The Supreme Court of South Carolina

In the Matter of Adam Louis Marchuk, Petitioner.

O R D E R

The records in the office of the Clerk of the Supreme Court show that on January 4, 2005, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated April 10, 2014, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner has submitted an affidavit that he cannot locate his certificate to practice law in this State. In addition, this affidavit advised that Petitioner did not have any clients or matters pending in this State.

Since Mr. Marchuk has submitted the required affidavit to the Clerk of the Supreme Court, this resignation is effective immediately. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

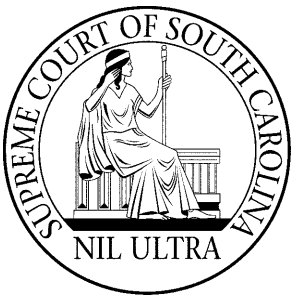
s/ Costa M. Pleicones J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Justice Donald W. Beatty, not participating.

Columbia, South Carolina
May 7, 2014



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19
May 14, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Lonnie J. Davis Respondent,

v.

KB Home of South Carolina, Inc. and Jeff Meyer,
Petitioners.

Appellate Case No. 2011-199587
Lower Court Case No. 2008-CP-10-01193

ORDER

After the South Carolina Court of Appeals issued a published opinion in this case, this Court granted a writ of certiorari and issued an opinion affirming in part and vacating in part. While the opinion of this Court was intended to be published, it was mistakenly assigned a memorandum opinion number.

Accordingly, the opinion of this Court in this case shall be assigned a published opinion number and shall be published with the opinions of this Court.

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

Columbia, South Carolina
May 8, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Lonnie J. Davis, Respondent,

v.

KB Home of South Carolina, Inc. and Jeff Meyer,
Petitioners.

Appellate Case No. 2011-199587

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 27386
Submitted January 8, 2014 – Filed January 29, 2014

AFFIRMED IN PART, VACATED IN PART

D. Michael Henthorne, of Littler Mendelson, PC, of Columbia, for Petitioners.

Allan R. Holmes and Allan Riley Holmes, Jr., both of Gibbs & Holmes, of Charleston, for Respondent.

PER CURIAM: KB Home and Jeff Meyer (collectively KB Home) seek review of the Court of Appeals' decision in *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011), finding the trial judge had authority to determine the validity of an arbitration clause contained in an employment application submitted by Lonnie Davis and finding KB Home waived the right to compel arbitration. We deny the petition for a writ of certiorari as to KB Home's Question I and affirm with regard to the trial judge's authority to determine the validity of the arbitration clause. However, we grant the petition as to KB Home's Question II, dispense with further briefing, and vacate the portion of the Court of Appeals' opinion regarding waiver of the right to compel arbitration.

After properly concluding, pursuant to *Buckeye Check Cashing, Inc. v. Cardegna*,[1] that the trial judge had the authority to determine the validity of the arbitration clause contained in the employment application, the Court of Appeals went on to hold that the application, and the arbitration clause therein, were superseded and rendered invalid by the presence of a merger clause in the employment contract between KB Home and Davis. Having concluded such, it was unnecessary to address Davis' argument that KB Home waived the right to compel arbitration because a substantial length of time had passed, the parties engaged in extensive discovery, and the parties had availed themselves of the circuit court's assistance. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive). We therefore vacate part II of the Court of Appeals' opinion addressing the issue of waiver.

AFFIRMED IN PART, VACATED IN PART.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

[1] 546 U.S. 440, 444 (2006) (stating a challenge to an arbitration agreement is considered by the trial judge, whereas a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

York County and Nazareth Baptist Church of Rock Hill, Inc., Defendants,

of whom York County is Petitioner,

v.

South Carolina Department of Health and Environmental Control and C & D Management Company, LLC, Respondents.

Appellate Case No. 2012-212041

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From The Administrative Law Court
Carolyn C. Matthews, Administrative Law Judge

Opinion No. 27387
Heard May 6, 2014 – Filed May 14, 2014

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Amy Elizabeth Armstrong, of South Carolina Environmental Law Project, of Pawleys Island, for Petitioner.

W. Thomas Lavender, Jr., Leon C. Harmon, and Joan W. Hartley, all of Nexsen Pruet, LLC, of Columbia, and Susan A. Lake, of Columbia, for Respondents.

PER CURIAM: We granted certiorari to review the court of appeals' opinion in *York County v. South Carolina Department of Health & Environmental Control*, Op. No. 4940 (S.C. Ct. App. filed Feb. 8, 2012), which affirmed the administrative law court's final order upholding the South Carolina Department of Health and Environmental Control's issuance of a commercial construction, demolition waste and land-clearing debris landfill to C&D Management Company, LLC. We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., PLEICONES, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

In re: Amendment to Rule 17, Rule 413, SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 17(e) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR) is amended to state:

> **(e) Order to be Public.** Unless otherwise ordered by the Court, an order of interim suspension and any order lifting an interim suspension shall be public.

This amendment shall take effect immediately.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Beatty, J., not participating

Columbia, South Carolina

May 8, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Coleen G. Mick-Skaggs, Appellant,

v.

William B. Skaggs, Respondent.

Appellate Case No. 2011-195268

Appeal From Horry County
Wylie H. Caldwell, Jr., Family Court Judge

Opinion No. 5229
Heard January 6, 2014 – Filed May 14, 2014

AFFIRMED IN PART AND AFFIRMED AS MODIFIED IN PART

Nicole Nicolette Mace, of The Mace Law Firm, of Myrtle Beach, for Appellant.

William B. Skaggs, pro se, for Respondent.

WILLIAMS, J.: On appeal, Coleen Mick-Skaggs (Wife) claims the family court erred in (1) denying Wife's request for a divorce on the grounds of William Skaggs' (Husband) adultery; (2) denying her request for alimony when Husband failed to prove she committed adultery; (3) improperly admitting certain photographs into evidence; and (4) improperly requiring Wife to pay her own attorney's fees. We affirm in part and affirm as modified in part.

FACTS/PROCEDURAL HISTORY

Husband and Wife married on February 9, 1991. After approximately eighteen years of marriage, the parties separated in October 2009. Wife then filed for divorce in December 2009 on the grounds of Husband's adultery. Husband timely answered and counterclaimed, accusing Wife of adultery. At the time of the parties' divorce, Wife was forty-seven years old and Husband was forty-nine years old.

Prior to the final hearing, the family court issued a temporary order requiring Husband to maintain health insurance for Wife and to pay Wife $1,500 in alimony per month. By the date of the final hearing, the parties reached an agreement on the equitable division of marital property and the division of marital debt. The primary issues to be decided at the final hearing were adultery and alimony.

Regarding alimony, Wife claimed she requested alimony because she only received $982 per month for her Social Security disability, but her prescriptions were at least $1,000 per month. Wife stated she and Husband both worked their entire marriage until Wife was forced to retire from her position as a paralegal in September 2008 due to her deteriorating physical condition. Specifically, she testified she suffers from an inoperable spinal tumor, fibromyalgia, degenerative disc disease, chronic pulmonary disease, rheumatoid arthritis, depression, anxiety, peripheral nerve damage, and severe eye damage resulting from a stroke.

Husband questioned the extent of Wife's disability. He highlighted how she continued to be able to ride horses and compete in horse shows after quitting work and applying for disability benefits. Husband presented Wife with certain photographs of her at local horse shows. Wife responded almost all of the pictures were prior to receiving disability benefits, and she continued to be involved in riding and caring for horses because she was "trying to hold on to hope" when dealing with her deteriorating physical condition.

To support his adultery claim, Husband introduced certain text messages sent from Wife's phone. Husband read the following text, which Wife asserted was sent by one of her friends as a joke. It read:

> I'm at Aynor Bar now. . . . I'm dancing with about half a dozen and French kissing them all down to the floor, and they don't kiss like small-mouth brim. They actually

> know how to kiss. LOL. Got a couple off-duty P.D. officers here, too. Gonna let me (sic) strip search my ass if they want to. . . . I love being single and free. Leaving for Texas for cutting horse congress, and I'm gonna have so much fun roping me a cowboy who knows what a real man is all about. 6-2, thirty-five years old. . . .

Husband also called William Russo, a co-worker and friend of Husband, to support his allegations of Wife's adultery. Russo stated that on the night of Wife's birthday, he arrived at the Cattle Company bar around midnight. Upon walking into the bar, he claimed he saw Wife with a couple and another male. Upon Husband's request, Russo stated he stayed outside the bar for approximately an hour and a half until the bar closed at 1:30 a.m. At that time, Russo observed Wife exit the bar with the same male. Russo stated, "At one point, she had her head in his lap asleep or whatever and, you know, there was certainly some hanging on each other while they were on the front porch. Some affection."

Russo testified Wife eventually took a cab home, and the male followed the cab in his separate vehicle. Russo observed the male enter Wife's home. Russo stated he waited outside Wife's house for approximately twenty-five or thirty minutes, and the male did not leave while Russo was there. Husband corroborated Russo's testimony and stated that on the morning after Wife's birthday, he drove by Wife's home at 5:30 a.m., and an unoccupied car was still parked outside Wife's home.

At the conclusion of Russo's testimony, Husband sought to introduce into evidence several photographs taken by Russo that evening. Wife's counsel objected to the pictures on the grounds they were poor quality and unfairly depicted the scene. The family court admitted the photographs over Wife's objection, ruling, "I think it's admissible, I honestly can't tell what it is, you know. He says what it is, and I'm not -- I'll overrule the objection. [Russo] took the picture. That's what it -- it is what it is."

Mary Katherine Fisher, who boards horses at the parties' barn, corroborated Russo's testimony. She testified she observed Wife kissing the same male outside the Cattle Company bar on the night of Wife's birthday.

Husband testified regarding the allegations of his adultery made by Wife. Husband denied cheating on Wife, claiming Wife accused him of having an affair with at least seventeen different women. However, when questioned by Wife's counsel,

Husband acknowledged he had feelings for another woman, Destiny Athey, and even stated, "Yeah, the lady I had an affair with . . . ."

In response to Husband's allegations of adultery, Wife recounted the night of her birthday. Wife testified she went to Applebee's Neighborhood Bar and Grill with some friends for dinner and then went to the Cattle Company bar for drinks. She confirmed she "started off with red wine . . . had a couple of beers, and then when [her] other friends got there, they bought [her] a couple of shots." Wife claimed that at the end of the night, she called a cab and went home by herself. She denied the male at the bar stayed at her home that evening.

In support of Wife's allegations against Husband, Wife called Katherine Bujarski, another person who boards horses at Husband and Wife's barn, to testify. Bujarski stated she observed Husband and Debbie Scott (Scott) sitting together at a horse show within the last year. Bujarski testified Husband was rubbing Scott's lower back underneath her shirt. Tamara Tindal, a private investigator, also testified at the final hearing regarding her observations of Husband and Scott. Tindal was hired by a third party, Larry Scott, to conduct surveillance on his wife. Tindal stated she observed Scott and Husband alone on at least five occasions at Husband's barn within the two weeks prior to trial. All of these occurrences were in the evening, with two of these meetings occurring from 11:30 p.m. until 12:59 a.m. and 12:05 a.m. until 12:40 a.m. Tindal stated Husband and Scott were inside the barn[1] during her surveillance, so she did not know whether Husband committed adultery during those times.

At the conclusion of all the testimony, the family court approved the parties' settlement agreement. The court granted the parties a divorce based on one year's continuous separation and stated,

> I'm doing it on these grounds because as I see the evidence, we have evidence of adultery, at least inclination and opportunity on both sides of the case . . . which means that we have, as I see it, uncorroborated evidence of adultery on both sides. For a divorce to be granted on the grounds of adultery, as I understand the law, it needs to be corroborated.

[1] Wife's daughter confirmed that Husband's living quarters were inside the barn.

In denying Wife's claim to alimony, the court held, "I don't think adultery as a bar to alimony had to be corroborated as does adultery as a ground for divorce." The court then recounted Russo's testimony and found it to be credible proof that Wife committed adultery and should be barred from receiving alimony. After the family court issued a written order confirming its oral ruling, Wife timely appealed. Husband did not submit a respondent's brief.

STANDARD OF REVIEW

"In appeals from the family court, [appellate courts] review[] factual and legal issues de novo." *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "[W]hile retaining the authority to make our own findings of fact, we recognize the superior position of the family court judge in making credibility determinations." *Lewis v. Lewis*, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011) (footnote omitted). The burden is upon the appellant to convince the appellate court that the preponderance of the evidence is against the family court's findings. *Id.* "Stated differently, de novo review neither relieves an appellant of demonstrating error nor requires us to ignore the findings of the family court." *Id.* at 388-89, 709 S.E.2d at 654 (italics omitted).

ISSUES ON APPEAL

1. Did the family court err in denying Wife's request for a divorce on the grounds of Husband's adultery?

2. Did the family court err in finding Wife committed adultery, and thus, in barring Wife from receiving alimony?

3. Did the family court err in admitting certain photographs into evidence?

4. Did the family court err in requiring Wife to pay her own attorney's fees?

LAW/ANALYSIS

1. Grounds for Divorce

Wife claims the family court erred in granting the parties a no-fault divorce because she presented sufficient evidence that Husband committed adultery. We agree and modify the family court's decision on this issue.

Proof of adultery as a ground for divorce must be "clear and positive, and the infidelity must be established by a clear preponderance of the evidence." *McLaurin v. McLaurin*, 294 S.C. 132, 133, 363 S.E.2d 110, 111 (Ct. App. 1987). "A 'preponderance of the evidence' is evidence which convinces as to its truth." *Brown v. Brown*, 379 S.C. 271, 278, 665 S.E.2d 174, 178 (Ct. App. 2008). Because of the "clandestine nature" of adultery, obtaining evidence of the commission of the act by the testimony of eyewitnesses is rarely possible, so direct evidence is not necessary to establish the charge. *Fulton v. Fulton*, 293 S.C. 146, 147, 359 S.E.2d 88, 88 (Ct. App. 1987).

Accordingly, adultery may be proven by circumstantial evidence. *Hartley v. Hartley*, 292 S.C. 245, 246, 355 S.E.2d 869, 871 (Ct. App. 1987). Circumstantial evidence showing opportunity and inclination is sufficient to sustain a finding of adultery. *Brown*, 379 S.C. at 279, 665 S.E.2d at 179. Generally, "proof must be sufficiently definite to identify the time and place of the offense and the circumstances under which it was committed." *Loftis v. Loftis*, 284 S.C. 216, 218, 325 S.E.2d 73, 74 (Ct. App. 1985). Evidence placing a spouse and a third party together on several occasions, without more, does not warrant the conclusion the spouse committed adultery. *Fox v. Fox*, 277 S.C. 400, 402, 288 S.E.2d 390, 391 (1982).

In its final order, the family court held both parties likely committed adultery based on the testimony presented at the final hearing. However, the family court found the parties' failure to corroborate this testimony precluded the court from granting either party a divorce based on adultery. We disagree with the family court on this specific point as the record shows both Husband and Wife presented satisfactory corroborating testimony to establish that each party committed adultery.[2]

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[2] Wife argues the family court misstated the law when it held testimony must be corroborated to establish adultery. We are aware that corroboration typically is required in divorce actions, but this rule may be relaxed when it is evident that collusion does not exist. *See McLaughlin v. McLaughlin*, 244 S.C. 265, 270, 136 S.E.2d 537, 539 (1964) (stating corroboration is typically necessary in divorce actions but may be relaxed when it is evident that collusion does not exist); *Harvley v. Harvley*, 279 S.C. 572, 574, 310 S.E.2d 161, 162 (Ct. App. 1983) (holding corroboration of testimony is normally required to sustain a ground for divorce, although the requirement can be waived when the possibility of collusion is not apparent). In this instance, there was no collusion between the parties as

Regarding proof of Husband's adultery, we note Husband's own admission at the final hearing that he had an affair with Destiny Athey. When asked about Athey by Wife's counsel, Husband stated, "Yeah, the lady I had an affair with." Wife's counsel then asked, " --- you, that you had feelings for?", to which Husband replied, "Yeah. . . ." We find his statement serves as evidence that he committed adultery.[3] *See McLaurin*, 294 S.C. at 134, 363 S.E.2d at 112 (finding husband's alleged admission to wife of adultery was evidence on which family court could base finding of adultery).

Additionally, we find Wife presented corroborating evidence that Husband had both the opportunity and inclination to commit adultery. As to inclination, Wife presented testimony that Husband publicly displayed affection for another woman, Debbie Scott, by touching and rubbing the lower part of her back underneath her shirt. While not conclusive on whether Husband committed adultery, we find this physical contact is an overt romantic demonstration that Husband was inclined to commit adultery.

As to opportunity to commit adultery, we are persuaded by the private investigator's observations. The investigator testified she observed Husband and Scott enter Husband's barn late in the evening multiple times over a relatively short period of time. Wife's daughter's testimony confirmed Husband was living in the barn during this time. Although she did not observe Husband and Scott engaging in the act of adultery, we believe the timing and location of these encounters, coupled with other testimony, demonstrate Husband had both the opportunity and inclination to commit adultery. *See McLaurin*, 294 S.C. at 135, 363 S.E.2d at 112

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evidenced by the contested nature of the divorce. *See McLaughlin*, 244 S.C. at 271, 136 S.E.2d at 540 (acknowledging some states' adoption of a rule that permits courts to grant a divorce based on the plaintiff's uncorroborated testimony in contested cases and stating that only slight corroboration is necessary in certain contested cases in our state). Regardless, because the parties presented sufficient testimony to corroborate their claims of adultery, we find any confusion over this requirement to be immaterial under these circumstances.

[3] We also note Wife's daughter's testimony, which corroborates Husband's admission. Wife's daughter stated Husband never told her that he had sexual relations with Destiny. However, she testified Husband told her that he had feelings for Destiny and was seeking Destiny's "comfort" because Wife would no longer sleep with him.

(finding husband's presence at alleged paramour's house where paramour answered the door "comfortably clothed" but husband was fully clothed was not enough to establish adultery but was some evidence they had the opportunity and disposition to commit adultery); *Brown*, 379 S.C. at 280, 665 S.E.2d at 179 (finding paramour and husband's presence in husband's home, without more, is insufficient to establish adultery, but finding other evidence provided opportunity and inclination to establish adultery).

Regarding proof of Wife's adultery, we concur with the family court's conclusion that Husband presented a clear preponderance of evidence, by way of Russo's testimony, that Wife committed adultery on the night of her birthday. Although there was no direct evidence Wife engaged in illicit intercourse, we find Russo's testimony "sufficiently definite to identify the time and place of offense and the circumstances under which it was committed." *See Loftis*, 284 S.C. at 218, 325 S.E.2d at 74. Wife admitted she drank a substantial amount of alcohol that evening, and several witnesses observed Wife being affectionate with a man throughout the course of that evening. This same man followed Wife home in the early morning hours and entered Wife's house after being invited inside by Wife. Wife's subsequent text messages are also evidence she was inclined to commit adultery.

Based on the foregoing, we find each party presented a clear preponderance of the evidence by way of circumstantial evidence that the other engaged in adulterous conduct during the parties' marriage. We accordingly modify the family court's holding as it pertains to the grounds for divorce and grant both parties a divorce based on adultery.

2. Wife's Entitlement to Alimony

Next, Wife contends the family court erred in denying her request for alimony because Husband did not sufficiently demonstrate she committed adultery. Based on our finding that Wife committed adultery, we affirm the family court's decision to deny Wife alimony. We also affirm the family court's order as it pertains to reimbursement for temporary alimony. *See Griffith*, 332 S.C. at 642, 506 S.E.2d at 532 (holding the establishment of adultery as a defense to alimony is a bar to all alimony and requires the reimbursement of court-ordered temporary alimony).

3. Admission of Photographs

Wife also claims the family court erred in permitting Husband to introduce certain photographs into evidence because they were poor quality and did not accurately portray the scene.[4] We disagree.

To justify reversal based on the admission or exclusion of evidence, the complaining party must establish both error and resulting prejudice. *Divine v. Robbins*, 385 S.C. 23, 37, 683 S.E.2d 286, 293 (Ct. App. 2009).

We find these photographs were relevant to Husband's claim of adultery against Wife. *See* Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Although Wife claims these photographs were unfairly prejudicial in violation of Rule 403, SCRE, we find the statements of Wife's counsel and the family court prove otherwise. Russo, the witness who took these photographs, Wife's counsel, and the family court all acknowledged the quality of the photographs was poor, and it was impossible to discern what the photographs actually depicted. As a result, we fail to see how Wife was prejudiced by the admission of these photographs. Furthermore, this was an action in equity and there was no jury. The likelihood that the family court, as the sole factfinder, was improperly persuaded by the admission of these photographs is negligible. Accordingly, we affirm the family court on this issue.

4. Attorney's Fees

Last, Wife claims the family court erred when it ordered Wife to pay all of her attorney's fees. Wife contends Husband's financial condition was far superior to that of Wife's, and as a result, the family court should have ordered Husband to pay her attorney's fees. We disagree.

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[4] Wife also argues on appeal the photographs were not properly authenticated pursuant to Rule 901, SCRE, nor were they admissible duplicates as envisioned by Rules 1001 and 1003, SCRE. Wife never raised these grounds to the family court; thus, to the extent she raises these grounds in her brief, we decline to address them on appeal. *See Bodkin v. Bodkin*, 388 S.C. 203, 227, 694 S.E.2d 230, 243 (Ct. App. 2010) (holding an issue may not be raised for the first time on appeal but must be raised to and ruled upon by the family court to be preserved for appeal).

The family court should first consider the following factors as set forth in *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992), in deciding whether to award attorney's fees and costs: "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; (4) effect of the attorney's fee on each party's standard of living." *Fitzwater v. Fitzwater*, 396 S.C. 361, 370, 721 S.E.2d 7, 12 (Ct. App. 2011). In so doing, the family court should set forth specific findings of fact on the record about each of the required factors from *E.D.M.* *See Griffith v. Griffith*, 332 S.C. 630, 646, 506 S.E.2d 526, 534-35 (Ct. App. 1998) (citing Rule 26(a), SCRFC, and highlighting requirement of family court to make specific findings of fact on the record about each of the required factors from *E.D.M.*, but noting the appellate court may make its own findings of fact in accordance with the preponderance of the evidence if the record is sufficient).

Although the family court failed to set forth findings of fact in support of its decision, we find the family court acted within its discretion in requiring the parties to pay their own attorney's fees. Wife succeeded on the adultery issue as it pertains to Husband, but our holding still bars Wife from receiving alimony based on our finding that she also committed adultery. Further, because Wife failed to include her attorney's fees affidavit or either party's financial declarations in the record on appeal, we are unable to discern exactly how much she incurred in attorney's fees or how those fees will impact her standard of living or her current financial condition. *See Harkins v. Greenville Cnty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (finding it impossible to evaluate the merits of certain issues because the appellant failed to include the relevant material in the record on appeal); *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 215, 493 S.E.2d 826, 834 (1997) (noting an appellant bears the burden of providing a sufficient record to review his assertions of error). We are aware of Wife's claim that she only receives disability, and she has very few assets from which to pay her attorney's fees. However, without further proof that the family court acted improperly in requiring the parties to pay their own attorney's fees, we affirm the family court's decision on this issue.

CONCLUSION

Based on the foregoing, we modify the family court's order to find Husband and Wife are entitled to a divorce on the ground of each party's adultery. We

consequently affirm the family court's decision to deny Wife's request for alimony, its admission of certain photographs into evidence, and its ruling on each party's entitlement to attorney's fees. Accordingly, the family court's decision is

AFFIRMED IN PART and AFFIRMED AS MODIFIED IN PART.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Christopher Lee Johnson, Appellant.

Appellate Case No. 2011-201808

Appeal From Greenville County
G. Edward Welmaker, Circuit Court Judge

Opinion No. 5230
Heard January 7, 2014 – Filed May 14, 2014

AFFIRMED

Dayne C. Phillips, of Lexington, and Appellate Defender Carmen Vaughn Ganjehsani, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, for Respondent.

THOMAS, J.: Christopher Lee Johnson appeals his conviction for driving under the influence (DUI), arguing the circuit court erred in denying his motion to dismiss the charge because the Greenville Police Department (GPD) failed to

comply with the video recording requirements of section 56-5-2953 of the South Carolina Code (Supp. 2013).[1] We affirm.

FACTS/PROCEDURAL HISTORY

In the early hours of March 18, 2010, Officer Jesse Lowe of the GPD conducted a traffic stop of Johnson after observing Johnson (1) operating a vehicle without its headlights on and with an inoperable brake light and (2) stopping at a red light, entering the intersection, and stopping again in the middle of the red-lit intersection. During the traffic stop, Officer Lowe noted Johnson's eyes were "glassy" and that he smelled of alcohol. Officer Lowe also noticed Johnson was wearing a wristband from a local restaurant and bar. After informing Johnson of his traffic violations, Officer Lowe asked Johnson if he had consumed any alcohol. Johnson responded "too much," and stated he had consumed "six to seven beers at least." As a result of his initial observations, Officer Lowe conducted three field sobriety tests.[2] After Johnson failed these tests, Officer Lowe placed Johnson under arrest for DUI and transported him to the Greenville County Detention Center.

Upon arrival at the detention center, Officer Lowe prepared an affidavit regarding his failure to produce a video recording of Johnson's conduct at the incident site. On the affidavit, Officer Lowe checked a box reading:

> At the time of the Defendant's arrest the vehicle I was operating had not been equipped with [a] videotaping device and therefore pursuant to Section 18 of Senate Bill

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[1] The code provision in effect at the time Johnson committed the offense in 2010 has not since been amended; thus, we cite to the current version of section 56-5-2953.

[2] The field sobriety tests were recorded on a personal camera by Officer Donnie Ng of the GPD, who arrived at the scene of the traffic stop after Johnson was already out of his car. Upon Officer Ng's arrival, Officer Lowe asked him if he had a video camera in his vehicle, which Officer Ng did not. The video recorded by Officer Ng did not begin until after Johnson had already been pulled over and exited his car. The State has not argued on appeal that the video recorded by Officer Ng meets the requirements of section 56-5-2953.

> 174 of 1998, the videotaping requirement regarding vehicles is not applicable.

Johnson was subsequently indicted for second-offense DUI and driving under suspension, and the case proceeded to trial. Prior to trial, Johnson's counsel moved to dismiss the DUI charge on the ground that the GPD failed to comply with the video recording requirements of section 56-5-2953.

At a pre-trial hearing on this matter, Lieutenant Joe Browning testified regarding his management of the GPD's budget and the GPD's efforts over the previous decade to obtain and maintain video recording systems for their law enforcement vehicles. Lieutenant Browning stated the GPD acquired its first four camera systems from the Department of Public Safety (DPS) as part of a safety award some time prior to 2001. Lieutenant Browning testified the GPD began an effort in December 2001 to purchase its own camera systems and expended $35,550 on eighteen camera systems. However, these camera systems began failing soon after the purchase, and the GPD sold them all for $155.

According to Lieutenant Browning, on February 13, 2002, DPS informed the GPD that it would be receiving VHS-based camera systems from DPS following "the change with the DUI law." The GPD subsequently requested fifteen camera systems. On August 8, 2002, the GPD received one camera system from DPS along with a letter informing them that funds were not available to provide all the requested camera systems at one time. Instead, a computerized random selection process was utilized, by which the GPD received one camera system. By the end of 2004, the GPD had received twenty-one camera systems.

Lieutenant Browning further testified that the GPD was confined to the amount of camera systems it had previously requested and could not request any more camera systems until 2009. After waiting to no avail for DPS to take more camera system requests, the GPD established a committee in late 2007 and early 2008 to look into purchasing its own camera systems. The committee decided the GPD should utilize digital-based camera systems rather than VHS-based camera systems due to the advantages in storage, installation, and video quality. The committee requested recording systems from nine different companies in order to test the equipment. In February 2010, the GPD began purchasing digital-based camera systems from

Kustom Signals.[3] As of the date of Johnson's trial, the GPD had spent $463,463.99 to purchase eighty-nine digital-based camera systems.

In April of 2009, DPS notified law enforcement agencies that the 2002 requests had been satisfied and it was now accepting requests for additional camera systems. Lieutenant Browning testified that this was the first opportunity since 2002 to request additional camera systems. DPS also informed law enforcement agencies that it would fulfill requests for VHS-based camera systems before fulfilling any requests for digital-based camera systems.[4] According to Lieutenant Browning, the GPD opted to request twenty digital-based camera systems in 2009 rather than VHS-based camera systems because the GPD had already expended a significant amount of its own funds transitioning towards digital-based recording.[5] As of the date of Johnson's trial, the GPD had yet to receive any camera systems from DPS since its 2009 request.

Elaine Johnson, an employee of DPS and previously the Director of the Department of Resource Management when section 56-5-2953 was enacted, testified next regarding DPS's efforts to implement legislation and provide video recording systems to state law enforcement agencies. She indicated that DPS is responsible for purchasing, installing, and maintaining video recording systems. Johnson stated that, as she understood it, section 56-5-2953 was enacted so that individual law enforcement agencies would not have to spend their own money on camera systems. According to Johnson, it will take fifteen years to fulfill the number of camera systems requested statewide in 2009. She further verified that the GPD had received twenty-one camera systems as of 2004, and that the GPD's 2009 request for twenty digital-based camera systems was still pending.

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[3] Lieutenant Browning explained the GPD's delay in purchasing these camera systems was due to the lengthy process of attempting to obtain approval and extra funding from state and local government.

[4] The Greenville Sheriff's Department (GSD), the highest priority agency in the state to request VHS-based camera systems in 2009, did not receive any camera systems until over a month after Johnson's arrest. The GSD had second priority statewide; the GPD had twenty-first priority.

[5] Lieutenant Browning testified the GPD would have requested forty camera systems in 2009 but he did not believe DPS could supply that many.

Johnson's counsel then argued our supreme court's holding in *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011), warranted dismissal of the DUI charge. At the conclusion of the pre-trial hearing, the circuit court denied the motion to dismiss, finding the facts of this case were distinguishable from those in *Roberts* because, unlike the law enforcement agency in *Roberts*, the GPD "was always seeking to get to the trough to get the equipment when they could, expending their own dollars in addition." The case proceeded to trial and the jury convicted Johnson of DUI and driving under suspension.[6] This appeal followed.

ISSUE ON APPEAL

Did the circuit court err in denying Johnson's motion to dismiss his DUI charge because of the GPD's failure to comply with the video recording requirements of section 56-5-2953 of the South Carolina Code (Supp. 2013)?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

A person who commits the offense of DUI "must have his conduct at the incident site and the breath test site video recorded . . . [and] [t]he video recording at the incident site must . . . not begin later than the activation of the officer's blue lights." S.C. Code Ann. § 56-5-2953(A)(1)(a)(i) (Supp. 2013). However, subsection 56-5-2953(B) outlines four exceptions that excuse noncompliance with subsection (A)'s mandatory video recording requirements:

> Failure to comply with the video recording requirement is excused: (1) if the arresting officer submits a sworn affidavit certifying the video equipment was inoperable despite efforts to maintain it; (2) if the arresting officer submits a sworn affidavit that it was impossible to produce the video recording because either (a) the defendant needed emergency medical treatment or (b)

[6] At trial, Johnson stipulated to knowingly driving with a suspended license.

> exigent circumstances existed; (3) in circumstances including, but not limited to, road blocks, traffic accident investigations, and citizen's arrests; or (4) for any other valid reason for the failure to produce the video recording based upon the totality of the circumstances.

State v. Manning, 400 S.C. 257, 264, 734 S.E.2d 314, 317-18 (Ct. App. 2012) (citing § 56-5-2953(B)). Pursuant to subsection (G) of 56-5-2953, the provisions of subsections (A) and (B) of 56-5-2953 take effect for each law enforcement vehicle used for traffic enforcement once the law enforcement vehicle is equipped with a video recording device. The failure to comply with the provisions of section 56-5-2953 merits a *per se* dismissal. *Town of Mount Pleasant v. Roberts*, 393 S.C. 332, 348, 713 S.E.2d 278, 286 (2011).

Johnson alleges the failure to produce a video recording in compliance with section 56-5-2953 merited the dismissal of the DUI charge pursuant to the supreme court's holding in *Roberts*. In *Roberts*, a Mount Pleasant police officer failed to record the traffic stop of Roberts because the officer's vehicle was not equipped with a video camera. *Id*. at 336, 713 S.E.2d at 280. Prior to the trial in municipal court, Roberts moved to dismiss the charge based on the officer's failure to videotape the entire arrest pursuant to section 56-5-2953. *Id.* at 337, 713 S.E.2d at 280. In opposing that argument, the Town of Mount Pleasant (the Town) relied on subsection (G) of section 56-5-2953 for the proposition that the videotaping requirement only takes effect once the law enforcement vehicle is equipped with a videotaping device. *Id.* at 337-38, 713 S.E.2d at 280-81. As the vehicle had not been equipped with such a device, the Town argued the statute had not taken effect.[7] *Id.* In support of her motion to dismiss, Roberts called several law enforcement officers from Charleston, Berkeley, and Dorchester counties in an attempt to establish that Mount Pleasant had fewer video cameras than these municipalities despite a higher number of DUI arrests. *Id.* at 338, 713 S.E.2d at 281. Roberts argued the Town had willfully avoided compliance with 56-5-2953 as it had not requested additional cameras from DPS in response to increasing DUI arrests.[8] *Id.* Additionally,

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[7] Our supreme court noted "this argument would be valid but for the Town's obvious intentional efforts to avoid complying with section 56-5-2953." *Roberts*, 393 S.C. at 338, 713 S.E.2d at 281.

[8] From our reading of *Roberts*, the Town did not argue that the difficulty in receiving video cameras from DPS contributed to their noncompliance. Unlike

Roberts argued the Town was financially able to purchase additional video cameras but had chosen not to do so. *Id.*

At the conclusion of the pre-trial hearing, the municipal court denied Roberts's motion to dismiss. *Id.* at 339, 713 S.E.2d at 281. The municipal court concluded there was no requirement that Mount Pleasant obtain any video cameras, and noted that subsection (G) indicated the other provisions of section 56-5-2953 only take effect once a vehicle is equipped with a videotaping device. *Id.* Roberts was convicted of DUI and subsequently appealed her conviction to the circuit court. *Id.* The circuit court reversed Roberts's conviction, finding that to construe subsection (G) as proposed by the Town would permit law enforcement agencies to circumvent the statute by not requesting video cameras from DPS. *Id.* at 340, 713 S.E.2d at 282. The circuit court also concluded that none of the exceptions in subsection (B) of 56-5-2953 were satisfied. *Id.*

In affirming the circuit court, our supreme court held that the Town's failure to equip its patrol vehicles with video cameras, despite its "priority" ranking, "defeat[ed] the intent of the Legislature and violated the statutorily-created obligation to videotape DUI arrests." *Id.* at 347, 713 S.E.2d at 285. The supreme court went on to say the Town should not be able to continually evade its duty by relying on subsection (G) of section 56-5-2953. *Id.* The court also pointed out that the Town failed to satisfy any of the statutory exceptions to the videotaping requirement. *Id.* Furthermore, the Town's failure to request additional video cameras from DPS did not constitute a "valid reason for the failure to produce the videotape based upon the totality of the circumstances." *Id*. at 348, 713 S.E.2d at 286 (citing § 56-5-2953(B)). In reaching this decision, the supreme court noted that its holding was dependent on the specific facts of *Roberts*, and it could envision other circumstances in which a law enforcement agency could establish a "valid reason" for noncompliance:

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this case, it does not appear that the Town presented evidence that law enforcement agencies were unable to request additional cameras until 2009. Instead, "[t]he Town countered Roberts's arguments by claiming that DPS was solely responsible for providing the video cameras and, thus, the Town did not have a duty to request or purchase additional cameras in order to comply with the statute." *Roberts*, 393 S.C. at 338-339, 713 S.E.2d at 281.

> Our decision should in no way be construed as eradicating subsection (G) of section 56-5-2953. Instead, we emphasize that subsection (G) is still viable and must be read in conjunction with subsection (B) as these exceptions, under the appropriate factual circumstances, could operate to excuse a law enforcement agency's noncompliance due to the failure to equip a patrol vehicle with a video camera. For example, we can conceive of a scenario where a law enforcement agency establishes a 'valid reason' for failing to create a video of the incident site by offering documentation that, despite concerted efforts to request video cameras, it has not been supplied with the cameras from DPS.

Id. at 349, 713 S.E.2d at 286-87.

In the present case, we find the GPD established a valid reason for its failure to equip a patrol vehicle with a video recording system. Lieutenant Browning's testimony outlined the GPD's extensive efforts to obtain video recording systems for its law enforcement vehicles. The GPD requested camera systems from DPS in both 2002 and 2009, which were the only opportunities to request camera systems from DPS.[9] Unlike the police department in *Roberts*, the GPD had already begun a

[9] Johnson also argues the number of camera systems requested by the GPD was insufficient in comparison to the number of requests made by police departments in "other highly populated cities." Specifically, Johnson points out that in 2009 the Charleston Police Department requested 200 camera systems and the Columbia Police Department requested 193 camera systems. However, this argument lacks merit because the number of DUI arrests, rather than population, governs priority for camera systems. In 2009, the Charleston and Columbia police departments had first and ninth priority, respectively, while the GPD had twenty-first priority. According to a DPS spreadsheet, the number of camera systems requested by the GPD was comparable to the number of requests by agencies with similar "priority" rankings. More specifically, the Richland County and Anderson County sheriff's departments had 2009 priority rankings of nineteenth and twentieth, respectively. Accordingly, the spreadsheet reveals that Richland County requested ten camera systems in 2009, Anderson County requested fifteen camera systems, and the GPD requested twenty camera systems. Similarly, in 2002, the GPD had twentieth

process of expending its own funds to purchase camera systems before Johnson's arrest. This process included establishing a committee to research camera systems and necessitated the time-consuming task of attempting to secure extra funding from state and local government. These efforts do not constitute an attempt to evade the requirements of section 56-5-2953; instead, we agree with the circuit court that these efforts signify an attempt to comply with the statute with the limited funds and opportunities available. As we find the GPD did not seek to evade compliance with 56-5-2953 through reliance on subsection (G), subsection (G) still applies. Therefore, the video recording requirements of subsection 56-5-2953(A) had not taken effect because the vehicle had yet to be equipped with video recording equipment. Additionally, had the requirements taken effect, we find these facts constitute a "valid reason" under a totality of the circumstances analysis, which would satisfy an exception under section 56-5-2953(B). *See Roberts*, 393 S.C. at 349, 713 S.E.2d at 286-87 ("We can conceive of a scenario where a law enforcement agency establishes a 'valid reason' for failing to create a video of the incident site by offering documentation that, despite concerted efforts to request video cameras, it has not been supplied with the cameras from DPS.").

CONCLUSION

We hold the circuit court properly denied Johnson's motion to dismiss his charge for DUI. Unlike the police department in *Roberts*, the GPD did not seek to evade its duties in equipping law enforcement vehicles with video recording systems. Thus, under subsection (G) of 56-5-2953, the video recording requirements of subsection 56-5-2953(A) had not taken effect because a video camera had not been installed in the vehicle. Accordingly, the circuit court's decision is

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

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priority and requested more camera systems than the two agencies with eighteenth and nineteenth priority.