OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 26

July 3, 2006
Daniel E. Shearouse, Clerk
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CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

EXTENSION OF TIME TO FILE PETITION FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

None

PETITIONS FOR REHEARING

4114-Martin v. Rapid Plumbing	Pending
4115-Smith v. NCCI, Inc,	Pending
4118-Richardson v. Donald Hawkins Const.	Pending
2006-UP-158-State v. R. Edmonds	Pending
2006-UP-191-State v. N. Boan	Pending
2006-UP-194-State v. E. Johnson	Pending
2006-UP-203-Sammy Garrison Const. v. Russo	Pending
2006-UP-211-Cunningham v. Mixon	Pending
2006-UP-218-Luther Smith v. State	Pending
2006-UP-222-State v. T. Lilly	Pending
2006-UP-230-Ex Parte: Van Osdell In re: Babb v. Graham	Pending
2006-UP-235-We Do Alterations v. Powell	Pending
2006-UP-237-SCDOT v. McDonald's Corp.	Pending
2006-UP-238-SCDSS v. Hutson	Pending
2006-UP-239-SCDSS v. Glenn	Pending
2006-UP-243-SunTrust Mortgage v. Gobbi	Pending
2006-UP-245-Gobbi v. Peoples' Fed. Bank	Pending
2006-UP-246-Gobbi v. Simerman	Pending
2006-UP-247-State v. S. Hastings	Pending
2006-UP-249-State v. L. Fleming	Pending
2006-UP-251-Rabon v. SCDHPT	Pending

2006-UP-256-Fulmer v. Cain	Pending
2006-UP-258-SCDSS v. Smith	Pending
2006-UP-262-Norton v. Wellman	Pending
2006-UP-265-Brown v. Harris	Pending
2006-UP-267-Barnum v. Sto Corp.	Pending
2006-UP-268-DSS v. Mother et al.	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3787-State v. Horton	Pending
3900-State v. Wood	Pending
3903-Montgomery v. CSX Transportation	Pending
3906-State v. James	Pending
3914-Knox v. Greenville Hospital	Pending
3917-State v. Hubner	Pending
3918-State v. N. Mitchell	Pending
3926-Brenco v. SCDOT	Pending
3928-Cowden Enterprises v. East Coast	Pending
3929-Coakley v. Horace Mann	Pending
3935-Collins Entertainment v. White	Pending
3936-Rife v. Hitachi Construction et al.	Pending
3938-State v. E. Yarborough	Pending
3939-State v. R. Johnson	Pending

3940-State v. H. Fletcher	Pending
3949-Liberty Mutual v. S.C. Second Injury Fund	Pending
3950-State v. Passmore	Pending
3952-State v. K. Miller	Pending
3956-State v. Michael Light	Pending
3963-McMillan v. SC Dep't of Agriculture	Pending
3965-State v. McCall	Pending
3966-Lanier v. Lanier	Pending
3967-State v. A. Zeigler	Pending
3968-Abu-Shawareb v. S.C. State University	Pending
3971-State v. Wallace	Pending
3976-Mackela v. Bentley	Pending
3977-Ex parte: USAA In Re: Smith v. Moore	Pending
3978-State v. K. Roach	Pending
3981-Doe v. SCDDSN et al.	Pending
3982-LoPresti v. Burry	Pending
3983-State v. D. Young	Pending
3984-Martasin v. Hilton Head	Pending
3985-Brewer v. Stokes Kia	Pending
3988-Murphy v. Jefferson Pilot	Pending
3989-State v. Tuffour	Pending

3993-Thomas v. Lutch (Stevens)	Pending
3994-Huffines Co. v. Lockhart	Pending
3995-Cole v. Raut	Pending
3996-Bass v. Isochem	Pending
3998-Anderson v. Buonforte	Pending
4000-Alexander v. Forklifts Unlimited	Pending
4004-Historic Charleston v. Mallon	Pending
4005-Waters v. Southern Farm Bureau	Pending
4006-State v. B. Pinkard	Pending
4011-State v. W. Nicholson	Pending
4014-State v. D. Wharton	Pending
4015-Collins Music Co. v. IGT	Pending
4020-Englert, Inc. v. LeafGuard USA, Inc.	Pending
4022-Widdicombe v. Tucker-Cales	Pending
4025-Blind Tiger v. City of Charleston	Pending
4026-Wogan v. Kunze	Pending
4027-Mishoe v. QHG of Lake City	Pending
4028-Armstrong v. Collins	Pending
4033-State v. C. Washington	Pending
4034-Brown v. Greenwood Mills Inc.	Pending
4035-State v. J. Mekler	Pending

4036-State v. Pichardo & Reyes	Pending
4037-Eagle Cont. v. County of Newberry	Pending
4039-Shuler v. Gregory Electric et al.	Pending
4041-Bessinger v. Bi-Lo	Pending
4042-Honorage Nursing v. Florence Conval.	Pending
4043-Simmons v. Simmons	Pending
4044-Gordon v. Busbee	Pending
4045-State v. E. King	Pending
4047-Carolina Water v. Lexington County	Pending
4048-Lizee v. SCDMH	Pending
4052-Smith v. Hastie	Pending
4054-Cooke v. Palmetto Health	Pending
4058-State v. K. Williams	Pending
4061-Doe v. Howe et al.(2)	Pending
4062-Campbell v. Campbell	Pending
4064-Peek v. Spartanburg Regional	Pending
4065-Levine v. Spartanburg Regional	Pending
4068-McDill v. Mark’s Auto Sales	Pending
4070-Tomlinson v. Mixon	Pending
4071-State v. K. Covert	Pending
4074-Schnellmann v. Roettger	Pending

4079-State v. R. Bailey	Pending
4080-Lukich v. Lukich	Pending
4082-State v. Elmore	Pending
4085-Sloan Construction Co. v. Southco	Pending
4088-SC Mun. Ins. & Risk Fund v. City of Myrtle Beach	Pending
4091-West v. Alliance Capital	Pending
4092-Cedar Cove v. DiPietro	Pending
4093-State v. J. Rogers	Pending
2003-UP-757-State v. Johnson	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-487-State v. Burnett	Pending
2004-UP-537-Reliford v. Mitsubishi Motors	Pending
2004-UP-605-Moring v. Moring	Pending
2004-UP-606-Walker Investment v. Carolina First	Pending
2004-UP-610-Owenby v. Kiesau et al.	Pending
2004-UP-617-Raysor v. State	Pending
2004-UP-650-Garrett v. Est. of Jerry Marsh	Pending
2004-UP-653-State v. R. Blanding	Pending
2005-UP-001-Hill v. Marsh et al.	Pending
2005-UP-014-Dodd v. Exide Battery Corp. et al.	Pending
2005-UP-016-Averette v. Browning	Pending

2005-UP-018-State v. Byers	Pending
2005-UP-022-Ex parte Dunagin	Pending
2005-UP-023-Cantrell v. SCDPS	Pending
2005-UP-054-Reliford v. Sussman	Pending
2005-UP-058-Johnson v. Fort Mill Chrysler	Pending
2005-UP-113-McCallum v. Beaufort Co. Sch. Dt.	Pending
2005-UP-115-Toner v. SC Employment Sec. Comm'n	Pending
2005-UP-116-S.C. Farm Bureau v. Hawkins	Pending
2005-UP-122-State v. K. Sowell	Pending
2005-UP-124-Norris v. Allstate Ins. Co.	Pending
2005-UP-128-Discount Auto Center v. Jonas	Pending
2005-UP-130-Gadson v. ECO Services	Pending
2005-UP-138-N. Charleston Sewer v. Berkeley County	Pending
2005-UP-139-Smith v. Dockside Association	Pending
2005-UP-152-State v. T. Davis	Pending
2005-UP-163-State v. L. Staten	Pending
2005-UP-165-Long v. Long	Pending
2005-UP-170-State v. Wilbanks	Pending
2005-UP-171-GB&S Corp. v. Cnty. of Florence et al.	Pending
2005-UP-174-Suber v. Suber	Pending
2005-UP-188-State v. T. Zeigler	Pending

2005-UP-192-Mathias v. Rural Comm. Ins. Co.	Pending
2005-UP-195-Babb v. Floyd	Pending
2005-UP-197-State v. L. Cowan	Pending
2005-UP-216-Hiott v. Kelly et al.	Pending
2005-UP-219-Ralphs v. Trexler (Nordstrom)	Pending
2005-UP-222-State v. E. Rieb	Pending
2005-UP-256-State v. T. Edwards	Pending
2005-UP-274-State v. R. Tyler	Pending
2005-UP-283-Hill v. Harbert	Pending
2005-UP-296-State v. B. Jewell	Pending
2005-UP-297-Shamrock Ent. v. The Beach Market	Pending
2005-UP-298-Rosenblum v. Carbone et al.	Pending
2005-UP-303-Bowen v. Bowen	Pending
2005-UP-305-State v. Boseman	Pending
2005-UP-319-Powers v. Graham	Pending
2005-UP-337-Griffin v. White Oak Prop.	Pending
2005-UP-340-Hansson v. Scalise	Pending
2005-UP-345-State v. B. Cantrell	Pending
2005-UP-348-State v. L. Stokes	Pending
2005-UP-354-Fleshman v. Trilogy & CarOrder	Pending
2005-UP-361-State v. J. Galbreath	Pending

2005-UP-365-Maxwell v. SCDOT	Pending
2005-UP-373-State v. Summersett	Pending
2005-UP-375-State v. V. Mathis	Pending
2005-UP-422-Zepsa v. Randazzo	Pending
2005-UP-425-Reid v. Maytag Corp.	Pending
2005-UP-459-Seabrook v. Simmons	Pending
2005-UP-460-State v. McHam	Pending
2005-UP-471-Whitworth v. Window World et al.	Pending
2005-UP-472-Roddey v. NationsWaste et al.	Pending
2005-UP-490-Widdicombe v. Dupree	Pending
2005-UP-506-Dabbs v. Davis et al.	Pending
2005-UP-517-Turbevile v. Wilson	Pending
2005-UP-519-Talley v. Jonas	Pending
2005-UP-530-Moseley v. Oswald	Pending
2005-UP-535-Tindall v. H&S Homes	Pending
2005-UP-540-Fair v. Gary Realty	Pending
2005-UP-541-State v. Samuel Cunningham	Pending
2005-UP-543-Jamrok v. Rogers	Pending
2005-UP-556-Russell Corp. v. Gregg	Pending
2005-UP-557-State v. A. Mickle	Pending
2005-UP-574-State v. T. Phillips	Pending

2005-UP-580-Garrett v. Garrett	Pending
2005-UP-584-Responsible Eco. v. Florence Consolid.	Pending
2005-UP-585-Newberry Elect. v. City of Newberry	Pending
2005-UP-590-Willis v. Grand Strand Sandwich Shop	Pending
2005-UP-592-Biser v. MUSC	Pending
2005-UP-595-Powell v. Powell	Pending
2005-UP-603-Vaughn v. Salem Carriers	Pending
2005-UP-604-Ex parte A-1 Bail In re State v. Larue	Pending
2005-UP-608-State v. (Mack.M) Isiah James	Pending
2005-UP-613-Browder v. Ross Marine	Pending
2005-UP-615-State v. L. Carter	Pending
2005-UP-635-State v. M. Cunningham	Pending
2006-UP-001-Heritage Plantation v. Paone	Pending
2006-UP-002-Johnson v. Estate of Smith	Pending
2006-UP-013-State v. H. Poplin	Pending
2006-UP-015-Watts Const. v. Feltes	Pending
2006-UP-022-Hendrix v. Duke Energy	Pending
2006-UP-025-State v. K. Blackwell	Pending
2006-UP-027-Costenbader v. Costenbader	Pending
2006-UP-030-State v. S. Simmons	Pending
2006-UP-037-State v. Henderson	Pending

2006-UP-038-Baldwin v. Peoples	Pending
2006-UP-047-Rowe v. Advance America	Pending
2006-UP-049-Rhine v. Swem	Pending
2006-UP-065-SCDSS v. Ferguson	Pending
2006-UP-066-Singleton v. Steven Shipping	Pending
2006-UP-071-Seibert v. Brooks	Pending
2006-UP-072-McCrea v. Gheraibeh	Pending
2006-UP-073-Oliver v. AT&T Nassau Metals	Pending
2006-UP-074-Casale v. Stivers Chrysler-Jeep	Pending
2006-UP-079-Ffrench v,. Ffrench	Pending
2006-UP-088-Meehan v. Meehan	Pending
2006-UP-096-Smith v. Bloome	Pending
2006-UP-128-Heller v. Heller	Pending
2006-UP-130-Unger v. Leviton	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In re: Matter of Anne D. Ulmer / Jane Ulmer Patrick, successor Trustee and Conservator, Appellant,

v.

Will C. Ulmer, III, Respondent.

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

Opinion No. 26177
Heard February 1, 2006 – Filed July 3, 2006

REVERSED

Edgar W. Dickson, of Williams & Williams, of Orangeburg, for Appellant.

Thomas E. Lydon, of McAngus Goudelock & Courie, LLC, of Columbia, for Respondent.

James B. Jackson, Jr., of Yarborough Hutto & Jackson, of Orangeburg, for Guardian Ad Litem.

CHIEF JUSTICE TOAL: This case was certified for review from the court of appeals pursuant to Rule 204(b), SCACR. This appeal arises from an order of the probate court restricting Will Ulmer (Respondent) from visiting his mother, Anne Ulmer (Mrs. Ulmer). During the appeal of a separate issue, Respondent made a motion to the circuit court to modify the probate court's visitation order. The circuit court granted the motion. Jane Ulmer Patrick (Appellant), successor trustee and conservator for Mrs. Ulmer, appeals. We reverse the circuit court's order modifying the probate court's visitation order.

FACTUAL / PROCEDURAL BACKGROUND

Mrs. Ulmer served as trustee for a trust established upon the death of her husband for the benefit of her grandson. She was to receive income from the trust during her lifetime. Upon Mrs. Ulmer's death, the trust was to terminate and the trust property distributed to her grandson.

In September of 2000, Respondent was appointed as Attorney in Fact for Mrs. Ulmer. However, Respondent was replaced in February of 2003 after Mrs. Ulmer filed a petition to determine if Respondent had committed a breach of his fiduciary duties by selling timber located on the trust property and by removing money from savings accounts, certificates of deposit, and her safe deposit box. Subsequently, the court named Appellant as Mrs. Ulmer's guardian and conservator.

On April 21, 2004, the probate court found that Respondent had breached his fiduciary duties and ordered that he pay $91,490.87 in restitution. The probate court order also provided that Respondent was not to visit Mrs. Ulmer until he was contacted by Appellant at Mrs. Ulmer's request. Respondent did not appeal this order.

On October 15, 2004, the probate court held Respondent in contempt of court for failing to pay the restitution due the trust. Additionally, in the

contempt order, the probate court allocated the repayment and ordered Respondent to replant timber on some of the properties. Respondent filed a motion for reconsideration. On December 3, 2004, the probate court denied the motion and ordered that Respondent be imprisoned until he complied with the court's orders or for thirty days, whichever occurred first.

After the court denied Respondent's motion to alter or amend the judgment of the contempt order, Respondent filed a notice of appeal. Respondent later amended the notice of appeal, limiting the issues on appeal to the probate court's contempt orders dated October 15, 2004 and December 3, 2004. On February 9, 2005, Respondent filed a motion in circuit court for permission to visit Mrs. Ulmer. The circuit court granted the motion on the limited ground that Respondent be allowed one supervised visit with Mrs. Ulmer. This appeal followed, wherein Appellant raises the following issues for review:

I. Did the circuit court err in ordering a change in visitation because the matter was not preserved for review?[1]

II. If this Court finds the matter is preserved for review, did the circuit court err in ordering visitation because the facts do not support a modification of the probate court's order?

LAW AND ANALYSIS

I. Issue Preservation

[1] Both Appellant and Respondent frame the issue on appeal in terms of the "jurisdiction" of the circuit court. "The concept of jurisdiction refers to the authority of a court over a particular person (personal jurisdiction) or the authority of a court to entertain a particular action (subject matter jurisdiction)." *Boan v. Jacobs*, 296 S.C. 419, 421, 373 S.E.2d 697, 698 (Ct. App. 1988) (citations omitted). This case involves whether the issue reviewed by the circuit court was properly appealed and preserved for appellate review, not the circuit court's power to hear appeals from the probate court.

Appellant contends the circuit court erred in ordering a change in visitation because the matter was not preserved for review. We agree.

The Probate Code governs appeals from the probate court. Under the Probate Code, final orders or decrees of the probate court may be appealed to the circuit court. S.C. Code Ann § 62-1-308(a) (Supp. 2005). In reviewing an appeal from the probate court, the circuit court must apply the same rules of law as an appellate court would apply. S.C. Code Ann. § 62-1-308(d); *In re Estate of Pallister*, 363 S.C. 437, 447, 611 S.E.2d 250, 256 (2005). Accordingly, because the circuit court has appellate jurisdiction only, it has no power to hear new evidence in reviewing a probate matter. S.C. Code Ann. § 62-1-308(d); *In re Estate of Howard*, 315 S.C 356, 360, 434 S.E.2d 254, 257 (1993).

An appellate court will not consider issues on appeal which have not been preserved for appellate review. *In the Interest of Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (holding that issues must be raised and ruled upon in the trial court to be preserved for appellate review). When an appellate court rules on an issue not preserved for appellate review, the portion of the appellate court's opinion pertaining to the unpreserved issue should be vacated. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003).

Further, the circuit court has appellate jurisdiction over only those matters which are properly appealed. *In re Cretzmeyer*, 365 S.C. 12, 14, 615 S.E.2d 116, 116 (2005). "A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case." *Austin v. Specialty Transp. Servc.*, 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004). Therefore, even where the error has been preserved at the trial level, the party must make timely service of the notice of appeal to present the issue to the appellate court for review. 15 S.C. Jur. *Appeal and Error* § 71 (2005).

In this case, the probate court initially ruled upon the issue of visitation in its April 21, 2004 order. The second order of the probate court, entered

October 15, 2004, concerned only the contempt proceedings instituted against Respondent. Respondent filed a motion for reconsideration in the probate court with regard to the second order finding him in contempt. However, at no time did Respondent petition the probate court to modify the visitation order. After the probate court denied Respondent's motion for reconsideration in its December 3, 2004 order, Respondent filed an appeal with the circuit court. Respondent later amended the notice of appeal, limiting the issues to the probate court's October and December orders only.

We find that the circuit court could not modify the visitation order of the probate court because the issue of visitation was not preserved for review. Respondent did not make a post trial motion to the probate court regarding visitation, nor did he petition the probate court for modification of its visitation order. Therefore, the trial court was not given an opportunity to rule on the issue before the issue was raised in the appellate court. For that reason, the circuit court erred in changing the visitation order because the circuit court could review only those matters which were properly preserved for review.

Additionally, we find that by amending the notice of appeal, limiting the issues to the probate court's October 2004 and December 2004 orders only, Respondent failed to appeal the April 2004 order limiting visitation. Accordingly, even if the issue had been preserved, the circuit court erred in modifying the visitation order, no appeal having been taken from the April 2004 order.

Respondent contends the circuit court properly heard the motion to modify the visitation order because the probate court was divested of its jurisdiction over the entire matter under S.C. Code Ann. § 62-1-308(c).[2]

[2] Section 62-1-308(c) reads, "[w]hen an appeal according to law is taken from any sentence or decree of the probate court, all proceedings in pursuance of the order, sentence, or decree appealed from shall cease until the judgment of the circuit court, court of appeals, or Supreme Court is had. If the appellant, in writing, waives his appeal before the entry of the

Respondent misunderstands the statute. Section 62-1-308(c) does not apply to all orders of the probate court concerning the parties. The only proceedings required to cease are those proceedings addressed in the orders from which an appeal was taken. Accordingly, Respondent's reliance on § 62-1-308(c) is misplaced. Therefore, we reverse the circuit court's order modifying visitation.

II. **Modification of Visitation**

Appellant argues that if the matter was preserved for review, the facts do not support a change in visitation. Because the Court finds that the matter was not preserved for review or properly appealed, we do not address this issue.

CONCLUSION

For the reasons stated above, the Court finds that the circuit court erred in modifying the visitation order of the probate court. Accordingly, the circuit court's order granting visitation is reversed.

MOORE, BURNETT, JJ., and Acting Justice Brooks P. Goldsmith, concur. PLEICONES, J., concurring in result only.

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judgment, proceedings may be had in the probate court as if no appeal had been taken."

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David W. Goldman and Emilie E. Goldman, Respondents,

v.

RBC, Inc., Petitioner.

Appeal from Sumter County
Thomas W. Cooper, Jr., Circuit Court Judge

Opinion No. 26178
Heard June 6, 2006 – Filed July 3, 2006

AFFIRMED

J. Edward Bell, III, of Sumter, for Petitioner.

Kristi F. Curtis, of Sumter, for Respondents.

JUSTICE BURNETT: RBC, Inc. (Petitioner) challenges the Court of Appeals' decision affirming the circuit court judge's ruling quieting title to a strip of land containing an abandoned railway in David W. Goldman and Emilie E. Goldman (the Goldmans). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1846, the General Assembly, anxious to encourage the building of railroads, granted a liberal charter by statute to the Wilmington & Manchester Railroad Company. In provisions typically seen in railroad charters of that era, the railroad was empowered to obtain land on which to lay track by buying it and receiving a deed; condemning it through the formal process of eminent domain; or through a statutory presumption of grant by which the railroad would simply lay track where it wished and then, if the owner asserted his rights within ten years after completion, pay the owner a fair market price for the land. Act No. 2986, 1846 S.C. Acts 402, §§ XVI and XVII. It is the third method which is at issue in the present case, and it is undisputed the owner of the land at the time of construction never sought compensation from the railroad by 1863, ten years after this section of track was completed.[1]

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[1] Section XVII of the railroad's charter prescribed the method by which the railroad acquired land by statutory presumption of grant:

> In the absence of any contract or contracts with the said company, in relation to land through which the said road may pass, signed by the owner thereof, or by his agent, or any claimant or person in possession thereof, which may be confirmed by the owner thereof, it shall be presumed that the land upon which the road may be constructed, together with a space of sixty-five feet on each side of the center of the said road, has been granted to the company by the owner or owners thereof, *and the said company shall have good right and title thereto, and shall have, hold and enjoy the same, as long as the same may be used only for the purposes of the said road, and no longer*, unless the person or persons owning the said land, at the time that the part of the said road which may be on the said land, was finished, or those claiming under him, her or them, shall apply for an

continued . . .

CSX Transportation (CSX), the successor in interest to the Wilmington & Manchester and several other railroad companies which have used this particular track since 1863, in 1994 abandoned a 16.1-mile stretch of track between Lynchburg and Sumter through a process overseen by the former Interstate Commerce Commission. In 1995, Petitioner paid $104,000 to obtain a quitclaim deed from CSX for a 1.19-mile portion of the abandoned track, which it intended to use to bring railroad tankers to its location. Petitioner manufactures and installs non-sparking agitation equipment used in railroad tankers.

The Goldmans own a 190-acre farm through which a portion of the 1.19-mile track passes. The track is located across a pond about 100 yards from their home, which they built in 1992. Before the unanticipated sale to Petitioner, the Goldmans planned to buy the strip of land from CSX after abandonment in order to avoid litigation over its ownership and they contacted CSX to discuss a sale.

After CSX sold the land to Petitioner, the Goldmans sued Petitioner in 1998 to quiet title in themselves as adjoining landowners in the

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> assessment of the value of the said lands, as hereinafter directed, within ten years next after the said part was finished; and *in the case the said owner or owners, or those claiming under him, her or them, shall not apply for such assessment within ten years next after the said road is finished, he, she, or they shall be forever barred from recovering the said land, or having any assessment or compensation therefore*; provided, Nothing herein contained shall effect the rights of feme coverts or infants, until two years after the removal of their respective disabilities.

Act No. 2986, 1846 S.C. Acts 402, § XVII. The emphasized portions of the charter highlight the language which has given rise to issues presented in this railway abandonment case and earlier, similar cases.

strip of land, totaling about four acres, which passes through their farm. The circuit court, on cross-motions for summary judgment ruled in favor of the Goldmans and ordered that fee simple title is held by the Goldmans.

The Court of Appeals affirmed. Goldman v. RBC, Inc., Op. No. 2004-UP-362 (S.C. Ct. App. filed June 4, 2004) (unpublished opinion). We granted the petition for a writ of certiorari to consider the following issue:

> Did the Court of Appeals err in rejecting Petitioner's argument that a ruling which quieted title in the Goldmans conflicts with Lewis v. Wilmington & Manchester Railroad Company, 45 S.C.L. (11 Rich.) 91 (1857)?

STANDARD OF REVIEW

An action to remove a cloud on and to quiet title to land is one in equity. Johnson v. Arbabi, 355 S.C. 64, 68, 584 S.E.2d 113, 115 (2003). In an action in equity tried by a judge alone, the appellate court may find facts in accordance with its view of the preponderance of the evidence. Doe v. Clark, 318 S.C. 274, 276, 457 S.E.2d 336, 337 (1995); Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). However, this broad scope of review does not require the appellate court to disregard the findings made below. Stevenson v. Stevenson, 276 S.C. 475, 279 S.E.2d 616 (1981).

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. The evidence must be viewed in the light most favorable to the non-moving party. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001). In reviewing a summary judgment motion, the appellate courts apply the same standards as the trial court under Rule 56(c), SCRCP. Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 145 (1991).

LAW AND ANALYSIS

Petitioner argues the Court of Appeals erred in declining to follow the view Petitioner believes was expressed in Lewis v. Wilmington & Manchester Railroad Company, 45 S.C.L. (11 Rich.) 91 (1857). Petitioner contends the Goldmans are forever barred by statute from recovering the disputed land because their predecessors in interest failed to file for an assessment by 1863, ten years after completion of the railroad. CSX's predecessor obtained fee simple title to the property at that time, which was confirmed by this Court in Lewis and consequently became a property right which could not be divested by later developments in the law. Specifically, Petitioner relies on the statement in Lewis that "if application for an assessment is not made within ten years after the completion of the road, the owner is forever barred from recovering the land or having an assessment, which manifests the intention of the legislature to divest the owner's title. . . ." *Id.* at 94. Therefore, the Wilmington & Manchester Railroad obtained a fee simple title, meaning CSX, as successor in interest, was able to transfer a fee simple title in the land to Petitioner in 1995. We disagree.

In several cases, we have considered the following issue: When a previous landowner did not assert his ownership rights and force the railroad to buy the land within a specified period after completion of the tracks pursuant to a statutory presumption of a land grant contained in a railroad charter, did the railroad (A) obtain an easement across the land as long as it was used as a railroad, with the property reverting to present adjoining landowners when no longer used as a railroad or (B) obtain title to the land in fee simple absolute, giving the railroad's successor in interest the ability to transfer a fee simple title to the land? We repeatedly have held that the answer to this question is (A).[2]

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[2] When the railroad paid for the land, whether by deed transfer, condemnation, or after an owner asserted his right to payment, the railroad obtained a fee simple title. Waring v. Cheraw & Darlington R.R. Co., 16 S.C. 416, 423 (1882) (citing Lewis dissent for proposition that "if

continued . . .

Most recently, in Faulkenberry v. Norfolk Southern Ry. Co., 349 S.C. 318, 563 S.E.2d 644 (2002), the railroad argued it held a fee simple determinable estate in a 200-foot wide strip of land underlying the tracks, which its predecessor had obtained by a statutory presumption of grant provision in an 1845 railroad charter very similar to the one in the present case. We rejected the railroad's arguments in Faulkenberry, several of which are echoed by Petitioner in the present case. Citing several cases dating back to 1882, we held the railroad had only an easement as long as the land was used as a railroad, not a fee simple determinable estate. *Id.* at 325, 563 S.E.2d at 645; accord Boney v. Cornwell, 117 S.C. 426, 435, 109 S.E. 271, 274 (1921) (in deciding boundary dispute implicating charter by which railroad obtained land by statutory presumption of grant, Court cited several cases in which it "has distinctly held that the [railroad] company thereby acquired, not the fee, but an easement of right of way"); Hill v. Southern Ry., 67 S.C. 548, 552-53, 46 S.E. 486, 487 (1903) (railroad holds an easement of right of way across land obtained by statutory presumption of grant); Southern Ry. v. Beaudrot, 63 S.C. 266, 41 S.E. 299 (1902) (railroad, which obtained easement of right of way by statutory presumption of grant, may bring action to force adjoining landowner to remove fence from area encompassed by easement); Ragsdale v. Southern Ry. Co., 60 S.C. 381, 389, 38 S.E. 609, 612 (1901) (in dispute over use of buildings located next to railroad, Court held that railroad, when it obtains easement of right of way by statutory presumption of grant, obtains only an easement so long as it is used for railroad purposes, not title in fee simple absolute); Waring v. Cheraw & Darlington R.R. Co., 16 S.C. 416, 423 (1882) (interpreting the Wilmington & Manchester charter and finding that when railroad obtains easement of right of way by statutory presumption of grant due to owner's failure to move for assessment during specified period, railroad then has "right to enjoy the slip occupied by [it] so long as [railroad] continued to use it for [its] road"); Eldridge v. City of Greenwood, 331 S.C. 398, 417-18, 503 S.E.2d 191, 201

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compensation should be claimed and paid [by the railroad], the fee-simple absolute would thereby be vested in the [railroad] company"); Ragsdale v. Southern Ry. Co., 60 S.C. 381, 389, 38 S.E. 609, 612 (1901) (same).

(Ct. App. 1998) (interpreting statutory presumption of grant language in railroad charter and explaining that "ample South Carolina Supreme Court precedent has defined the Railroad's interest in [such cases] as an easement only").

We reaffirm the position we took in Faulkenberry and the earlier cases. This result reconciles the seemingly conflicting provisions of Section XVII of the statutory charter.[3] Furthermore, this position represents the wiser choice on public policy grounds because it avoids unnecessary disputes between numerous past landholders and their heirs over ownership of small strips of land.

We take this opportunity to clarify Lewis, the case on which Petitioner primarily relies. The Lewis Court did not directly address the issue at hand and that opinion is neither controlling nor dispositive. The issue presented in Lewis was whether a grantee of the person who held the land when the railroad originally was built could seek compensation from the railroad before expiration of the ten-year period.

The Lewis Court held the later grantee could not seek compensation, and in doing so indicated in passing that "if application for an assessment is not made within ten years after the completion of the road, the owner is forever barred from recovering the land or having an assessment, *which manifests the intention of the legislature to divest the owner's title*, reserving to him the right to claim the purchase money or compensation

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[3] Compare "the said company shall have good right and title thereto, and shall have, hold and enjoy the same, *as long as the same may be used only for the purposes of the said road, and no longer*," indicating the railroad held an easement; with "[if] the said owner or owners, or those claiming under him, her or them, shall not apply for such assessment within ten years next after the said road is finished, he, she, or they *shall be forever barred from recovering the said land*, or having any assessment or compensation therefore;" indicating the railroad held a fee simple title.

alone. . . ." *Id.* at 94 (emphasis added). We view the emphasized language, relied upon by Petitioner, as dicta or an inapt remark which does not support Petitioner's argument. It plainly was not the owner's title which was divested after ten years under these circumstances, but his right to seek compensation from the railroad. As the Lewis Court observed, "[i]t is not the land, but the right to compensation that is involved in this controversy. . . ." Lewis, 45 S.C.L. at 94. In short, the Lewis Court did not decide whether the railroad, after obtaining land by statutory presumption of grant, held only an easement or title in fee simple because the Court was not faced with that issue. The easement-versus-fee-simple issue arose later and was resolved as explained in Faulkenberry and the cited cases.

CONCLUSION

We reaffirm our previous holdings and conclude that when a previous landowner did not assert his ownership rights and force the railroad to buy the land within a specified period after completion of the tracks pursuant to a statutory presumption of a land grant contained in a railroad charter, the railroad obtained an easement across the land as long as it was used as a railroad, with the property reverting to present adjoining landowners when no longer used as a railroad. We reject an interpretation of Lewis, 45 S.C.L. 91, which conflicts with this established proposition. Accordingly, the Court of Appeals properly affirmed the circuit court's grant of summary judgment to the Goldmans.

AFFIRMED.

TOAL, C.J., MOORE, WALLER, JJ., and Acting Justice D. Garrison Hill, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas E. Pope, as Solicitor,
Sixteenth Judicial Circuit, Petitioner,

v.

Willie Edward Gordon, Jr., and Twenty-five Thousand Three Hundred Forty-one and 09/100's (25,341.09) Dollars in U.S. Currency, One 1984 GMC Pickup Truck; Two Motorola Cellular Phones (Serial Numbers; SUF1857M and SUG1049B 230 L012QT16WF1); and One Hundred Twenty-EIght & no/100s (128.00) Dollars in U.S. Currency, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from York County
John Buford Grier, Circuit Court Judge

Opinion No. 26179
Heard June 6, 2006 – Filed July 3, 2006

AFFIRMED

Kristie H. Jordan, of York, for Petitioner.

Leland Bland Greeley, of Rock Hill, for Respondent.

CHIEF JUSTICE TOAL: The court of appeals held that the State failed to provide probable cause that the property sought to be forfeited was traceable to illegal drug activity. We affirm.

FACTUAL / PROCEDURAL BACKGROUND

In 1996, William Edward Gordon, Jr. (Respondent) was arrested for trafficking in crack cocaine. At the time of his arrest, Respondent owned a car cleaning and detailing business named Gordon's Car Cleaning Service. The primary customers of the service were automobile dealerships and individuals.

The Rock Hill Police Department arrested Respondent during a 1996 investigation. The Police Department's investigation of Respondent began in 1994. In January of 1994, the Police Department conducted a controlled buy of illegal drugs from Respondent. In February of 1994, the Police Department obtained a search warrant for Respondent's home and recovered crack cocaine and marijuana. While conducting an additional search at Respondent's home, the Police Department discovered crack cocaine in a well house near the home. Respondent plead guilty to possession of marijuana which was recovered during the 1994 investigation.

In September of 1996, the Police Department began a second investigation of Respondent following the arrest of another crack dealer in

the Rock Hill area who identified Respondent as the supplier. In addition, the same person identified Tommy Rhinehart (Rhinehart) as a dealer.

Rhinehart agreed to cooperate with the Police Department after he was arrested for possession of crack cocaine and other narcotics. The undisputed facts outlined by the court of appeals relating the sting operation are as follows:

> The next day, Rhinehart met with Gordon to discuss future transactions. During the course of the conversation, Rhinehart told Gordon that he had "flushed" the crack cocaine during the Department's search of his residence. On September 26, 1996, Gordon and his nephew, Spencer, gave Rhinehart another bag of crack cocaine. Spencer stayed with Rhinehart while he sold some of the crack cocaine. On September 27, 1996, Rhinehart met with agents and turned over the proceeds from the sale and the remaining crack cocaine. At that time, the agents gave Rhinehart $500 in marked money to pay Gordon for the crack cocaine that he had "fronted" him. In a recorded conversation, Rhinehart set up another transaction with Gordon. Gordon indicated that he needed to contact Spencer. Rhinehart was then instructed to meet Spencer at Gordon's car wash. At the car wash, Spencer gave Rhinehart two bags of crack cocaine, weighing 9.4 grams and 9.8 grams respectively, and collected $500 for a previous transaction. Rhinehart then left, met with the agents, and turned over the crack cocaine.
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> On September 30, 1996, Rhinehart paged Gordon to arrange a meeting time so that he could pay for the two additional bags of crack cocaine. The agents gave Rhinehart $1,000 in marked money and equipped him with a surveillance wire. Rhinehart met with Spencer at a designated location. He then gave Spencer the money received from the sale of the crack cocaine that was purchased earlier from Gordon. Spencer left and told Rhinehart he would return with more crack cocaine. Spencer met Gordon, who was driving the pickup truck, at the car wash. Spencer left the car wash, drove to NationsBank, and made a deposit. Shortly

> thereafter, agents arrested Spencer and searched him. The agents found a bank deposit receipt for account number 790167308, the business account for Gordon's car wash. The balance of the account was $22,209.85, which included the deposit.
>
> During the same time period, Gordon was arrested while driving his pickup truck. He was found to be in possession of two cellular phones as well as $1,584 in cash, $880 of which was law enforcement funds given to Spencer earlier by Rhinehart. Pursuant to this arrest, the State seized the following property: the NationsBank operating account of Gordon's car wash business, $22,209.85 plus $726.24 from the payroll account; the $1,584 in cash; the pickup truck; and two cellular phones.
>
> The forfeiture action also included seizures of cash in the amount of $821 and $128. On September 29, 1996, agents seized $821 in cash from Gordon when he was arrested on unrelated warrants during the search of another person's residence. On October 5, 1996, Gordon was arrested for obstruction of justice. While Rhinehart was wearing a surveillance wire, Gordon offered him $5,000 to leave town and not testify against him. At the time of the arrest, the agents seized $128 in cash from Gordon.

Pope v. Gordon, 359 S.C. 572, 598 S.E.2d 288 (Ct. App. 2004).

Ultimately, Respondent was convicted of trafficking in crack cocaine and sentenced to thirty years imprisonment and payment of a $50,000 fine. The State then filed this forfeiture action, seeking to confirm the seizures made as a result of this investigation were proceeds of illegal drug activity.

The circuit court ordered that all seized property, with the exception of $128 in "marked" cash be returned to Respondent. The court found that the State failed to meet its burden of showing probable cause that there was a nexus between the illegal drug activity and the property sought to be forfeited. The State appealed and the court of appeals affirmed. As a result, the State sought and this Court granted certiorari to review the following issue:

Did the court of appeals err in holding that the State failed to establish probable cause that the property sought to be forfeited was traceable to illegal drug transactions?

STANDARD OF REVIEW

An action for forfeiture of property is a civil action at law. *State v. 192 Coin-Operated Video Game Machs.*, 338 S.C. 176, 525 S.E.2d 872 (2000). In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law. *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.*, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2004). The trial judge's findings of fact will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or controlled by an erroneous conception of the application of the law. *Gordon v. Colonial Ins. Co.*, 342 S.C. 152, 536 S.E.2d 376 (Ct. App. 2000).

LAW / ANALYSIS

The State argues that the court of appeals erred in holding that the State failed to establish probable cause that the property sought to be forfeited was traceable to illegal drug transactions. We disagree.

The purpose of a forfeiture hearing is to confirm that the state had probable cause to seize the property forfeited. *Medlock v. One 1985 Jeep Cherokee VIN 1JCWB782FT129001*, 322 S.C. 127, 131, 470 S.E.2d 373, 376 (1996). The State has the initial burden of demonstrating probable cause for the belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by statute. *United States v. Thomas*, 913 F.2d 1111, 1114 (4th Cir.1990) (quoting *Boas v. Smith*, 786 F.2d 605, 609 (4th Cir.1986)). If probable cause is shown, the burden then shifts to the owner to prove that he or she was not a consenting party to, or privy to, or did not have knowledge of, the use of the property which made it subject to seizure and forfeiture. *Medlock*, 322 S.C. at 131, 470 S.E.2d at 376 (quoting S.C. Code Ann. § 44-53-586(b)(1) (2002)).

The relevant statute outlines that the following are subject to forfeiture in part:

> all property including, but not limited to, monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, and all proceeds including, but not limited to, monies, and real and personal property traceable to any exchange.

S.C. Code Ann. § 44-53-520(a)(7) (2002).

The State urges this Court to adopt the rationale of the Fourth Circuit employed in *U.S. v. Thomas*. 913 F.2d 1111 (4th Cir. 1990).[1] While, the court in *Thomas* outlined the proper standard in a forfeiture action, the court employed a "totality of the circumstances" approach in finding that proceeds were traceable to illegal drug activity. *Thomas*, 913 F.2d at 1114-1115. The court noted the significance of the evidence presented, namely the possession of unusually large amounts of cash, or the making of uncommonly large purchases that may be circumstantial evidence of drug trafficking. *Thomas*, 913 F.2d at 1115. The court further relied on the fact that it appeared that Thomas's cash expenditures exceeded any verifiable income in determining that the totality of the circumstances pointed to income derived from illegal drug activity. *Id.* As a result, the State urges this Court to view the evidence "as a total picture" and to employ a "practical, common sense" approach in determining that the probabilities point to the proceeds being derived from illegal drug transactions. *See Thomas*, 913 F.2d at 1114-1115.

In the present case, the State presented several witnesses who testified regarding Respondent's finances. Christine Rogers, an employee of a property management company, testified she became acquainted with Respondent in 1995 or 1996 when she rented him an apartment in Rock Hill.

[1] The federal forfeiture statute at issue in *Thomas* contains similar language to the state statute at issue in the present case. *See* 21 U.S.C. § 881(a)(6) (Supp. 2000). However, we believe the language in the federal statute to be broader than that of our own state statute.

In 1996, Respondent entered into a commercial lease agreement for the purchase of property. The terms of the agreement required Respondent to provide a $6,000 down payment and then a $750 monthly lease payment. According to Rogers, Respondent paid cash for monthly rent for his apartment as well as the $6,000 down payment.

The State also presented, John Comer, a South Carolina Department of Revenue employee. Comer testified the Department had no tax records for Respondent individually or for the car wash during the years of 1995 or 1996. Further, the State offered the testimony of Margaret Parsons, an accountant, who began assisting Respondent with his finances beginning in May or June 1996. Based on her review of Respondent's finances, Parsons believed Respondent's expenses exceeded his business income and that the balance of the expenses was paid for in cash.

In addition to this testimony, the State presented Respondent's voluminous NationsBank records into evidence. The record reflects that the NationsBank's documents contain extensive evidence that the bank accounts held legitimate business income, including checks from Rock Hill car dealerships. However, the record is unclear whether the deposit ticket the State seized was evidence that Spencer deposited drug money or money from Respondent's car wash. Furthermore, the State failed to show the withdrawals from the bank accounts were used to pay for items in cash as opposed to Respondent paying for these items directly from money gained from the sale of drugs.

We hold that the court of appeals correctly held that the State failed to meet its burden of proof. The record shows that Respondent did have a legitimate car detailing business that involved cash transactions. In addition, the bank records show that money in the accounts came from the car detailing business. As a result, the State failed to demonstrate how the money contained in the bank account came from illegal drug transactions.

Therefore, we affirm the court of appeals opinion holding that the State failed to establish probable cause that the money in the bank accounts contained proceeds traceable to illegal drug transactions. Further, we decline to use the rationale in *Thomas* because we believe the standard in *Thomas*

would lessen the burden on the State and is in direct contravention to the word traceable in the language of the statute. *See Ducworth*, 319 S.C. at 162, 459 S.E.2d at 899 (holding that the terms of a forfeiture statute must be strictly construed and as a result, the words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation).

CONCLUSION

Accordingly, based on the above cited authority, we affirm the court of appeals' decision.

MOORE, WALLER, BURNETT, JJ., and Acting Justice D. Garrison Hill, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Theodore H. Kirkman and
Karen K. Kirkman, Petitioners,

v.

Parex, Inc., Francis Coaxum,
d/b/a Coaxum Stucco, R. E.
Miller, Miller Housing, Inc.,
Miller Development Group,
and First Union National Bank
of South Carolina, Defendants,

of which First Union National
Bank of South Carolina is Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26180
Heard February 2, 2006 – Filed July 3, 2006

REVERSED AND REMANDED

John D. Kassel, Theile Branham McVey, and William D. Robertson, III, all of Columbia, for Petitioners.

Thomas E. Lydon, of McAngus Goudelock & Courie, LLC, of Columbia, for Respondent.

JUSTICE PLEICONES: We granted a writ of certiorari to review Kirkman v. Parex, Inc., 356 S.C. 525, 590 S.E.2d 36 (Ct. App. 2003), in which the Court of Appeals affirmed the circuit court's grant of summary judgment to Respondent First Union National Bank of South Carolina (First Union). The Court of Appeals held that, as a matter of law, First Union did not impliedly warrant the habitability of the house that it sold to Petitioners Theodore and Karen Kirkman (the Kirkmans), and therefore could not be liable for breach of warranty. We reverse the Court of Appeals' decision and remand the case to the circuit court.

FACTS

The Kirkmans and Miller Housing Corporation (Miller Housing) executed a contract for the sale and purchase of a house. First Union, which financed Miller Housing's construction of the house,[1] was listed in the contract "as principal lien holder."

When the contract was executed, Miller Housing was experiencing financial problems, and First Union was contemplating foreclosure. The parties agreed that First Union would not foreclose on the property and that Miller Housing's debt would be satisfied by the Kirkmans' payment at closing. It later became apparent that foreclosure was necessary because of junior liens on the property, which would not have been satisfied by the Kirkmans' payment. Consequently, the parties amended the sales contract by omitting the provision barring foreclosure. First Union then foreclosed and took title to the property.

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[1] The construction loan actually came from South Carolina Federal Savings Bank, which was later acquired by First Union. For ease of discussion, we refer to the banks collectively as "First Union."

The contract also included a clause requiring Miller Housing to complete the house prior to closing. Unfortunately, Miller Housing's financial troubles caused it to go out of business, and it never completed the house.

First Union, then the owner of the house, hired another contractor to finish the project. There is evidence in the record that First Union's contractor finished the heating and air systems and all of the hardwood floors; sub-contracted out some plumbing work; installed light fixtures and appliances; fixed the sheetrock walls; and painted at least some of the interior of the house. It is undisputed, however, that First Union's contractor did not install the artificial stucco which the Kirkmans claim was defective and rendered the house unhabitable. Miller Housing had already performed that task.

Neither party has been able to locate any records showing the amount of money that First Union paid to the new contractor. The only evidence comes from an employee of the contractor, who testified in his deposition that the work described above was performed and that it took a month and a half to two months to do it. His best guess was that his company charged First Union between forty and fifty thousand dollars. The First Union employee who was involved in the project testified in his deposition that he "would not be able to deny" that First Union spent that much money to complete the house.

After its contractor completed the house, First Union deeded the property to the Kirkmans. In addition to the usual conveyance language and description of the property, the deed provided that First Union disclaimed the implied warranty of habitability and that the property was sold as-is. According to the Kirkmans, they were unaware that the deed included the disclaimer and did not believe they were purchasing the house as-is.

When the Kirkmans tried to sell the property years later, they spent approximately forty-five thousand dollars to repair the artificial stucco on the exterior of the house. They then brought this action, alleging that First

Union, as the seller of the property, breached the implied warranty of habitability.

Both parties moved for summary judgment, and the circuit court granted it to First Union, finding as a matter of law that First Union was a "mere lender" and therefore did not impliedly warrant the habitability of the house. The Court of Appeals affirmed.

ISSUES

I. Whether the Court of Appeals erred in affirming the grant of summary judgment on the ground that First Union was a "mere lender."

II. Whether the record contains an additional sustaining ground: that First Union effectively disclaimed the implied warranty of habitability.

STANDARD OF REVIEW

In reviewing a grant of summary judgment, an appellate court applies the same standard as the circuit court: summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." Osborne, 346 S.C. at 7, 550 S.E.2d at 321.

ANALYSIS

Under the doctrine of *caveat venditor*, the seller of a new house impliedly warrants the habitability of the house. Arvai v. Shaw, 289 S.C. 161, 345 S.E.2d 715 (1986) (holding that the warranty is implied only in the

initial sale, not in a resale); Lane v. Trenholm Bldg. Co., 267 S.C. 497, 503, 229 S.E.2d 728, 730-31 (1976) (holding that, generally, the warranty is made by the seller even if he did not build the house); Rutledge v. Dodenhoff, 254 S.C. 407, 413-15, 175 S.E.2d 792, 795 (1970) (first recognizing the warranty). The seller's "liability is not founded upon fault, but because it has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects." Lane, 267 S.C. at 503, 229 S.E.2d at 731. "[T]he warranty springs from the sale. The determining factor is not whether the defendant actually builds the defective house, but that he places it, by the initial sale, into the stream of commerce." Arvai, 289 S.C. at 164, 345 S.E.2d at 717.

"[A] mere lender," however, "even if a party to the sale, is ordinarily not liable under an implied warranty of habitability theory." Kennedy v. Columbia Lumber and Mfg. Co., 299 S.C. 335, 340, 384 S.E.2d 730, 734 (1989).

> This is not to say that a lender will never incur implied warranty liability when it makes a sale after default. Obviously, a lender can be held liable if it is also a developer. ... Liability may also attach when the lender becomes highly involved with construction in a manner that is not normal commercial practice for a lender. In such a situation, the lender might be said to be a joint venturer. The lender may be liable if it is so amalgamated with the developer or builder so as to blur its legal distinction. A lender may also be liable where it forecloses on a developer in the midst of construction, takes title, has substantial involvement in completing the construction and sells homes.[2]

[2] We take this opportunity to re-visit the following passage from Kennedy:

Id. at 340, 384 S.E.2d at 734 (citations omitted).

I. MERE LENDER

The Court of Appeals held that First Union was a mere lender as a matter of law and therefore did not impliedly warrant the habitability of the house purchased by the Kirkmans. We disagree.

It is clear that First Union was not a developer; that it was not in a joint venture with Miller Housing; and that it was not amalgamated with Miller Housing. It is equally clear, however, that First Union foreclosed before construction was complete, took title to the property, and sold the house to the Kirkmans. Contrary to the opinion of the Court of Appeals, there remains a genuine issue of material fact whether First Union was substantially involved in completing the construction. As stated above, there is evidence

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> Roundtree Villas establishes liability on lenders for defects in those portions of the house(s) which they complete. A lender will also incur liability for the performance of express representations made to a buyer. A lender should be held responsible if it is aware of defects but conceals them from an unwitting buyer.

Kennedy, 299 S.C. at 340, 384 S.E.2d at 734 (parentheses in original) (internal citations omitted).

Under none of these scenarios would a lender expose itself to "implied warranty liability." First, a lender's liability "for defects in those portions of the house(s) which they complete" is unrelated to the implied warranty of habitability. As we specifically held in Roundtree Villas, such liability would be imposed under principles of tort law. 282 S.C. at 423, 321 S.E.2d at 50-51. Second, by definition, an express representation does not constitute an implied warranty. Third, the implied warranty of habitability does not spring from a lender's engagement in fraudulent conduct; it springs from the sale of a new house.

in the record that First Union's contractor finished the heating and air systems and all of the hardwood floors; sub-contracted out plumbing work; installed light fixtures and appliances; fixed the sheetrock walls; and painted some or all of the interior of the house.

The Court of Appeals focused on the Kirkmans' suggestion that the forty to fifty thousand dollars which First Union paid to complete the house was a substantial portion of the roughly two hundred and forty thousand dollars that constituted the total construction cost. The court opined that the Kirkmans were arguing that substantial involvement was "to be determined solely by a mathematical approach." Kirkman, 356 S.C. at 530-31, 590 S.E.2d at 39. That is not the Kirkmans' argument. They raise First Union's expenditure only to emphasize their thesis that all of the work performed by First Union's contractor over the course of two months was a substantial portion of the total work.

In addition, the Court of Appeals improperly relied on Roundtree Villas and the fact that First Union "was not involved in the installation of the [allegedly defective] stucco siding." Kirkman, 356 S.C. at 531, 590 S.E.2d at 39. As mentioned above in note 2, in Roundtree Villas we held that a lender could be liable for faulty construction with respect to those parts of the house on which it worked, but we specifically held that such liability would lie in tort, not contract. See 282 S.C. at 423, 321 S.E.2d at 50-51. There was an issue in Roundtree Villas concerning a lender's warranty liability, but our discussion of it was very brief. We found that none of the defendants warranted the habitability of the house because none was a seller of the house. Id. at 423, 321 S.E.2d at 51; see also Kennedy, 299 S.C. at 340, 384 S.E.2d at 734 (discussing the limited warranty holding in Roundtree Villas).

In sum, there remains a genuine issue of material fact whether First Union was substantially involved in completing the house. If it was, then it impliedly warranted the habitability of the house, unless it effectively disclaimed the warranty.

II. DISCLAIMER

As an additional sustaining ground, First Union argues that the grant of summary judgment should be affirmed because First Union disclaimed the implied warranty of habitability. Whether the warranty can be disclaimed is a novel issue in South Carolina.

We agree with the Supreme Court of Alabama "that the principle of freedom of contract permits a party to effectively disclaim the implied warranty of habitability." Turner v. Westhampton Court, L.L.C., 903 So.2d 82, 93 (Ala. 2004). To maintain the protection of purchasers, however, disclaimer can be permitted only if strict conditions are satisfied. We adopt the requirements set forth by the Washington Court of Appeals: the disclaimer "must be (1) conspicuous, (2) known to the buyer, and (3) specifically bargained for." Burbo v. Harley C. Douglass, Inc., 106 P.3d 258, 263 (Wash. Ct. App. 2005). This standard is to be applied strictly and will be met only in rare circumstances. It will protect buyers but also give them freedom to purposefully bargain for a price discount or other desired benefit. Denying buyers that freedom would be unduly paternalistic.

In this case, the disclaiming language within the four corners of the deed does not, standing alone, lead to the conclusion that the standard we adopt was satisfied. The circuit court needs to consider all relevant evidence in determining this issue.

CONCLUSION

We reverse the grant of summary judgment to First Union and remand the case to the circuit court. On remand, the following issues must be determined by the fact finder: whether First Union was substantially involved in completing the house sold to the Kirkmans; and whether First Union effectively disclaimed the implied warranty of habitability. If First Union was so involved and did not effectively disclaim the warranty, then whether First Union breached the warranty will need to be determined.

REVERSED AND REMANDED.

TOAL, C.J., MOORE, J., and Acting Justices James W. Johnson, Jr. and William P. Keesley, concur.

The Supreme Court of South Carolina

In the Matter of Richard A. Blackmon, Respondent.

ORDER

Respondent was suspended on April 24, 2006, for a period of sixty (60) days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

JEAN H. TOAL, CHIEF JUSTICE

s/ Brenda F. Shealy
Chief Deputy Clerk

Columbia, South Carolina

July 3, 2006

The Supreme Court of South Carolina

Theodore Edith, #287832 Petitioner,

v.

State of South Carolina, Respondent.

ORDER

By order dated October 31, 2005, the circuit court issued a conditional order of dismissal in this post-conviction relief (PCR) case. This order gave petitioner twenty days to show cause why the conditional order should not become final. Petitioner did not file a reply to the conditional order of dismissal, and the circuit court issued a final order of dismissal on March 6, 2006. Petitioner has now served and filed a notice of appeal from this last order.

S.C. Code Ann. § 17-27-70 (b) (2003) provides for conditional orders of dismissal in PCR actions. It states:

> When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any

> further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

This Court has previously held that the issuance of a default judgment based on the failure of a party to file a response pleading or to appear is not appealable. Cf. Belue v. Belue, 276 S.C. 120, 276 S.E.2d 295 (1981)(default judgment based on failure to appear);Duncan v. Duncan, 93 S.C. 487, 76 S.E. 1099 (1913)(default judgment based on failure to file response pleading); Gadsden v. Home Fertilizer & Chemical Co., 89 S.C. 483, 72 S.E. 15 (1911)(same); Gillian v. Gillian, 65 S.C. 129, 43 S.E. 386 (1903)(same); Washington v. Hesse, 56 S.C. 28, 33 S.E. 787 (1899)(same); Odom v. Burch, 52 S.C. 305, 29 S.E. 726 (1898)(same). We see no reason why this same rule should not be equally applicable to a PCR applicant who fails to avail himself of the opportunity to reply to a conditional order of dismissal and, as a result of this default, a final order of dismissal is issued.

Accordingly, the notice of appeal in this matter is dismissed.[1]

The remittitur will be sent as provided by Rule 221, SCACR.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
May 24, 2006

[1] We are aware that petitioner challenged the subject matter jurisdiction of the court of general sessions in his PCR application. In the case of State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), we held that "subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong" and that "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." See also State v. Means, Op. No. 26105 (S.C. Sup. Ct. filed Feb. 6, 2006) (applying Gentry to amendments of indictments); Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005) (summarizing holding in Gentry). There is simply no question that the court of general sessions had subject-matter jurisdiction over the charges in this matter.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kenneth Middleton, Appellant,

v.

Elizabeth Ann Johnson and
Eugene Hollington, Respondents.

Appeal From Berkeley County
Jack Alan Landis, Family Court Judge

Opinion No. 4108
Submitted March 1, 2006 – Filed April 24, 2006
Revised June 28, 2006

REVERSED AND REMANDED

Daphne A. Burns, of Mt. Pleasant, and Margaret D. Fabri, of Charleston, for Appellant.

Elizabeth Johnson McCants, of Florence, and Eugene Hollington, of Warner-Robbins, GA, no appearance.

HEARN, C.J.: Kenneth Middleton appeals from an order of the family court denying him visitation with Joshua Hollington, a minor child. Although Middleton admits he is not biologically related to Josh, he argues he is entitled to visitation because he served as Josh's "psychological parent" for ten years and because visitation is in Josh's best interest. We reverse and remand.

FACTS

Middleton and Elizabeth Johnson (Mother) had a long-term relationship from 1979 until the early 1990s. At the time they met, Mother had two small daughters: a four-year-old named Chelsea and a one-year-old named Tenille. Middleton also had two daughters; his older daughter, Andrea, was eleven, and his younger daughter, Kenisha, was four. While Mother dated Middleton, she and her children spent Thursdays through Sundays at his home. Middleton, with Mother's encouragement, developed a strong, parental relationship with both Mother's daughters. He supported the two girls financially and emotionally, and even though they are now grown, he still considers them his daughters. In fact, when Chelsea married, Middleton escorted her down the aisle despite the fact that her biological father attended the wedding.

By 1992, Mother and Middleton were no longer in a serious relationship; however, they had an intimate encounter in July of that year. Nine months later, on April 7, 1993, Joshua Hollington was born. During Mother's pregnancy, she told Middleton that Eugene Hollington was the father of her child. However, after Josh's birth, Mother called Middleton and told him he needed to see Josh, and she sent a photograph to Middleton when Josh was three months old. The implication was that Middleton was Josh's father because the resemblance between Josh and Middleton was so striking.

Once Middleton saw the photograph and the physical similarity between Josh and himself, he showed the picture to various family members and friends. They all thought, as did Middleton, that Josh and Middleton were biologically related. Subsequently, Middleton went to his doctor to

have a blood test performed, and the test did not exclude him as Josh's biological father.

Beginning when Josh was three months old, Middleton took an active role in Josh's life. He regularly spent time with Josh and supported him financially. When Josh was approximately one year old, a DNA test revealed Eugene Hollington to be Josh's biological father. By that time, Middleton testified he was already committed to being Josh's father, and with Mother's blessing, Middleton continued to love and take care of Josh as though he were a son. When Josh was three, Mother lived in a home owned by Middleton that was next door to Middleton's father's house. Middleton checked on his father daily, and nearly every time Middleton was at his father's house, Mother sent Josh over to visit. Often, Middleton would take Josh home to spend the night.

When Josh began preschool, Middleton and Mother shared the costs. Middleton signed Josh's report cards and picked Josh up from preschool at least three days per week. Essentially, Middleton and Mother had a joint custody arrangement, with Mother caring for Josh Mondays through Wednesdays and Middleton keeping Josh the remainder of the week.

This joint custody arrangement was interrupted briefly when Josh was approximately four years old, and Mother moved in with her boyfriend. At that point, Mother attempted to stop Middleton from seeing Josh because her boyfriend did not like Middleton's presence in their lives. This was resolved when Middleton offered to pay Josh's entire daycare expense, at which point, his normal Thursday through Sunday visitation schedule resumed.

When Josh started public school, Middleton, without Mother, took Josh to his first day of kindergarten. Josh's teachers from second, third, and fourth grades testified that they all believed Middleton was Josh's biological father. Even on the days when Josh did not spend the night with Middleton, Middleton would drive him to school in the mornings. He also picked up Josh nearly every day after school, and he attended PTA meetings, open houses, field trips, and other school-related activities. The teachers acknowledged Middleton as Josh's father in front of Mother, and Mother

never corrected them. Middleton also enrolled Josh in the Boy Scouts and in a basketball league. Josh's basketball coach testified that Josh referred to Middleton as "my dad," and Middleton took Josh to every practice and game.

When Josh was in third grade, Mother began to date John McCants. As the couple became more serious, Mother called Middleton and stated McCants did not want Josh at Middleton's house every weekend. To accommodate her boyfriend, Mother came up with a schedule where she and Middleton rotated days every week. By this point in time, McCants was living with Mother, and eventually the two married.

As part of the rotating schedule, Josh spent Christmas of 2002 with Middleton and New Year's Eve with Mother. According to the visitation schedule, Josh was to return to Middleton's house on January 1, 2003; however, Mother called Middleton that day and explained that she was not going to bring Josh over because he had been acting up, and she had to punish him. When Josh came over the following day, he hugged Middleton and told him that Mother had left marks on him by hitting him with a studded belt. Josh showed Middleton the marks on his upper thighs, near his groin area.

Middleton testified that he had previously observed signs of physical abuse and that he had spoken to Mother about hitting Josh. Middleton was concerned that if he reported this suspected abuse, Mother would forbid him from seeing Josh. Because Middleton did not want to jeopardize his relationship with Josh, he spoke with Josh's principal about the marks, but did not otherwise contact the authorities.

Later that evening, Mother called and asked to speak with Josh. Middleton informed her Josh was about to get in the shower, and that Josh would call her back once he was through. Moments later, Mother called back and demanded Josh be brought to her. Middleton did not understand what could have transpired in those few minutes to make Mother so angry, but speculated that Mother's change in demeanor could have occurred because she thought Middleton might see the marks she left on Josh when Josh undressed to shower. Middleton told Mother it was his night with Josh, and

because Josh had been sick earlier, he should not travel outside in the winter right after a shower. Middleton testified he was afraid for Josh's welfare and refused to bring him to Mother's house. When the telephone conversation ended, he called the police department and reported the alleged abuse. Mother and McCants also contacted the police to report Middelton's refusal to return Josh.

When the police arrived, they brought Mother and McCants with them. Because Mother had legal custody, Josh was returned to her. Officer Maggie Carver reported the case to the Department of Social Services, but inexplicably, the Department informed Officer Carver in a voicemail that it would not "take the case." Officer Carver testified she believed Middleton's reason for reporting the alleged abuse was out of true concern for Josh.

After this incident in January 2003, Mother terminated all contact between Josh and Middleton. She also contacted school officials and told them Middleton was not allowed to see Josh. Approximately one year later, Mother, McCants, and Josh moved to Florence, South Carolina.

On February 11, 2003, Middleton filed this action seeking custody of Josh.[1] He also filed a motion to have a guardian ad litem appointed to represent Josh. Mother answered, stating the action should be dismissed because Middleton, not being biologically related to Josh, lacked standing to proceed. The family court (1) denied Mother's motion to dismiss; (2) appointed a guardian to represent Josh; (3) required Middleton to join Eugene Hollington, Josh's biological father; and (4) denied Middleton any visitation. On April 14, 2003, Middleton filed an amended complaint joining Hollington to the action. Despite being joined in the action and having the pleadings served on him by certified mail, return receipt requested, Hollington has never made an appearance or responded.

On June 23, 2003, the guardian filed a motion seeking counseling for Josh. The family court issued an order requiring Mother, Middleton, and

[1] At trial, Middleton amended the complaint, seeking only visitation with Josh.

Josh to cooperate in counseling. Several months later the guardian filed an ex parte emergency motion seeking to compel Mother's continued compliance with court mandated counseling because Mother stopped taking Josh to counseling. After a hearing, the family court ordered both Mother and Josh to continue meeting with the therapist, Dr. Kay Newman.

On November 10, 2004, Dr. Newman issued her report recommending Middleton resume visitation with Josh. In her report she stated Josh was a kind, gentle boy whose primary concern was that Dr. Newman understand how much he loves Middleton. According to Dr. Newman, Josh and Middleton separately, "report[ed] a very close, happy relationship between them. Josh reminisce[d] much about Mr. Middleton's taking him to church, Boy Scouts, signing him up for and attending his basketball league, and other events." Dr. Newman noted that Josh's biological dad had never been involved in Josh's life,[2] while Middleton had been, with Mother's blessing, very involved. She also stated McCants declined to be involved in any of the therapy sessions. Further, her report revealed that because Middleton had been instrumental in involving Josh in activities and was an important source of socialization, the move to Florence coupled with losing contact with Middleton, had a negative impact on Josh emotionally. Ultimately, Dr. Newman recommended Josh resume visitation with Middleton, with Mother's liberal input into the form of visitation.

After a three-day trial, the family court denied Middleton's right to visitation. The family court found that despite Mother's position that Middleton had been overindulgent with Josh, Middleton had done nothing "which would have a negative effect on the relationship between the child and his Mother." However, the family court found that under the law of South Carolina, a fit, biological parent has the fundamental right to make decisions concerning whether a third party may visit her child. The family court reasoned that because Josh knew he had a biological father, Middleton could not be his psychological parent, and therefore Middleton had no legal right to petition for visitation. This appeal followed.

[2] Other than seeing Josh one time when Josh was three days old, Hollington has never visited Josh.

STANDARD OF REVIEW

On appeal from the family court, this court has the authority to find facts in accordance with its own view of the preponderance of the evidence. Rutherford v. Rutherford, 307 S.C. 199, 204, 414 S.E.2d 157, 160 (1992). This broad scope of review does not require us to disregard the family court's findings. Cherry v. Thomasson, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981). We remain mindful of the fact the family court judge, who saw and heard the parties, is in a better position to evaluate their credibility and assign weight to their testimony. Id.

LAW/ANALYSIS

In this case, we are asked to determine what legal standard applies to a third party's claim for visitation of a non-biological child for whom he claims to have functioned as a psychological parent. On appeal Middleton argues he has standing to seek visitation because he functioned as a psychological parent to Josh. For the reasons set forth below, we agree, and find the family court erred in concluding Middleton was not Josh's psychological parent and erred in finding Middleton was not entitled to visitation. Accordingly, we reverse and remand.

I. Standing

In all child custody cases, the welfare of the child and the child's best interest is the "primary, paramount and controlling consideration of the court . . . ." Cook v. Cobb, 271 S.C. 136, 140, 245 S.E.2d 612, 614 (1978) (citing Davenport v. Davenport, 265 S.C. 524, 220 S.E. 2d 228 (1975)). To further promote the goal of safeguarding the best interests of children, the General Assembly has recognized that in certain circumstances, persons who are not a child's parent or legal guardian may be proper parties to a custody proceeding. Section 20-7-420 (20) of the South Carolina Code grants the family court jurisdiction to award custody of a child to the child's parent or "any other proper person or institution." Pursuant to that statute, third parties have been allowed to bring an action for custody of a child. See Kramer v.

Kramer, 323 S.C. 212, 473 S.E.2d 846 (Ct. App. 1996) (awarding custody to child's aunt and uncle over biological mother); Donahue v. Lawrence, 280 S.C. 382, 312 S.E.2d 594 (Ct. App. 1984) (finding stepmother had standing to initiate termination of parental rights action).

Under the penumbra of custody is the lesser included right to visitation. Because Middleton would have standing to bring an action for custody, it follows that he would also have standing to seek visitation. In Dodge v. Dodge, 332 S.C. 401, 415 505 S.E.2d 344, 351 (Ct. App. 1998), this court found "no authority" to grant visitation rights to a stepfather of nineteen months, once the biological father, who had been in prison, resumed full custody. However, we specifically found no psychological parent relationship existed between stepfather and children, as the children often saw their biological father. Id. at 413, 505 S.E.2d at 350.

In this case, Middleton claims he has a right to visitation based on his status as a psychological parent and the significant harm denying visitation causes Josh. As explained more fully below, we agree, and hold the family court erred in finding Middleton lacked standing to bring this action.

II. Third Party's Right To Visitation

A. Psychological Parent Doctrine

In refusing to grant Middleton visitation, the family court specifically found that because Josh knew he had a biological father, Middleton was not Josh's psychological father. We disagree.

The notion of a psychological parent or de facto parent was first recognized by the South Carolina Supreme Court in Moore v. Moore, 300 S.C. 75, 386 S.E.2d 456 (1989). In Moore, the supreme court found that although a psychological parent-child relationship existed between the child and his unrelated custodians, such a bond was inadequate to support awarding permanent custody to the custodians where the biological parent was fit. Id. at 80-81, 386 S.E.2d at 459. Notably, the supreme court found the psychological parent-child relationship was built largely upon the

custodians' overt acts, which inhibited the relationship between the biological father and the child.

Subsequently, in Dodge v. Dodge, 332 S.C. 401, 413, 505 S.E.2d 344, 350 (Ct. App. 1998), this court found that although the children had a close and loving relationship with their stepfather and grandparents, the level of attachment did not rise to the level of a psychological parent-child relationship. Therefore, we found the family court erred in granting joint custody to the stepfather and grandparents, and should have awarded the biological father full custody. Id. at 415, 505 S.E.2d at 351.

Both Moore and Dodge recognized the existence of the psychological-parent doctrine; however, neither case explores how a party establishes that he or she is the psychological parent to a child of a fit, legal parent.

The question of who may be deemed a psychological parent for purposes of receiving parental responsibilities has been answered variously. Some states define a psychological parent by breaking down parenthood to its fundamental elements. In California, for example, a de facto parent is defined as "a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period." Cal. Rules of Court, R. 1401 (8); see also C.E.W. v. D.E.W., 845 A.2d 1146, 1152 (Me. 2004) (declining to define a de facto parent, but noting "it must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life").

Other states have attempted to refine the concept further by expanding the definition of psychological parenthood. The Alaska Supreme Court has defined a psychological parent as:

> [O]ne who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for an adult. This adult becomes an essential focus of the child's

> life, for he is not only the source of the fulfillment of the child's physical needs, but also the source of his emotional and psychological needs . . . . The wanted child is one who is loved, valued, appreciated, and viewed as an essential person by the adult who cares for him. . . . This relationship may exist between a child and any adult; it depends not upon the category into which the adult falls – biological, adoptive, foster, or common-law – but upon the quality and mutuality of the interaction.

Evans v. McTaggart, 88 P.3d 1078, 1082 (Alaska 2004). Similarly, in In re Clifford K., 619 S.E.2d 138 (W.Va. 2005), the West Virginia Supreme Court defined the nature of the relationship that supports a finding that the third party acted as a psychological parent. The court stated:

> A "psychological parent," who has greater protection under the law in a child custody proceeding than would ordinarily be afforded to one who is not the biological or adoptive parent of the child, is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support.

Id. at 157.

The Wisconsin Supreme Court has developed a four-prong test for determining whether a person has become a psychological parent. In order to demonstrate the existence of a psychological parent-child relationship, the petitioner must show:

> (1) that the biological or adoptive parent[s] consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the

> child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; [and] (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

In re Custody of H.S.H.-K., 533 N.W.2d 419, 435-36 (Wis. 1995). We believe this test provides a good framework for determining whether a psychological parent-child relationship exists. These four factors ensure that a nonparent's eligibility for psychological parent status will be strictly limited.

The first factor is "critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child." V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000) (explaining the Wisconsin test's first prong). This factor recognizes that when a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced. The legal parent's active fostering of the psychological parent-child relationship is significant because the legal parent has control over whether or not to invite anyone into the private sphere between parent and child. Where a legal parent encourages a parent-like relationship between a child and a third party, "the right of the legal parent [does] not extend to erasing a relationship between [the third party] and her child which [the legal parent] voluntarily created and actively fostered." Id. at 552 (citing J.A.L. v. E.P.H., 682 A.2d 1314, 1322 (Pa. 1996)). A parent has the absolute control and ability to maintain a zone of privacy around his or her child. However, a parent cannot maintain an absolute zone of privacy if he or she voluntarily invites a third party to function as a parent to the child. See In re E.L.M.C., 100 P.3d 546, 560 (Colo. Ct. App. 2004); see also Rubano v. DiCenzo, 759

A.2d 959, 976 (R.I. 2000) (explaining that when a legal parent allows a third-party to assume a role equal to one of the child's two parents, she renders her own parental rights with respect to the minor child "less exclusive and less exclusory" than they otherwise would have been).

As for the second prong, which considers whether the psychological parent and child have lived together, it further protects the legal parent by restricting the class of third-parties seeking parental rights. Normally, the child, legal parent, and psychological parent have at one point, all resided together under the same roof. However, we can conceive of a situation, as in this case, where the legal parent and the psychological parent operated under a sort of joint custody agreement where the child spends half the time at the legal parent's house. The other half of the time is spent at the psychological parent's house, which the child also considers home. This type of arrangement also suffices to meet the second part of the test.

The last two prongs are the most important because they ensure both that the psychological parent assumed the responsibilities of parenthood and that there exists a parent-child bond between the psychological parent and child. The psychological parent must undertake the obligations of parenthood by being affirmatively involved in the child's life. The psychological parent must assume caretaking duties and provide emotional support for the child. These duties, however, must be done for reasons other than financial gain, which guarantees that a paid babysitter or nanny cannot qualify for psychological parent status. See In re E.L.M.C., 100 P.3d at 560 (citing Rubano, 759 A.2d at 976) ("The additional elements further protect the legal parent against claims by neighbors, caretakers, babysitters, nannies, au pairs, nonparental relatives, and family friends."). We further note that when both biological parents are involved in the child's life, a third party's relationship with the child could never rise to the level of a psychological parent, as there is no parental void in the child's life.

Additionally, the length of time the psychological parent acted in a parental capacity must be sufficient for a parent-child bond to have been established. The existence of a parent-child bond "is simply not a court-bestowed determination . . . [t]he finding of the existence of such a bond

reflects that the singular emotional and spiritual connection, ordinarily only expected in the relationship of a legal parent and child, has been created between an adult and child" who have neither blood nor adoption between them. Id. at 557 (Long, J., concurring). Further, "inherent in the bond between child and psychological parent is the risk of emotional harm to the child should the relationship be curtailed or terminated." In re E.L.M.C., 100 P.3d at 560. South Carolina has long recognized the importance of the degree of attachment, echoed by other jurisdictions, between a child and a third-party in making a custody determination between a biological parent and the third party. See Moore, 300 S.C. at 80-81, 386 S.E.2d at 459 (considering whether a psychological parent-child relationship exists in order to determine the degree of attachment); see also In re Clifford K., 619 S.E. at 157 ("The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian.").

Turning to the facts here, the record is replete with evidence showing that Mother invited Middleton to act as a father. Mother sent Middleton pictures of Josh as a baby and insinuated that he was Josh's father. When Josh was three years old, Mother and Middleton worked out a schedule whereby Middleton had Josh from Thursday through Sunday every week. Middleton paid at least half of the daycare costs, and was listed as the emergency contact on the daycare registration.

As Josh entered elementary school, it was Middleton rather than Mother who accompanied him to his first day of kindergarten, and it was Middleton who brought Josh to school almost every morning. Middleton also picked up Josh from school nearly every day and accompanied Josh on school field trips. Middleton took Josh to doctor and dentist appointments, and Josh attended family reunions and functions with Middleton.

For the first ten years of his life, Josh spent a considerable amount of time with Middleton. Mother cultivated this relationship by giving Middleton parental responsibilities and by allowing Josh to spend a significant amount of his childhood with Middleton. In essence, Josh lived with Middleton at least half of the week for most of his life. Mother, by

ceding over a large part of her parental responsibilities to Middleton, fostered the parent-child bond between Middleton and Josh.

The second prong in the psychological parent test, that the child and psychological parent reside together, is also met. The evidence shows Josh spent at least half of any given week residing with Middleton. Additionally, Josh had his own room, clothes, and school books in Middleton's house.

We also find Middleton assumed the obligations of parenthood by taking significant responsibility for Josh's care, education, and development. Middleton paid for Josh's preschool. Additionally, he paid mother $250 dollars per month while Josh was in Mother's custody. Although Middleton had not thought to keep receipts, he was able to document approximately $12,000 he had given Mother over the years. Further, Middleton established a savings account for Josh's education.

Middleton not only contributed financially to Josh's development, he also spent quality time with Josh. On weekends they would go to movies and visit Frankie's Fun Park. On Sundays, Middleton and Josh attended church. Hollington, on the other hand, made no attempt to fulfill Josh's emotional need for a father. In fact, other than seeing Josh one time when he was three days old, Hollington has never visited Josh. This parental void left by Josh's biological father coupled with the parental obligations assumed by Middleton compel us to find that Middleton undertook the responsibilities necessary to meet the third prong of the psychological-parent test.

As to the fourth prong, the record reveals Josh spent ten years of his life thinking of Middleton as a father and is suffering greatly in his absence. Dr. Newman, the court-appointed therapist, opined that Middleton is a psychological parent to Josh. She stated that even though Josh has not seen Middleton in two years, he wanted her to tell the court that he misses Middleton and wants to see Middleton. In her clinical opinion, the emotional attachment between Josh and Middleton is so strong that despite the passing of two years' time, Josh still feels a sense of loss. According to Dr. Newman,

the severance of the relationship between Middleton and Josh will have a profound, negative impact for the rest of his life.[3]

B. Compelling Circumstances

In declining to grant Middleton visitation, the family court stated: "When our law does not allow us to grant autonomous visitation to grandparents against the wishes of a fit parent, I don't know how we can grant autonomous visitation to an unrelated third party against the wishes of a fit parent." While great deference is accorded to the visitation decisions made by a fit parent, the family court can in fact grant visitation to a third-party over a fit parent's objection when faced with compelling circumstances.

In Troxel v. Granville, the Supreme Court of the United States considered whether the application of the state of Washington's visitation statute violated Granville's due process right to make decisions concerning the custody, care, and control of her children. 530 U.S. 57 (2000). The dispute in Troxel arose because Granville sought to limit her in-laws' visitation to one visit per month and holidays. Id. at 71. In turn, the grandparents sought visitation under a Washington statute that provided "any person" could petition for visitation rights at "any time." Id. at 61. The grandparents did not rely on a common law de facto or psychological parent doctrine.

A plurality of the Court explained that parents have a protected liberty interest in the care, custody, and control of their children. Id. at 65-66. The plurality noted this fundamental right of parents encompasses the presumption that a fit parent will act in the best interest of his or her child.

The Supreme Court held Washington's visitation statute unconstitutionally infringed upon Granville's fundamental right to direct the upbringing of her children. The statute's language effectively allowed "any

[3] Additionally, Dr. Newman says that Josh knows he has a biological father, but does not sense a loss in not knowing him. Josh's sense of loss is directly related to the loss of Middleton in his life.

third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review," and if the trial judge disagreed with the parent's determination of the child's best interest, the judge's view would prevail. Id. at 67. The plurality noted the trial court's order "was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions" regarding her children. Id. at 68.

The plurality gave three reasons to support its conclusion that no "special factors" justified the State's interference in this case. First, the grandparents did not allege that Granville was an unfit parent, and therefore Granville was presumed to have acted in the best interest of her children. Id. at 68. Second, the trial court did not give special weight to Granville's determination of what was in her children's best interest. Id. at 69. Third, Granville had not sought to cut off visitation entirely. Notably, the plurality did not consider "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." Id. at 73. The Court explained, "[w]e do not, and need not, define today the precise scope of the parental due process right in the visitation context." Id. Thus, the Troxel decision, which turned on the constitutionality of the state of Washington's extremely liberal visitation statute, has little bearing on the peculiar facts of the case before us.

We find the decision by our own supreme court in Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565 (2003), more pertinent to our determination of whether Middleton can be awarded visitation with Josh. In Camburn, maternal grandparents successfully petitioned the family court for visitation of their daughter's three children over the objection of the children's mother and her husband.[4] Despite uncontested evidence that the children were well-cared for by their mother and her husband, the family court found visitation would be in the children's best interest because their grandparents were a stabilizing factor in their lives. Mother and her husband appealed, and our

[4] Mother's husband was the biological father of one of the children the grandparents sought to visit.

supreme court reversed. The Camburn court held: "Before visitation may be awarded over a parent's objection, one of two evidentiary hurdles must be met: the parent must be shown to be unfit by clear and convincing evidence, or there must be evidence of compelling circumstances to overcome the presumption that the parental decision is in the child's best interest." Id. at 579-80, 586 S.E.2d at 568. As an example of a compelling circumstance, the Camburn court specifically mentioned a situation in which denying visitation would cause "significant harm to the child." Id. at 579, 586 S.E.2d at 568. Ultimately, the supreme court found that the circumstances in Camburn were not compelling enough to justify awarding grandparents visitation of the three children in the face of their mother and her husband's decision to the contrary.

Here, the record is replete with evidence illustrating how Mother's refusal to allow Middleton to visit with Josh has caused Josh significant harm. After the separation, Josh's fourth grade teacher asked the school's guidance counselor to talk with Josh because "he just wasn't himself [and] seemed really sad." The guidance counselor testified that she arranged for Josh to attend a support group for children who have suffered from losing someone they love. During these group sessions, Josh expressed grief over losing Middleton, who Josh talked about "as his father and his dad."

Mother's daughter, Tenille Johnson, testified about the special relationship Middleton had with Josh. Since Josh's visitation with Middleton ended, Johnson testified that Josh "is not the same happy person that he used to be" and that his attitude toward life has changed.

Dr. Newman, who counseled Josh for eighteen months prior to the final hearing, explained that the severance of Middleton's visitation with Josh "will have a profound impact . . . [that] reverberates throughout life." Dr. Newman further explained that Josh, who was ten years old when his relationship with Middleton abruptly ended, was particularly devastated by the loss because he was at a stage in life when he was learning how to socialize. In the report she submitted to the court, Dr. Newman opined that Josh's loss of contact with Middleton rendered Josh "at-risk regarding his ability to trust, [and to] form and maintain close relationships."

Similar to the testimony from Josh's teachers, counselor, and his sister, the court-appointed guardian ad litem reiterated: "[T]he one thing that I can tell the Judge that I strongly believe is that Joshua Hollington loves Kenneth Middleton. He misses Kenneth Middleton. I have no doubt of that whatsoever." The guardian testified that "the separation of a year, year and a half had done nothing to lessen [Josh's] feelings there. . . . [S]ince [the relationship with Middleton] ended he is – I'm not trained like Ms. Newman is. I don't know the correct terms as far as grieving, but he's missing Mr. Middleton quite a bit." Even Mother herself testified that she did not have "any doubt at all that Josh loves Kenneth Middleton . . . [or] that Josh misses Kenneth Middleton."

CONCLUSION

Based on the overwhelming evidence in the record, we reverse the family court's finding that Middleton was not Josh's psychological parent. Middleton's absence from Josh's life has caused and will continue to cause significant harm to Josh. Thus, the circumstances of this case are compelling enough to meet the "evidentiary hurdle" third-parties must overcome when seeking visitation over the objection of a fit parent. Camburn, at 579-80, 586 S.E.2d at 568.

We caution that our decision today does not automatically give a psychological parent the right to demand custody in a dispute between the legal parent and psychological parent. The limited right of the psychological parent cannot usually overcome the legal parent's right to control the upbringing of his or her child. See In re Clifford K., 619 S.E.2d 138, 157-58 (W.Va. 2005) (noting that in "exceptional cases and subject to the court's discretion, a psychological parent may intervene in a custody proceeding . . . when such intervention is likely to serve the best interest of the child(ren) . . . .") (emphasis added); see V.C., 748 A.2d at 554 (stating that custody is usually given to the legal parent, with "[v]isitation" as the "presumptive rule" for psychological parents).

Establishing psychological parenthood is a difficult undertaking. However, once established, the bond between the psychological parent and child should not be unilaterally severed by the biological parent who fostered the relationship in the first place. The standard to be applied is whether compelling circumstances exist to overcome the presumption that a fit, legal parent acts in the child's best interest, and of course, visitation must actually be in the child's best interest. The compelling circumstances standard encompasses a situation where, as here, a third party has attained psychological parent status.

Accordingly, we reverse the order of the family court and remand the action so that a suitable visitation schedule can be established as expeditiously as possible. Because we find Josh is suffering from Middleton's absence, we order that visitation between Middleton and Josh resume on a schedule of one weekend per month, beginning in the month of May 2006, until a final hearing can be scheduled.

REVERSED AND REMANDED.

KITTREDGE, J., concurs and ANDERSON, J., concurs in result only in a separate opinion.

ANDERSON, J. (concurring in result only in a separate opinion): In Troxel v. Granville, 530 U.S. 57 (2000), the Supreme Court of the United States held that parents have a protected liberty interest in the care, custody and control of their children that is a fundamental right protected by the Due Process Clause. This fundamental right encompasses the presumption that a fit parent will act in the best interest of his or her child. I have gargantuan trepidation in regard to expanding Camburn v. Smith, 355 S.C. 574, 586 S.E.2d 565 (2003), and Moore v. Moore, 300 S.C. 75, 386 S.E.2d 456 (1989), beyond the actual holdings in these cases.

I **VOTE** to **ALLOW** visitation in the case sub judice over the objection of the biological mother and would confine the holding to the unique factual circumstances in this particular case.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

SCDSS Child Support Enforcement/Cindy Ruff, Plaintiffs

of whom SCDSS Child Support Enforcement is Appellant

v.

Ralph Mangle, Respondent.

Appeal From Greenville County
Stephen S. Bartlett, Family Court Judge

Opinion No. 4130
Submitted June 1, 2006 – Filed July 3, 2006

AFFIRMED

Stacey L. Kaufman, S.C. Dept. of Social Services, of Greenville, for Appellant.

Ralph Mangle, Pro se, of Simpsonville, for Respondent.

PER CURIAM: South Carolina Department of Social Services, Child Support Enforcement (DSS) appeals the family court's denial of its motion to continue child support until the child's graduation from high school. We affirm.

FACTS

Ralph Mangle is the father of Toran Mangle. On October 31, 1991, custody of Toran was given to his mother, and Mr. Mangle was ordered to pay child support directly to the mother. On January 17, 1996, Mr. Mangle was ordered to pay child support through the court. Neither order addresses the termination of the child support obligation.

In the fall of 2004, Toran began his senior year of high school and turned eighteen on September 14, 2004. In March of 2005, Mr. Mangle informed the family court that Toran had turned eighteen. On March 11, 2005, the family court terminated Mr. Mangle's child support obligation and dismissed the arreareage that had accrued after Toran's eighteenth birthday. Neither DSS nor the mother was given an opportunity to be heard on the issue of termination before the court's ruling.

DSS filed a motion for reconsideration on March 22, 2005, seeking modification of the March 11th order to provide child support until Toran's high school graduation in June 2005. The motion for reconsideration was heard on April 21, 2005. At the hearing, DSS presented evidence showing Toran was in his senior year of high school, was an A and B student, and had perfect attendance. On June 1, 2005, the family court denied DSS's motion to continue the child support obligation because there was no existing order for child support beyond the eighteenth birthday. DSS appeals this denial.

ANALYSIS

DSS argues the family court erred in not finding the child support order continued as a matter of law beyond Toran's eighteenth birthday until his graduation from high school or his nineteenth birthday. We disagree.

Child support awards are addressed to the sound discretion of the trial judge and, absent an abuse of discretion, will not be disturbed on appeal. Mitchell v. Mitchell, 283 S.C. 87, 92, 320 S.E.2d 706, 710 (1984). Prior to the 1996 amendment to S.C. Code Ann. § 20-7-420, child support obligations generally ended by operation of law when the child reached majority. See Thornton v. Thornton, 328 S.C. 96, 109, 492 S.E.2d 86, 93 (1997).

S.C. Code Ann. § 20-7-420 (A) (17) (Supp. 2005) gives family courts jurisdiction to make orders of child support and states, in pertinent part:

> (A) The family court has exclusive jurisdiction: (17) To make all orders for support run until further order of the court, except that orders for child support run until the child is eighteen years of age or until the child is married or becomes self-supporting, as determined by the court, whichever occurs first or to provide for child support past the age of eighteen years if the child is in high school and is making satisfactory progress toward completion of high school, not to exceed the nineteenth birthday unless exceptional circumstances are found to exist or unless there is a preexisting agreement or order to provide for child support past the age of eighteen years.

DSS argues this requires child support obligations to continue as a matter of law beyond the child's eighteenth birthday where the child is in high school and making satisfactory progress towards graduation even if the original support order is silent as to support past the eighteenth birthday.

It is undisputed that the family court can order child support to continue beyond the age of eighteen for children who are in high school and are making satisfactory progress towards completion. However, a lack of jurisdiction was not the basis of the family court's denial. The family court's denial was based solely on procedure. The authority to grant a specific form of relief does not mean that form of relief will automatically be granted.

Child support like all relief must be properly pleaded, noticed, and specifically granted by the court. There was no existing order granting child support past the age of eighteen. Neither the mother nor DSS had ever filed an action seeking the continuation of child support beyond Toran's eighteenth birthday. See Dake v. Painter, 288 S.C. 118, 118, 341 S.E.2d 620, 620 (1986) (holding the family court had no authority to reduce amount or frequency of child support payments where neither was requested in the pleadings). The court dismissed the motion to reconsider without prejudice and informed DSS that the mother would need to seek a new order granting child support to cover the remaining period until the child's graduation or nineteenth birthday. Accordingly, judgment of the family court is

AFFIRMED.[1]

KITTREDGE, SHORT, and WILLIAMS, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Town of Hilton Head Island, Appellant,

v.

Montgomery Godwin, Respondent.

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

Opinion No. 4131
Submitted June 1, 2006 – Filed July 3, 2006

VACATED

Marshall H. Waldron, Jr., of Bluffton, for Appellant.

Montgomery Godwin, pro se, of Bluffton, for Respondent.

HEARN, C.J.: In this action, the Town of Hilton Head Island (the Town) appeals the order of the circuit court denying its motion to dismiss and granting a new trial in favor of Montgomery Godwin. We vacate.[1]

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

FACTS

In July 1995, Godwin received a citation charging him with criminal domestic violence. The uniform traffic ticket set a trial date for August 8, 1995. When Godwin failed to appear, the Hilton Head Island municipal court found him guilty, in absentia; assessed a $304 fine; and issued a bench warrant for his arrest.[2] Godwin neither appealed the conviction nor took any other action to set aside the conviction. On September 29, 1995, police arrested Godwin in connection with three outstanding arrest warrants, including the warrant issued following his CDV conviction. That same day, Godwin, or someone on his behalf, paid the $304 fine in connection with the CDV conviction to obtain his release from custody. Again, Godwin took no action related to the conviction.

On August 11, 2003, Godwin applied for a gun permit pursuant to an employment opportunity. A subsequent SLED investigation revealed the 1995 CDV conviction on his record. Then, on March 26, 2004, approximately eight years after the CDV conviction, Godwin sent a letter to the Hilton Head Island Municipal Court, which the court treated as a motion to set aside the conviction and/or a motion for a new trial. At the hearing before municipal court Judge James Herring, Godwin claimed the first notice he received of the CDV conviction was on August 11, 2003, and that the Town committed several procedural and clerical errors relating to his conviction for CDV that warranted his conviction be set aside or a new trial granted. The Town argued the municipal court lacked the jurisdiction to entertain Godwin's motion because the motion was untimely. The municipal court agreed and denied the motion, finding Godwin's actions were untimely.

Godwin appealed the municipal court's order to the circuit court. The Town filed a motion to dismiss, arguing the circuit court and the municipal court lacked jurisdiction to hear Godwin's motion. At the motion hearing, Godwin again argued he did not receive notice of his 1995 CDV conviction

[2] Godwin agreed that the municipal court found him guilty, in absentia, but he denied receiving notice until August 11, 2003.

until August 11, 2003, and that he discovered many procedural and clerical errors that warranted his conviction be set aside or a new trial granted. The circuit court agreed with Godwin, denied the motion to dismiss, and granted a new trial based on "substantial justice." The Town's motion to reconsider was denied, and this appeal followed.

STANDARD OF REVIEW

The appellate court must always take notice of the lack of subject matter jurisdiction. Amisub of S.C., Inc. v. Passmore, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994). The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the court. See, e.g., Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998) (holding issues related to subject matter jurisdiction may be raised at any time). "The acts of a court with respect to a matter as to which it has no jurisdiction are void." State v. Guthrie, 352 S.C. 103, 107, 572 S.E.2d 309, 311-12 (Ct. App. 2002).

LAW/ANALYSIS

The Town argues the circuit court erred in denying its motion to dismiss and in granting Godwin's motion for a new trial. Specifically, the Town argues the circuit court lacked the jurisdiction necessary to entertain Godwin's motion. We agree.

Rule 29(a) of the South Carolina Rules of Criminal Procedure governs post trial motions from a conviction in magistrate's court and states, in part:

> In cases involving appeals from convictions in magistrate's or municipal court, post trial motions shall be made within ten (10) days after receipt of written notice of entry of the order or judgment disposing of the appeal.

Furthermore, the supreme court has noted that "a party's time to appeal from a judgment in a magistrate's court or move for a new trial therein ... begin[s] [when] he has notice of the judgment." State v. Martin, 352 S.C. 32, 33, 572 S.E.2d 287, 288 (2002) (citing Brewer v. South Carolina State Highway Dep't, 261 S.C. 52, 56, 198 S.E.2d 256, 257 (1973)). A party who fails to timely appeal or take any other timely action necessary to correct an error is procedurally barred from contesting the validity of the conviction. Martin, 352 S.C. at 33, 572 S.E.2d at 288.

Martin is analogous to the present case. Because of a series of administrative errors, Martin was notified in December 1997, that she had been convicted, in absentia, of driving under the influence on August 26, 1997. Martin, 352 S.C. at 33, 572 S.E.2d at 287. A bench warrant was issued for Martin's arrest, and she paid the fine assessed by the municipal court. Id. Shortly thereafter, Martin notified the State, via her attorney, of the disposition of the ticket. Id. at 33, 572 S.E.2d 288. The State took no action at that time. Nearly six months later, in June 1998, the State sought to reopen the case on the ground that the traffic ticket had been "signed off" in error. Id. The circuit court ruled the State's efforts to set aside the conviction were untimely. Id. The supreme court agreed, finding the state took no action between December 1997 and June 1998 to rectify the situation or to notify Martin that her conviction had been erroneously entered. The court, relying on Rule 29, SCRCrimP, held the State's "failure to take any remedial action to remedy this situation in a timely manner therefore precluded its ability to challenge the entry of a conviction on the DUI first ticket." Id. at 34, 572 S.E.2d at 288.

In this matter, Godwin had notice of his 1995 CDV conviction no later than September 29, 1995, when he was arrested under the bench warrant and his release was secured by payment of the fine imposed by the municipal court after the 1995 conviction. Under Rule 29, SCRCrimP, Godwin had until October 9, 1995 to file any post trial motions or his notice of appeal. Godwin failed to take any remedial actions at that time. His motion to set aside the 1995 conviction came in March 2004, approximately eight years after he received notice of the conviction. Similar to the State's inaction in Martin, Godwin's inaction precludes his ability to challenge the 1995

conviction. Therefore, the municipal court correctly held Godwin's challenge to his conviction was untimely, and the circuit court erred in failing to grant the Town's motion to dismiss for lack of jurisdiction.

Assuming, arguendo, notice was not received until August 11, 2003, the date Godwin admitted he received notice of the 1995 conviction, his motion would still be untimely. Godwin took no action from August 11, 2003 until his letter to the municipal court on March 26, 2004, some seven months from the date he claimed he received notice of the conviction. Accordingly, as Godwin concedes he had actual notice of the 1995 conviction on August 11, 2003, and he failed to timely appeal or take any other action to correct the matter, he is now procedurally barred from contesting the validity of the 1995 conviction.

CONCLUSION

Based on the foregoing, the order of the circuit court is hereby

VACATED.

GOOLSBY and ANDERSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Doe, Respondent,

v.

Jane Doe, Appellant.

Appeal From Kershaw County
Rolly W. Jacobs, Family Court Judge

Opinion No. 4132
Heard May 9, 2006 – Filed July 3, 2006

AFFIRMED IN PART AND REVERSED IN PART

Emma I. Bryson, of Columbia and William S. Tetterton, of Camden, for Appellant.

George W. Speedy, of Camden, for Respondent.

HEARN, C.J.: In this action for divorce and equitable distribution, Wife appeals the family court's identification, valuation, and distribution of the marital estate. In addition, Wife appeals the family court's award of attorneys' fees, costs, and certain advancements to Husband. We affirm in part and reverse in part.

FACTS

Wife and Husband were married on September 8, 1970, when Husband was seventeen and Wife was sixteen. Husband worked as a construction laborer until he began his own construction company in the 1980s. For the first fourteen years of their marriage, Wife had numerous jobs, one of which was at Jubilee Embroidery. At some time in the mid to late 1970s, while employed at Jubilee, Wife began having an affair with her boss (Paramour). In 1984, Wife ceased working after giving birth to a daughter (Daughter).

Although the parties had very few assets when their marriage began, they amassed a fairly large estate over the years. Husband's construction business was profitable, and Wife worked for the business approximately one day a week, keeping the books and offering decorating services. In 2002, after Daughter graduated from high school and moved out of the home to attend college, Wife asked Husband for a divorce. Husband testified he became suspicious when Wife refused to attempt marriage counseling. He hired a private investigator, who observed Wife entering a motel with Paramour. Husband recognized Paramour, not only because he had been Wife's former boss, but also because Paramour was a longtime family friend. Wife later admitted the affair had been going on for more than twenty years.

Upon learning of the adultery, Husband called Paramour's wife to inform her of the relationship between their spouses. After speaking with her, Husband suspected the daughter he had raised might not be his biological child. He later had a DNA test, which confirmed his suspicions that Paramour was Daughter's biological father.[1]

Subsequently, Husband filed a complaint in the family court, asking for, among other things, a divorce on the grounds of adultery and an equitable

[1] Although the results of this test were not entered into evidence, Husband testified to the results without objection from Wife's counsel. Furthermore, Wife testified she "had been told that [Paramour] was declared the father."

distribution of the marital property. Notably, Husband did not seek a ruling regarding Daughter's paternity. In Wife's answer, she admitted the adultery.

At the final hearing, the parties presented evidence of the valuation of the marital property, the quality of Husband and Wife's relationship before separation, the costs associated with the divorce, and various advances made by Husband between the time of filing for divorce and the time of the hearing. Additionally, Husband presented evidence indicating Daughter was not his biological child and introduced the testimony of Dr. Perry Woodside, an economist, to establish the cost of raising a child. The family court issued a divorce decree granting Husband a divorce on the grounds of adultery; barring alimony to Wife; valuing the marital property at $1,332,798; awarding Husband seventy percent of the marital property; and ordering Wife to reimburse Husband for his advances, his attorneys' fees, his accountant's fees, and the cost of Dr. Woodside's testimony. Wife submitted a Rule 59(e), SCRCP, motion to alter or amend this decree, which the family court denied. This appeal followed.

STANDARD OF REVIEW

"In appeals from the family court, the appellate court has the authority to find the facts in accordance with its view of the preponderance of the evidence." Ex parte Morris, 367 S.C. 56, 61, 624 S.E.2d 649, 652 (2006). However, "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).

LAW/ANALYSIS

I. Identification and Valuation of Marital Property

Wife contends the family court erred in identifying and valuing the marital property. This issue is not preserved for our review.

To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court. Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005). "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). Without an initial ruling by the trial court, a reviewing court simply is not able to evaluate whether the trial court committed error. Id. Therefore, when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review. Washington v. Washington, 308 S.C. 549, 551, 419 S.E.2d 779, 781 (1992).

At trial, Wife made no arguments with respect to the valuation of the marital property. Additionally, Wife failed to specifically raise any issues with regard to valuation in her Rule 59(e) motion. Instead, she generally asserted that the divorce decree was unsupported by the evidence and that the family court judge failed to properly apply the equitable division statute. These broad assertions failed to preserve her appellate arguments relating to the identification and valuation of the marital estate.

II. Daughter's Paternity

Wife argues the family court erred in making findings of facts that essentially determined Daughter's paternity. This issue has also not been preserved for our review.

Wife objected at trial to the consideration of Daughter's paternity, and the family court assured her that a "determination as to whether or not the child is bastardized . . . is not a finding for the Court to make." The family court later stated "[t]here will be no finding as to the paternity of the child." However, in its written order, the family court found that "although the question of paternity was not before the Court, DNA testing and the admission of the wife has proven that the child is not the biological daughter of [Husband]." Although Wife made a motion to alter or amend the family

court's order, she did not ask the family court to reconsider this finding. Under these circumstances, Wife failed to preserve this issue for our review. See Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993) (holding when trial court's oral and written orders are inconsistent, appellant must bring these inconsistencies to the trial court's attention through a motion to alter or amend to preserve the issue for appeal).[2]

III. Equitable Distribution

Wife argues the family court erred in distributing seventy percent of the marital property to Husband. Specifically, Wife contends the family court erred in considering the paternity of Daughter as a factor in equitable distribution, intimating that the length of the marriage favored Husband, penalizing Wife for her marital misconduct, and undervaluing her contribution to the marital estate. We agree.

The division of marital property is in the family court's discretion and will not be disturbed absent an abuse of that discretion. Craig v. Craig, 365 S.C. 285, 290, 617 S.E.2d 359, 361 (2005). Section 20-7-472 of the South Carolina Code (Supp. 2005) provides fifteen factors for the family court to consider in apportioning marital property and affords the family court with the discretion to give weight to each of these factors "as it finds appropriate." On appeal, this court looks to the overall fairness of the apportionment, and it is irrelevant that this court might have weighed specific factors differently than the family court. Greene v. Greene, 351 S.C. 329, 340, 569 S.E.2d 393, 399 (Ct. App. 2002). Even if the family court commits error in distributing marital property, that error will be deemed harmless if the overall distribution

[2] To the extent the proceedings here can be interpreted as an adjudication of paternity, we note this decision has no effect on Daughter. See Palm v. General Painting Co., Inc., 302 S.C. 372, 374, 396 S.E.2d 361, 362 (1990) (holding child is not bound by prior adjudication of paternity in divorce proceeding).

is fair. See West v. West, 315 S.C. 44, 46, 431 S.E.2d 603, 604 (Ct. App. 1993).

In awarding Husband seventy percent of the marital estate, the family court found "the two controlling factors" were the duration of the marriage and the conduct of the parties. The family court went on to say the marriage's dissolution was "solely at the hands of [Wife]" and Wife "duped her spouse through at least twenty years of the thirty-two year marriage into believing that he should love her." Additionally, the family court noted that Husband's contribution to the marital estate was ninety to ninety-five percent and that Dr. Woodside's testimony, which outlined the cost of raising a child, was relevant to the court's equitable apportionment determination.

We find the family court's seventy-thirty split in favor of Husband constituted an abuse of discretion. This was a marriage of significant duration. While there is certainly no recognized presumption in favor of a fifty-fifty division, we approve equal division as an appropriate starting point for a family court judge attempting to divide an estate of a long-term marriage. See Roy T. Stuckey, Marital Litigation in South Carolina 321-22 (3rd ed. 2001 and Supp. 2005) ("Although neither the case decisions nor the Equitable Apportionment of Marital Property Act say so directly, the results in cases involving long marriages would lead one to predict that, absent special circumstances, marital property will be divided on a 50-50 basis . . . ."). Case law seems to bear out this trend. See id. (citing Craig v. Craig, 358 S.C. 548, 595 S.E.2d 837 (Ct. App. 2004) (upholding a 50-50 division of marital property following a twenty-seven-year marriage), aff'd by 365 S.C. 285, 617 S.E.2d 359 (2005); Widman v. Widman, 348 S.C. 97, 557 S.E.2d 693 (Ct. App. 2001) (affirming a 50-50 split in a sixteen year marriage that ended because of husband's adultery); Mallet v. Mallett, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996) (noting the family court's 50-50 split was "generous," but ultimately affirming the award, which followed a twenty-one year marriage); Doe v. Doe, 324 S.C. 492, 478 S.E.2d 854 (Ct. App. 1994) (affirming the family court's 50-50 split where the parties had been married over thirty years); Murray v. Murray, 312 S.C. 154, 439 S.E.2d 312 (Ct. App. 1993) (affirming the family court's award to Wife of a fifty percent "special equity interest" in the appreciated value of the family home, which

was Husband's nonmarital property, following a seventeen-year marriage); Harlan v. Harlan, 300 S.C. 537, 389 S.E.2d 165 (Ct. App. 1990) (affirming a 50-50 division of marital property following an eighteen-year marriage); Kirsch v. Kirsch, 299 S.C. 201, 203, 383 S.E.2d 254, 255 (Ct. App. 1989) (affirming a 50-50 split and stating: "This was a marriage of thirty years. While Mr. Kirsch provided the bulk of the income, Mrs. Kirsch was a homemaker and she also worked for approximately twelve years outside the home."); Smith v. Smith, 294 S.C. 194, 363 S.E.2d 404 (Ct. App. 1987) (affirming a 50-50 split in a marriage that lasted eighteen years, during which time Wife provided homemaker services and occasionally worked outside the home); Leatherwood v. Leatherwood, 293 S.C. 148, 359 S.E2d 89 (Ct. App. 1987) (affirming a 50-50 split of marital property following a twenty-two year marriage)).

We recognize that in many long-term marriages, one spouse becomes the primary breadwinner while the other spouse makes less or even no money in order to have the flexibility to keep the household running smoothly. This arrangement is agreed upon, often implicitly, among the parties, and it would be unfair to the spouse who undertook household duties for the family court to apportion the marital estate solely based on the parties' direct financial contributions. See Walker v. Walker, 295 S.C. 286, 289, 368 S.E.2d 89, 90 (Ct. App. 1988) ("Equitable distribution is based on a recognition that marriage is, among other things, an economic partnership.").

This equal division of marital assets can, of course, be altered in favor of one spouse depending on the circumstances of each case. Here, for instance, Wife's adultery caused the breakup of the marriage, an appropriate consideration for equitable apportionment. However, we have consistently held that fault does not justify a severe penalty. [3] See Dixon v. Dixon, 334

[3] In defending the family court's division, Husband points out that in Simmons v. Simmons, 275 S.C. 41, 267 S.E.2d 427 (1980), our supreme court upheld an apportionment of twenty-three percent of marital property to wife after her affair despite her contributions to the thirty-year marriage. We note, however, that this case was decided in 1980, six years prior to the enactment of section 20-7-472 of the South Carolina Code.

S.C. 222, 236, 512 S.E.2d 539, 546 (Ct. App. 1999); Rampey v. Rampey, 286 S.C. 153, 156, 332 S.E.2d 213, 214 (Ct. App. 1985). We believe that Wife's adultery, alone, does not justify a forty percent differential between her portion of the marital estate and Husband's portion. Indeed, such a lopsided division could only be sustainable if our equitable division laws sanction the consideration of fault as a permissible punitive factor. Our law is to the contrary, expressly disallowing fault as a penalty. Thus, Wife's adultery does not justify a forty percent equitable division differential.

In arriving at its seventy-thirty division, the family court specifically found Dr. Woodside's testimony regarding the cost of raising a child relevant. However, the issue of paternity was never properly before the court. In fact, Husband's complaint alleged that "of this marriage one child has been born, namely, [Daughter]." Because paternity was not an issue, the cost of raising Daughter, who was born during the marriage, was not relevant, and the family court erred in considering the testimony.

In light of the marriage's longevity, our prohibition against imposing a severe penalty for fault, and the family court's erroneous consideration of Dr. Woodside's testimony, we find the family court abused its discretion when it awarded Husband seventy percent of the marital estate. We believe the more equitable division would be sixty percent to Husband and forty percent to Wife. [4]

[4] To accomplish this new division, Husband's share of the Bank of Camden account will be reduced to $326,180, and Wife's share of the account will be increased to $242,511. With these new figures, Husband will receive $799,730 of the overall estate, and Wife will receive $533,068 of the marital estate.

IV. Advancements

Wife argues the family court erred in ordering her to reimburse Husband for certain advancements made on behalf of Wife.[5] Wife specifically contends Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997), provides that these payments, to the extent they are voluntary, do not entitle Husband to reimbursement. However, Wife did not raise this issue to the family court and did not challenge this portion of the ruling in her Rule 59(e), SCRCP, motion.[6] Therefore, this issue is not preserved for our review. See Washington v. Washington, 308 S.C. 549, 551, 419 S.E.2d 779, 781 (1992) (holding when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion to amend, the issue is not presented properly to an appellate court for review); Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005) (holding an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review).

V. Attorneys' Fees and Cost of Dr. Woodside's Testimony

Wife argues the family court erred in ordering her to pay all of Husband's attorneys' fees.[7] Additionally, Wife contends the family court erred in admitting the testimony of Dr. Woodside and ordering her to pay the

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[5] Some of these advancements were made to Daughter. The family court required Wife to reimburse Husband for half of these advancements.

[6] Not only was this issue not raised to the family court in a Rule 59(e) motion, but Wife also did not object to Husband entering in evidence a document outlining these expenses.

[7] Wife also asserts the family court erred in requiring her to pay Husband's accountant's fee. However, in support of this argument she merely states "the accountant's fee was incorrect," and she does not explain why it was incorrect. Because Wife fails to point out a specific error, we deem her argument abandoned on appeal. State v. Tyndall, 336 S.C. 8, 16-17, 518 S.E.2d 278, 283 (Ct. App. 1999) (explaining that conclusory arguments are deemed abandoned on appeal).

costs associated with his testimony. We address these issues separately below.

A. Attorneys' Fees

Wife argues the family court erred in ordering her to pay all of Husband's attorneys' fees. We agree.

Attorneys' fees may be assessed against a party in an action brought in the family court. S.C. Code Ann. § 20-7-420(38) (Supp. 2005); Patel v. Patel, 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004). The award of attorneys' fees is within the discretion of the court. Hailey v. Hailey, 357 S.C. 18, 31, 590 S.E.2d 495, 502 (Ct. App. 2003). The trial court's decision regarding attorneys' fees will not be disturbed absent an abuse of discretion. Green v. Green, 320 S.C. 347, 353, 465 S.E.2d 130, 134 (Ct. App. 1995).

"An order or judgment pursuant to an adjudication in a domestic relations case shall set forth the specific findings of fact and conclusions of law to support the court's decision." Rule 26(a), SCRFC. "Our case law and court rules make clear that when a contract or statute authorizes an award of attorney's fees, the trial court must make specific findings of fact on the record for each of the required factors to be considered." Griffith v. Griffith, 332 S.C. 630, 646, 506 S.E.2d 526, 534-35 (Ct. App. 1998). "[W]hen an Order is issued in violation of Rule 26(a), this Court may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence." Holcombe v. Hardee, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991); Badeaux v. Davis, 337 S.C. 195, 203, 522 S.E.2d 835, 839 (Ct. App. 1999).

In deciding whether to award attorneys' fees, the family court should consider: (1) each party's ability to pay his or her own fees; (2) the beneficial results obtained by counsel; (3) the respective financial condition of each party; and (4) the effect of the fee on each party's standard of living. Upchurch v. Upchurch, 367 S.C. 16, 28, 624 S.E.2d 643, 648-49 (2006); Browning v. Browning, 366 S.C. 255, 269, 621 S.E.2d 389, 396 (Ct. App. 2005). To determine the amount of an award of attorneys' fees, the court

should consider: the nature, extent, and difficulty of the services rendered; the time necessarily devoted to the case; counsels' professional standing; the contingency of compensation; the beneficial results obtained; and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991); Deidun v. Deidun, 362 S.C. 47, 65, 606 S.E.2d 489, 499 (Ct. App. 2004).

Here, in the family court's prelude to awarding attorneys' fees to Husband, the court noted: "[Husband] has incurred certain expenses in the bringing and maintaining of this action which would have not been necessary but for the conduct of [Wife]." After listing the amount of Husband's attorneys' fees, the family court specifically found "the reason [Wife] should bear these costs is that her adultery caused the divorce in spite of [Husband's] willingness to reconcile and her unwillingness to do so and because of the deception throughout the marriage concerning her adulterous activities and the birth of the child by [Wife's] paramour." A party's fault in causing a divorce, however, is not a factor to be considered when awarding attorney's fees. Furthermore, although the family court went on to consider factors that are relevant, such as the effect ordering attorney's fees would have on Wife's standard of living, Wife's ability to pay the fees, and the beneficial results obtained by Husband's attorneys, the family court neglected to consider two factors that weigh in Wife's favor: Husband's ability to pay and the relative financial situations of the parties. See Upchurch, 367 S.C. at 28, 624 S.E.2d at 648-49; Browning, 366 S.C. at 269, 621 S.E.2d at 396. Husband has earned a comfortable living with his construction business, and his employment status will not change as a result of the divorce. Conversely, Wife has only her share of the equitable distribution with which to pay these costs and must enter the workforce after a nearly twenty-year absence. We further note that our opinion today has reduced the beneficial results obtained by Husband.

Under these circumstances, we hold the family court erred in ordering Wife to pay Husband's attorneys' fees. Considering the parties' ability to pay their own fees, the beneficial results obtained by Husband's attorneys, the parties' respective financial conditions, and the effect of the fee on each

party's standard of living, we believe Husband and Wife should be responsible for their own attorneys' fees.

B. Cost of Husband's Economic Expert

Wife contends the family court erred in ordering her to pay the costs of Dr. Woodside because his testimony was not relevant to equitable distribution. We agree the testimony of Dr. Woodside was irrelevant to this case and therefore hold the family court abused its discretion in ordering Wife to pay his costs.

An award of litigation expenses rests within the sound discretion of the trial court and should not be disturbed on appeal absent an abuse of discretion. Ellerbe v. Ellerbe, 323 S.C. 283, 298, 473 S.E.2d 881, 889 (Ct. App. 1996). The same considerations that apply to awarding attorneys' fees also apply to awarding litigation expenses. Id.; see also Nienow v. Nienow, 268 S.C. 161, 173, 232 S.E.2d 504, 510 (1977) (holding the same equitable considerations apply in awarding attorneys' fees and costs of litigation).

"'Relevant evidence' means evidence having any tendency to make, the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence which is not relevant is not admissible." Rule 402, SCRE.

As discussed earlier, Daughter's paternity was not an issue in this case. Indeed, Husband's own pleadings acknowledged she was his daughter. Therefore, the amount of money Husband spent on support for her was not relevant. Accordingly, the family court erred in admitting the testimony of Dr. Woodside and ordering Wife to pay his costs.

CONCLUSION

We find Wife failed to preserve the issues of the family court's identification and valuation of the marital property, determination of

Daughter's paternity, and award of advancements to Husband. We find the family court erred in awarding Husband seventy percent of the marital estate, and modify the division to a sixty-forty split in favor of Husband. Additionally, we find the family court erred in ordering Wife to pay Husband's attorneys' fees and the fees for Dr. Woodside. Accordingly, the family court's order is

AFFIRMED IN PART and REVERSED IN PART.

ANDERSON and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patrick M. Siau and Nancy S. Siau, as Co-Trustees of the Siau Qualified Personal Residence Trust Dated January 25, 2002, Raymond A. Pendleton and Jean C. Pendleton,	Respondents,
v.	
Kal Kassel, Millard Dozier and Robert M. Rogerson,	Defendants and Third Party Plaintiffs,
of whom Kal Kassel is	Appellant,
v.	
Hagley Estates Property Owners Association, The County of Georgetown and the State of South Carolina,	Respondents.

Appeal From Georgetown County
Benjamin H. Culbertson, Master-In-Equity

Opinion No. 4133
Heard May 11, 2006 – Filed July 3, 2006

AFFIRMED

Robert J. Moran, of Murrells Inlet, for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy General Salley W. Elliott and Assistant Deputy Attorney General J. Emory Smith, Jr., all of Columbia; Charles T. Smith, of Georgetown; Ed Kelaher and Sid Connor, both of Surfside Beach; Jack M. Scoville and Joe Michael Crosby, both of Georgetown; Linda Weeks Gangi, of Conway, for Respondents.

SHORT, J.: Kal Kassel appeals from a decision restraining and enjoining him from building any permanent structure within thirty feet of his rear property line and ordering him to remove all permanent structures currently located within thirty feet of his rear property line. Kassel contends the trial court erred in determining ownership of land through the "Public Trust Doctrine," balancing the equities, and failing to determine his rights against Georgetown County. We affirm.

FACTS

In 1997, Kassel and Millard Dozier purchased a single lot bordering the Waccamaw River in a Georgetown County residential subdivision known as Hagley Estates. Kassel, a licensed real estate agent, and Dozier, a licensed builder, then legally split the single lot into two separate lots by filing a new

plat with Georgetown County in 1997. Kassel and Dozier split the lot into two "flag lots" with the intention to build a house on each lot.[1]

Kassel and Dozier built a house on one of their two newly created lots (Lot 11) and sold this property to Ray Pendleton. Kassel later bought Dozier's interest in the remaining lot (Lot 12), and he became the sole owner of the property. After spending several years considering whether to sell Lot 12, Kassel informed Pendleton that he was going to build his own home on the lot "right up to the bulkhead."[2]

Pendleton, concerned that Kassel's house would partially obstruct his view of the river, declared that Kassel could not build there and asserted he would sue him if he tried. Kassel responded that he had already received approval.

Kassel's architect, Dwayne Vernon, presented his building plan to both the Georgetown County Zoning Office and the Hagley Estates Property Owner's Association (the Association), and this plan was approved by both. Vernon also contacted the Office of Coastal Resource Management (OCRM) and the Army Corps of Engineers, and both groups stated they had no issue with him building up to the bulkhead.

Georgetown County maintains a fifteen-foot rear setback requirement for Kassel's property, and the Association maintains a thirty-foot rear setback requirement. Kassel and his architect represented to the county zoning department that Kassel owned not only Lot 12, but also the adjacent cypress flats which lie between the bulkhead on Lot 12 and the Waccamaw River.

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[1] "Flag Lots" simply refers to the irregular flag shape of the lots. Flag lots are "real wide on one side and very narrow on the other." Kassel and Dozier had to configure the lots irregularly because in order for a home to be built on a lot in Georgetown County, the lot must contain 10,000 square feet or more and contain a sufficient "envelope" in which to build.

[2] The "bulkhead" in this case is a retaining wall built along the waterfront; it sits very near the rear property line of Lot 12.

The cypress flats are strips of tidal land that lie between the mean high water mark (MHWM) and the mean low water mark of the tidal Waccamaw River. Kassel intended to use the cypress flats to comply with the rear setback requirements.

When Kassel began building his home as planned, Pendleton contacted the county zoning department to inquire about Kassel's permit. Pendleton was told the permit was granted, but his concerns about Kassel building so close to the bulkhead would be investigated. Having received no further response from the county, Pendleton spoke with other neighboring landowners. These neighbors, the Siaus, would have their view of the river completely obstructed by Kassel's house. Therefore, the Siaus also contacted county zoning to prevent construction of the house.

After repeatedly attempting to contact OCRM, the Army Corps of Engineers, and several county officials over a period of several months, Pendleton and the Siaus were finally able to meet with the county to review Kassel's building plans. Pendleton and the Siaus contended Kassel did not own the cypress flats, and therefore, he was not in compliance with the rear setback requirements. The county agreed, and on August 25, 2003, approximately 120 days after construction began, the county posted a stop work order for the construction of Kassel's house.

Kassel appealed the stop work order to the Georgetown County Construction Board of Adjustments and Appeals (the Board). On September 16, 2003, a hearing was held before the Board. The Board, after hearing testimony and reviewing pertinent documentation, found in favor of Kassel and rescinded the stop work order.

On September 17, 2003, the Pendletons and the Siaus (collectively, Plaintiffs) filed a verified complaint against Kassel and Dozier alleging the construction on Lot 12 violated rear setback requirements.[3] Accompanying

[3] Dozier was named as a party based on his prior ownership of Lots 11 and 12 and the fact that he was acting as Kassel's builder in the construction of the house on Lot 12.

this complaint was Plaintiffs' motion to temporarily restrain and preliminarily enjoin Kassel from continuing his construction during the pendency of the case. Kassel and Dozier answered Plaintiffs' complaint and filed third party complaints against Georgetown County, the Association, and the State of South Carolina.[4] In addition to their complaint, Plaintiffs appealed the Board's decision to rescind the stop work order, and the trial court incorporated this separate appeal into the instant action.

The trial court found in favor of Plaintiffs, restrained and enjoined Kassel from building any permanent structure within thirty feet of his rear property line, ordered him to remove all permanent structures located within thirty feet of his rear property line, and dismissed as moot Plaintiffs' appeal of the Board's decision. Kassel now appeals.

STANDARD OF REVIEW

"An action to enforce restrictive covenants by injunction is in equity." South Carolina Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). On appeal of an equitable action tried by a master, the court may find facts in accordance with its own view of the evidence. Id. However, the appellate court is not required "to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses." Seabrook Island Prop. Owners Ass'n v. Marshland Trust, Inc., 358 S.C. 655, 661, 596 S.E.2d 380, 383 (Ct. App. 2004).

A decision whether to grant or deny an injunction is ordinarily left to the sound discretion of the trial court. County of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002). An abuse of discretion occurs when a trial court's decision is either unsupported by the evidence or

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[4] The Association informed the court that it did not wish to participate in the trial. The Association believed no specific relief was sought against it, and its position would be adequately represented by the other parties. They agreed to be bound by the court's decision.

controlled by an error of law. Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 383 (1976) (citations omitted).

LAW/ANALYSIS

I. Public Trust Doctrine

Kassel contends his use of tidal wetlands as his rear setback does not violate the public trust doctrine. Kassel argues neither his neighbors nor Georgetown County should be allowed to utilize the doctrine as a weapon to prevent his use of the cypress flats. We disagree.

Under the public trust doctrine, the State holds presumptive title to land below the high water mark. McQueen v. South Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003). "[N]ot only does the State hold title to this land in jus privatum, it holds it in jus publicum, in trust for the benefit of all the citizens of this State." Id. "The State's presumptive title may be overcome only by showing a specific grant from the sovereign [either the King of England or the State] which is strictly construed against the grantee." Id. at 149 n.6, 580 S.E.2d at 119 n.6. The State's presumptive title applies to tidelands. Id. at 149-50, 580 S.E.2d at 120.

Kassel did not erect any structure or commit any encroachment upon land below the MHWM. Therefore, we agree with his assertion that building his home up to the bulkhead does not violate the public trust doctrine. However, his compliance with the doctrine is irrelevant to the disposition of this matter. The only relevancy of the doctrine in this dispute is with regard to determining ownership of the cypress flats.

Because Kassel admits he cannot overcome the State's presumption of ownership of the cypress flats, it is undisputed that he does not own this land. Kassel seeks to use land he does not own to satisfy both the county and the Association's rear setback requirements. It is as a result of these setback violations, not a violation of the public trust doctrine, that Kassel has been enjoined from building his house up to the bulkhead.

Because Kassel does not own the cypress flats, his lot essentially ends at the bulkhead. Thus, his house would have to be no less than thirty feet away from the bulkhead. Kassel's house clearly violates the setback requirements in that it is less than thirty feet from the bulkhead.[5] We find no error in the trial court's interpretation and use of the public trust doctrine.

II. Balancing of the Equities

Kassel contends the trial court erred in balancing the equities. He argues he should not be required to remove, redesign, and reconstruct his home when he had no knowledge or fault in creating the problem, and Plaintiffs' only damages are a diminished view of the river. We disagree.

As voluntary contracts, restrictive covenants will be enforced unless they are indefinite or contravene public policy. Houck v. Rivers, 316 S.C. 414, 416, 450 S.E.2d 106, 108 (Ct. App. 1994). The Association's applicable restrictive covenant states: "No residence constructed on this lot, including porches or projections, shall be erected less than thirty (30) feet from the front lot line nor thirty (30) feet from the rear lot line." The Association's restrictive covenants further provide that "any person or persons owning real property in Hagley Estates Subdivision" may seek enforcement of the restrictive covenants. We do not find these restrictive covenants to be indefinite or in contravention of public policy.

Kassel asks us to balance the equities in the application of the restrictive covenants. "Although an injunction, like all equitable remedies, is granted as a matter of sound judicial discretion, and not as a matter of legal right, the right of a plaintiff to an injunction to enforce restrictive covenants has long received special treatment." Id. at 418, 450 S.E.2d at 109 (citation

[5] Even if Kassel legally owned the cypress flats, his use of this land to satisfy the setback requirements for the construction on Lot 12 would be inappropriate because Lot 12 and the cypress flats constitute two separate lots. Kassel would have had to file a new plat with the county and been permitted to join the two lots.

omitted). Generally, a restrictive covenant will be enforced regardless of the amount of damage that will result from the breach and even though there is no substantial monetary damage to the complainant by reason of the violation. Id. at 419, 450 S.E.2d at 109. "The mere breach alone is grounds for injunctive relief." Id.

Based on Houck, we do not need to reach the issue of "balancing the equities" in order to enforce restrictive covenants. However, we will undertake a brief analysis. In evaluating a request for injunction, the equities of both sides are to be considered, and each case must be decided on its own particular facts through a "balancing of the equities." MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003).

Kassel's first indication that his ownership of the cypress flats was tenuous at best should have been when he was provided a quit-claim deed to this property in exchange for five dollars. A second indication of a potential ownership problem was the fact Kassel was never able to attain title insurance for the cypress flats. Kassel, a licensed real estate agent himself, should have realized that his ownership of the cypress flats was far from certain.

Kassel argues that he received permission from all of the necessary organizations to proceed with his desired building plan, but the building plans submitted to the county zoning office and the Association represented that Kassel owned the cypress flats. In fact, Kassel's architect admitted that he told the zoning officer that Kassel owned the cypress flats. It was based on this misrepresentation that the zoning officer gave her approval to the building plan. Additionally, prior to the commencement of any construction on Lot 12, Pendleton informed Kassel of his intent to sue if Kassel built up to the bulkhead.

While removal of the partially constructed home will result in a hardship to Kassel, we find that Kassel was not without fault or knowledge of a potential problem with his desired building plan. After balancing the

equities, we find the granting of the permanent injunction was appropriate under the facts of this case.

III. Laches

Kassel contends Plaintiffs should have been prevented from seeking an injunction under the equitable doctrine of laches. He argues that Plaintiffs' delay in asserting their rights was unreasonable. We disagree.

"Laches is the negligent failure to act for an unreasonable period of time." Gibbs v. Kimbrell, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993) (emphasis in original). Courts of equity will refuse to protect a party's rights if the party's delay in exercising those rights is unreasonable and has resulted in injury to his adversary. Id. A determination of laches rests within the sound discretion of the trial court and must be determined by the facts of each case. Id.

In this case, Pendleton informed Kassel of his intent to sue before any construction on Lot 12 began. During the months that followed Kassel beginning construction of his house, Plaintiffs repeatedly attempted to contact the county zoning office, the Association, OCRM, and the Army Corps of Engineers to determine their rights in this matter. When Plaintiffs were finally able to meet with county zoning officers, they addressed their issues with Kassel's construction plan, and the county issued a stop work order. Once the Board rescinded the stop work order on appeal, Plaintiffs diligently filed their complaint the next morning. Under the facts of this case, we find Plaintiffs' delay to be reasonable.

IV. Adjudicating Kassel's Rights Against Georgetown County

Kassel contends the trial court erred in not addressing Plaintiffs' appeal from the Board's decision. We find this issue is not preserved for review.

One party may not 'bootstrap' or benefit from another party's objection or challenge. See Tupper v. Dorchester County, 326 S.C. 318, 324 n.3, 487 S.E.2d 187, 190 n.3 (1997). When the circuit court does not specifically address an issue, and when an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review. Summersell v. South Carolina Dep't of Public Safety, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999).

Kassel was successful in his appeal to the Board seeking rescission of the stop work order; thus he did not appeal its decision to the trial court. The appeal of the Board's order rightfully came from the aggrieved parties, the Plaintiffs. In the interest of judicial economy, the trial court incorporated Plaintiffs' appeal from the Board's order into Plaintiffs' civil suit against Kassel. After finding in favor of Plaintiffs and ordering Kassel to remove all structures within thirty feet of the bulkhead and permanently enjoining him from building in that area, the trial court properly dismissed Plaintiffs' appeal of the Board's order as moot.

Kassel is attempting to "bootstrap" his appeal to this court based on Plaintiffs' appeal of the Board's decision to the trial court. This simply cannot be done. Kassel neither raised this issue at trial nor in his motion for reconsideration; thus, this issue is not preserved for appellate review.

CONCLUSION

We find the trial court properly enjoined Kassel from building within thirty feet of his rear property line, ordered Kassel to remove all permanent structures located within thirty feet of his rear property line, and dismissed Plaintiffs' appeal of the Board's decision as moot. Based on the foregoing, the trial court's order is

AFFIRMED.

KITTREDGE and WILLIAMS, JJ., concur.