, insurance plans carried by the parties during marriage, insurability of the payor spouse, the probable economic condition of the supported spouse upon the death of the payor spouse, and any other factors the court may deem relevant, to carry and maintain life insurance so as to assure support of a spouse beyond the death of the payor spouse.

In Gilfillin, we stated subsection (D) must be strictly construed because it is in derogation of the common law rule that periodic alimony terminates at the death of the payor spouse. We held that life insurance is the only permitted means of securing alimony beyond the life of the payor spouse and struck down the family court's creation of an alimony trust. We stated that "[w]ith the enactment of subsection 20-3-130(D), the Legislature provided that life insurance could be used to secure such payment whenever the family court made factual findings concerning the five factors favored requiring such insurance." Gilfillin, 344 S.C. at 414, 544 S.E.2d at 832. Further, the "use of life insurance is restricted in subsection (D) for use only after the family court makes comprehensive review of five distinct issues. . . ." Id. We noted several of the pre-1990 Court of Appeals' cases listed above which require a finding of "special circumstances," but did not explicitly endorse or reject such a requirement.[4]

Since 1990, the Court of Appeals has continued to require a showing of "special circumstances" or a "compelling reason" before the

[4] Justice Moore, dissenting, appeared to endorse the requirement of "special circumstances" to secure an alimony award. See Gilfillin, 344 S.C. at 416 n.1, 544 S.E.2d at 833 n.1 (Hardin and cases following it "do not prohibit ordering life insurance to secure alimony if there are special circumstances or statutory authority").

family court may order the purchase or maintenance of life insurance as security for an alimony or child support obligation. Wooten, 356 S.C. at 477, 589 S.E.2d at 771 ("precedent of this court, both before and after 1990, has consistently applied the 'compelling reason' standard to secure the payment of alimony and child support"); Mallett v. Mallett, 323 S.C. 141, 150, 473 S.E.2d 804, 810 (Ct. App. 1996) (finding no compelling reason requiring husband to secure child support award with life insurance); McElveen v. McElveen, 332 S.C. 583, 603-04, 506 S.E.2d 1, 11-12 (Ct. App. 1998) (finding no compelling reason requiring husband to secure child support and alimony payments with life insurance); Allen v. Allen, 347 S.C. 177, 186-87, 554 S.E.2d 421, 426 (Ct. App. 2001) (remanding for family court to reconsider decision requiring husband to secure alimony award with life insurance by making a comprehensive review of statutory factors, and mentioning precedent requiring a showing of special circumstances for such security); Roberson v. Roberson, 359 S.C. 384, 391-92, 597 S.E.2d 840, 844 (Ct. App. 2004) (upholding ruling which required husband to secure alimony award with life insurance where record revealed family court properly considered statutory factors; Court of Appeals cited Wooten, 356 S.C. 473, 589 S.E.2d 769, which requires showing of special circumstances or compelling reason). See also John J. Michalik, Divorce: Provision in Decree That One Party Obtain or Maintain Life Insurance for Benefit of Other Party or Child, 59 A.L.R.3d 9 (1974).

We conclude, in clarifying Gilfillin, the family court must conduct a comprehensive review of the statutory factors to determine whether special circumstances exist which require the purchase or maintenance of a life insurance policy to secure an alimony award. Although the term "special circumstances" is not found in the statute, the Legislature was aware of prior case law on this issue when it enacted subsection 20-3-130(D), which indicates the Legislature anticipated the provision would be applied in light of existing precedent. See State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197 (1997) (Legislature is presumed to be aware of common law when enacting statutes and using terms that have a well-recognized meaning in the law); Berkebile v. Outen, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993) (basic presumption exists that the Legislature has knowledge of previous legislation when later statutes are passed on a related subject).

However, we disapprove of the requirement of a showing of a "compelling reason" before life insurance may be ordered to secure an alimony award. While the difference between "special circumstances" and a "compelling reason" may appear semantic, use of the latter term arguably places a higher burden on the spouse requesting security. We also reject the conclusion a "court-mandated requirement for life insurance to secure the alimony payments is the exception, not the rule." Wooten, 356 S.C. at 478, 589 S.E.2d at 772.

The Court of Appeals' requirement of a "compelling reason," combined with its view that court-mandated life insurance is the exception, not the rule, effectively established a presumption against ordering life insurance to secure an alimony award. The Legislature did not intend to establish a presumption in favor of or against such security under the statute. Instead, as we indicated in Gilfillin, the statute contemplates a comprehensive review of the factors set out in subsection 20-3-130(D). If that review reveals the existence of special circumstances in which the supported spouse establishes the need for the security and the payor spouse is capable of providing it, the family court may order the award be secured with life insurance.

In making such a determination, the analysis should begin with the supported spouse's need for such security, *i.e.*, consideration of the supported spouse's probable economic condition in the event of the payor spouse's death. The family court should consider the supported spouse's age, health, income earning ability, and accumulated assets. If a need for security is found, the family court should next consider the payor spouse's ability to secure the award with life insurance, *i.e.*, the payor spouse's age, health, income earning ability, accumulated assets, insurability, cost of premiums, and insurance plans carried by the parties during the marriage. The cost of

premiums could be assigned solely to the payor spouse, solely to the payee spouse, or shared between them.[5]

In the instant case, Wife is in good health, has a stable income and substantial assets with which she may support herself should Husband predecease her and alimony payments cease. Husband can afford the premiums, carried the policy during the marriage, and apparently is in good health and insurable. We do not find the existence of special circumstances giving rise to a need for security in this case. We affirm the family court and Court of Appeals' application of the statutory factors to find Husband was not required to purchase life insurance to secure Wife's alimony award.[6]

IV. WIFE'S ATTORNEY'S FEES

Husband argues he should not be required to pay Wife's attorneys' fees because the Court of Appeals reversed the family court's ruling in favor of Wife on the main issues in dispute, the distribution of the marital home and the credit card debt. Our resolution of these appeals largely nullifies Husband's argument. We affirm. See Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991) (listing factors to consider in awarding attorney's fees, including beneficial results obtained).

---

[5] Alimony payments terminate "on the remarriage or continued cohabitation of the supported spouse or upon the death of either spouse" and are "terminable and modifiable based upon changed circumstances occurring in the future." Section 20-3-130(B)(1). A requirement that an alimony award be secured with life insurance is similarly terminable and modifiable.

[6] Some of the cited Court of Appeals' opinions addressed the issue of securing a child support obligation with life insurance. Our decision today addresses only the securing of an alimony award with life insurance as provided by statute. We express no opinion on the analysis established by the Court of Appeals in the securing of a child support award.

CONCLUSION

We reverse the Court of Appeals and award the marital home to Wife in the equitable division of the marital estate. We affirm the Court of Appeals and conclude Wife's credit card debt was not a marital debt. We reverse the Court of Appeals' requirement the family court find a "compelling reason" before requiring a spouse to secure an alimony award with life insurance, but affirm the conclusion Husband is not required to secure Wife's alimony award with life insurance. We affirm the Court of Appeals and require Husband to pay Wife's attorney's fees in the amount of $52,917. The designation of the credit card debt as nonmarital increases the size of the marital estate by $12,322 and affects the equitable distribution of Husband's IRA funds. We remand this case to the family court for reconsideration of that issue in a manner consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART.

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

The Supreme Court of South Carolina

In the Matter of Miles L. Green, Respondent.

ORDER

In March 2005, respondent was indicted in Georgia for possession of methamphetamine in violation of Georgia Code Ann. § 16-13-30 (2003). He has previously been arrested and charged with driving under the influence of a drug (methamphetamine) in Georgia.

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR, because he has been charged with a serious crime. In addition, ODC requests the Court appoint an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent has not filed a return.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of the Court.

IT IS FURTHER ORDERED that Donna V. Sands, Esquire, is

hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Ms. Sands shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Sands may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Donna V. Sands, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be

delivered to Ms. Sands' office.

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

IT IS SO ORDERED.

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

Columbia, South Carolina

April 26, 2005

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Rules of Civil Procedure

---

O R D E R

By order dated January 26, 2005 (attached), certain amendments to the South Carolina Rules of Civil Procedure were submitted to the General Assembly pursuant to Art. V, § 4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, these amendments are effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
April 27, 2005

The Supreme Court of South Carolina

RE: Amendments to South Carolina Rules of Civil Procedure

ORDER

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

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
January 26, 2005

AMENDMENTS TO THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE

(1) Rule 5(a) is amended to read as follows:

(a) Service: When Required. Unless otherwise ordered by the court because of numerous defendants or other reasons, all (1) written orders; (2) pleadings subsequent to the original summons and complaint, which includes answers, counterclaims, cross claims, replies and amended complaints; (3) written motions, other than ones which may be heard ex parte; (4) written notices; (5) discovery requests and responses; (6) appearances; (7) demands; (8) offers of judgment; (9) designations of record or case; (10) grounds or exceptions on appeal; and (11) other similar papers shall be served upon each of the parties of record. No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.

(2) The following is added to the end of Rule 5(a):

Note to 2005 Amendment:

This amendment to subsection (a) makes explicit that all major documents and papers, including, but not limited to, pleadings and amended pleadings, discovery requests and responses, motions and similar papers are to be served on every party of record. The amendment also adds the word "grounds" in subsection (a)(10).

(3) The first paragraph of Rule 30(a)(2) is amended to read as follows:

(2) Limitations. A witness may be compelled to attend 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.

(4) The following is added to the end of Rule 30(a)(2):

Note to 2005 Amendment:

Rule 30(a)(2) previously established the counties in which a witness, but not a party, could be deposed. The rule is amended to add that a party may be deposed in the county where the action is pending, as well as where the deponent resides, or is employed or transacts business in person, or where set by order of the court.

The Supreme Court of South Carolina

RE: Amendments to Rule 227, SCACR

O R D E R

By order dated January 31, 2005 (attached), amendments to Rule 227 of the South Carolina Appellate Court Rules (SCACR) were submitted to the General Assembly pursuant to Article V, § 4A, of the South Carolina Constitution. Since ninety days have passed since submission without rejection by the General Assembly, the amendments to Rule 227, SCACR, are effective immediately.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
May 1, 2005

The Supreme Court of South Carolina

RE: Amendments to Rule 227, SCACR

ORDER

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 227 of the South Carolina Appellate Court Rules is amended as set forth in the attachment to this order. These amendments shall be submitted to the General Assembly as provided by Article V, § 4A, of the South Carolina Constitution.

IT IS SO ORDERED.

s/Jean H. Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Columbia, South Carolina
January 31, 2005

AMENDMENTS TO RULE 227 OF THE SOUTH CAROLINA APPELLATE COURT RULES

(1) Sections (c) through (j) of Rule 227, SCACR, are re-lettered as Sections (d) through (k).

(2) Section (c) is added to Rule 227, SCACR, to read as follows:

> **(c) Explanation Required.** If the lower court has determined that the post-conviction relief action is barred as successive or being untimely under the statute of limitations, the petitioner must, at the time the notice of appeal is filed, provide an explanation as to why this determination was improper. This explanation must contain sufficient facts, argument and citation to legal authority to show that there is an arguable basis for asserting that the determination by the lower court was improper. If the petitioner fails to make a sufficient showing, the notice of appeal may be dismissed.

(3) Rule 227, SCACR, is amended by adding the following:

> **(l) Transfer of Cases to the Court of Appeals.** The Supreme Court may transfer a case filed under this rule to the Court of Appeals. If transferred, the Court of Appeals shall proceed with the case in the same manner as the Supreme Court would have done under this rule with the exception that a petition for a writ of certiorari may be granted by one judge of a three-judge panel. Review of any final decision of the Court of Appeals shall be by a petition for a writ of certiorari under Rule 226, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, **Respondent,**

v.

Derringer L. Young, **Appellant.**

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

Opinion No. 3983
Heard December 7, 2004 – Filed May 2, 2005

AFFIRMED

Acting Chief Attorney Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General David Spencer, all of Columbia; and Solicitor Ralph E. Hoisington, of Charleston, for Respondent.

ANDERSON, J.: Derringer L. Young was charged with possession with intent to distribute crack cocaine, criminal sexual conduct in the first degree, and kidnapping. He pled guilty to the possession charge, and a jury convicted him of kidnapping, and of assault and battery of a high and aggravated nature as a lesser included offense of criminal sexual conduct. On appeal, Young argues (1) the trial judge erred by admitting evidence of his prior convictions for criminal sexual conduct and criminal domestic violence, and (2) the State improperly injected race as a motive. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Young was accused of kidnapping and raping the victim in the early morning hours of September 9, 2001, in downtown Charleston, South Carolina. Following dinner the previous evening, the victim drove downtown by herself to purchase crack cocaine. She testified she had done this numerous times before. The victim bought crack cocaine on this particular night from Young because he "looked familiar to [her], like [she] had bought from him before." After purchasing crack from Young, the victim smoked it and asked to buy more. He indicated he needed a ride to get more crack, and she agreed to drive him. Young became enraged when the victim informed Young she wanted more crack so that she could return home and smoke it with her husband. She alleges Young hit her, forced his way into the driver's seat, drove to a secluded area, and raped her.

At approximately nine o'clock a.m., Corporal Sherry Niblock spotted the victim's car parked and observed the victim fully reclined in the passenger seat with Young on top of her. When Young saw Niblock, he jumped into the driver's seat and sped away in the vehicle. Niblock testified that the victim looked exhausted, had been crying, and had bruises on her neck. Niblock stated the victim "rolled her head over at [her] and said, 'Would you please just help me?'" Niblock dispatched information about the vehicle, which Officer Peter Hall located approximately ten minutes later. According to Hall, the victim looked exhausted and had marks on her neck and wrists. A rape exam was inconclusive as to whether sexual assault had occurred.

Young testified at trial and gave a much different account of his encounter with the victim on the night in question. According to Young, the victim was one of his customers. He stated the two of them drove around all night smoking crack and talking.

Throughout his testimony, Young conveyed his concernment for the victim's safety. He averred that he had previously sold drugs to the victim and on the night of the alleged rape, she returned to the place they had first met and asked for him. Young proclaimed he sold her $80 worth of crack, which the two of them smoked. After consuming the crack, the victim asked for more. Young recounted:

> A. Right after that she said she aint had anymore money. So I said, well, I'll get the drugs for you. Just whenever, you know, you come back down the area, bring the money to me.
>
> Now I was able to trust her, because like I say before, once a person deal with you and we use the word and the term keep it real. She kept it real.
>
> And I was able to trust [the victim]. So any time that she would come down—**and then I also told some people, said, If she come down, I don't want nobody talking to her. I don't want nobody selling her nothing. I don't want nobody bothering her. Leave her be whenever she come, because she's coming to me.**
>
> . . . .
>
> Q. Well, tell me what happened after she asked you for some more drugs. What did y'all do?
>
> A. Well, we get the drugs.
>
> Q. How did you get the drugs?
>
> A. Well, I was getting all the drugs fronted to me by some people that I know.
>
> Q. Okay. And was she paying you for them?
>
> A. Well, she aint had no more money.
>
> . . . .

Any time we would run low [on drugs], [the victim] would feel that, you know, she have to have more than what she got.

So I like, Well, . . . you know you got to get back on the road soon, you know?

So she like, I'm going to be all right. I'm going to be all right.

I said, But then I don't want nothing to happen to you, because people saw, you know, me and you, you know, riding around together. And me and you were riding around for—

. . . .

And I do remember saying, . . . you got to get back on the road soon. You know, because you know, I don't want nothing to happen to you down here, because people saw me and you together, you know?

So she said, I'm going to be all right. I'm going to be all right.

So I said, Okay**. I said, Come on then, take me back on the block and I'll go and get something else for you.**

. . . .

So we park on Sheppard Street**. I said, . . . lock your windows. Up your windows. Don't talk to nobody. I mean nobody.**

So she said, Okay. I said, Just give me five minutes and I'll be right back.

So I got out of the vehicle . . . .

. . . .

I got the drugs and I came back. This little fellow by the nickname of Daddy, which is his real nick—his real name is Antwan Grant.

So when I came up, I saw him and [the victim] talking. I said, Yo, what are you doing to the vehicle? You know I don't play that with nobody around here.

He said, Man, I was coming down the street, man, and I saw this white girl in this vehicle and I thought something was wrong. I know for a fact, dog, you always in this area.

So she probably thought he was spying on me or something.

I said, No, she with me, man.

So at that time I didn't know [the victim] and him had already done spoke.

So she said, Let me hold on him for a minute, Duke.

I said, . . . you aint come down here to talk to nobody, you come down here to deal with me; not nobody else.

So at that time I was kind of like—can I continue?

Q. Yes.

A. I was like getting angry with [the victim] because I was like, wait a minute. You come to deal with me, not nobody else. So if something happened to you, everybody going to look at me; not this man right here. . . .

(Emphasis added).

At this point, Grant entered the car with Young and the victim. According to Young, Grant directed the victim to drive to a certain location and park the vehicle. Grant then asked to be alone with the victim. Young, on direct examination, described his reaction:

He said, because I need to holler at her, dog.

I said, Yo, you aint got no words for her, period.

She said, it's all right. You're with me Duke, so I aint worried about nothing.

. . . .

So [the victim] said Step out a minute, let me holler at him.

So I look at her like—now I'm getting real angry with [the victim], because, first of all, she don't have to belittle herself like that, because like I said before, I'm giving you all these drugs. I haven't asked you for nothing but keep it real. So then—

Q. When you say haven't asked for nothing, what do you mean?

A. I have asked her for no sex. . . .

. . . .

Q. When you said you don't have to belittle yourself like this, what do you mean?

A. Well, what I was saying by belittling herself, **she don't have to play herself to a low standing just to get what she want when she got somebody who going to get it for her.**

. . . .

A. —I got out of the vehicle. I got out the passenger seat. When I got out the passenger seat, Daddy got out the back seat and got in the front seat. I went and I stood to the back part of the vehicle.

. . . .

. . . I thought that all they was going to do was talk and trade drugs.

So when I went back to the passenger side, now I see [the victim] performing oral sex on Daddy. And when [the victim] is performing oral sex on Daddy, I knocked on the window, and I did like this right here to her. (Demonstrating.)

So I walked back to the back part of the vehicle. When I walked back to the back part of the vehicle, that's when I said, no, **I aint going to let this go down like this right here**, because, see, I'm the type of person that I get angry when there's something going on that I don't like. So I walk back—

Q. Mr. Young, just talk about what happened.

A. Yes, sir.

. . . .

Q. Did you stay and watch what happened?

A. I stayed to the back of the vehicle, because just like I say, **I didn't want to leave her.**

(Emphasis added).

Grant left their company, and Young and the victim continued to drive around together getting high. Young testified that around five o'clock a.m. the victim expressed she was not ready to return home.

A. And at this time we sat right there by the East Side Community Center and that's when she said, I need to talk to you about something. She said, I aint ready to go. Not yet.

I said, okay. What's up? **So she like start crying. So I said . . . look, I aint angry no more.**

Because, see, like I told my lawyer, I hate to see a female cry.

. . . .

So I said, . . . I aint angry at you no more . . . .

. . . I'm going to make sure you all right, you know?

(Emphasis added).

Young then averred:

A. So at this time [the victim] was like, I still want to do something for you.

I said, okay. What?

So she said, I want to have oral sex with you.

So I said . . . if that going to get you to chill out, quit crying and all that, do what you got to do.

So at this time when [the victim] went down on me, **I was feeling bad.**

I said, no, . . . stop. I said, stop.

I said, because I can't get down like this right here. If I going to argue at you behind us then I'll be just as wrong if I allowed myself to let you go through his right here.

(Emphasis added).

Following Young's direct examination the State argued that he opened the door to admission of his prior convictions for criminal sexual conduct and criminal domestic violence. The trial judge found Young had placed a character trait in issue and allowed the State to impeach him with a 1994 conviction for criminal sexual conduct in the third degree and a 1993 conviction for criminal domestic violence.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, ___ S.C. ___, 608 S.E.2d 435 (Ct. App. 2004); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Mattison, 352 S.C. at 583, 575 S.E.2d at 855.

LAW/ANALYSIS

I. Admissibility of Prior Convictions

Generally, evidence of a defendant's character is not admissible to show a propensity to act in conformity therewith; however, it is well settled that if a defendant places his character in issue, the State may offer evidence of the defendant's bad character. See Rule 404(a)(1), SCRE ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same[.]").

The jurisprudence of this State contains a plethora of enlightening cases establishing and explicating the proposition that a defendant may open the door to what would otherwise be improper evidence. For instance, State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), although it never uses the open door language, is often cited for the door-opening doctrine. See, e.g., State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990); State v. Plath, 281

S.C. 1, 313 S.E.2d 619 (1984); State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979). In Allen, the defendant, who was accused of kidnapping and murder, offered four good-character witnesses. He then took the stand and described his past criminal activities. The Allen court explained, "The gist of his testimony was to show to the jury that, though he was admittedly an habitual criminal, none of his nefarious acts were committed with the use of force, so as to harm any person." 266 S.C. at 481, 224 S.E.2d at 886. The court observed: "By presenting character witnesses, defendant placed his good character and general reputation in issue; by submitting evidence of his criminal past, with the admitted purpose of establishing his propensity for nonviolence, defendant placed this specific character trait in issue." Id. at 481-82, 224 S.E.2d at 886.

On cross-examination, the solicitor questioned Allen about his convictions as well as prior acts of misconduct for which he had not been convicted. Allen argued that inquiry into the wrongful acts was error. The court disagreed:

> We recognize certain exceptions to the general rule that an accused's bad character may not be offered against him by the State. One exception is where the accused takes the stand and thus becomes subject to impeachment, like any other witness. The accused may thus be cross-examined about any of his past transactions tending to affect his credibility. Taylor v. State, 258 S.C. 369, 188 S.E.2d 850 (1972). Secondly, where the accused offers evidence of his good character, thereby putting his reputation in issue, he may be cross-examined on particular acts which manifestly bear reference to the trait of character covered by the charge in the indictment. State v. Gibert, 196 S.C. 306, 13 S.E.2d 451 (1941).
>
> . . . .
>
> Thus, the solicitor had the right to cross-examine the defendant with respect to conduct which reflected on his

> credibility as a witness and on the specific character trait involved in the crime charged.

Id. at 482-83, 224 S.E.2d at 886.

In State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984), the defendant was convicted of four counts of murder and five counts of kidnapping, as well as safecracking, assault and battery with intent to kill, armed robbery, and contempt of court. On appeal, he challenged the propriety of allowing the State to introduce testimony indicating Stroman had committed prior armed robberies. Frank McDowell, an accomplice in the crimes, testified for the State. On cross-examination, the defense asked McDowell whether he had ever broken into other homes for money. McDowell admitted that he had. On redirect, the State sought to further question McDowell as to two of the incidents in which Stroman had participated as well. Over the defense's objection, "The trial judge ruled the 'door had been opened' to inquiry into appellant's participation in 'any crime that included a breaking into a building' or 'armed robbery or some stealing of money.'" Id. at 513, 316 S.E.2d at 399. The supreme court agreed: "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." Id. (alterations in original) (citing State v. Albert, 277 S.E.2d 439, 441 (N.C. 1981)). The court held:

> Once appellant's counsel initiated the questioning concerning McDowell's prior acts of theft, the State was free to question him as to the details of any prior crime involving the stealing of money. The scope of redirect rests in the discretion of the trial court. State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). We hold the trial court properly admitted McDowell's testimony.

281 S.C. at 513, 316 S.E.2d at 399.

In State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979), the defendant was convicted of murder. The State was allowed to elicit evidence of Doby's prior convictions for trespassing in women's restrooms. The South Carolina Supreme Court employed the open-door doctrine in finding the admission proper:

> Appellant next asserts error in allowing the solicitor to cross examine him and his psychiatric witnesses about appellant's two prior convictions for trespassing in public women's restrooms, and in admitting a note he had left in one of those restrooms into evidence. We hold that appellant opened the door to this cross examination by direct testimony regarding his passive character and lack of mature sexual desires.

Id. at 710, 258 S.E.2d at 899-900 (citations omitted).

State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990), is an edifying opinion. Major was convicted of distribution of crack cocaine. The trial judge allowed the State to introduce a prior conviction for simple possession of cocaine after Major denied having ever used the drug. The court found that Major had made a "clear attempt . . . to communicate to the jury that he [wa]s not the sort of individual who would become involved in the drug trade." Therefore, "Having introduced evidence of his own good character on the issue of involvement in drugs, Major thereby became subject to cross-examination on that assertion." Id. at 185-86, 391 S.E.2d at 238.

State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991), is another demonstration of the supreme court's utilization of the door-opening theory. Robinson allegedly hired members of El Rukn, a Chicago-based gang, to murder the victim. The disputed evidence emanated from the solicitor's questioning Henry Harris, a member of El Rukn. The court explained: "Harris testified that in the 1980's he was in charge of drug operations for the organization. He was subsequently asked when he first became acquainted with appellant and he answered "'83 or '84." Id. at 474, 409 S.E.2d at 408. Appellant objected and moved for a mistrial on the ground Harris' testimony linked appellant to drug dealing. After finding that the testimony did not

imply appellant was involved in drug dealing, the court addressed the open-door doctrine:

> Further, appellant was the first to bring out the El Rukn's involvement in drug dealing. A previous witness, gang member Eugene Hunter, testified appellant was a friend of Jeff Fort, the head of El Rukns, and was assisting the El Rukns in establishing a legitimate business. On cross-examination, appellant elicited testimony from Hunter that El Rukns were involved in drug dealing. Since appellant opened the door to this evidence, he cannot complain of prejudice from its admission.

Id. at 474, 409 S.E.2d at 408 (citation omitted).

State v. Beam, 336 S.C. 45, 518 S.E.2d 297 (Ct. App. 1999), involved a conviction of transfer of recorded sounds for pirating videotapes. The defense questioned expert Beasley whether he had performed a particular type of test, a switch point test, in order to determine the authenticity of allegedly pirated videos. Beasley had not performed the test. The defense then questioned expert Bowley about the switch point test. Although Bowley had not conducted the test, he stated that he could arrange to perform the test in court. Over the defense's objection, Bowley was allowed to perform the test on two tapes, both of which he determined were counterfeits. This Court concluded:

> Beam cannot complain about the admission of evidence where he opened the door to the evidence. See State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991) (where appellant opened door to evidence, he cannot complain of prejudice from its admission); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) (appellant cannot complain of prejudice from admission of evidence if he opened the door to its admission). Further, when a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially. State v. Stroman, 281 S.C. 508, 316 S.E.2d 395

(1984). A party may not complain of error caused by his own conduct. Id.

336 S.C. at 53, 518 S.E.2d at 301.

In State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1999), the trial court allowed the State to introduce the defendant's prior criminal domestic violence convictions due to his opening the door to such evidence. The defendant stipulated he killed his wife by strangling her with a t-shirt. However, he denied the killing was murder. Taylor took the stand and stated that "things had kind of gotten rough for us the last couple of years . . . ." Id. at 172, 508 S.E.2d at 877. On cross-examination, the State brought out an eight-year-old conviction for criminal domestic violence to rebut Taylor's assertion that things were rough "the last couple of years."

Taylor contended the judge erred by allowing the solicitor to impeach him with a prior conviction for criminal domestic violence. The court disagreed and noted:

> An "accused may be cross-examined as to all matters which he himself has brought up on direct examination." 98 C.J.S. Witnesses § 515 at 439 (1957); State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976), citing 98 C.J.S. Witnesses § 378 at 134-135 ("[a]s a general rule, any matter is proper subject of cross-examination which is responsive to testimony given on direct examination, or which is material or relevant thereto, and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness."). The cross-examination of matters which were addressed in direct-examination is not objectionable, even if the answers affect a witness' credibility and character. 98 C.J.S. Witnesses § 378.

Id. at 174-75, 508 S.E.2d at 878 (footnote omitted).

Further, the Taylor court found:

> [T]his testimony did not place appellant's character in issue. However, because appellant "opened the door" about his relationship with his wife, the solicitor was entitled to cross-examine him about the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction.

Id. at 175, 508 S.E.2d at 878 (footnote and citations omitted).

The doctrine of opening the door was used by this Court in State v. Knighton, 334 S.C. 125, 512 S.E.2d 117 (Ct. App. 1999). Knighton was arrested and convicted for driving under the influence. Knighton testified on direct examination that Charleston and Greenville law enforcement made videotaping tests available to DUI arrestees, whereas his request for a videotape from Orangeburg was refused because they lacked the equipment. The solicitor questioned Knighton on how he knew the other counties used video equipment. The trial judge instructed the witness not to answer the question, and Knighton moved for a mistrial. The court held:

> Though there was the potential for prejudicial testimony to have been submitted to the jury, the trial judge prevented any prejudice by instructing Knighton not to answer the solicitor's question. Further, appellant himself opened the door to this inference by testifying about his knowledge of videotaping offered to DUI suspects in two other counties. Accordingly, we find no abuse of discretion.

Id. at 134, 512 S.E.2d at 112.

In State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003), Dunlap was convicted for distribution of crack cocaine. During opening statements, counsel for Dunlap professed that the defendant had "been in trouble with the law" and was "hooked on crack and had a problem with it," but "never sold it." Id. at 541, 579 S.E.2d at 319. Based on these statements, the State was able to introduce Dunlap's prior convictions for conspiracy to possess crack cocaine with intent to distribute; distribution of an imitation drug; simple possession of marijuana; and shoplifting. The Dunlap court explicated:

> The opening statement created the impression that petitioner had no prior connection to the sale of narcotics. In reality, petitioner was not a mere drug user, but an individual who sought to 'elevate' his status to that of a drug dealer. . . . We therefore agree . . . that petitioner's counsel opened the door to the introduction of evidence rebutting the contention that petitioner was merely an addict.

Id. at 541, 579 S.E.2d at 319 (citations omitted).

Moreover, the court found an analysis under Rule 609, SCRE, unnecessary:

> Because we find that counsel opened the door to the admission of petitioner's prior drug record, we need not reach the issue whether these convictions were admissible to impeach petitioner's credibility under Rule 609, [SCRE].

Id. at 542, 579 S.E.2d at 320.

In the case of State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004), Curtis was convicted of two counts of the sale of urine with the intent to defraud a drug or alcohol test. At trial, both Curtis and his webmaster testified that Curtis's website did not contain pornographic material, or links to websites containing pornographic material. On cross-examination, the State questioned Curtis about pornographic links and demonstrated, in court, how pornography indirectly could be accessed through links on pages linked to Curtis's page. Curtis argued that this inquiry was irrelevant and misleading. However, the court held: "Given that both Curtis and Turner maintained that PPS did not allow pornographic materials or links on the website, it is patent that they opened the door to this line of inquiry." Id. at 632, 591 S.E.2d at 605 (citation omitted).

State v. McIntosh, 358 S.C. 432, 595 S.E.2d 484 (2004), discusses the door-opening doctrine in the context of a Doyle violation, ultimately

concluding the doctrine did not apply to the facts of McIntosh. At issue was the solicitor's questioning the defendant "at length about his failure to present his alibi defense to police after he was arrested and given the Miranda warnings." Id. at 444, 595 S.E.2d at 490. The court observed:

> The State correctly explains other courts have held a defendant may open the door to cross-examination for impeachment purposes by testifying or creating the impression through his defense presentation he has cooperated with police when, in fact, he has not. Such cross-examination is permissible, as the Supreme Court recognized in Doyle by noting a prosecutor may challenge a defendant's contention he told his exculpatory story to police when he actually did not.

358 S.C. at 445, 595 S.E.2d at 491 (citations omitted). However, the court found that McIntosh "did not open the door to any Doyle violation" because he "did not, explicitly or implicitly, assert he cooperated with police." Id.

State v. White, 361 S.C. 407, 605 S.E.2d 540 (2004), involves a defendant convicted of first-degree criminal sexual conduct and kidnapping. At trial, Cole Badger, a psychotherapist who counseled the victim and was qualified as an expert, testified for the State. White argued that Badger was improperly allowed to testify that she believed the victim. The court concluded, "White opened the door to this testimony by cross-examining Badger as to whether she had cases in which she did not believe the alleged victim. State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003) (one who opens the door to evidence cannot complain of its admission)." White at 415-16; 605 S.E.2d at 544.

A number of additional arbitraments are extant wherein South Carolina courts have addressed the door-opening doctrine. See State v. Foster, 354 S.C. 614, 582 S.E.2d 426 (2003) (finding Rule 801(d)(1)(B), SCRE is the sole means by which a prior consistent statement may be introduced and therefore, the State's argument that defendant opened the door to the prior consistent statement, while it may have been proper under pre-SCRE law, is simply not tenable under the SCRE); State v. Bennett, 328 S.C. 251, 493

S.E.2d 845 (1997) (determining testimony that witness gave defendant drugs proper to rebut prior witness's testimony that implied defendant was adamantly opposed to drugs); State v. Sullivan, 277 S.C. 35, 45, 282 S.E.2d 838, 844 (1981) (holding where "[d]efense counsel asked Agent Powell on cross-examination whether the plastic was common place [sic] or specially made[, the] question opened the door for Powell's response that it was used inside the aircraft to set bales of marijuana on."); State v. Plath, 281 S.C. 1, 7, 313 S.E. 2d 619, 623 (1984) (finding no abuse of discretion where defense offered testimony of an expert who disclosed defendant's juvenile offenses whereupon the State inquired into defendant's adult offenses and escape; the defense, while objecting to the inquiry, admitted that "the 'door' had been 'opened'" to the testimony); State v. Bell, 263 S.C. 239, 209 S.E.2d 890 (1974) (ruling that evidence that victim had reported her watch as stolen was proper where defendant averred the victim had given the watch to him); State v. Spinks, 260 S.C. 404, 407-08, 196 S.E.2d 313, 315 (1973) ("The appellant in answer to the question of his counsel, 'What charge', introduced into record the testimony regarding the prior crimes for which he was sentenced, and in so doing, 'opened the door' to all crimes for which he was incarcerated, including the crime of carrying a concealed weapon."); State v. Kennedy, 143 S.C. 318, 141 S.E. 755 (1928) (finding the trial court properly permitted the State to question victim on the details of previous difficulties victim had with defendant where defendant had first questioned the victim on the details of the prior difficulties); State v. Bramlett, 114 S.C. 389, 103 S.E. 755 (1920) (ruling the State may offer rebutting evidence of the defendant's family's reputation for insanity where defendant offers evidence of his family's reputation for insanity); State v. Marks, 70 S.C. 448, 50 S.E. 14 (1905) (mentioning the opening the door theory); State v. Trotter, 317 S.C. 411, 415, 453 S.E.2d 905, 908 (Ct. App. 1997) (citing Benton & Rhodes, Inc. v. Boden, 310 S.C. 400, 426 S.E.2d 823 (Ct. App. 1993) for the proposition that "there is no error in admitting evidence where the appellant opened the door to the evidence") aff'd as modified by State v. Trotter, 322 S.C. 537, 473 S.E.2d 452 (1996).

Adverting to the case sub judice, Young's testimony is replete with statements that connote character traits antithetical to the character evinced by his prior convictions of criminal domestic violence and criminal sexual

conduct. Most poignant is his statement: "like I told my lawyer, I hate to see a female cry." Yet the denouement of this case need not hang on the lone phrase "I hate to see a female cry"; throughout his testimony, Young characterized himself as a benefactor and protector of women generally and of the victim particularly. His testimony demonstrates a concerted attempt to paint himself as a gallant man with the victim's best interest and safety always on his mind.

Young testified he told the other drug dealers, "I don't want nobody bothering her," and he told the victim to "lock your windows . . . . Don't talk to nobody." He expanded his expressions of concern for the victim to all women when he asseverated: "I hate to see a female cry." In addition to these physical and emotional concerns, Young related disquietude over the victim's chastity, saying she should not have to "belittle" herself, and telling her he would be "just as wrong if I allowed myself to let you go through this right here [perform sexual favors on him]."

Because Young set before the jury his concern for the victim's safety and chastity, the State was entitled to rebut his assertions with evidence of his prior abuse and the criminal results of his concupiscence. Young opened the door to the convictions for criminal domestic violence and criminal sexual conduct.

II. Racially Biased Comments

Young claims the trial court erred in allowing the solicitor to ask Young racially inflammatory questions. During cross-examination of Young, the State asked, "Mr. Young, isn't it also true that you like going out and being with white women?" Young admitted that he has a child with a Caucasian woman. The State then asked Young if he "prefer[ed] being with white women."

We find this argument is not preserved for our review. The lack of a contemporaneous objection to an improper argument acts as a wavier, except where a "vicious, inflammatory argument results in clear prejudice." Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

While the Toyota court did not condone a failure to make a contemporaneous objection, it found it "wholly unreasonable for any attorney to anticipate" flagrant, abhorrent conduct towards a party or witness. Id. However, the issue must be raised to the trial court by way of a post-trial motion. Dial v. Niggel Assoc., Inc., 333 S.C. 253, 257, 509 S.E.2d 269, 271 (1998). Because Young did not make a contemporaneous objection and did not present the issue during a post-trial motion, this issue is not preserved.

CONCLUSION

Based on the foregoing, Young's convictions are

AFFIRMED.

STILWELL, J., concurs.

SHORT, J., dissents in a separate opinion.

SHORT, J., dissenting: I respectfully dissent regarding the issue of whether the trial court erred in admitting Young's prior convictions for criminal sexual conduct and criminal domestic violence.

In a criminal case, the State cannot attack the defendant's character unless the defendant first places his or her own character in issue. State v. Taylor, 333 S.C. 159, 174, 508 S.E.2d 870, 877-878 (1998). "When the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the solicitor has the right to cross-examine him as to particular bad acts or conduct." State v. Major, 301 S.C. 181, 185, 391 S.E.2d 235, 238 (1990). However, the State is restricted to showing bad character only for the traits initially focused on by the accused. Id. Also, "where prior convictions or misconduct are appropriately brought out on cross-examination, the State may inquire only so far as to bring out the nature of the conviction or activity and may not go into details." State v. Allen, 266 S.C. 468, 482, 224 S.E.2d 881, 886 (1976), overruled on other grounds by State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992), and State v.

Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

When the prior crime is similar to the one for which the defendant is being tried, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission. State v. Dunlap, 353 S.C. 539, 542, 579 S.E.2d 318, 320 (2003). Thus, the trial court must consider the impeachment value of the prior crime, the timing of the prior crime, the similarity between the past crime and the charged crime, the importance of the defendant's testimony, and the centrality of the credibility issue. Green v. State, 338 S.C. 428, 433-34, 527 S.E.2d 98, 101 (2000). In determining whether similar prior convictions can be used to impeach the accused, the trial court must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in its discretion, whether to admit the evidence. Id.; Rule 609(a)(1), SCRE.

During an in camera hearing, the trial judge ruled the probative value of admitting Young's previous conviction for criminal sexual conduct was outweighed by its prejudicial value and allowed the prosecution to proceed by stating only that there was another felony for which Young had been convicted. The prosecution did not raise Young's prior conviction for criminal domestic violence to the judge during the hearing, so the judge did not rule on its admission. After his direct examination, the State argued that Young had placed his character in issue with his statements insinuating that he was concerned about the victim's well-being, particularly in the following testimony:

> . . . and that's when she said, I need to talk to you about something. She said, I ain't ready to go. Not yet. I said, okay. What's up? So she like start crying. So I said [victim's name], look, I ain't angry no more. Because, see, like I told my lawyer, I hate to see a female cry. So I said, all right. I ain't angry no more. I ain't angry no more. It's all good. I ain't angry no more.

(emphasis added). The State further contended that Young placed his character in issue by testifying that he was angry at the victim because "she don't have to belittle herself like that" by performing oral sex on the other

drug dealer and by testifying that he told her he was "going to make sure [she was] all right." The trial judge determined that Young's testimony had opened the door by injecting a character trait in issue and allowed the State to impeach the defendant with his prior criminal convictions for a 1994 criminal sexual conduct 3rd degree and a 1993 criminal domestic violence.

After carefully reviewing Young's testimony, I find he did not place his character in issue and, therefore, did not open the door for admitting into evidence his prior convictions for criminal sexual conduct 3rd degree and criminal domestic violence. Young testified he sold drugs to the victim; however, he denied kidnapping or criminally assaulting her. Young's testimony, when considered in proper context, did not connote specific character traits toward his treatment of females, but rather described and explained his version of what transpired between the victim and himself on the night in question.

I now address the question of whether the error was harmless, which necessarily depends on the particular circumstances of any case. "Error is harmless when it could not reasonably have affected the result of the trial." State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990). "Error which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense." Id. Young was on trial for criminal sexual conduct 1st degree and kidnapping. The trial jury could have concluded that Young had a greater propensity to commit a crime of a sexual nature because of his prior convictions for criminal sexual conduct 3rd degree and criminal domestic violence. Id. Whether Young committed the offenses of criminal sexual conduct 1st degree and kidnapping in this case essentially boils down to the conflicting testimony of the victim and Young himself. Because of the credibility issue in this case, the erroneous admission of Young's prior convictions for similar offenses cannot be found to be harmless error, and, therefore, I would reverse and remand Young's conviction for criminal sexual conduct 1st degree and kidnapping.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Donna C. Martasin, Personal Representative of the Estate of Edwin S. Martasin, Deceased, for the benefit of the heirs at law, Donna C. Martasin, Kenneth E. Martasin, and Jerald A. Martasin, Appellants,

v.

Hilton Head Health System, L.P.; Amisub (Hilton Head), Inc.; Tenet Physician Services, Hilton Head, Inc.; Hilton Head Health System, L.P., Amisub (Hilton Head), Inc., Tenet Physician Services Hilton Head, Inc., d/b/a Hilton Head Medical Center & Clinics; Urgent Care Center of Hilton Head Medical Center & Clinics; Gerald E. Vanderpool, M.D.; Christina S. Gwozdz, M.D.; Paul M. Long, M.D.; Frank L. Hart, M.D.; Kenneth C. Kunze, M.D.; Gary W. Thomas, M.D.; Charles T. Lucas, M.D., Defendants, Of Whom Hilton Head Health System, L.P., Tenet Physician Services Hilton Head, Inc., d/b/a Hilton Head Medical Center & Clinics; Urgent Care Center of Hilton Head Medical Center &

Clinics; Paul M. Long, M.D.; Frank L. Hart, M.D.; and Gary W. Thomas, M.D. are the, Respondents.

Appeal From Beaufort County
Jackson V. Gregory, Circuit Court Judge

Opinion No. 3984
Heard January 13, 2005 – Filed May 2, 2005

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

H. Fred Kuhn, Jr., of Beaufort, for Appellant.

E. Douglas Pratt-Thomas, Francis M. Ervin, II, J. Rutledge Young, Jr., Stephen L. Brown, John K. Blincow, Jr., R. Gerald Chambers, Jr., Robert H. Hood, Robert H. Hood, Jr., and Deborah H. Sheffield, all of Charleston, for Respondents.

KITTREDGE, J.: Donna C. Martasin (Mrs. Martasin) brought wrongful death and conscious pain and suffering claims against three physicians (and related corporate health care entities), alleging they committed medical malpractice in negligently failing to treat and prevent the fatal side effects of a cancer treatment administered to her husband, Edwin S. Martasin (Mr. Martasin). At trial, the circuit court entered a directed verdict in favor of all the defendants on the grounds Mrs. Martasin failed to present sufficient evidence to prove to a reasonable degree of medical certainty that the alleged negligence

"most probably" caused her husband's death—the required burden of proof in such medical malpractice cases. We affirm the directed verdict as to Defendant Dr. Frank L. Hart and reverse with respect to Defendants Dr. Paul M. Long and Dr. Gary W. Thomas. Additionally, we reverse the circuit court's grant of a directed verdict on Mrs. Martasin's claim for punitive damages.

FACTS/PROCEDURAL HISTORY

Mr. Martasin's Disease and Medical Treatment

This appeal concerns the medical treatment Mr. Martasin received from the three defendant physicians (respondents here) during the time immediately after he was initially diagnosed with a form of blood cancer leukemia. The relevant undisputed facts are as follows.

On Monday, December 4, 1995, Mr. Martasin sought treatment at the emergency room of Hilton Head Hospital for persistent headaches, fever, and fatigue. Mr. Martasin was examined by Dr. Paul Long, an internal medicine specialist. After his initial examination, Dr. Long decided to admit Mr. Martasin to the hospital for further tests. Based on the initial test results, Dr. Long suspected Mr. Martasin had some form of the blood cancer leukemia. Dr. Long called in Dr. Gary Thomas, an oncologist, for consultation. Dr. Thomas examined Mr. Martasin and performed additional tests. Dr. Thomas concluded that Mr. Martasin's clinical presentation was consistent with leukemia. The doctors ordered more sophisticated blood tests to confirm the diagnosis.

On Thursday, December 7, 1995, Dr. Thomas determined that Mr. Martasin should immediately begin a course of treatment to counteract the effects of the cancer. Mr. Martasin was given a prescription for the drug Prednisone to be taken daily. Later that day, he was discharged from the hospital with instructions to return to see Dr. Thomas the following Monday, December 11th. Mr. Martasin left the hospital, filled the prescription for the Prednisone, and took the medication as instructed.

While Mr. Martasin was at home, the doctors arranged for a home health care nurse to check in on him each day. When the nurse visited on Saturday, December 9th, Mr. Martasin's condition had noticeably worsened. The nurse paged Dr. Long, who responded by telephone, speaking directly with Mrs. Martasin. Dr. Long declined to see Mr. Martasin that day, but he instructed Mrs. Martasin to take her husband back to the emergency room where Dr. Frank Hart, Dr. Long's medical practice associate, would meet them. At the hospital, Dr. Hart examined Mr. Martasin and performed blood, urine and other tests. Dr. Hart informed Mr. Martasin that the examination and laboratory test results did not indicate a change in his condition that would warrant readmitting him to the hospital. Dr. Hart instructed the Martasins to return home and to keep their appointment with Dr. Thomas scheduled for the following Monday.

When Mr. Martasin returned for his Monday appointment, Dr. Thomas found his condition had deteriorated substantially since his initial discharge from the hospital. That evening, Mr. Martasin was transferred to the Intensive Care Unit at the Medical University of South Carolina, where he lapsed into unconsciousness and died the next morning, December 12.

Dr. Lawrence Afrin, an oncologist at MUSC who examined Mr. Martasin, concluded Mr. Martasin was suffering from a condition known as "Tumor Lysis Syndrome" (TLS) when he arrived at MUSC. Furthermore, the pathologist who performed the autopsy on Mr. Martasin reported that her findings as to the cause of death were clinically consistent with TLS.

As described in the undisputed portions of the medical testimony, TLS is a serious, yet predictable, complication that arises when treating cancer with certain medications. Treatments such as Prednisone work to attack the cancer cells in the body. As the dead cells are broken down by the body, the chemicals in the cells are released into the bloodstream. TLS occurs when these chemical by-products are released in quantities that overwhelm the body's ability to restore the

proper chemical balance in the blood. If a patient is at risk of TLS, the treating physician can prescribe certain prophylactic measures that will flush out the harmful chemicals in the bloodstream and aid the body in regulating the chemical balance in the blood. Failure to properly institute these prophylactic measures can lead to the death of a patient suffering from TLS.

This Action

As personal representative of her husband's estate, Mrs. Martasin filed suit against Dr. Long, Dr. Thomas, and Dr. Hart, as well as the physicians' medical practices, alleging they were negligent in failing to treat and prevent the side effects of Mr. Martasin's TLS. At trial, Mrs. Martasin offered expert testimony to establish the negligence of these physicians proximately caused the death of her husband. At the close of the evidence, all three doctors moved for a directed verdict claiming the expert testimony failed to establish that the alleged deviation from the standard of care proximately caused Mr. Martasin's death to "a reasonable degree of medical certainty." The circuit court granted the motion for directed verdict with respect to all three doctors and the corresponding corporate defendants, finding Mrs. Martasin did not establish the conduct of the doctors "most probably" resulted in the death of Edwin Martasin. Also, the circuit court directed a verdict denying Mrs. Martasin's claim for punitive damages. This appeal followed.

STANDARD OF REVIEW

When ruling on a motion for directed verdict, the court must view the evidence and the inferences that can reasonably be drawn therefrom in the light most favorable to the nonmoving party. Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied. Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995); Bailey v. Segars, 346 S.C. 359, 365-66, 550 S.E.2d 910, 913

(Ct. App. 2001). However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997).

LAW/ANALYSIS

I. Directed Verdict On Negligence Claims

The primary issue in this appeal is whether Mrs. Martasin presented sufficient evidence to establish the defendant physicians breached the applicable standard of care and that breach proximately caused her husband's death. To prove these critical components of her negligence claim, Mrs. Martasin relied on the testimony of medical experts, particularly the testimony of Dr. Mansoor N. Saleh. After careful review of the evidentiary record, especially Dr. Saleh's testimony, we find there is sufficient evidence for a reasonable jury to conclude the alleged acts of Dr. Long and Dr. Thomas in treating Mr. Martasin deviated from the standard of care and were a proximate cause of the death of Mr. Martasin. The directed verdict granted in favor of these two physicians, therefore, should not have been granted. We reach a different conclusion with regard to Dr. Hart. Viewing the evidence as a whole, we are unable to find sufficient evidence to establish any act or omission by Dr. Hart proximately caused Mr. Martasin's death. The directed verdict in favor of Dr. Hart shall, therefore, stand.

A plaintiff in a medical malpractice case must establish by expert testimony both the standard of care and the defendant's failure to conform to the required standard, unless the subject matter is of common knowledge or experience so that no special learning is needed to evaluate the defendant's conduct. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 254, 487 S.E.2d 596, 599 (1997). "In addition to proving the defendant negligent, the plaintiff must also prove that the defendant's negligence was a proximate cause of the plaintiff's injury." Carver v. Med. Soc'y of S.C., 286 S.C. 347, 350, 334 S.E.2d 125, 127 (Ct. App. 1985). Our supreme court has articulated the burden of proof

borne by plaintiffs in proving proximate cause in medical malpractice cases:

> Negligence is not actionable unless it is a proximate cause of the injury complained of, and negligence may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided. When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence. The reason for this rule is the highly technical nature of malpractice litigation. Since many malpractice suits involve ailments and treatments outside the realm of ordinary lay knowledge, expert testimony is generally necessary.

Ellis v. Oliver, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996) (citations omitted and emphasis added). Therefore, the expert testimony as to proximate cause must provide a significant causal link between the alleged negligence and the injuries suffered, rather than a tenuous and hypothetical connection. Id.

However, in determining whether particular evidence meets the "most probably" test, it is not necessary that the testifying expert actually use the words "most probably." Baughman v. Am. Tel. & Tel., 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991); see also Gamble v. Price, 289 S.C. 538, 544, 347 S.E.2d 131, 132-33 (Ct. App. 1986) (holding the exact words "most probably" need not be used by the expert). The Baughman court held:

> It is not sufficient for the expert to testify merely that the ailment might or could have resulted from the alleged cause. He must go further and testify that taking into consideration all the data it is his professional opinion that the result in question most probably came from the cause alleged. In determining whether particular evidence meets this test it is not necessary that the expert actually use the words "most probably." It is sufficient that the testimony is such "as to judicially impress that the opinion . . . represents his professional judgment as to the most likely one among the possible causes."

Baughman, 306 S.C. at 111, 410 S.E.2d at 543 (citations omitted).

A. Alleged Negligence of Dr. Long and Dr. Thomas

Mrs. Martasin relied primarily on the testimony of Dr. Saleh to establish the failure of Dr. Long and Dr. Thomas to treat the TLS was a breach of the standard of care that resulted in the death of Mr. Martasin.

Dr. Saleh testified it was a deviation from the standard of care not to prophylax Mr. Martasin against TLS when administering Prednisone as treatment for leukemia. Dr. Saleh testified:

> It is a written law of oncology that any tumor that is sensitive to chemotherapy, there is a propensity of killing the cell very rapidly, that you have to prophylax the patient against the effect of killing the tumor . . . [t]hat kills the malignant cells but the product of cell death results in liver shutdown, kidney shutdown, heart failure . . . . If you treat the patient for that

> condition, with this amount of tumor burden, you have to prophylax the patient.

Dr. Saleh emphasized the need to take prophylactic measures against the build-up of toxins when you prescribe a patient Prednisone, and, importantly, testified this would be the standard of care for an oncologist as well as a doctor practicing "general internal medicine." [1] Dr. Saleh explained:

> [T]umor lysis prophylaxis is instituted by my residents, first year residents, even by medical students. This is internal medicine therapy. It does not require an oncologist. The oncologist may treat the patient for the treatment of the malignancy but tumor lysis prophylaxis . . . is general internal medicine. In fact, there are board questions that ask internists to say what would you do in a patient getting leukemic therapy for his high white count; you have a high white count, what would you do. And the answer is tumor lysis prophylax.

Based on his review of the pertinent medical records, Dr. Saleh concluded that the cause of Mr. Martasin's death was the TLS that occurred as a result of the Prednisone being administered without

[1] In granting the directed verdict, the circuit court noted that Dr. Saleh's expert testimony was deficient because he failed to differentiate between the appropriate standard of care applicable to an oncologist (such as Dr. Thomas) versus the standard applicable to a physician who does not specialize in cancer treatment (such as Dr. Long). This distinction, however, is not germane in the present case in light of Dr. Saleh's testimony that the need to prophylax against TLS is basic medical knowledge, known to physicians practicing general internal medicine as well as oncologists—even "first year residents" and "medical students."

necessary prophylactic measures being instituted. Admittedly, Dr. Saleh did not use the magic words "most probably," but the entirety of the evidence persuades us that Mrs. Martasin presented sufficient evidence to withstand the directed verdict motion with respect to Dr. Long and Dr. Thomas.

Accordingly, viewing the evidence in the light most favorable to Mrs. Martasin as we must, we conclude that a reasonable jury could have found as fact that Mr. Martasin's death was most probably the result of the Prednisone treatment that Dr. Long and Dr. Thomas implemented without taking appropriate measures to treat the TLS. The order of the circuit court granting a directed verdict in favor of these two physicians is reversed, and the matter is remanded for a new trial. Additionally, our ruling reversing the directed verdict as to these two individual defendants extends to the corresponding corporate defendants plaintiff claimed were vicariously liable for Dr. Long's and Dr. Thomas's alleged negligence.

B. Proof of Causal Link to the Alleged Negligence of Dr. Hart

As noted above, Dr. Frank Hart was the physician who examined Mr. Martasin when he returned to Hilton Head Hospital on Saturday, December 9th, after the initial discharge by Dr. Long and Dr. Thomas two days earlier. Dr. Hart concluded it was not necessary to admit Mr. Martisan to the hospital at that time. Mrs. Martasin claims there is sufficient evidence upon which a reasonable jury could conclude the failure of Dr. Hart to admit her husband to the hospital that Saturday and implement prophylaxis for the TLS was a proximate cause of her husband's death. We disagree.

Plaintiff's expert, Dr. Saleh, was asked about Dr. Hart's examination of Mr. Martasin on Saturday, December 9th and whether Mr. Martasin's death could have been prevented had Dr. Hart admitted him to the hospital that day and begun immediate prophylactic measures to counteract the TLS. Though the transcript reveals some

confusion in Dr. Saleh's initial attempt to respond to this line of questioning, defense counsel asked for and received clarification:

> DR. SALEH: . . . If you have not prophylaxed and you get into the acute setting, the odds are less. But there's still one in three chance you can salvage the patient in that setting, yes.

Therefore, according to Dr. Saleh's expert opinion, there was only a "one in three chance" Mr. Martasin's fatal TLS could have been prevented had Dr. Hart admitted Mr. Martasin on Saturday, December 9th and initiated immediate prophylactic measures. This assessment fails to establish the causal link required under South Carolina law to recover for medical negligence.

We first note that our supreme court has expressly declined to adopt the "loss of chance" doctrine, which, in the context of medical malpractice, "permits a recovery when the delay in proper diagnosis or treatment of a medical condition results in the patient being deprived of a less than even chance of surviving or recovering." Jones v. Owings, 318 S.C. 72, 75, 456 S.E.2d 371, 373 (1995). In rejecting the doctrine, the supreme court stated, "We consider the better rule to be that in order to comport with the standard of proof of proximate cause, plaintiff in a malpractice case must prove that defendant's negligence, in probability, proximately caused the death." Id. at 76, 456 S.E.2d at 373 (emphasis in original).

More recently, in Haselden v. Davis, 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000), this court had the opportunity to determine whether evidence which demonstrates the negligence of a physician in failing to diagnose the decedent, who would have had a greater than fifty percent chance of survival except for the negligence of the doctor, satisfies the "most probably" standard. We held that, when an individual would have had a greater than fifty percent chance of survival if the physician had properly advised the decedent at an earlier

time, evidence of the failure to do so satisfies the "most probably" requirement for causation. Id. at 495, 534 S.E.2d at 300.

In the instant case, Dr. Saleh's testimony demonstrates that Mr. Martasin would not have had a greater than fifty percent chance of survival if the TLS had been recognized and treated on December 9, 1995. Indeed, the testimony makes plain—in clear, quantitative terms—that Dr. Hart's decision not to admit Mr. Martasin to the hospital deprived him of roughly a thirty percent chance of survival. The survival chances articulated in this expert assessment therefore fall well short of satisfying the "most probably" causation standard. Moreover, a thorough review of the record reveals no other evidence that would tend to establish that Dr. Hart's actions contributed in any material way to Mr. Martasin's death.

Finding no evidence upon which a reasonable jury could conclude the alleged negligent acts or omissions of Dr. Hart proximately caused Mr. Martasin's death, we conclude the circuit court's grant of a directed verdict in favor of Dr. Hart was proper. Our ruling extends as well to any of the corporate defendants Mrs. Martasin claimed were vicariously liable for Dr. Hart's alleged negligence.

II. Punitive Damages

Mrs. Martasin argues the circuit court erred in granting Respondents' motion for directed verdict on her claim for punitive damages. We agree.

In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135 (2005). Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Taylor v. Medenica, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996); Lister v. NationsBank of Delaware, 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct. App. 1997).

"The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." Welch v. Epstein, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000).

Without repeating the relevant testimony already discussed above, and viewing the evidence in a light most favorable to Mrs. Martasin, there is some evidence that the decision by Dr. Long and Dr. Thomas to prescribe Prednisone without instituting prophylactic measures to prevent the TLS was a breach of the most basic standard of care such as to give rise to a reasonable inference that this decision rose to the level of recklessness. Therefore, the issue as to whether these alleged negligent acts were reckless was properly a question for the jury.

CONCLUSION

We find there was sufficient evidence upon which a reasonable jury could conclude that Dr. Long's and Dr. Thomas's failure to treat the TLS was a breach of the applicable standard of care that proximately caused Mr. Martasin's death. We therefore reverse the directed verdict granted in favor of these two defendants and the corresponding corporate entities. With respect to Dr. Hart, we find there was not sufficient evidence proving his alleged negligence proximately caused Mr. Martasin's death. The directed verdict granted to him and the corresponding corporate defendants is therefore affirmed. Finally, we reverse the circuit court's grant of directed verdict on Mrs. Martasin's claim for punitive damages.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rebecca Brewer, Appellant,

v.

Stokes Kia, Isuzu, Subaru, Inc., Respondent.

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

Opinion No. 3985
Heard March 9, 2005 – Filed May 2, 2005

AFFIRMED

Costa Steven Moskos, of Charleston, for Appellant.

Susan Corner Rosen, of Charleston, for Respondent.

HEARN, C.J.: This appeal arises after summary judgment was granted to Stokes Kia, Isuzu, Subaru, Inc., in a claim for breach of contract, conversion, and violation of certain consumer protection laws brought by a purchaser whose car had been repossessed in what was alleged to have been a yo-yo sale. We affirm.

FACTS

In January 2000, Rebecca Brewer's automobile quit running, and she began shopping for another car. Brewer visited two car dealerships before visiting Stokes Kia. At both of the prior dealerships, Brewer was unable to purchase a car because of her poor credit rating. When Brewer arrived at Stokes Kia and explained her price range, she was shown a 1996 Ford Aspire, which she agreed to purchase. The salesman completed a handwritten buyer's order, which was signed by Brewer and initialed by the Stokes Kia sales manager. This buyer's order specified the car to be purchased, the price, and memorialized the acceptance of a one thousand dollar down payment from Brewer for the car.

Next, Brewer met with the Stokes Kia finance manager. The finance manager had her sign a new buyer's order that had been computer-generated and was stamped "VEHICLE DELIVERED SUBJECT TO CREDIT APPROVAL." Brewer initialed beside the stamped language. Brewer also signed a retail installment sales contract and security agreement. The retail installment sales contract lists the amount financed for the purchase of the car, $6,609.50; the name of the seller, Stokes Kia-Isuzu Subaru; the annual percentage rate, 21.95%; the number of payments, 36; amount of payments, $252.24; and when the monthly payments begin, February 10, 2000. This form was not signed by a representative of Stokes Kia. Additionally, Brewer signed a bailment agreement. The bailment agreement states: "If dealer is able to provide the Buyer(s) with financing according to the terms set forth in the Sales Agreement, the said Sales Agreement shall be binding upon Buyer(s) and enforceable by Dealer. In the event dealer is unable to provide financing Buyer(s) shall provide their own financing." It also says: "Pending credit approval of the Buyer(s) by the financing institution and completion of the sales transaction, delivery of said vehicle by the Dealer is hereby made to Buyer(s) as a convenience to Buyer(s) . . . ." Brewer admitted nobody at Stokes Kia told her financing had been approved, but she also testified no one had indicated otherwise.

Several days later, Stokes Kia was having difficulty obtaining financing for Brewer and called to obtain further information about her employment

status. When Brewer called back to resolve the question, she was told the dealer was unable to secure financing for her and, in order to keep the car, she would have to get a co-signor or find her own financing. Brewer contacted her bank, but her request for a loan was denied due to her poor credit rating. On January 19, 2000, Brewer received a call from Stokes Kia asking her to return the car, but she refused. Later that evening, a representative of Stokes Kia repossessed the vehicle. After this claim was initiated and depositions had been taken by Brewer, Stokes Kia returned her deposit with interest.

Brewer commenced this action against Stokes Kia, alleging causes of action for breach of contract; conversion; violations of the Unfair Trade Practices Act; and violation of the Manufacturers, Distributors, and Dealers Act. Approximately one year later, Stokes Kia moved for summary judgment. Nearly three weeks after the motion, Brewer sought to amend her complaint to add six additional causes of action. In June 2001, Judge Smoak denied the motion for summary judgment and granted the motion to amend the complaint. However, upon reconsideration, Judge Smoak granted summary judgment. A motion for reconsideration was timely filed, but was not heard until six months later. By that time, Judge Smoak had retired and the motion for reconsideration was heard by Judge Rawl. Judge Rawl denied the motion, and this appeal followed.

STANDARD OF REVIEW

A trial court's decision to grant a motion for summary judgment is appropriate when there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. Gilbert v. Miller, 356 S.C. 25, 28, 586 S.E.2d 861, 863 (Ct. App. 2003). All ambiguities, conclusions, and inferences arising from the evidence must be construed against the moving party. Id. An appellate court will review summary judgment in a liberal manner so as to construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom. Jackson v. Doe, 342 S.C. 552, 555, 537 S.E.2d 567, 568 (Ct. App. 2000). Additionally, our court is cognizant

that summary judgment is a drastic remedy, which must be cautiously invoked so that no person will be improperly deprived of a trial on disputed factual issues. Id.

LAW/ANALYSIS

Brewer argues the trial court erred in granting summary judgment because: (1) issues of fact exist as to the existence of a contract; (2) she was not in default and therefore Stokes Kia did not have a right to repossess; and (3) she suffered damages. Brewer further argues that because summary judgment was granted in error, she should have been allowed to amend her complaint to add various other causes of action.

1. Contract issues

Brewer argues the trial court erred in granting summary judgment because there were issues of material fact regarding the existence of a contract. To support this argument, she first asserts the contract between Stokes Kia was not conditioned on her credit being approved. We disagree.

A condition precedent to a contract is "any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises." Worley v. Yarborough Ford, Inc., 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994). "The question of whether a provision 'in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ.'" Id. (citations omitted).

Here, the computer-generated buyer's order contained a stamped declaration that delivery was subject to credit approval, and Brewer admitted to seeing and initialing this declaration. Further, Brewer admitted no one at Stokes Kia told her that her credit had been approved.

In addition to the stamp on the signed, computer-generated buyer's order, a bailment agreement signed by Brewer states: "In the event dealer is

unable to provide financing Buyer(s) shall provide their own financing." The computer-generated buyer's order and the bailment agreement make it clear that the sale was not final until financing was arranged. The contract provided that Stokes Kia would attempt to obtain financing for Brewer, but if it could not, the responsibility would become Brewer's. If neither Stokes Kia nor Brewer were able to obtain financing, ownership of the vehicle would remain with Stokes Kia.

In the event we find a condition precedent existed, Brewer further argues there was nothing to indicate the condition was not met, nor was there anything specifying who had to approve her request for credit. However, the bailment agreement explained the deal would be completed "[i]f dealer is able to provide Buyer(s) with financing according to the terms set forth in the Sales Agreement . . . ." This language vests discretion concerning financing with the dealership. Stokes Kia, like the two dealerships Brewer had previously visited, was unable to find a company to finance Brewer's purchase. Thus, it became Brewer's responsibility to find financing on her own. She, too, was unable to find financing.

Brewer also argues the computer-generated buyer's order was preceded by a handwritten buyer's order which did not have a condition precedent and that the handwritten order itself constituted a contract. However, the actions of the parties and Brewer's ultimate signature on the computer-generated buyer's order demonstrate this handwritten buyer's order was simply a preliminary negotiation to the final agreement. This is underscored by the fact that no terms besides price were discussed in the handwritten buyer's order. In fact, it says that the "UNPAID BALANCE IS DUE ON DELIVERY" and lists the balance as $5,397.50. If this were the only enforceable contract between the parties, Brewer would be obligated to pay $5,397.50 to own the car. It is undisputed that Brewer was not able to meet that obligation.

Brewer also argues the retail installment contract and security agreement constitute Stokes Kia's offer to finance the transaction. It appears from deposition testimony the retail installment contract was signed by Brewer when she met with the finance manager. It was at this time that she

also signed the computer-generated buyer's order. Although Brewer signed the installment contract, it was never signed by Stokes Kia. In fact, Stokes Kia generally does not sign this document until the credit has been approved. Because the document was not signed by Stokes Kia, it is not enforceable against it. See S.C. Code Ann. § 36-2-201 (2004).

Additionally, Brewer argues physical delivery of the car by Stokes Kia is either evidence the contract was complete or an indication that legal ownership of the car had transferred. She refers to section 36-2-401 of the South Carolina Code (2004) to support the latter proposition. Section 36-2-401 provides:

> Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place . . . .

The key phrase from section 36-2-401 is "unless otherwise explicitly agreed." The agreement between Brewer and Stokes Kia did explicitly state physical delivery of the car was only a convenience provided to the buyer and the sale was pending credit approval. Therefore, pursuant to the agreement, title did not pass at the time of physical delivery. This contract language also prevents introduction of this conduct as evidence the contract was complete.

Finally, in her reply brief, Brewer attempts to argue this case is controlled by Singleton v. Stokes Motors, Inc., 358 S.C. 369, 595 S.E.2d 461 (2004). Singleton involved a yo-yo sale, defined as occurring when:

> The consumer believes a vehicle's installment or sale is final and the dealer gives the consumer possession of the car 'on the spot.' The dealer later tells the consumer to return the car because the financing has fallen through. If the consumer does not return the

> vehicle or agree to rewrite the transaction on less favorable terms, the dealer repossesses the vehicle.

Id. at 380, 595 S.E.2d at 467 (quoting National Consumer Law Center, Unfair and Deceptive Acts and Practices 316 (5th ed. 2001)). The transaction in Singleton involved an unconditional sales contract and conditional bailment agreement, which our supreme court called "patently unfair and deceptive acts." Id. at 381, 595 S.E.2d at 468. However, the court determined the dealerships could easily cure the unfairness by explaining in the sales agreement that the sale is conditioned upon the buyer obtaining financing and telling the customers the truth about their credit. Id. at 381-82, 595 S.E.2d at 468. Singleton does not apply to Brewer's transaction because the buyer's order did contain a stamp making delivery of the car conditional upon Brewer obtaining financing and because Stokes Kia never told Brewer she had been financed.

Thus, we agree the trial court did not err in granting summary judgment on the basis of the lack of an enforceable contract.

2. Right to repossess, damages, and amendment of the complaint

Brewer argues the trial court was also in error when it found Stokes Kia had a right to repossess, when it found there were no damages, and when it denied her motion to amend the complaint. We disagree.

Brewer argues there was no right to repossession because she had not defaulted on the contract. See S.C. Code Ann. § 37-5-110 (2002). However, as discussed above, the car was delivered to Brewer subject to credit approval as a convenience extended to her by Stokes Kia. When Brewer was not financed and she was not able to obtain financing on her own, she was unable to complete the transaction. By failing to pay for the car, she defaulted on the contract. When default occurred, Stokes Kia had the right to repossess the car. See S.C. Code Ann. § 37-5-112 (2002).[1]

[1] Providing: "Upon default by a consumer with respect to a consumer credit transaction, unless the consumer voluntarily surrenders possession of the

The trial court also supported its grant of summary judgment on the basis that Brewer could not demonstrate any damages. The trial court explained Brewer's down payment had been returned with interest and though Brewer alleged she could have had a free rental car for four additional days from the time of the sale, she actually used the car from Stokes Kia for eight days. Because we found the trial court was correct in granting summary judgment to Stokes Kia on the basis of the contract issues, it is not necessary that we rule on this issue. See Rule 220(c), SCACR; Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining the appellate court need not address remaining issues when disposition of prior issue is dispositive).

Finally, Brewer's argument regarding amendment of her complaint is contingent on our finding the grant of summary judgment was in error. Because we have affirmed the grant of summary judgment this issue must also fail.

CONCLUSION

For the reasons discussed above, the trial court's grant of summary judgment is

AFFIRMED.

KITTREDGE and WILLIAMS, JJ., concur.

---

collateral or rented property to the creditor, the creditor may take possession of the collateral or rented property without judicial process only if possession can be taken without entry into a dwelling used as a current residence and without the use of force or other breach of the peace."

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Leroy J. Howard and John Nasser, Appellants,

v.

JoAnn Nasser, Joey Nasser, Christina Nasser, Ashley Nasser, Leander Nasser, Mary Kaye Barki and Debbie Coggins, Defendants, of whom JoAnn Nasser is, Respondent.

Appeal From Greenville County
Charles B. Simmons, Jr., Acting Circuit Court Judge

Opinion No. 3986
Heard December 8, 2004 – Filed May 2, 2005

REVERSED AND REMANDED

Ben G. Leaphart, of Greenville, for Appellants.

William Wallace Culp, III, of Greenville, for Respondent.

BEATTY, J.: In this will contest case, Leroy J. Howard and John Nasser (collectively Appellants) appeal the circuit court's order granting summary judgment for JoAnn Nasser (Respondent), surviving spouse of the decedent Leroy Nasser (Nasser) and personal representative of his estate.

Appellants argue the will was invalid because it was the product of undue influence by Respondent. We reverse and remand.

FACTS

Leroy Howard and John Nasser, the decedent's nephews, brought an action to contest an April 10, 2000 will of Nasser. The will was properly executed and was admitted to probate. Nasser's surviving spouse and second wife, Respondent, was appointed as personal representative of his estate. The will left nothing to either Leroy Howard or John Nasser. Instead, Nasser gave $10,000 to each of his great nieces and the remainder of his estate to Respondent. Additionally, Nasser gave Respondent a power of attorney in October of 1999, specifically revoking a previous power of attorney in favor of Leroy Howard.

Nasser had executed two prior wills. The first will, executed on July 30, 1985, left everything to his first wife and appointed Leroy Howard as his personal representative. After Nasser's first wife died, he executed another will, dated May 19, 1995, that left $50,000 to John Nasser and the residue to Leroy Howard. Leroy Howard was also appointed personal representative of Nasser's estate.

In August of 1998, Nasser was injured in a fall while in Roanoke, Virginia. Leroy Howard drove Nasser back to Greenville, where he was admitted to the St. Francis Hospital System and released in September of 1998. While recovering from his fall, Nasser met Respondent, who was employed as a housekeeper at the hospital. Respondent obtained a divorce from her first husband, from whom she had been separated for approximately ten years, in April of 1999. On May 24, 1999, Respondent and Nasser were married. The will giving rise to this litigation was executed on April 10, 2000. Nasser died as a result of pancreatic cancer and cirrhosis on May 19, 2000.

Appellants filed a petition in probate court, alleging causes of action for undue influence, lack of capacity, fraud, and tortious interference with an expectancy to inherit. Respondent moved for summary judgment on all

causes of action.[1] At the hearing on the motion, Appellants argued that Respondent's fiduciary relationship with Nasser, along with other evidence, created a presumption of undue influence. In support of their contention, Appellants offered the following evidence:

> (1) Karen R. Hunter, M.D., testified that she diagnosed Nasser with pancreatic cancer in mid-April, 2000. At that time, he appeared ill and was jaundiced, but he did not appear overly distraught about the diagnosis.
>
> (2) Leroy Howard's affidavit stated that during the last year of Nasser's life, his health had deteriorated, and that he believed that Respondent had poisoned his relationship with Nasser, as communication inexplicably broke down and he was not allowed to visit Nasser alone. Additionally, Nasser allegedly withdrew funds in excess of $200,000 from a joint account held by Leroy Howard and Nasser in April of 2000.
>
> (3) John Nasser's affidavit also stated that his communication with Nasser decreased dramatically in late 1999, and that Nasser appeared sickly and confused in April of 2000.
>
> (4) The affidavit of Nicholas M. Franchina, a realtor and friend of the family, stated that in addition to a "dramatic change in [Nasser's] affect, and personality," he noticed on two occasions that someone was listening in on the telephone, and that Mr. Nasser abruptly cut short the conversation and hung up.
>
> (5) A local attorney who had prepared Nasser's two previous wills felt that Nasser was upset about the April 2000 will, and since the disposition was dramatically different from that of the previous wills, he felt uncomfortable and encouraged the Nassers to seek other counsel.

---

[1] Pursuant to section 62-1-302 of the South Carolina Code of Laws, the parties consented to remove the action from probate court to circuit court. S.C. Code Ann. § 62-1-302(c) (Supp. 2004) ("Notwithstanding the exclusive jurisdiction of the probate court . . . any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party . . . must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo. . . .").

(6) The durable power of attorney Nasser executed in October of 1999 specifically revoked the previous power of attorney in favor of Leroy Howard. However, the paragraph containing the revocation was in a different font from the rest of the document.

In contrast, the attorney who drafted the April 2000 will testified that Nasser appeared to be of sound mind, and that he freely and voluntarily indicated that he wanted the majority of his estate to go to his wife. Additionally, there was testimony that Leroy Howard's relationship with Nasser had become strained. Nasser allegedly told the witness that he "would rather throw that money in the garbage can or throw it away than for him to have one cent of my money." Moreover, the same witness testified that Leroy Howard called immediately after learning of Nasser's death to inquire about Nasser's estate, whereas Respondent seemed much more concerned about Nasser's death.

After hearing arguments, the circuit court granted Respondent's motion for summary judgment.[2] Specifically, the court ruled that Appellants' burden of proving undue influence could not be shifted to Respondent. The court reasoned that Appellants continued to bear the burden of proof even if a confidential/fiduciary relationship existed between Respondent and Nasser. As to the merits of the cause of action for undue influence, the court found there was no evidence to support Appellants' claim. This appeal followed.

STANDARD OF REVIEW

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed." McClanahan v. Richland County Council, 350 S.C. 433, 437, 567 S.E.2d 240, 242 (2002). In ruling on a motion for summary judgment, a reviewing court must view the evidence in the light most

[2] Although the circuit court judge granted Respondent's motion for summary judgment on all causes of actions, Appellants only appeal the grant of summary judgment as to undue influence. Accordingly, we have limited our analysis solely to the cause of action involving undue influence.

favorable to the non-moving party. Id. at 438, 567 S.E.2d at 242. Summary judgment is a drastic remedy. Thus, it "should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues." Cunningham ex rel. Grice v. Helping Hands, Inc., 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003).

DISCUSSION

I.

Appellants argue the circuit court erred in finding the existence of a confidential/fiduciary relationship between Nasser and Respondent did not shift the burden to Respondent to show the absence of undue influence. Appellants claim Respondent's status as spouse of the decedent and holder of a power of attorney created a fiduciary relationship that gave rise to the presumption of undue influence.

The procedure outlining the burden of proof in contested will cases is governed by section 62-3-407 of the South Carolina Code of Laws. S.C. Code Ann. § 62-3-407 (Supp. 2004). This section provides in pertinent part:

> In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.

S.C. Code Ann. 62-3-407 (Supp. 2004); see In re Estate of Cumbee, 333 S.C. 664, 671, 511 S.E.2d 390, 393 (Ct. App. 1999) ("Proponents of a will have the burden of establishing prima facie proof of due execution in all cases . . . Contestants of a will have the burden of establishing undue influence, fraud,

duress, mistake, revocation, or lack of testamentary intent or capacity."). In analyzing this code section, our supreme court has explained:

> When the formal execution of a will is admitted or proved, a prima facie case in favor of the will is made out, and the burden is then on the contestants to prove undue influence, incapacity or other basis of invalidation. The contestants continue to bear the burden of proof throughout the will contest. In determining whether the contestants sustained such burden, the evidence has to be viewed in the light most favorable to the contestants.

Calhoun v. Calhoun, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982).

"Undue influence may be proved by circumstantial evidence, but the circumstances relied on to show it must be such as taken together point unmistakenly and convincingly to the fact that the mind of the testator was subjected to that of some other person, so that the will is that of the latter and not of the former." Havird v. Schissell, 252 S.C. 404, 410-11, 166 S.E.2d 801, 804 (1969) (citations omitted); In re Last Will and Testament of Smoak, 286 S.C. 419, 424, 334 S.E.2d 806, 809 (1985) ("A will contest based on alleged undue influence is most often adjudicated on the basis of circumstantial evidence.").

"Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship." Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). "'A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence.'" In re Estate of Cumbee, 333 S.C. at 672, 511 S.E.2d at 394 (quoting Brown v. Pearson, 326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct. App. 1997)).

Both parties acknowledge that in contested deed cases a presumption of invalidity arises if the contestants of the deed present evidence that a confidential or fiduciary relationship existed between the grantor and the grantee. See Middleton v. Suber, 300 S.C. 402, 405, 388 S.E.2d 639, 641

(1990) (recognizing that where a "confidential relationship" exists between a grantor and a grantee, the deed is presumed invalid and the burden is upon the grantee to establish the absence of undue influence); Bullard v. Crawley, 294 S.C. 276, 280-81, 363 S.E.2d 897, 900 (1987) ("Undue influence in the procurement of a deed may be shown in two ways. The party challenging the deed may show the existence of a confidential relationship between the grantor and the grantee. Once a confidential relationship is shown, the deed is presumed invalid. The burden then shifts to the grantee to affirmatively show the absence of undue influence."); Hudson v. Leopold, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986)("A fiduciary relationship between the grantor and grantee may give rise to a presumption of undue influence, thus shifting the burden of proof to the grantee to rebut the presumption.").

However, because the instant case involves a will, the central question in this appeal is whether this presumption, which affects the burden of proof, is applicable in the context of a contested will. The parties have not presented nor has our research revealed any case law providing definitive guidance on this issue. However, a recent case of our supreme court appears to implicitly recognize that the presumption of invalidity in deed cases applies to will cases. Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005).

In Dixon, Mother, who was elderly, conveyed her property to Son. At the same time the deed was executed, Mother signed an agreement prepared by Son whereby he agreed to care for Mother and maintain her residence. Following a confrontation approximately three years later, Mother asked Son to leave her home, changed the locks on the home, and requested that Son re-convey the title to the property to her. When Son refused, Mother filed an action to set aside the deed. Mother claimed undue influence as one of her grounds challenging the deed. Specifically, she asserted that because she and Son were in a confidential relationship, Son had the burden of proving that he did not unduly influence her and he failed to meet that burden. As a threshold matter, our supreme court found a confidential relationship existed between the parties. The court ultimately concluded that Son proved that he did not unduly influence Mother. In reaching this decision, the court utilized the principles of undue influence applicable in contested will cases. The court relied on precedent from other jurisdictions which has found that "the analysis is the same regardless of whether the underlying document sought to

be set aside on the grounds that the plaintiff was unduly influenced is a will or a deed." Dixon, 362 S.C. at 398 n.7, 608 S.E.2d at 854 n.7. Based on these cases, the court recognized "[m]ost of our jurisprudence on the issue of undue influence involves a contestant seeking to set aside a will, rather than a deed . . ., nonetheless, we find no reason why this discrepancy should change our analysis." Id.

In addition to Dixon, we find secondary authority supports the application of the presumption to contested will cases. Concerning this issue, the Restatement of Property provides in relevant part:

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.

Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. f (2003) (emphasis added).

We interpret the foregoing to mean that if the contestants of a duly executed will provide evidence that a confidential/fiduciary relationship existed sufficient to raise the presumption, the proponents of the will must offer evidence in rebuttal. We emphasize that although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will. See S.C. Code Ann. § 62-3-407 (Supp. 2004) ("Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof."); Calhoun, 277 S.C. at 530, 290 S.E.2d at 417 ("The contestants continue to bear the burden of proof throughout the will contest."); Smith v.

Whetstone, 209 S.C. 78, 84, 39 S.E.2d 127, 129 (1946) (stating in case where will is formally executed the burden of proof is on the contestant to prove undue influence "and this burden remains on him to the end").

To summarize, "[w]here the contestants introduce testimony raising a presumption of undue influence by a beneficiary sustaining a confidential or fiduciary relation toward the testator, the issue should be submitted to the jury, as where, in addition to the factor of confidential relations, there also appear the further facts of an unnatural disposition making the person charged with the undue influence chief beneficiary, and that such person generally dominated the testatrix." Moorer v. Bull, 212 S.C. 146, 149, 46 S.E.2d 681, 682 (1948) (citations omitted). However, "[a] mere showing of opportunity and even of a motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional evidence that such influence was actually utilized. General influence is not enough. A contestant must show that the influence was brought directly to bear upon the testamentary act." Mock v. Dowling, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976). "The influence must be of such a degree that it dominated the testator's will, took away his free agency, and prevented the exercise of judgment and choice by him. If the testator had the testamentary capacity to dispose of his property and was free and unrestrained in his volition at the time of making the will, the influence that may have inspired it or some provision of it will not be 'undue influence.'" In re Last Will and Testament of Smoak, 286 S.C. at 424, 334 S.E.2d at 809.

II.

Appellants contend the circuit court erred in finding that they had not proved that undue influence was exerted upon Nasser.

Viewing the facts in the light most favorable to Appellants and in the context of the above-outlined principles, we hold a genuine issue of material fact was created regarding Appellants' claim of undue influence. Initially, we note the formal execution of the will is undisputed, and thus, is presumed valid. Furthermore, we find, and the parties appear to agree, that a confidential/fiduciary relationship existed between Nasser and Respondent.

In addition to the confidential relationship by way of marriage, Respondent admitted at oral argument that the power of attorney that Nasser gave to Respondent created a fiduciary relationship. See In re Estate of Cumbee, 333 S.C. at 672-73, 511 S.E.2d at 394 (finding in will contest that fiduciary relationship, which created the presumption of undue influence, existed between son and mother where son had mother's power of attorney and managed her finances); see also Chapman v. Citizens & S. Nat'l Bank of South Carolina, 302 S.C. 469, 477, 395 S.E.2d 446, 451 (Ct. App. 1990) ("[W]e hold that when a husband or wife reposes in the other a trust to do or not do an act relating to the corpus of his estate after his or her death a confidential relationship shall be deemed to have existed if the one in whom the confidence is reposed has the power to abuse the confidence to his or her advantage.").

Appellants did not rely solely on the existence of a confidential/fiduciary relationship, but additionally offered the following evidence in support of their claim of undue influence: (1) Nasser was physically infirm as a result of a terminal illness prior to the execution of the will; (2) the disposition of Nasser's estate was significantly different from his two prior wills; (3) Respondent was present at the meetings with the attorneys to discuss the contents of the new will; (4) Nasser's relationship with his nephews became strained and the frequency of family visits was limited after Nasser's remarriage; (5) Nicholas Franchina, a member of the extended family, noticed a change in Nasser's disposition and believed someone was monitoring Nasser's telephone conversations; and (6) Joseph Francis, Jr., an attorney who discussed estate planning with Nasser and Respondent, refused to draft Nasser's will because he believed Nasser was troubled by the changes. We believe this evidence was sufficient to require Respondent to present evidence rebutting the presumption of invalidity.

In contrast to Appellants' evidence, Respondent offered the following evidence: (1) Nasser traveled to Pennsylvania shortly before his death to attend a family event; (2) treating physicians did not discern any mental infirmity; (3) the attorney who prepared the final will believed Nasser had the requisite mental and physical capacity to dispose of his estate and that Nasser and his nephew had a "falling out"; (4) a stockbroker, who handled Nasser's investments in April 2000, testified that Nasser did not want his nephew to

have any of his money; and (5) Respondent denied she used Nasser's power of attorney, restricted his family visits, or monitored his telephone conversations.

Because there exists a conflict in the evidence, thus creating a genuine issue of material fact, we find the circuit court improperly granted summary judgment in favor of Respondent. See Byrd v. Byrd, 279 S.C. 425, 431, 308 S.E.2d 788, 791-92 (1983) (finding in will contest case that issue of undue influence was properly submitted to the jury where: testator was physically and mentally infirm prior to and contemporaneous with the execution of the will; son, who was the principal beneficiary of the will and in a confidential/fiduciary relationship with testator, threatened to place testator in a nursing home and attempted to restrict visits between testator and his other children; and the will was executed less than six months prior to testator's death); Moorer, 212 S.C. at 149, 46 S.E.2d at 681-82 (holding issue of undue influence in contested will case was properly submitted to the jury where there was evidence that testator's son was in a confidential/fiduciary relationship with his mother, mother was in fear of him, and he indicated an intention to procure for himself her estate).

Again, we emphasize that the burden of proof as to undue influence remains on Appellants throughout the will contest. In reversing the circuit court, we offer no opinion regarding Appellants' success on the merits. We merely find that Appellants offered sufficient evidence to survive summary judgment.

Accordingly, the decision of the circuit court is

REVERSED AND REMANDED.

HUFF, J. and CURETON, A.J.