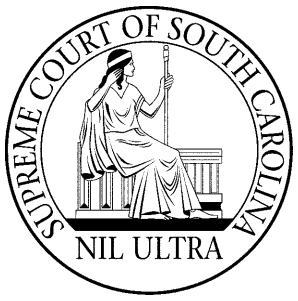

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 21
June 1, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Jack Schoer, Respondent.

Opinion No. 26824
Submitted April 29, 2010 – Filed June 1, 2010

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Joseph P. Turner, Jr., Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

R. Davis Howser, of Howser, Newman, & Besley, LLC, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a two year suspension from the practice of law. Respondent requests the suspension be imposed retroactively to March 22, 2006, the date of his interim suspension. In the Matter of Schoer, 368 S.C. 172, 628 S.E.2d 884 (2006). We accept the Agreement and impose a two year suspension from the practice of law, retroactive to the date of respondent's interim suspension. The facts, as set forth in the Agreement, are as follows.

FACTS

Matter I

Between 2002 and 2003, respondent routinely directed his non-lawyer assistant to conduct residential real estate refinancing closings at borrowers' residences. Borrowers were instructed to provide a witness at the closings so that the mortgage execution could be witnessed by two parties, the agent for the lawyer and the witness provided by the borrower. When borrowers failed to provide a witness, respondent's standard practice was to have the closing agent (either his non-lawyer assistant or another lawyer) deliver the closing documents after closing and respondent would sign the mortgage as the second witness even though he had not witnessed its execution.

In April 2002, respondent was hired to perform closing services on behalf of an out-of-state lender in a refinance transaction in which Jane Doe was the borrower. Respondent was under the assumption that Tom Hall, a South Carolina attorney, was supervising the title abstract, document preparation, recordation, and disbursement related to the closing, but respondent failed to insure that this was the case when, in fact, it was not. Respondent did not personally attend the closing, but, instead, sent his non-lawyer assistant to conduct the closing. The legal significance of the documents executed by Jane Doe was not explained to her at closing or at any other time prior to closing.

The Jane Doe closing required a quit claim deed to be executed to Ms. Doe by her former husband so that she could refinance the property solely in her name. Instead, respondent mistakenly prepared a quit claim deed indicating a conveyance from Ms. Doe to her former husband, but with a signature block for the former husband as the grantor. Respondent sent a non-lawyer assistant to obtain the former husband's signature on the incorrect deed. Respondent had previously notarized the deed prior to its execution and was not present when the former husband signed the deed. Thereafter, respondent signed the deed as a second witness to the former husband's signature

even though he had not witnessed the deed's execution. After the quit claim deed was recorded, the error was corrected by another lawyer who obtained the former husband's signature on a deed which properly conveyed the property to Jane Doe.

When Jane Doe fell behind on her mortgage payments, the lender initiated foreclosure proceedings. Jane Doe filed a third party complaint against several parties, including respondent, in the foreclosure action. Respondent's malpractice carrier settled the claim by payment of $30,000 to Jane Doe.

Matter II

During 2004 and 2005, respondent engaged in ongoing business relationships with two out-of-state entities that facilitated real estate transactions in several states, including South Carolina. Pursuant to these relationships, respondent was regularly retained to conduct real estate closings in which the title abstract, recordation, and disbursement were not performed or supervised by a South Carolina lawyer. Respondent closed approximately one hundred transactions on behalf of these two entities without making a sufficient effort to insure that a South Carolina lawyer was performing or supervising the closing-related activities.

LAW

Respondent admits that his misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law). In addition, respondent admits he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to a client); Rule 4.1 (in the course of representing a client, a lawyer shall not make a false

statement of fact or law to a third person); Rule 5.5 (a) (lawyer shall not assist another in practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction); Rule 8.4(a) (lawyer shall not violate the Rules of Professional Conduct); and Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for two years, retroactive to March 22, 2006, the date of respondent's interim suspension. In the Matter of Schoer, supra. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., PLEICONES, KITTREDGE and HEARN, JJ., concur. BEATTY, J., not participating.

The Supreme Court of South Carolina

RE: Amendment to Rules for Judicial Disciplinary Enforcement

O R D E R

Pursuant to Article V, § 4 of the South Carolina Constitution, Rules 17(e) of the Rules for Judicial Disciplinary Enforcement (RJDE) contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR) is amended as indicated in the attachment to this order. This amendment shall be effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
June 1, 2010

AMENDMENT TO THE RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT (RJDE)

Rule 17(e), RLDE, is amended to read:

> **(e) Order to be Public.** The order of interim suspension or transfer to incapacity inactive status shall be public. Unless the Supreme Court determines that it is appropriate to do so, an order transferring a judge to incapacity inactive status shall not disclose the nature of the incapacity.

The Supreme Court of South Carolina

RE: Amendments to Rules for Lawyer Disciplinary Enforcement

O R D E R

Pursuant to Article V, § 4 of the South Carolina Constitution, Rules 17(e) and Rule 31(a) of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR) are amended as indicated in the attachment to this order. These amendments shall be effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
June 1, 2010

AMENDMENTS TO THE RULES FOR LAWYER DISCIPLINARY ENFORCEMENT (RLDE)

(1) Rule 17(e), RLDE, is amended to read:

(e) Order to be Public. The order of interim suspension or transfer to incapacity inactive status shall be public. Unless the Supreme Court determines that it is appropriate to do so, an order transferring a lawyer to incapacity inactive status shall not disclose the nature of the incapacity.

(2) The title and subsection (a) of Rule 31, RLDE, are amended to read:

RULE 31
APPOINTMENT OF ATTORNEY TO PROTECT CLIENTS' INTERESTS

(a) Appointment of Attorney. If a lawyer has been transferred to incapacity inactive status, has disappeared or died, or has been suspended or disbarred, and no partner, personal representative or other responsible party capable of conducting the lawyer's affairs is known to exist, disciplinary counsel shall petition the Supreme Court for an order appointing an attorney or attorneys to inventory the files of the inactive, disappeared, deceased, suspended or disbarred lawyer and to take action as appropriate to protect the interests of the lawyer and the lawyer's clients. If the Supreme Court determines that a lawyer suffers from a physical or mental condition that adversely affects the lawyer's ability to practice law but decides that a transfer to incapacity inactive status is not warranted, it may appoint an attorney to protect clients' interests. The order of appointment shall be public.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Corrections, Respondent,

v.

Billy Joe Cartrette, Appellant.

Appeal From Jasper County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4670
Submitted March 1, 2010 – Filed April 5, 2010
Withdrawn, Substituted and Refiled May 28, 2010

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Billy J. Cartrette, pro se, for Appellant.

Lake E. Summers, of Columbia, for Respondent.

CURETON, A.J.: Billy Joe Cartrette filed a grievance with the South Carolina Department of Corrections concerning conditions of his participation in the Prison Industries Program (PIP). Cartrette appeals the circuit court's order remanding his case to the Administrative Law Court (ALC) for a determination of the prevailing wage for similar work, reversing the ALC's finding that Cartrette was an employee of the private sponsor, affirming the ALC's denial of overtime wages, and affirming the ALC's denial of reimbursement for certain pay deductions.[1] We reverse as to overtime wages, remand that issue to the ALC for further proceedings as outlined in this opinion, and affirm the circuit court's decisions on all remaining issues.[2]

After we issued our original opinion affirming in part and reversing in part, both parties petitioned for rehearing. We deny Cartrette's petition for rehearing, grant the Department's petition for rehearing, withdraw our previous opinion, and substitute this opinion.

FACTS

Cartrette was an inmate of the Ridgeland Correctional Institution. As a participant in PIP, Cartrette provided on-site labor at the Ridgeland Correctional Institution, sometimes working in excess of ninety hours per two-week period, for PIP sponsor Kwalu Furniture. Cartrette was compensated at a rate of $5.50 per hour. Cartrette filed a grievance with the Department complaining his hourly wage was insufficient compared to the prevailing wage for similar work performed in the private sector. He asserted non-inmate employees earned $11.00 to $14.00 per hour for the same work. Cartrette further complained he did not receive additional pay for overtime hours and the Department improperly withheld funds from his paychecks.

[1] This appeal is being considered alongside S.C. Dep't of Corr. v. George Lee Tomlin. The material facts, substantive arguments, and procedural postures of these two appeals are identical.

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

Specifically, Cartrette challenged as unconstitutional the withholding of funds for his room and board and additional funds for Victim's Assistance.[3]

The Department denied Cartrette's grievance, and Cartrette appealed to the ALC. The ALC reversed the Department's refusal to pay Cartrette the prevailing wage and found the prevailing wage was $5.25. Furthermore, the ALC affirmed the Department's denials of overtime and reimbursement for wage deductions.

Both Cartrette and the Department then appealed to the circuit court. After a hearing, the circuit court found $5.25 was not the prevailing wage and remanded that issue to the ALC with seven questions for the ALC to consider in determining the correct prevailing wage. The circuit court reversed the ALC's apparent finding that Cartrette "worked for . . . or was otherwise ever an employee of Kwalu." Finally, the circuit court affirmed the ALC's determinations Cartrette was ineligible for overtime or reimbursement of wage deductions for room and board and for Victims Assistance. Cartrette now appeals.

STANDARD OF REVIEW

The ALC has subject matter jurisdiction under the Administrative Procedures Act (APA) to hear properly perfected appeals from the Department's final orders in administrative or non-collateral matters. Slezak v. S.C. Dep't of Corr., 361 S.C. 327, 331, 605 S.E.2d 506, 507 (2004). Our standard of review derives from the APA. Al-Shabazz v. State, 338 S.C. 354, 379, 527 S.E.2d 742, 755 (2000). We may affirm, remand, reverse, or modify the appealed decision if the appellant's substantive rights have suffered prejudice because the decision is:

[3] See S.C. Code Ann. § 16-3-1290 (2003) (establishing Victim's Compensation Fund from which State Office of Victim Assistance may pay victims' claims); S.C. Code Ann. § 16-3-1260 (2003) (requiring persons convicted of criminal acts to reimburse the State and directing such payments to be made from inmate wages to the State Office of Victim Assistance).

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2009).

LAW/ANALYSIS

I. Overtime Pay

Cartrette contends he is entitled to time-and-a-half pay for overtime worked. We agree.

In South Carolina, a non-inmate employee's right of action for overtime pay lies in § 207(a)(1) of the Federal Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C.A. §§ 201-219 (1998 & Supp. 2009). Under the FLSA, non-inmate workers receive compensation at a rate of one and one-half times their hourly rate for hours worked in excess of forty per week. 29 U.S.C.A. § 207(a)(2) (1998). This court recently examined the legislative intent underlying the FLSA and found:

> The purpose of the FLSA is to protect "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597, 64 S.Ct. 698, 88 L.Ed. 949 (1944). The FLSA was enacted in response to a congressional finding that some industries, engaged in commerce, maintained labor conditions which were detrimental to a minimum standard of living necessary for health, efficiency, and the general well-being of workers. See 29 U.S.C. § 202(a) (1998). The Act attempts to eliminate unfair labor practices without substantially curtailing employment or earning power. 29 U.S.C. § 202(b). Because the FLSA is remedial and humanitarian in purpose, it should be broadly interpreted and applied to effectuate its goals. Tennessee Coal, Iron & R.R. Co., 321 U.S. at 597, 64 S.Ct. 698; Benshoff v. City of Virginia Beach, 180 F.3d 136 (4th Cir. 1999).

Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 221, 616 S.E.2d 722, 730 (Ct. App. 2005).

Our supreme court has held the FLSA does not extend to inmate workers because, for purposes of payment of wages, inmate workers are not employees of PIP sponsors. Williams v. S.C. Dep't of Corr., 372 S.C. 255, 260, 641 S.E.2d 885, 888 (2007). Other courts, including the Federal Court of Appeals for the Fourth Circuit, have also declined to extend the protections of the FLSA and state labor statutes to inmates. See, e.g., Harker v. State Use Indus., 990 F.2d 131, 135 (4th Cir. 1993).

Nonetheless, South Carolina law requires that inmate workers in a PIP enjoy pay and working conditions comparable to those enjoyed by non-inmate workers. According to our supreme court, the overall purpose of

these statutes "is to prevent unfair competition." Adkins v. S.C. Dep't of Corr., 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004).

> The [Department] must determine prior to using inmate labor in a [PIP] that it will not displace employed workers, that the locality does not have a surplus of available labor for the skills, crafts, or trades that would utilize inmate labor, and that the rates of pay and other conditions of employment are not less than those paid and provided for work of [a] similar nature in the locality in which the work is performed.

S.C. Code Ann. § 24-3-315 (2007). "No inmate participating in [PIP] may earn less than the prevailing wage for work of [a] similar nature in the private sector." S.C. Code Ann. § 24-3-430(D) (2007). "Inmate participation in the program may not result in the displacement of employed workers in the State of South Carolina and may not impair existing contracts for services." S.C. Code Ann. §24-3-430(E) (2007). While inmates are not entitled to a private right of action in tort, they may protest through the grievance process the Department's failure to comply with these statutes. Adkins, 360 S.C. at 419, 602 S.E.2d at 55.

We expand upon the analysis of this issue in our original opinion, as that analysis appears to have been incomplete. Cartrette properly brought this matter as a grievance and alleged the Department denied him time-and-a-half overtime wages for the hours he worked beyond forty each week. As observed above, both federal and South Carolina courts have held inmate workers do not qualify as "employees" and are therefore excluded from the coverage of the FLSA.[4] See Williams, 372 S.C. at 260, 641 S.E.2d at 888;

[4] We specifically reject Cartrette's contention that Hamilton v. Daniel Int'l Corp., 273 S.C. 409, 257 S.E.2d 157 (1979), established his right to time-and-a-half pay for overtime work. Although the Hamilton court cited to statutory language similar to that found in section 24-3-315, it did not contemplate overtime work. Id. at 410, 257 S.E.2d at 158. The issue in that

Harker, 990 F.2d at 135. However, our General Assembly has required the Department to ensure inmate workers receive "rates of pay and other conditions of employment" comparable to those afforded non-inmate workers performing similar labor in the same locality. See § 24-3-315. Consequently, we hold that although the FLSA does not apply to inmate workers, sections 24-3-315 and 24-3-430(D) compel the Department to ensure inmate workers who are employed under those sections receive the same pay rates and employment conditions as their non-inmate peers.[5]

The statutory mandate of comparable pay rates and employment conditions does not expressly exclude time-and-a-half pay for overtime hours worked. Instead, sections 24-3-315 and 24-3-430(E) require that inmate workers receive comparable compensation and prohibit inmate workers from displacing non-inmate workers. These provisions appear to support Cartrette's argument for overtime pay. Failure of the Department's contracts with PIP sponsors to provide inmate workers with time-and-a-half pay for overtime hours when their non-inmate counterparts receive it would create an impermissible and unfair advantage for inmate labor over private labor. Moreover, any failure on the Department's behalf to pay inmates time-and-a-half overtime pay when non-inmate workers receive it for comparable work in the same area contradicts the Department's obligation under section 24-3-315.[6] Consequently, the circuit court erred in denying Cartrette time-and-a-

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case concerned the right of an inmate participating in a work-release program to benefits under the Worker's Compensation Act. Id. at 410-11, 257 S.E.2d at 158.

[5] While the Department argues our opinion impacts three of its PIPs, this opinion is limited solely to the program in which Cartrette was involved and that was promulgated and operated pursuant to sections 24-3-315 and 24-3-430.

[6] In its petition for rehearing, the Department declares the majority's analysis of section 24-3-430's provision of a prevailing wage for inmate labor "obviously overlooked the explicit intent of our General Assembly" regarding inmate labor. The Department cites section 24-3-310 of the South Carolina Code (2007), which indicates the purposes of inmate labor include self-maintenance, reimbursement of the State, restitution, and child support. In

half pay for overtime work without first determining whether non-inmate workers performing the same work in the same locality receive time-and-a-half pay for overtime.[7]

In addition, we observe section 24-3-430(D) requires inmates receive the "prevailing wage" paid to their non-inmate peers for comparable work. However, the question of the prevailing wage to which Cartrette is entitled

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our opinion, these purposes harmonize with the General Assembly's mandate that inmate labor not unfairly compete with non-inmate labor. See §§ 24-3-315 & -430(E); see also Adkins, 360 S.C. at 418, 602 S.E.2d at 54 (finding the overall purpose of these statutes "is to prevent unfair competition"). By statute, seventy percent or more of each inmate worker's pay is diverted for restitution, victim's programs, child support, room and board, or taxes. S.C. Code Ann. § 24-3-40 (2007). Increased pay, including overtime pay, for inmate workers ultimately benefits the Department by increasing the funds available to relieve the burden of inmate housing and care; benefits crime victims, both directly through fulfillment of inmates' restitution obligations and indirectly by funding state agencies that provide victim assistance; and benefits inmates' minor children by increasing the amount available for child support. We believe that in crafting these statutes, our General Assembly carefully balanced its desire to maximize inmates' financial contributions against the need to ensure inmate workers do not supplant non-inmate workers in the labor force.

[7] We note with some consternation that despite its persistent arguments against paying Cartrette time-and-a-half for overtime under Cartrette's theories of entitlement, the Department admits in its petition for rehearing that applicable federal regulations "required [the Department] to pay Cartrette time-and-a-half for his overtime labor." (emphasis supplied) Furthermore, despite the fact the record in this case appears to reflect a failure to pay overtime at the time-and-a-half rate, the Department repeatedly asserts for the first time in its petition for rehearing that it did pay Cartrette time-and-a-half overtime pay for his work on Kwalu projects "on numerous and diverse occasions." We are troubled that these assertions, which might have led to a speedy disposition of this issue before the ALC, escaped counsel's attention for so long.

has been remanded to the ALC for further proceedings. We nonetheless have jurisdiction to consider whether the prevailing wage language of section 24-3-430(D) entitles Cartrette to overtime pay because the issue remanded concerned the proper hourly rate, only. However, because we have found section 24-3-315 resolves Cartrette's dispute, we need not address this argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate court need not discuss remaining issues when decision on prior issue disposes of appeal).

For the foregoing reasons, we reverse the circuit court's decision concerning overtime pay and remand this issue to the ALC for a determination of whether the Department failed to pay Cartrette at the time-and-a-half rate for the hours he worked in excess of forty per week. In the event of such a failure, we instruct the ALC to determine the rate of compensation to which Cartrette was entitled, the number of overtime hours that were underpaid, and the amount the Department owes Cartrette for his labor.

II. Remaining Issues

With regard to Cartrette's remaining issues, we affirm based upon the following authorities:

1. As to the circuit court's remand to the ALC for determination of the prevailing wage: Condor, Inc. v. Bd. of Zoning Appeals, City of N. Charleston, 328 S.C. 173, 178, 493 S.E.2d 342, 344 (1997) (preventing an appellant from arguing on appeal an issue conceded in the trial court); Bowman v. Bowman, 357 S.C. 146, 160, 591 S.E.2d 654, 661 (Ct. App. 2004) (holding a party cannot seek and receive a particular result at trial and then challenge it on appeal).

2. As to whether Cartrette was an employee of the private sponsor: S.C. Code Ann. § 24-3-40(A) (2007) ("Unless otherwise provided by law, the employer of a prisoner authorized to work . . . in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages

directly to the Department of Corrections."); Williams v. S.C. Dep't of Corr., 372 S.C. 255, 258-59, 641 S.E.2d 885, 887 (2007) (holding a prison industries program sponsor is not an employer of inmates because the sponsor does not exclusively control the payment of inmate wages and finding agreement among other jurisdictions that examined this issue).

3. As to whether Cartrette is entitled to reimbursement of monies deducted from his pay for room and board because he was double-billed for this cost: Rule 210(h), SCACR (limiting appellate review to facts appearing in the record on appeal); State v. Mitchell, 330 S.C. 189, 199, 498 S.E.2d 642, 647 (1998) (placing on appellant the burden of presenting a sufficient record to allow appellate review).

4. As to whether Cartrette is entitled to reimbursement of monies deducted from his pay for room and board because the deduction was unconstitutional: S.C. Const. art. XII, § 2 ("The General Assembly shall establish institutions for the confinement of all persons convicted of such crimes as may be designated by law, and shall provide for the custody, maintenance, health, welfare, education, and rehabilitation of the inmates."); S.C. Code Ann. § 24-3-40 (2007) (allocating portions of inmates' wages for restitution, the State Office of Victim Assistance, child support, room and board, and inmate use); Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("An appellate court cannot construe a statute without regard to its plain meaning and may not resort to a forced interpretation in an attempt to expand or limit the scope of a statute.").

5. As to whether Cartrette is entitled to reimbursement of monies deducted from his pay for victim's assistance because inmate wages are outside the funds available for appropriations by the General Assembly: S.C. Code Ann. § 24-3-40 (2007) (allocating portions of inmates' wages for restitution, the State Office of Victim Assistance, child support, room and board, and inmate use); S.C. Code Ann. § 16-3-1260 (2003) (requiring persons convicted of criminal acts to reimburse the State and directing such payments to be made from inmate wages to the State Office of Victim Assistance); S.C. Code Ann. § 16-3-1290 (2003) (establishing Victim's

Compensation Fund from which State Office of Victim Assistance may pay victims' claims).

CONCLUSION

We find sections 24-3-315 and 24-3-430(D) entitle inmate workers in a PIP to pay and working conditions comparable to those enjoyed by workers in private industry, including time-and-a-half pay for overtime hours worked. Accordingly, we reverse the circuit court's decision on this issue and remand to the ALC for additional proceedings consistent with this opinion. For the foregoing reasons, we affirm the circuit court's decision on the remaining issues.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GEATHERS, J., concurs.

PIEPER, J., concurring in part and dissenting in part:

I concur in the majority's conclusion to affirm the decision to remand to determine a prevailing wage. I also concur in the determination that the inmate is not an employee of the private sponsor or entitled to reimbursement for room and board and other costs. However, I respectfully dissent as to any finding that the inmate is entitled to overtime pay. Section 24-3-430 establishes an inmate's right to the prevailing wage, stating "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." S.C. Code Ann. § 24-3-430(D) (2007). Our supreme court recognizes that a critical purpose of the prevailing wage provision is to prevent unfair competition. Adkins v. S.C. Dep't of Corr., 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004). Nonetheless, I would distinguish between prevailing wages and any right to overtime pay for inmates participating in a prison industries program. In fact, there is no authority within the applicable state statutory scheme recognizing any right to

overtime pay for inmates.[8] See § 24-3-430(D) (2007) (stating only that no inmate participating in the program may earn less than the prevailing wage). Moreover, the inmate never specifically raised the issue of whether a particular federal program provides for the right to overtime pay.

While the Fair Labor Standards Act (FLSA) provides a right to overtime pay for certain employees, the protections of the act do not apply to inmates working within the prison setting. See Harker v. State Use Indus., 990 F.2d 131, 136 (4th Cir. 1993) ("For more than fifty years, Congress has operated on the assumption that the FLSA does not apply to inmate labor. If the FLSA's coverage is to extend within prison walls, Congress must say so, not the courts."). As noted by the Fourth Circuit in Harker, inmates participating in these types of programs perform work not to "turn profits for their supposed employer, but rather as a means of rehabilitation and job training." Id. at 133.

In sum, I am not convinced the current statutory scheme provides for overtime pay to inmates. Inmates are not employees entitled to the protections of the FLSA, and I do not find it appropriate to read into the prevailing wage statute any such right to inmates voluntarily participating in a prison industries program.[9] As Judge Posner of the Seventh Circuit has explained:

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[8] Although not within the applicable statutory scheme, section 8-11-55 of the South Carolina Code mentions overtime in the context of state employees. That statute only applies to state employees and provides that "[a]ny state employee who is required to work overtime during any particular week may, as a result, be given compensatory time . . . ." S.C. Code Ann. § 8-11-55 (Supp. 2009). The statute further provides that any compensatory time granted must be in accordance with the FLSA. As indicated, the FLSA does not apply to inmates and the prevailing wage statute at issue specifically states that inmates participating in the prison industries program are not considered employees of the state. See S.C. Code Ann. § 24-3-430(F) (2007).

[9] An inmate's participation in the prison industries program is voluntary and contingent upon consent to the conditions of the employment. S.C. Code

> People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress.

Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005). Accordingly, I concur in the decision of the majority to affirm the circuit court and remand to the ALC to determine a prevailing wage; however, I respectfully dissent as to the overtime issue, and I would affirm the finding of the ALC and the circuit court that the inmate is not entitled to overtime pay.

Ann. § 24-3-430(C) (2007) ("An inmate *may* participate in the program established pursuant to this section only on a voluntary basis and only after he has been informed of the conditions of his employment.") (emphasis added).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Corrections, Respondent,

v.

George Lee Tomlin, Appellant.

Appeal From Jasper County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 4671
Submitted March 1, 2010 – Filed April 5, 2010
Withdrawn, Substituted and Refiled May 28, 2010

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

George Tomlin, pro se, for Appellant.

Lake E. Summers, of Columbia, for Respondent.

CURETON, A.J.: George Lee Tomlin filed a grievance with the South Carolina Department of Corrections concerning conditions of his

participation in the Prison Industries Program (PIP). Tomlin appeals the circuit court's order remanding his case to the Administrative Law Court (ALC) for a determination of the prevailing wage for similar work, reversing the ALC's finding that Tomlin was an employee of the private sponsor, affirming the ALC's denial of overtime wages, and affirming the ALC's denial of reimbursement for certain pay deductions.[1] We reverse as to overtime wages, remand that issue to the ALC for further proceedings as outlined in this opinion, and affirm the circuit court's decisions on all remaining issues.[2]

After we issued our original opinion affirming in part and reversing in part, both parties petitioned for rehearing. We deny the petitions for rehearing, withdraw our original opinion, and substitute this opinion.

FACTS

Tomlin was an inmate of the Ridgeland Correctional Institution. As a participant in PIP, Tomlin provided on-site labor at the Ridgeland Correctional Institution, sometimes working in excess of eighty hours per two-week period, for PIP sponsor Kwalu Furniture. Tomlin was compensated at a rate of $5.25 per hour. Tomlin filed a grievance with the Department complaining his hourly wage was insufficient compared to the prevailing wage for similar work performed in the private sector. He asserted non-inmate employees earned $11.00 to $14.00 per hour for the same work. Tomlin further complained he did not receive additional pay for overtime hours and the Department improperly withheld funds from his paychecks. Specifically, Tomlin challenged as unconstitutional the withholding of funds for his room and board and additional funds for Victim's Assistance.[3]

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[1] This appeal is being considered alongside S.C. Dep't of Corr. v. Billy Joe Cartrette. The material facts, substantive arguments, and procedural postures of these two appeals are identical.

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

[3] See S.C. Code Ann. § 16-3-1290 (2003) (establishing Victim's Compensation Fund from which State Office of Victim Assistance may pay victims' claims); S.C. Code Ann. § 16-3-1260 (2003) (requiring persons

The Department denied Tomlin's grievance, and Tomlin appealed to the ALC. The ALC reversed the Department's refusal to pay Tomlin the prevailing wage and found the prevailing wage was $5.25.[4] Furthermore, the ALC affirmed the Department's denials of overtime and reimbursement for wage deductions.

Both Tomlin and the Department then appealed to the circuit court. After a hearing, the circuit court found $5.25 was not the prevailing wage and remanded that issue to the ALC with seven questions for the ALC to consider in determining the correct prevailing wage. The circuit court reversed the ALC's apparent finding that Tomlin "worked for . . . or was otherwise ever an employee of Kwalu." Finally, the circuit court affirmed the ALC's determinations Tomlin was ineligible for overtime or reimbursement of wage deductions for room and board and for Victims Assistance. Tomlin now appeals.

STANDARD OF REVIEW

The ALC has subject matter jurisdiction under the Administrative Procedures Act (APA) to hear properly perfected appeals from the Department's final orders in administrative or non-collateral matters. Slezak v. S.C. Dep't of Corr., 361 S.C. 327, 331, 605 S.E.2d 506, 507 (2004). Our standard of review derives from the APA. Al-Shabazz v. State, 338 S.C. 354, 379, 527 S.E.2d 742, 755 (2000). We may affirm, remand, reverse, or modify the appealed decision if the appellant's substantive rights have suffered prejudice because the decision is:

> (a) in violation of constitutional or statutory provisions;

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convicted of criminal acts to reimburse the State and directing such payments to be made from inmate wages to the State Office of Victim Assistance).

[4] The ALC's order seems to presume Tomlin complained of receiving a "training wage" of less than $5.25 per hour. However, Tomlin appears to have complained only that $5.25 per hour was below the prevailing wage.

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2009).

LAW/ANALYSIS

I. Overtime Pay

Tomlin contends he is entitled to time-and-a-half pay for overtime worked. We agree.

In South Carolina, a non-inmate employee's right of action for overtime pay lies in § 207(a)(1) of the Federal Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C.A. §§ 201-219 (1998 & Supp. 2009). Under the FLSA, non-inmate workers receive compensation at a rate of one and one-half times their hourly rate for hours worked in excess of forty per week. 29 U.S.C.A. § 207(a)(2) (1998). This court recently examined the legislative intent underlying the FLSA and found:

> The purpose of the FLSA is to protect "the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of

> others." Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597, 64 S.Ct. 698, 88 L.Ed. 949 (1944). The FLSA was enacted in response to a congressional finding that some industries, engaged in commerce, maintained labor conditions which were detrimental to a minimum standard of living necessary for health, efficiency, and the general well-being of workers. See 29 U.S.C. § 202(a) (1998). The Act attempts to eliminate unfair labor practices without substantially curtailing employment or earning power. 29 U.S.C. § 202(b). Because the FLSA is remedial and humanitarian in purpose, it should be broadly interpreted and applied to effectuate its goals. Tennessee Coal, Iron & R.R. Co., 321 U.S. at 597, 64 S.Ct. 698; Benshoff v. City of Virginia Beach, 180 F.3d 136 (4th Cir. 1999).

Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 221, 616 S.E.2d 722, 730 (Ct. App. 2005).

Our supreme court has held the FLSA does not extend to inmate workers because, for purposes of payment of wages, inmate workers are not employees of PIP sponsors. Williams v. S.C. Dep't of Corr., 372 S.C. 255, 260, 641 S.E.2d 885, 888 (2007). Other courts, including the Federal Court of Appeals for the Fourth Circuit, have also declined to extend the protections of the FLSA and state labor statutes to inmates. See, e.g., Harker v. State Use Indus., 990 F.2d 131, 135 (4th Cir. 1993).

Nonetheless, South Carolina law requires that inmate workers in a PIP enjoy pay and working conditions comparable to those enjoyed by non-inmate workers. According to our supreme court, the overall purpose of these statutes "is to prevent unfair competition." Adkins v. S.C. Dep't of Corr., 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004).

> The [Department] must determine prior to using inmate labor in a [PIP] that it will not displace employed workers, that the locality does not have a surplus of available labor for the skills, crafts, or trades that would utilize inmate labor, and that the rates of pay and other conditions of employment are not less than those paid and provided for work of [a] similar nature in the locality in which the work is performed.

S.C. Code Ann. § 24-3-315 (2007). S.C. Code Ann. § 24-3-315 (2007). "No inmate participating in [PIP] may earn less than the prevailing wage for work of [a] similar nature in the private sector." S.C. Code Ann. § 24-3-430(D) (2007). While the prevailing wage statutes do not entitle inmates to a private right of action in tort, inmates may protest through the grievance process the Department's failure to comply with these statutes. Adkins, 360 S.C. at 419, 602 S.E.2d at 55.

We expand upon the analysis of this issue in our original opinion, as that analysis appears to have been incomplete. Tomlin properly brought this matter as a grievance and alleged the Department denied him time-and-a-half overtime wages for the hours he worked beyond forty each week. As observed above, both federal and South Carolina courts have held inmate workers do not qualify as "employees" and are therefore excluded from the coverage of the FLSA.[5] See Williams, 372 S.C. at 260, 641 S.E.2d at 888; Harker, 990 F.2d at 135. However, our General Assembly has required the Department to ensure inmate workers receive "rates of pay and other

[5] We specifically reject Tomlin's contention that Hamilton v. Daniel Int'l Corp., 273 S.C. 409, 257 S.E.2d 157 (1979), established his right to time-and-a-half pay for overtime work. Although the Hamilton court cited to statutory language similar to that found in section 24-3-315, it did not contemplate overtime work. Id. at 410, 257 S.E.2d at 158. The issue in that case concerned the right of an inmate participating in a work-release program to benefits under the Worker's Compensation Act. Id. at 410-11, 257 S.E.2d at 158.

conditions of employment" comparable to those afforded non-inmate workers performing similar labor in the same locality. See § 24-3-315. Consequently, we hold that although the FLSA does not apply to inmate workers, sections 24-3-315 and 24-3-430(D) compel the Department to ensure inmate workers who are employed under those sections receive the same pay rates and employment conditions as their non-inmate peers.[6]

The statutory mandate of comparable pay rates and employment conditions does not expressly exclude time-and-a-half pay for overtime hours worked. Instead, sections 24-3-315 and 24-3-430(E) require that inmate workers receive comparable compensation and prohibit inmate workers from displacing non-inmate workers. These provisions appear to support Tomlin's argument for overtime pay. Failure of the Department's contracts with PIP sponsors to provide inmate workers with time-and-a-half pay for overtime hours when their non-inmate counterparts receive it would create an impermissible and unfair advantage for inmate labor over private labor. Moreover, any failure on the Department's behalf to pay inmates time-and-a-half overtime pay when non-inmate workers receive it for comparable work in the same area contradicts the Department's obligation under section 24-3-315.[7] Consequently, the circuit court erred in denying Tomlin time-and-a-

[6] While the Department argues our opinion impacts three of its PIPs, this opinion is limited solely to the program in which Tomlin was involved and that was promulgated and operated pursuant to sections 24-3-315 and 24-3-430.

[7] In its petition for rehearing, the Department declares the majority's analysis of section 24-3-430's provision of a prevailing wage for inmate labor "obviously overlooked the explicit intent of our General Assembly" regarding inmate labor. The Department cites section 24-3-310 of the South Carolina Code (2007), which indicates the purposes of inmate labor include self-maintenance, reimbursement of the State, restitution, and child support. In our opinion, these purposes harmonize with the General Assembly's mandate that inmate labor not unfairly compete with non-inmate labor. See §§ 24-3-315 & -430(E); see also Adkins, 360 S.C. at 418, 602 S.E.2d at 54 (finding the overall purpose of these statutes "is to prevent unfair competition"). By statute, seventy percent or more of each inmate worker's pay is diverted for

half pay for overtime work without first determining whether non-inmate workers performing the same work in the same locality receive time-and-a-half pay for overtime.[8]

In addition, we observe section 24-3-430(D) requires inmates receive the "prevailing wage" paid to their non-inmate peers for comparable work. However, the question of the prevailing wage to which Tomlin is entitled has been remanded to the ALC for further proceedings. We nonetheless have jurisdiction to consider whether the prevailing wage language of section 24-3-430(D) entitles Tomlin to overtime pay because the issue remanded concerned the proper hourly rate, only. However, because we have found section 24-3-315 resolves Tomlin's dispute, we need not address this

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restitution, victim's programs, child support, room and board, or taxes. S.C. Code Ann. § 24-3-40 (2007). Increased pay, including overtime pay, for inmate workers ultimately benefits the Department by increasing the funds available to relieve the burden of inmate housing and care; benefits crime victims, both directly through fulfillment of inmates' restitution obligations and indirectly by funding state agencies that provide victim assistance; and benefits inmates' minor children by increasing the amount available for child support. We believe that in crafting these statutes, our General Assembly carefully balanced its desire to maximize inmates' financial contributions against the need to ensure inmate workers do not supplant non-inmate workers in the labor force.

[8] We note with some consternation that despite its persistent arguments against paying Tomlin time-and-a-half for overtime under Tomlin's theories of entitlement, the Department admits in its petition for rehearing that applicable federal regulations "required [the Department] to pay Tomlin time-and-a-half for his overtime labor." (emphasis supplied) Furthermore, despite the fact the record in this case appears to reflect a failure to pay overtime at the time-and-a-half rate, the Department repeatedly asserts for the first time in its petition for rehearing that it did pay Tomlin time-and-a-half overtime pay for his work on Kwalu projects "on numerous and diverse occasions." We are troubled that these assertions, which might have led to a speedy disposition of this issue before the ALC, escaped counsel's attention for so long.

argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate court need not discuss remaining issues when decision on prior issue disposes of appeal).

For the foregoing reasons, we reverse the circuit court's decision concerning overtime pay and remand this issue to the ALC for a determination of whether the Department failed to pay Tomlin at the time-and-a-half rate for the hours he worked in excess of forty per week. In the event of such a failure, we instruct the ALC to determine the rate of compensation to which Tomlin was entitled, the number of overtime hours that were underpaid, and the amount the Department owes Tomlin for his labor.

II. Remaining Issues

With regard to Tomlin's remaining issues, we affirm based upon the following authorities:

1. As to the circuit court's remand to the ALC for determination of the prevailing wage: Condor, Inc. v. Bd. of Zoning Appeals, City of N. Charleston, 328 S.C. 173, 178, 493 S.E.2d 342, 344 (1997) (preventing an appellant from arguing on appeal an issue conceded in the trial court); Bowman v. Bowman, 357 S.C. 146, 160, 591 S.E.2d 654, 661 (Ct. App. 2004) (holding a party cannot seek and receive a particular result at trial and then challenge it on appeal).

2. As to whether Tomlin was an employee of the private sponsor: S.C. Code Ann. § 24-3-40(A) (2007) ("Unless otherwise provided by law, the employer of a prisoner authorized to work . . . in a prison industry program provided under Article 3 of this chapter shall pay the prisoner's wages directly to the Department of Corrections."); Williams v. S.C. Dep't of Corr., 372 S.C. 255, 258-59, 641 S.E.2d 885, 887 (2007) (holding a prison industries program sponsor is not an employer of inmates because the sponsor does not exclusively control the payment of inmate wages and finding agreement among other jurisdictions that examined this issue).

3. As to whether Tomlin is entitled to reimbursement of monies deducted from his pay for room and board because he was double-billed for this cost: Rule 210(h), SCACR (limiting appellate review to facts appearing in the record on appeal); State v. Mitchell, 330 S.C. 189, 199, 498 S.E.2d 642, 647 (1998) (placing on appellant the burden of presenting a sufficient record to allow appellate review).

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5. As to whether Tomlin is entitled to reimbursement of monies deducted from his pay for victim's assistance because inmate wages are outside the funds available for appropriations by the General Assembly: S.C. Code Ann. § 24-3-40 (2007) (allocating portions of inmates' wages for restitution, the State Office of Victim Assistance, child support, room and board, and inmate use); S.C. Code Ann. § 16-3-1260 (2003) (requiring persons convicted of criminal acts to reimburse the State and directing such payments to be made from inmate wages to the State Office of Victim Assistance); S.C. Code Ann. § 16-3-1290 (2003) (establishing Victim's Compensation Fund from which State Office of Victim Assistance may pay victims' claims).

CONCLUSION

We find sections 24-3-315 and 24-3-430(D) entitle inmate workers in a PIP to pay and working conditions comparable to those enjoyed by workers in private industry, including time-and-a-half pay for overtime hours worked. Accordingly, we reverse the circuit court's decision on this issue and remand to the ALC for additional proceedings consistent with this opinion. For the foregoing reasons, we affirm the circuit court's decision on the remaining issues.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

GEATHERS, J., concurs.

PIEPER, J., concurring in part and dissenting in part:

I concur in the majority's conclusion to affirm the decision to remand to determine a prevailing wage. I also concur in the determination that the inmate is not an employee of the private sponsor or entitled to reimbursement for room and board and other costs. However, I respectfully dissent as to any finding that the inmate is entitled to overtime pay. Section 24-3-430 establishes an inmate's right to the prevailing wage, stating "[n]o inmate participating in the program may earn less than the prevailing wage for work of similar nature in the private sector." S.C. Code Ann. § 24-3-430(D) (2007). Our supreme court recognizes that a critical purpose of the prevailing wage provision is to prevent unfair competition. Adkins v. S.C. Dep't of Corr., 360 S.C. 413, 418, 602 S.E.2d 51, 54 (2004). Nonetheless, I would distinguish between prevailing wages and any right to overtime pay for inmates participating in a prison industries program. In fact, there is no authority within the applicable state statutory scheme recognizing any right to overtime pay for inmates.[9] See § 24-3-430(D) (2007) (stating only that no inmate participating in the program may earn less than the prevailing wage). Moreover, the inmate never specifically raised the issue of whether a particular federal program provides for the right to overtime pay.

While the Fair Labor Standards Act (FLSA) provides a right to overtime pay for certain employees, the protections of the act do not apply to inmates working within the prison setting. See Harker v. State Use Indus.,

[9] Although not within the applicable statutory scheme, section 8-11-55 of the South Carolina Code mentions overtime in the context of state employees. That statute only applies to state employees and provides that "[a]ny state employee who is required to work overtime during any particular week may, as a result, be given compensatory time . . . ." S.C. Code Ann. § 8-11-55 (Supp. 2009). The statute further provides that any compensatory time granted must be in accordance with the FLSA. As indicated, the FLSA does not apply to inmates and the prevailing wage statute at issue specifically states that inmates participating in the prison industries program are not considered employees of the state. See S.C. Code Ann. § 24-3-430(F) (2007).

990 F.2d 131, 136 (4th Cir. 1993) ("For more than fifty years, Congress has operated on the assumption that the FLSA does not apply to inmate labor. If the FLSA's coverage is to extend within prison walls, Congress must say so, not the courts."). As noted by the Fourth Circuit in Harker, inmates participating in these types of programs perform work not to "turn profits for their supposed employer, but rather as a means of rehabilitation and job training." Id. at 133.

In sum, I am not convinced the current statutory scheme provides for overtime pay to inmates. Inmates are not employees entitled to the protections of the FLSA, and I do not find it appropriate to read into the prevailing wage statute any such right to inmates voluntarily participating in a prison industries program.[10] As Judge Posner of the Seventh Circuit has explained:

> People are not imprisoned for the purpose of enabling them to earn a living. The prison pays for their keep. If it puts them to work, it is to offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours. The reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress.

[10] An inmate's participation in the prison industries program is voluntary and contingent upon consent to the conditions of the employment. S.C. Code Ann. § 24-3-430(C) (2007) ("An inmate *may* participate in the program established pursuant to this section only on a voluntary basis and only after he has been informed of the conditions of his employment.") (emphasis added).

Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005). Accordingly, I concur in the decision of the majority to affirm the circuit court and remand to the ALC to determine a prevailing wage; however, I respectfully dissent as to the overtime issue, and I would affirm the finding of the ALC and the circuit court that the inmate is not entitled to overtime pay.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Charles Carmack, Appellant.

Appeal From Fairfield County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 4688
Heard March 2, 2010 – Filed May 24, 2010

AFFIRMED

Jack B. Swerling, of Columbia, for Appellant

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Julie M. Thames, all of Columbia; and Solicitor Douglas A. Barfield, of Lancaster, for Respondent.

THOMAS, J.: Charles Carmack (Carmack) was indicted and tried on four counts of assault and battery with intent to kill and one charge of possession of a firearm during the commission of a violent crime. A jury found him guilty on four counts of the lesser included offense of assault and battery of a high an aggravated nature (ABHAN) and acquitted him on the firearm charge. On appeal, Carmack argues the trial court erred: (1) in failing to sequester all the witnesses; (2) in failing to remove the jury foreperson; (3) in admitting Carmack's allegedly involuntary statement; (4) in admitting extrinsic evidence of prior statements made by a witness; and (5) in excluding a school-related document. We affirm.

FACTS

On July 28, 2006, John Wood hosted fifty to seventy people for a party he dubbed "Farm Fest" on property he owned in Fairfield County. Although a bandstand was erected outdoors, rainy conditions forced many of the party-goers to celebrate in an adjacent barn. While in the barn, Carmack and Scott Fowler engaged in a brief altercation, after which Carmack left the barn and headed toward his pick-up truck parked nearby.

Carmack's brother, Chris Carmack (Brother), testified that as Carmack approached his truck he was attacked by a group of men. Daniel Holt testified that after this second altercation Carmack retrieved a rifle from his truck and fired one shot in the air and then approached the barn. Brother followed Carmack and attempted to cool the situation;[1] however, another shot was fired which penetrated the barn wall and injured three people inside and paralyzed a fourth from the waist down.

In the early morning hours following the party, then seventeen-year-old Carmack surrendered to police, was arrested, and placed in an interview room

[1] It is unclear as to how Brother attempted to cool the situation; whether he grabbed Carmack, or grabbed the gun. Brother's testimony is less than clear as to what extent he was engaging Carmack (i.e., whether Brother's hands were on the gun and Carmack, or just Carmack).

at the Fairfield County Sheriff's Office. Deputy Sheriff Boney read Carmack his rights, and he initialed a waiver of rights form around 2:00 or 2:30 a.m. Carmack did not initial next to the right to remain silent; however, Deputy Boney testified he read Carmack this right and Carmack indicated he understood it. Furthermore, although Carmack said he had been drinking, Deputy Boney noticed no signs he was intoxicated as he was not slurring his speech and was steady on his feet. Deputy Boney then recorded Carmack's statement by hand, which Carmack subsequently read and signed.

At trial, Carmack moved to have the State's thirty-four witnesses sequestered; however, the trial court sequestered only the witnesses who had not previously given written statements. One of the unsequestered witnesses was Brother, who offered testimony providing more detail and an account of the evening that differed slightly from his prior written statement. When questioned by the State, Brother maintained the prior statement was accurate, but admitted some details were left out. The State then successfully admitted the prior written statement into evidence over Carmack's objection.

During the trial, Carmack's counsel learned the jury foreperson, Watts, had allegedly discussed the case with his live-in girlfriend, Mary, who had in turn allegedly discussed the case with a colleague, Nona Money. The trial court met with the jury foreperson twice and was convinced that no juror misconduct had occurred. Money testified *in camera* that when she inquired whether Mary and Watts would still be taking a vacation, Mary responded: "Yeah. It's cut and dry case. [sic] Everyone knows that he did it." The trial court again decided not to excuse Watts.

Carmack called Cindy Burley as his sole defense witness and sought to introduce a documented "service plan" or "Individual Educational Plan" (IEP) as of evidence an alleged learning disability. The State objected, and the trial court ruled the evidence to be inadmissible hearsay because it contained subjective information. Carmack immediately rested his case.

The jury convicted Carmack on four counts of the lesser included offense of ABHAN, and the trial court sentenced Carmack to twenty-five years.[2] This appeal follows.

ISSUES ON APPEAL

I. Did the trial court err in failing to sequester all of the State's fact witnesses?

II. Did the trial court err in failing to remove the jury foreperson?

III. Did the trial court err in admitting Carmack's statement?

IV. Did the trial court err in admitting extrinsic evidence of Brother's statement to police?

V. Did the trial court err in failing to allow the IEP into evidence?

STANDARD OF REVIEW

In criminal cases an appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

LAW/ANALYSIS

I. Sequestering Witnesses

Carmack argues the trial court erred in failing to sequester all the State's fact witnesses. We disagree.

[2] This sentence consisted of ten years on the first ABHAN conviction, ten years consecutive on the second ABHAN conviction, five years consecutive on the third ABHAN, and finally, five years concurrent on the final ABHAN conviction.

While Rule 615, SCRE allows for sequestration of a witness, "[t]he granting or refusal of a motion to sequester witnesses is solely discretionary." State v. Jackson, 265 S.C. 278, 281, 217 S.E.2d 794, 795 (1975). The trial court's ruling on a motion to sequester a witness will not be disturbed on appeal absent an abuse of discretion and prejudice to an appellant. State v. Sullivan, 277 S.C. 35, 46, 282 S.E.2d 838, 844 (1981); see Jackson, 265 S.C. at 282, 217 S.E.2d at 796 (finding no error when trial court's ruling demonstrated no abuse of discretion or prejudice to appellant). "The mere opportunity for the State's witnesses to compare testimony is insufficient to compel sequestration." Sullivan, 277 S.C. at 46, 282 S.E.2d at 844.

Here, the trial court ruled that only witnesses who had not previously given written statements needed to be sequestered. While this ruling allowed many of the State's witnesses to remain in the courtroom, the threat that exposure to other testimony would taint subsequent testimony was alleviated by affording Carmack the opportunity to impeach any witnesses who altered their accounts by way of their previous written statements. Accordingly, the trial court did not abuse its discretion and Carmack was not prejudiced by this ruling. See Jackson, 265 S.C. 278, 217 S.E.2d 794 (affirming a trial court's denial of a motion to sequester witnesses when the witnesses had testified at a previous trial and could easily be impeached with their prior testimony).

II. Removal of Foreperson

Carmack argues the trial court erred in failing to remove the jury foreperson, Watts. We disagree.

The decision to dismiss a juror and replace him with an alternate rests in the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 265-66 (Ct. App. 1999). Premature deliberations may amount to misconduct that could affect fundamental fairness. State v. Aldret, 333 S.C. 307, 311, 509 S.E.2d 811, 813 (1999). "The trial court has broad discretion in assessing allegations of juror misconduct" and unless such misconduct affects the

"jury's impartiality, it is not [of the type] as will affect the verdict." State v. Kelly, 331 S.C. 132, 141, 502 S.E.2d 99, 105 (1998).

In this case, Carmack's counsel learned Watts may have discussed the case with his live-in girlfriend, Mary, who subsequently may have mentioned the discussion to her boss, Nona Money. As a result, the trial court met with Watts on two occasions. During these meetings, Watts was under oath and informed the court he had neither discussed the matter with his girlfriend nor engaged in any activity that would affect his impartiality.

We find the trial court was in the best position to assess Watts's veracity and its refusal to dismiss Watts is deserving of this court's deference. See id. at 142, 502 S.E.2d at 104 (stating "the trial judge is in the best position to determine the credibility of the jurors; therefore, this [c]ourt should grant him broad deference"). Furthermore, as the State indicates, other than Carmack's allegations, no evidence exists on the record to support that Watts discussed the matter with Mary. Rather, the record merely reflects Money testified that Mary stated, "It's cut and dry case. [sic] Everyone knows he did it." Nothing suggests Watts made any statements to Mary. Accordingly, as Carmack presents no other allegation of prejudice, the ruling of the trial court is affirmed.

III. Carmack's Statement

Carmack argues the trial court erred in admitting his statement to the jury because it was involuntary. We disagree.

The process for determining whether a statement is voluntarily made is two-fold; requiring a determination by both the trial court and the jury. State v. Miller, 375 S.C. 370, 379, 652 S.E.2d 444, 448 (Ct. App. 2007). In order for the issue to be submitted to the jury, the State must prove to the trial court, by preponderance of the evidence, that the statement was freely and voluntarily given. Id. On appeal, this court reviews the trial court to "simply determine[] whether the . . . ruling is supported by any evidence." Id. (emphasis added).

In order to determine whether a statement is voluntary, the trial court must inquire whether under the totality of the circumstances the suspect's will was overborne. Id. at 384, 652 S.E.2d at 451. Some factors to consider in the totality of the circumstances include "the youth of the accused, his lack of education, or . . . low intelligence, the lack of . . . advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and . . . physical punishment such as the deprivation of food or sleep." Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (internal citations omitted); see Miller, 375 S.C. at 385-86, 652 S.E.2d at 452 (stating the totality of the circumstances includes the crucial elements of police coercion: length of the interrogation, location, continuity, defendant's maturity, defendant's education, physical conditions, and the defendant's mental health).

In this case, Carmack points to his age, his ninth-grade education, the fact that it was late in the evening and he had earlier been drinking, and the lack of his initials next to the right to remain silent on the waiver of rights form. However, evidence also exists to demonstrate that Officer Boney had fully advised Carmack of his rights and Carmack indicated he understood them. Although Carmack had been drinking earlier that night, Officer Boney noticed nothing to suggest he was intoxicated. Further, although Carmack's initials are lacking next to the line informing him of his right to remain silent, he demonstrated his ability to read and signed all other areas of the waiver of rights form. Accordingly, based on our standard of review, evidence exists to support the trial court's ruling that the statement was voluntary. See Miller, 375 S.C. at 378, 652 S.E.2d at 448 (stating this court will affirm the trial court's ruling on the voluntariness of a statement if supported by any evidence). Thus, the issue was properly submitted to the jury, and the ruling of the trial court is affirmed.

IV. Extrinsic Evidence of Brother's Statement

Carmack argues the trial court erred in allowing the State to introduce Brother's prior written statement into evidence because, he alleges, Brother

admitted he made a prior inconsistent statement, rendering it inadmissible under Rule 613(b), SCRE. We disagree.

As an initial matter, in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). Arguments raised for the first time on appeal are not preserved for our review. Knight v. Waggoner, 359 S.C. 492, 496, 597 S.E.2d 894, 896 (Ct. App. 2004).

The State takes the position that Carmack's argument under Rule 613, is not preserved. Specifically, the State maintains Carmack's only argument at trial was that the statement was inadmissible under Rule 801(d)(1). However, the record demonstrates Carmack's objection specifically recognized that the solicitor could cross-examine the content of the statement, but the statement itself was not admissible. Although Carmack did make reference to Rule 801(d) he clarified his objection by stating; "If he wants to read the statement . . . into the record, . . . that's certainly appropriate. The document itself [is] what we have an objection to." While Carmack never explicitly mentioned Rule 613 by name, the record demonstrates Carmack's argument against the admissibility of the written statement itself was sufficiently raised to the trial court. See State v. Caldwell, 378 S.C. 268, 283, 662 S.E.2d 474, 482 (Ct. App. 2008) (noting a "party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground" (quoting Dunbar, 356 S.C. at 142, 587 S.E.2d at 694)). Accordingly, we address the merits of the argument.

A decision to admit extrinsic evidence of a prior inconsistent statement will not be reversed absent a manifest abuse of discretion that prejudiced the appellant. State v. Blalock, 357 S.C. 74, 78, 591 S.E.2d 632, 635 (Ct. App. 2003).

On reply, the State argues the trial court did not err because the statement is admissible under Rule 801(d). However, the record indicates Carmack agreed the statement could be read into the record; accordingly, this

is tantamount to conceding the statement was not hearsay pursuant to Rule 801(d). This concession leaves the only remaining inquiry to be whether the written statement itself is admissible.

Rule 613 (b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place is was allegedy made, and the person to whom it was made . . . . If a witness does not admit [making] . . . the prior inconsistent statement, extrinsic evidence of such statement is admissible.

When the issue is whether the witness admitted making the prior inconsistent statement, the admission must be unequivocal. Blalock, 357 S.C. at 80, 591 S.E.2d at 635. "Generally, where the witness has responded with anything less than an unequivocal admission, trial court's have been granted wide latitude to allow extrinsic evidence proving the statement." Id. at 80, 591 S.E.2d at 636. Here, Brother testified his prior statement was "accurate." Further he indicated that certain details were not in his original statement because such details were not inquired into at the time and "everything was chaotic." Accordingly, Brother did not unequivocally admit making a prior inconsistent statement; therefore, the trial court did not abuse its discretion in allowing extrinsic evidence of the statement. See id. (finding a witness had not unequivocally admitted the prior inconsistent statement simply by virtue of recognizing some details were lacking in the prior statement).

V. The School-Related Document

Finally Carmack argues the trial court erred in not admitting the IEP into evidence. We disagree.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion," which occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law. State v. Rivera, 384 S.C. 356, 360, 682 S.E.2d 307, 309 (Ct. App. 2009). "An error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). Rule 803(6), SCRE excepts from the prohibition against hearsay, records of regularly conducted activity, and provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make [the same] . . . ; *provided however*, that subjective opinions and judgments found in business records are not admissible.

The trial court found the document to be inadmissible hearsay, under Rule 803(6) because the document contained subjective opinions. Carmack maintains the document should have been admitted as it contained information of "acts, events, conditions, or diagnoses, made at or near the time" the document was prepared.

In this case, Carmack sought to introduce the IEP in an effort to demonstrate an alleged learning disability in the hopes of providing the jury with evidence that his statement was not voluntary. The IEP was prepared at a meeting attended by three teachers from Carmack's school familiar with his scholastic performance. While the trial court ruled the actual report to be inadmissible, the court never precluded Carmack from introducing testimonial evidence through any of the school representatives familiar with Carmack's work performance. Thus, Carmack's contention that he was precluded from putting on a full defense as a result of the document being excluded is unfounded. Accordingly, we find no reversible error. See King,

367 S.C. at 136, 623 S.E.2d at 867 (stating the trial court's ruling will not be reversed unless it amounted to prejudicial error).

CONCLUSION

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

AFFIRMED.

FEW, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jan Ford Bodkin, Respondent/Appellant,

v.

Lester Hobart Bodkin, III, Appellant/Respondent.

Appeal From Horry County
Deborah Neese, Family Court Judge

Opinion No. 4689
Heard November 17, 2009 – Filed May 27, 2010

AFFIRMED AS MODIFIED

Anita Ruth Floyd, of Conway, for Appellant/Respondent.

Charles Richard Rhodes, Jr., of Surfside Beach, for Respondent/Appellant.

KONDUROS, J.: Both Lester Hobart Bodkin, III (Husband) and Jan Ford Bodkin (Wife) appeal from the grant of a divorce on the ground of one year's continuous separation. Husband argues the family court erred in (1) failing to grant him a divorce on the grounds of Wife's habitual drunkenness,

(2) awarding Wife alimony, (3) apportioning the marital estate, and (4) awarding Wife attorney's fees. Wife contends the family court erred in its determination of marital property. We affirm as modified.

FACTS/PROCEDURAL HISTORY

Husband and Wife married in 1988. Wife worked in Atlanta, Georgia, but after the parties married she quit her job and moved to Surfside Beach, South Carolina, where Husband lived. Prior to the marriage, both parties owned separate residences, which they sold once they were married and purchased the marital home. Wife became a stay-at-home mother to Husband's two children from a previous marriage, Bart (Stepson) and Georgia (Stepdaughter), and eventually to their child, Whitney (Daughter), who was born in 1991. She also obtained her bachelor's and master's degrees during that time and her "licensed independent social work credentials." Wife worked sporadically after obtaining her degrees, taking two years off to care for her parents.

The parties separated on October 8, 2005, and lived separate and apart from that time forward. Wife began working to establish her practice around that time. On January 5, 2006, Wife filed a complaint requesting an order of separate support and maintenance, custody of Daughter, child support, alimony, a substantial portion of the marital assets, and attorney's fees. Husband filed an answer and counterclaim requesting a divorce on the ground of Wife's habitual intoxication. Prior to the commencement of trial, Wife amended her complaint to request a divorce on the ground of one year's continuous separation. The parties also agreed Wife would have custody of Daughter and Husband would have visitation.

Prior to trial, Wife filed a Petition for Citation for Contempt alleging Husband used money from a money market account to purchase property in Georgetown County (Georgetown Property) while an order was in effect prohibiting the parties "from injuring, damaging, destroying, selling, alienating, exchanging, trading, encumbering, collaterizing, or otherwise liquidating or decreasing in value any personal or real property, until a final

order on the merits is issued." The family court found Husband had "dissipated an asset," held him in contempt, and ordered him to pay $500 in court costs, $1,500 to Wife as a fine, and $585 in attorney's fees to Wife's attorney.

Following a trial, the family court found Husband's "evidence did not meet the level of proof necessary to establish habitual drunkenness" and he was not entitled to a divorce on that ground. The family court granted Wife a divorce based on one year's continuous separation. The family court determined the marital estate should be distributed fifty percent to Wife and fifty percent to Husband. It found the marital home was a marital asset and awarded it to Wife. However, it determined Husband had contributed the entire down payment of $81,707 with premarital funds and awarded him a credit in that amount. The family court awarded Wife permanent, periodic alimony of $1,500 per month. Additionally, the family court awarded Wife $15,000 in attorney's fees and costs. Wife filed a Rule 59(e), SCRCP, motion for reconsideration, and Husband filed a Rule 60, SCRCP, motion for a new trial. The family court denied both motions. This appeal followed.

STANDARD OF REVIEW

"On appeal from a family court order, this [c]ourt has authority to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence." E.D.M. v. T.A.M., 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992). "Because the family court is in a superior position to judge the witnesses' demeanor and veracity, its findings should be given broad discretion." Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003). When the evidence is disputed, the appellate court may adhere to the family court's findings. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

LAW/ANALYSIS

I. HUSBAND'S APPEAL

A. Habitual Drunkenness

Husband argues the family court erred in failing to grant him a divorce on the grounds of Wife's habitual drunkenness. We disagree.

A divorce may be granted on the ground of habitual drunkenness, including drunkenness caused by the use of any narcotic drug. S.C. Code Ann. § 20-3-10(4) (1985). "In order to prove habitual drunkenness, there must be a showing that the abuse of alcohol caused the breakdown of the marriage and that such abuse existed at or near the time of filing for divorce." Epperly v. Epperly, 312 S.C. 411, 414, 440 S.E.2d 884, 885 (1994). In Epperly, "Wife and her witnesses testified that Husband drank heavily on a daily basis. However, Husband and his witnesses testified that he seldom drank and never to excess." Id. The supreme court adopted the findings of the family court as it was in the best position to determine the credibility of the witnesses because the testimony on this issue was so divergent. Id., 440 S.E.2d at 885-86.

In the present case, Wife testified she was a social drinker and she and Husband drank socially together during the marriage. She acknowledged that on one occasion she had too much to drink before Stepdaughter's sorority party and embarrassed Stepdaughter with her behavior. She indicated Husband had never really suggested to her she needed treatment for a problem with alcohol, but he had complained about a lot of things, including drinking.

Wife also testified she had developed a lot of health problems since Daughter's birth, and she took several prescription medications for conditions including hypertension, depression, chronic obstruction pulmonary disease,

and skin problems. She testified she had several cancers removed the year of the trial.

Stepson testified that growing up there was always drinking in the house, but that neither Husband nor Wife's behavior concerned him. He testified Husband and Wife drank about the same amount, a few beers. He testified that when he went away to college and returned to visit, Wife had a tendency to get drunk at home and also drank excessively when they were out in public. Stepson acknowledged that around the time when Husband and Wife separated, he had not spent much time at the marital home and did not know the details of their day-to-day life.

Husband testified Wife's drinking had been a problem since 1998. He stated Wife drank six to ten beers a day combined with prescription medication and acknowledged she had a drinking problem. He believed Wife's drunkenness was the primary cause for the breakdown of their marriage.

Stepdaughter testified that before she moved out of the home to attend college, she did not want to be at home because of Wife's drinking. She indicated that at times, Wife became intoxicated when they were away from home and embarrassed her. She also testified Wife often passed out at night and would be drunk when the family went out to dinner. Stepdaughter further stated that in 2002 she "made a move in her personal life to move [Wife] out of [her] life to a certain extent" but continued to see Wife at family functions until the parties separated.

The family court found neither Stepson nor Stepdaughter could provide any information to the court concerning eyewitness accounts of Wife's drinking habit within one year prior to the parties' separation. The court found "[n]either was aware of the extent of [Wife's] drinking habit at that time." The court noted Wife admitted she consumed beer while taking prescription medications and taking multiple prescriptions at a time. Although the court had "concerns about [Wife's] combining alcohol with prescription medications," it determined Husband's "evidence does not meet

the level of proof necessary to establish habitual drunkenness." The court found Wife was the one who moved out of the residence and filed the action. Further, the court noted Wife took Daughter, who was fourteen years old at the time, with no objection by Husband, and Husband agreed to Wife having sole custody. Also, it found Husband had shown little concern for Wife's ability to care for Daughter because he had not seen Daughter for three months until the night before the hearing.

The family court determined testimony was presented that both parties drank, at times together, and Husband admitted he drank on a daily basis. The family court further found Husband conceded that over the course of the marriage, Wife completed her bachelor's and master's degrees, received her certification or license, stayed at home with his children and Daughter, and cared for her ailing father. The court also noted Husband's contention that Wife was not entitled to alimony and was capable of earning a good salary was inconsistent with his claim that she has a drinking problem of such a serious degree that it rises to the level of habitual drunkenness and led to the breakdown of the marriage. The court found Husband presented no evidence Wife ever attended any facility or meeting in regards to her alleged drinking problem or that she had any difficulty with her current employment. The court found the testimony of Husband and his children was less credible than that of Wife on the issue.

Much like Epperly, the parties presented conflicting evidence as to how much Wife drank and if it was a problem. Although both Husband's son and daughter testified Wife drank too much, neither was around the parties often in the year prior to the parties' separation. Because the family court was in the better position to see the witnesses and judge their credibility, we defer to its determinations on credibility. Accordingly, we affirm the family court's finding Husband did not meet his burden of proof.

B. Alimony

Husband contends the family court erred in its determination of alimony. We disagree.

The amount to be awarded for alimony, as well as a determination of whether a spouse is entitled to alimony, is within the sound discretion of the family court. Smith v. Smith, 264 S.C. 624, 628, 216 S.E.2d 541, 543 (1975). An abuse of discretion occurs when the decision is controlled by an error of law or is based on factual findings without evidentiary support. Degenhart v. Burriss, 360 S.C. 497, 500, 602 S.E.2d 96, 97 (Ct. App. 2004).

The purpose of alimony is to place the supported spouse, as close as is practical, in the same position of support as during the marriage. Johnson v. Johnson, 296 S.C. 289, 300, 372 S.E.2d 107, 113 (Ct. App. 1988). If the claim for alimony is well-founded, the family court has the duty of making "an alimony award that is fit, equitable, and just." Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). The family court should consider the following factors in awarding alimony:

> (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations; as well as (13) other factors the court considers relevant.

Davis v. Davis, 372 S.C. 64, 79-80, 641 S.E.2d 446, 454 (Ct. App. 2006) (citing S.C. Code Ann. § 20-3-130(C) (Supp. 2009)). The South Carolina Supreme Court has held "[t]hree important factors in awarding periodic alimony are (1) the duration of the marriage; (2) the overall financial situation of the parties, especially the ability of the supporting spouse to pay; and (3) whether either spouse was more at fault than the other." Patel v. Patel, 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004). In making an alimony

award, "[n]o one factor is dispositive." Pirri v. Pirri, 369 S.C. 258, 267, 631 S.E.2d 279, 284 (Ct. App. 2006).

Further, alimony is intended to be neither a reward nor a punishment. Kane v. Kane, 280 S.C. 479, 484, 313 S.E.2d 327, 330 (Ct. App. 1984). "Marital fault is only one of the factors the family court must consider in making an award of alimony." Gilfillin v. Gilfillin, 334 S.C. 213, 222, 512 S.E.2d 534, 538 (Ct. App. 1999), rev'd on other grounds, 344 S.C. 407, 544 S.E.2d 829 (2001). South Carolina courts have awarded spouses alimony in spite of the fact that they had fault in the breakup of their marriages. See Lee v. Lee, 282 S.C. 76, 79-80, 316 S.E.2d 435, 437-38 (Ct. App. 1984) (affirming the award of alimony to wife of $150 per month for six months when her habitual drunkenness caused the breakup of the marriage and she was able to work); see also Murray v. Murray, 271 S.C. 62, 64, 244 S.E.2d 538, 539 (1978) (affirming the family court's award of alimony of $400 per month for six months when wife's conduct caused the disintegration of the marriage and she was able to work).

The family court considered the following factors when making its decision: (1) the parties were in a long-term marriage lasting nineteen years; (2) they were thirty-five years old when they married and fifty-four at the final hearing; (3) Husband was the primary wage earner and was the one responsible for the payment of the majority of the marital bills and the creation and operation of several businesses; (4) Wife quit her job and relocated to South Carolina from Georgia when they married; (5) Wife was the primary caretaker of the parties' child and Husband's children; (6) Husband has the greater earning potential even though he lacks a four-year college degree; (7) although Wife earned her bachelor's and master's degrees during the marriage, she only began her career as a counselor around the time the parties separated; (8) Wife's projected gross monthly income is $2,500, while Husband's gross monthly income is $11,027; (9) Wife has several medical problems; (10) testimony was presented that both parties drank on a regular or daily basis and at times, together; (11) no misconduct occurred that affected the economic conditions of the parties; (12) Wife was granted custody of Daughter and there are no other support obligations; and (13)

Wife will have the additional expense of health insurance because she will no longer be able to be on Husband's policy. The family court found Husband's argument that Wife had nonmarital funds available to her uncompelling, finding both parties have nonmarital assets and although Wife has more than Husband, she also has nonmarital debt and he does not.

Husband seems to take issue with the family court's weighing of the factors and wants us to reweigh them. However, that is not this court's role in the determination of alimony. We look to see if the family court abused its discretion. The family court made findings of fact on all of the relevant factors, and the record contains evidence to support each of those findings. Accordingly, the family court did not abuse its discretion in awarding alimony or in determining the amount of alimony. Therefore, the family court's award of alimony is affirmed.

C. Equitable Distribution

Husband argues the family court erred in its apportionment of the marital estate. We disagree.

"An appellate court should approach an equitable division award with a presumption that the family court acted within its broad discretion." Dawkins v. Dawkins, 386 S.C. 169, 172, 687 S.E.2d 52, 54 (2010). The division of marital property is within the family court's discretion and will not be disturbed on appeal absent an abuse of that discretion. Craig v. Craig, 365 S.C. 285, 290, 617 S.E.2d 359, 361 (2005). The appellate court looks to the overall fairness of the apportionment. Deidun v. Deidun, 362 S.C. 47, 58, 606 S.E.2d 489, 495 (Ct. App. 2004). If the end result is equitable, the fact that the appellate court would have arrived at a different apportionment is irrelevant. Id.

Marital property includes all real and personal property the parties acquired during the marriage and owned as of the date of filing or commencement of marital litigation. S.C. Code Ann. § 20-3-630(A) (Supp. 2009). "The doctrine of equitable distribution is based on a recognition that

marriage is, among other things, an economic partnership." Mallett v. Mallett, 323 S.C. 141, 150, 473 S.E.2d 804, 810 (Ct. App. 1996). "Upon dissolution of the marriage, property acquired during the marriage should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of which spouse holds legal title." Id. The ultimate goal of apportionment is to divide the marital estate, as a whole, in a manner that fairly reflects each spouse's contribution to the economic partnership and also the effect on each of the parties of ending that partnership. Johnson, 296 S.C. at 298, 372 S.E.2d at 112.

In making an equitable apportionment of marital property, the family court must give weight in such proportion as it finds appropriate to all of the following factors: (1) the duration of the marriage along with the ages of the parties at the time of the marriage and at the time of the divorce; (2) marital misconduct or fault of either or both parties, if the misconduct affects or has affected the economic circumstances of the parties or contributed to the breakup of the marriage; (3) the value of the marital property and the contribution of each spouse to the acquisition, preservation, depreciation, or appreciation in value of the marital property, including the contribution of the spouse as homemaker; (4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets; (5) the health, both physical and emotional, of each spouse; (6) either spouse's need for additional training or education in order to achieve that spouse's income potential; (7) the nonmarital property of each spouse; (8) the existence or nonexistence of vested retirement benefits for each or either spouse; (9) whether separate maintenance or alimony has been awarded; (10) the desirability of awarding the family home as part of equitable distribution or the right to live therein for reasonable periods to the spouse having custody of any children; (11) the tax consequences to each or either party as a result of equitable apportionment; (12) the existence and extent of any prior support obligations; (13) liens and any other encumbrances upon the marital property and any other existing debts; (14) child custody arrangements and obligations at the time of the entry of the order; and (15) such other relevant factors as the trial court shall expressly enumerate in its order. S.C. Code § 20-3-620(B) (Supp. 2009). These criteria are intended to guide the family court in

exercising its discretion over apportionment of marital property. Johnson, 296 S.C. at 297, 372 S.E.2d at 112. The family court has the discretion to decide what weight to assign various factors. Greene v. Greene, 351 S.C. 329, 340, 569 S.E.2d 393, 399 (Ct. App. 2002). The factors are only equities to be considered in reaching a fair distribution of marital property. Johnson, 296 S.C. at 297-98, 372 S.E.2d at 112.

1. Preservation

Husband argues the family court did not consider the tax consequences to him when making the distribution. He also contends he requested several credits against the marital home and the family court did not address the issue. We find these issues unpreserved for our review.

When the family court does not rule on an issue presented to it, the issue must be raised by a post-trial motion to be preserved for appeal. See Feldman v. Feldman, 380 S.C. 538, 545, 670 S.E.2d 669, 672 (Ct. App. 2008) (finding an issue unpreserved because husband failed to make a Rule 59(e), SCRCP, motion when family court failed to rule on it). Because Husband failed to raise these issues in a Rule 59(e) motion, they are unpreserved for our review.[1] See Lucas v. Rawl Family Ltd. P'ship, 359 S.C.

[1] Husband did raise these issues in a motion for a new trial pursuant to Rule 60(b)(3), SCRCP, asserting he was entitled to a new trial because of "mistakes of the [family] court, which may have been based wholly or partially upon [Wife's] fraud and misrepresentation." Any alleged fraud by Wife would have no impact on the family court's failure to rule on these issues. Therefore, a 59(e) motion would have been the proper vehicle for raising the family court's failure to rule on those issues. See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding when a trial court fails to address the specific argument raised by the appellant, the appellant must make a motion to alter or amend pursuant to Rule 59(e), SCRCP, to obtain a ruling on the argument or matter is not preserved for appellate review); see also Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006) ("[W]hen an appellant neither raises an issue at trial nor

505, 511, 598 S.E.2d 712, 715 (2004) (holding issues must be raised to and ruled upon to be preserved for appellate review).

2. Ford Explorer

Specifically, Husband contends the family court improperly included a Ford Explorer as Husband's nonmarital property. He argues the asset was purchased after filing and thus it could have no value at the date of filing. We disagree.

Husband testified he was not sure what funds he used to purchase the vehicle. Wife testified she only learned of the vehicle accidently and then Husband testified about it at his deposition. Although Husband testified he bought the car after the date of filing, the family court found as to that asset, Wife's evidence was credible and the vehicle was an asset not disclosed by Husband. Accordingly, as this was a matter of credibility, we find the family court did not abuse its discretion.

3. Survey Technology, Inc.

Husband also claims the family court erred in finding his interest in Survey Technology, Inc. was marital property. We disagree.

The family court found that when the parties married, Husband owned shares in Sur-Tech. In May 1995, Articles of Incorporation were filed for Survey Technology. In January 1996, Articles of Dissolution were filed, dissolving Sur-Tech. In 2004, Husband's current employer bought Survey Technology and Husband received eighty-six percent of the proceeds, $118,000, which was placed in a money market account. Husband testified at trial Survey Technology was the surviving entity in a merger with Sur-Tech.

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through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.").

Husband contends that because he owned an interest in Sur-Tech prior to the marriage, a portion of the proceeds from the sale of Survey Technology were nonmarital. The family court found neither Husband nor his expert witness could provide "a value of Sur-Tech on the date the [p]arties married or when it was dissolved or merged into Survey Technology. Furthermore, no testimony or evidence was presented [Husband's] stock in Sur-Tech was of any value whatsoever at the date of marriage or when the business was dissolved or merged." The court found Husband

> arbitrarily assigned a percentage value to the money market account based on the number of years he had an interest in Sur-Tech prior to the marriage. Without a value assessed to the stock at the date of marriage, the [c]ourt will not speculate as to the value of any claimed non-marital component. Both parties identify the money market account as a marital asset, and the [c]ourt so finds and determines that [Husband] is not entitled to a non-marital component.

Wife asserts Husband did not provide any proof the Articles of Merger were filed with the Secretary of State; instead, the only evidence was the Articles of Dissolution. See S.C. Code Ann. § 33-11-105 (2006) ("After a plan of merger . . . is approved . . . the surviving or acquiring entity shall deliver to the Secretary of State for filing articles of merger . . . . A merger . . . takes effect upon the effective date of the articles of merger . . . ."). Therefore, Wife contends Survey Technology was a new entity created after the parties married and thus, Husband's interest in it was marital property. Because Survey Technology was incorporated during the marriage and Husband provided Articles of Dissolution instead of Articles of Merger, the record contains evidence to support the family court's finding the funds were marital.

4. Lease Payments

Husband also contends the family court improperly valued Survey Leasing, Inc. by engaging in "double dipping." He asserts the family court improperly included lease payments from Survey Leasing in his income when calculating temporary alimony and child support. We disagree.

At trial, Husband's expert asserted the lease payments should not be classified both as income and as property subject to equitable division. Husband requested that the full temporary alimony payments be deducted from the value of the lease payments. However, the family court found the lease payment income was only a part of the income the family court used in calculating temporary alimony and child support. The court further found the evidence confirmed Wife's contention Husband vastly under-reported his income at the temporary hearing and thus should not be allowed to benefit from his misrepresentations. At the temporary hearing, Husband represented his 2005 salary was $65,000 or $73,000 per year, but at the final hearing, he admitted his 2005 W-2 reflected annual wages of $111,177. The family court found Husband had unclean hands and would not reward his misrepresentations by a downward adjustment equal to the value of the lease payments. Wife notes the salary Husband admitted at trial is virtually identical to the salary the family court used to calculate his temporary alimony and child support.

In Buckley v. Shealy, 370 S.C. 317, 324-25, 635 S.E.2d 76, 79-80 (2006), the family court gave Husband an equitable set-off for "overpayments" of child support husband made for six years despite the fact that he failed to make timely child support payments for almost thirteen years. The supreme court found husband was not entitled to an equitable set-off because of his own misdeeds in dealing with wife and the court and reversed the family court's decision awarding husband a set-off. Id. at 325, 635 S.E.2d at 80.

Here, if family court had not included the lease payments as martial property, Husband would have been rewarded for his dishonesty about his income. Further, because Husband's correct income is basically the same as the lesser income he provided for the temporary payments with the lease payments added to it, we find no prejudice to Husband. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter."). Accordingly, the family court did not abuse its discretion in including the lease payments as marital property.

5. Overall Distribution

Husband seems to disagree with the family court's findings as to several of the relevant factors. Much of his argument seems to be taking issue with the family court's findings but many of those findings relate to witness credibility. Additionally, Husband seeks to assign weight to the factors differently than the family court did in determining the equitable distribution. Because the record includes evidence to support those findings, the family court did not abuse its discretion.

Furthermore, the overall distribution of the estate appears fair. Although Husband did bring more money into the marriage through his salary, Wife contributed to the marriage by being a stay-at-home mom to the parties' child and Husband's two children that lived with them. Although Husband presented some testimony Wife did not contribute much to the household, Wife's testimony was to the contrary. Accordingly, we affirm the family court's equitable distribution.

D. Attorney's Fees

Finally, Husband maintains the family court erred in awarding Wife attorney's fees. He also contends the issue should be reversed and remanded. We disagree.

The family court has discretion in deciding whether to award attorney's fees, and its decision will not be overturned absent an abuse of discretion.

Donahue v. Donahue, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). An abuse of discretion occurs when the decision is controlled by an error of law or is based on factual findings lacking evidentiary support. Degenhart, 360 S.C. at 500, 602 S.E.2d at 97. In deciding whether to award attorney's fees, the family court should consider (1) each party's ability to pay his or her own fee, (2) the beneficial results obtained by the attorney, (3) the parties' respective financial conditions, and (4) the effect of the fee on each party's standard of living. Patel, 359 S.C. at 533, 599 S.E.2d at 123. In determining reasonable attorney's fees, the six factors the family court should consider are "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

This court has previously held when parties fail to cooperate and their behavior prolongs proceedings, this is a basis for holding them responsible for attorney's fees. Anderson v. Tolbert, 322 S.C. 543, 549-50, 473 S.E.2d 456, 459-60 (Ct. App. 1996); see also Donahue, 299 S.C. at 365, 384 S.E.2d 748 (holding husband's "lack of cooperation . . . serves as an additional basis for the award of attorney['s] fees"); Johnson, 296 S.C. at 304, 372 S.E.2d at 115 (citing husband's lack of cooperation in discovery as a basis for increasing wife's attorney fee award on appeal). "An adversary spouse should not be rewarded for such conduct." Anderson, 322 S.C. at 549, 473 S.E.2d at 459.

In determining if attorney's fees were appropriate, the family court stated it considered each party's ability to pay the attorney's fees, their respective financial conditions, the beneficial results obtained by his or her attorney, and the effect of the fee on each party's standard of living. The court found Husband was "in far better financial condition to pay [Wife's] attorney's fees than she is based upon their respective incomes and the effect on their standard of living." "Additionally, the [c]ourt considered the beneficial results obtained by [Wife's] attorney in regards to the ground for divorce, alimony, equitable division, and pursuit of asset and income

information that was made more difficult due to the conduct of [Husband]." Therefore, the family court found the overall results were more beneficial to Wife.

Once the family court determined an award was appropriate, the court considered the factors in Glasscock as to the amount of the award. The court found the extent of services, difficulty, and time invested to the case were all substantial in that discovery and pursuit of financial information were major issues in the case. The family court found Wife's counsel was experienced in family law and her rates were well within those customarily charged. As of the date of trial, the family court found Wife had incurred over $20,000 in attorney's fees and costs. Accordingly, the family court found an award of $15,000 to Wife for attorney's fees was reasonable.

The family court considered all of the appropriate factors and stated how those factors supported awarding Wife attorney's fees. The record contains evidence to support each of the family court's findings. Wife prevailed on most of the issues, and Husband has the ability to pay the fees. On appeal, Husband admits Wife prevailed on nearly every issue and relies on his other assertions of error in support of his argument—the family court erred in not granting him a divorce based on Wife's habitual drunkenness, its equitable distribution, and its award of alimony. Because we do not find that the family court erred in those determinations, Wife did in fact receive beneficial results. Husband also admits Wife's counsel has a good reputation and has hourly rates consistent with lawyers in the area she practices. Because the evidence in the record supports the family court's findings as to attorney's fees, it did not abuse its discretion in awarding attorney's fees and calculating the amount.

II. WIFE'S APPEAL

A. Credit for Equity in the Marital Residence

Wife argues the family court erred in giving Husband a credit against the equity in the marital home because he paid the down payment as the funds were transmuted into marital property. We disagree.

> The spouse claiming an equitable interest in property upon dissolution of the marriage has the burden of proving the property is part of the marital es[t]ate. If she carries this burden, she establishes a prima facie case that the property is marital property.
>
> If the opposing spouse then wishes to claim that the property so identified is not part of the marital estate, he has the burden of presenting evidence to establish its nonmarital character.

Johnson, 296 S.C. at 294, 372 S.E.2d at 110 (citation omitted).

The spouse claiming nonmarital property has been transmuted to marital property must produce objective evidence showing the parties themselves regarded the property as the common property of the marriage during the marriage. Id. at 295, 372 S.E.2d at 110-11. Evidence of transmutation includes jointly titling the property, using the property exclusively for marital purposes, commingling the property with marital property so that it becomes untraceable, or using marital funds to build equity in the property. Id. "The mere use of separate property to support the marriage, without some additional evidence of intent to treat it as property of the marriage, is not sufficient to establish transmutation." Johnson, 296 S.C. at 295-96, 372 S.E.2d at 111. Whether separate property has been transmuted into marital property is a matter of intent to be gleaned from the

facts of each case. Simpson v. Simpson, 377 S.C. 527, 538, 660 S.E.2d 278, 284 (Ct. App. 2008).

In Greene v. Greene, 351 S.C. 329, 337, 569 S.E.2d 393, 398 (Ct. App. 2002), wife borrowed $10,000 from her father to make a down payment on property. "Although the family court 'recognized a contribution on [wife's] behalf in the amount of $10,000 in the overall equitable division of the marital estate,' the family court nonetheless included the full equitable value of [the property] in valuing the marital estate for equitable distribution." Id. This court found the $10,000 was wife's separate property and modified the family court's order to subtract $10,000 from the assigned value of the property for purposes of equitable distribution. Id.

Also in Greene, the family court found $20,000 of the equity in a $50,500 property attributable to wife's contribution of premarital funds as a down payment on the property and assigned the property a value of $30,500 for purposes of equitable distribution. Id. at 341, 569 S.E.2d at 400. However, the court awarded the property to husband with a value of $30,500, giving wife the option of retaining the property by paying husband $30,500. Id. This court found wife was entitled to a $20,000 credit for her nonmarital contribution toward the acquisition of the property. Id.

Wife initially testified she could not remember who made the down payment on the marital home. Wife later testified that both she and Husband contributed the down payment but she could not remember how much each contributed and Husband could have contributed "a good bit more." On cross-examination, Wife testified that the money she put towards the home would have come from the sale of her home and her salary. She also acknowledged that when she sold her home in Georgia, she had two mortgages on it and she was behind on the payments for a condominium she owned. Husband testified because he alone contributed the funds for down payment of the home, it was titled solely in his name. He also testified that Wife used any money she received from the sale of her home in Georgia to pay towards the arrears on her condominium.

The family court found in light of Husband's testimony and evidence of the proceeds of the sale of his premarital home and other funds he had at the time and Wife's testimony as to the proceeds from her home and the debt on her condominium, Husband was more credible on the issue. We defer to the family court as to who contributed the down payment because it is a matter of credibility. Much like Wife in Greene, here, Husband contributed the down payment to purchase property that was marital property. Accordingly, we affirm the family court's awarding Husband the $81,707 credit.

B. Georgetown Property

Wife argues the family court erred in failing to include the entire value of the Georgetown Property in the marital estate because the Husband used marital funds to purchase the property, which violated the family court's temporary order. We find this issue is unpreserved for our review.

"An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). Although at trial Wife argued Husband should be found in contempt for dissipating the asset, she never argued she was entitled to special equity in the Georgetown Property. In Wife's testimony, she states that Husband paid $250,000 for the property although clearly only $157,623 was taken from the money market account. In the order, the family court reinstates the money market value to what it was before Husband removed the money. Additionally, the court lists the Georgetown Property as a marital asset and sets its adjusted value at $82,718.

In Wife's 59(e) motion she contends "the [family] [c]ourt erred in issuing its judgment . . . [b]y finding the Georgetown [P]roperty purchased by [Husband] had an adjusted value of $82,718." In the final order, the family court found the net value of $250,000 was adjusted for the $167,282 reinstated value of the money market account that Husband used to purchase the Georgetown Property. The family court set that adjusted value at $82,718. However, Husband used $156,644 from the money market account,

not the entire account. Therefore, the adjusted value should have been $92,377. Because Wife's argument in her 59(e) motion is unclear and unspecific, we cannot discern exactly what she is arguing. Seemingly, she is referring to this incorrect figure and not requesting a special equity. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground."). Further, any request at the 59(e) stage of the proceedings was untimely because Wife could have raised it at trial. See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("[A]n issue may not be raised for the first time in a post-trial motion."). Accordingly, we find this issue is unpreserved for our review.

C. Life Insurance Stipulation

Wife argues the family court erred in determining her life insurance policy was marital property because the parties stipulated it was not marital property. We agree.

"A stipulation is an agreement, admission, or concession made in judicial proceedings by the parties or their attorneys and is binding upon those who make them. The court must accept stipulations as binding upon the parties." McCrea v. City of Georgetown, 384 S.C. 328, 332, 681 S.E.2d 918, 921 (Ct. App. 2009) (citation omitted). In his brief, Husband states he agreed at trial that the policy was Wife's nonmarital asset and his forensic accountant testified to the same. Accordingly, the family court erred in including the $804 life insurance policy as marital property in the equitable division.

CONCLUSION

The family court did not err in failing to grant Husband a divorce on the ground of habitual drunkenness, in its award of alimony and attorney's

fees, or in its overall equitable distribution. However, the family court erred in determining Wife's life insurance policy was a marital asset when the parties stipulated it was not. Accordingly, the family court's decision is

AFFIRMED AS MODIFIED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

J. Emilie Carey and Henry Thomas, Appellants,

v.

Snee Farm Community Foundation and Jackie Walker, President, Defendants, of whom Snee Farm Community Foundation is the, Respondent.

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

Opinion No. 4690
Submitted May 3, 2010 – Filed June 1, 2010

VACATED AND REMANDED

Thomas R. Goldstein, of Charleston, for Appellants.

Kenneth Michael Barfield, of Charleston, for Respondent.

PER CURIAM: J. Emilie Carey and Henry G. Thomas (collectively Homeowners) filed this action against Snee Farm Community Foundation and Jackie Walker, President (collectively the Foundation) seeking injunctive relief based on alleged irregularities in the 2007 election of directors to the Foundation. The trial court granted summary judgment to the Foundation. Homeowners appeal. We vacate and remand.[1]

FACTS

The Snee Farm Subdivision contains approximately 890 homes, including single-family homes and townhouses, amenities, and open space restricted by deed for recreational use. The current owner of the open space sought to develop a portion of the open space. The proposal generated strong feelings in the community, both for and against the proposal.

Homeowners live in the Snee Farm Subdivision, which is subject to the by-laws of the Foundation. The Foundation is governed by the Board of Directors. Directors are elected to the Board and serve staggered three-year terms. At the time of the election and this action, Jackie Walker was a director and president of the Board.

According to Homeowners, Walker interfered in the 2007 election process to fill the Board with directors that supported the development proposal. Homeowners filed this action alleging, inter alia, Walker inappropriately placed herself on the nominating committee, and the 2007 election for Board members was invalid. Homeowners and the Foundation moved for summary judgment.

The trial court held a hearing on the motions. The Foundation argued: (1) the nominating committee's actions and election were conducted according to the by-laws; (2) the business judgment rule applied to the

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

conduct of the Board; and (3) the issue was moot because another election would soon be held. In a form order without any stated grounds for its decision, the trial court granted the Foundation's motion for summary judgment. Likewise without stated grounds, the trial court denied Homeowners' motion for reconsideration. Homeowners appeal.

LAW/ANALYSIS

Homeowners argue the trial court erred in failing to set forth findings of fact and conclusions of law in its order. We agree.

In Bowen v. Lee Process Systems Co., this court stated:

> On appeal from the grant of summary judgment, an appellate court must determine whether the trial court's stated grounds for its decision are supported by the record. It is our duty to undertake a thorough and meaningful review of the trial court's order and the entire record on appeal. Where, as here, the trial court fails to articulate the reasons for its action on the record or enter a written order outlining its rationale, we simply cannot perform our designated function. We therefore hold a trial court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review.

342 S.C. 232, 235-37, 536 S.E.2d 86, 87-88 (Ct. App. 2000) (footnotes omitted). The court in Bowen vacated the order granting summary judgment and remanded "the case to the trial court for a written order identifying the facts and accompanying legal analysis upon which it relied . . . ." Id. at 241, 536 S.E.2d at 91; see B&B Liquors, Inc. v. O'Neil, 361 S.C. 267, 271-72, 603 S.E.2d 629, 631-32 (Ct. App. 2004) (citing Bowen, this court vacated and remanded for a written order where trial court granted summary judgment by using a form order).

This court has distinguished Bowen where the trial court affirmed an order of the Workers' Compensation Commission in a form order where the commission's order adopted the single commissioner's order. Porter v. Labor Depot, 372 S.C. 560, 567-68, 643 S.E.2d 96, 100 (Ct. App. 2007) (stating "not all situations require a detailed order, and the trial court's form order may be sufficient if the appellate court can ascertain the basis for the trial court's ruling from the record on appeal"). Likewise, this court distinguished Bowen and addressed the merits where the trial court denied post-trial motions in a form order. See Clark v. S.C. Dep't of Pub. Safety, 353 S.C. 291, 311-12, 578 S.E.2d 16, 26 (Ct. App. 2002) (finding Bowen distinguishable because court's reasoning for denial of post-trial motions could be determined from the record on appeal).

However, this court relied on Bowen and distinguished Clark where the trial court summarily denied post-trial motions. Doe v. Howe, 367 S.C. 432, 447-48, 626 S.E.2d 25, 32-34 (Ct. App. 2005) (vacating and remanding where it could not be determined from the record why the trial court rejected the movant's post-trial arguments).

We conclude the trial court's reasoning for granting summary judgment in this case is not clear from the record. Accordingly, relying on Bowen, we vacate the order on appeal and remand for a written order identifying facts and accompanying legal analysis.

VACATED AND REMANDED.

HUFF, SHORT, and WILLIAMS, JJ., concur.