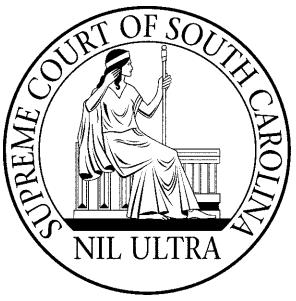

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 28
July 22, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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UNPUBLISHED OPINIONS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UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

2015-UP-269-Grand Bees Development v. SCDHEC	Denied 07/17/15
2015-UP-273-State v. Bryan M. Holder	Pending
2015-UP-275-State v. David Eugene Rosier, Jr.	Pending
2015-UP-279-Mary Ruff v. Samuel Nunez	Pending
2015-UP-280-State v. Calvin J. Pompey	Pending
2015-UP-300-Peter T. Phillips v. Omega Flex, Inc.	Pending
2015-UP-301-State v. William J. Thomas, Jr.	Pending
2015-UP-303-Charleston Cty. Assessor v. LMP	Pending
2015-UP-304-Robert K. Marshall v. City of Rock Hill	Pending
2015-UP-305-Tanya Bennet v. Lexington Medical Center	Pending
2015-UP-306-Ned Gregory v. Howell Jackson Gregory	Pending
2015-UP-307-Allcare Medical v. Ahava Hospice	Pending
2015-UP-310-State v. Christopher Miller	Pending
2015-UP-311-State v. Marty Baggett	Pending
2015-UP-313-John T. Lucas v. The Bristol Condominium	Pending
2015-UP-314-Student No. 1 John Doe v. Board of Trustees	Pending
2015-UP-316-S.C. Second Injury Fund v. Sompo Japan Ins.	Pending
2015-UP-325-Tilbros, Inc. v. Cherokee County	Pending
2015-UP-330-Bigford Enterprises v. D. C. Development	Pending
2015-UP-331-Johnny Eades v. Palmetto Cardiovascular	Pending
2015-UP-333-Jennifer Bowzard v. Sheriff Wayne Dewitt	Pending

PETITIONS-SOUTH CAROLINA SUPREME COURT

5209-State v. Tyrone Whatley	Pending
5231-Centennial Casualty v. Western Surety	Pending
5247-State v. Henry Haygood	Pending
5250-Precision Walls v. Liberty Mutual Fire Ins.	Pending
5263-Milton P. Demetre Family Ltd. Partnership v. Beckmann	Pending
5270-56 Leinbach Investors v. Magnolia Paradigm	Pending
5278-State v. Daniel D'Angelo Jackson	Pending
5279-Stephen Brock v. Town of Mt. Pleasant	Pending
5286-State v. Graham F. Douglas	Pending
5288-State v. Damon T. Brown	Pending
5291-Samuel Rose v. JJS Trucking	Pending
5297-Trident Medical Center v. SCDHEC	Pending
5298-George Thomas v. 5 Star	Pending
5299-SC Public Interest Foundation v. SCDOT	Pending
5300-Joseph E. Mason, Jr. v. Catherine L. Mason	Pending
5301-State v. Andrew T. Looper	Pending
5302-State v. Marvin B. Green	Pending
5303-State v. Conrad Lamont Slocumb	Pending
5307-George Ferguson v. Amerco/U-Haul	Pending
5309-Bluffton Towne Center v. Beth Ann Gilleland-Prince	Pending

5313-State v. Raheem D. King	Pending
2013-UP-147-State v. Anthony Hackshaw	Pending
2014-UP-128-3 Chisolm Street v. Chisolm Street	Pending
2014-UP-143-State v. Jeffrey Dodd Thomas	Pending
2014-UP-366-State v. Darrell L. Birch	Pending
2014-UP-430-Cashman Properties v. WNL Properties	Pending
2014-UP-435-SCBT, N.A. v. Sand Dollar 31 (Meisner)	Pending
2014-UP-436-Jekeithlyn Ross v. Jimmy Ross	Pending
2014-UP-446-State v. Ubaldo Garcia, Jr.	Pending
2014-UP-470-State v. Jon Wynn Jarrard, Sr.	Pending
2015-UP-010-Latonya Footman v. Johnson Food Services	Pending
2015-UP-014-State v. Melvin P. Stukes	Pending
2015-UP-015-State v. Albert Brandeberry	Pending
2015-UP-041-Nathalie Davaut v. USC	Pending
2015-UP-042-Yancey Env. v. Richardson Plowden	Pending
2015-UP-050-Puniyani v. Avni Grocers	Pending
2015-UP-051-Chaudhari v. S.C. Uninsured Employer's Fund	Pending
2015-UP-055-Alexander Guice v. Pamela Lee	Pending
2015-UP-059-In the matter of the estate of Willie Rogers Deas	Pending
2015-UP-066-State v. James Scofield	Pending
2015-UP-067-Ex parte: Tony Megna	Pending

2015-UP-068-Joseph Mickle v. Boyd Brothers	Pending
2015-UP-071-Michael A. Hough v. State	Pending
2015-UP-072-Silvester v. Spring Valley Country Club	Pending
2015-UP-074-State v. Akeem Smith	Pending
2015-UP-102-SCDCA v. Entera Holdings	Pending
2015-UP-107-Roger R. Riemann v. Palmetto Gems	Pending
2015-UP-110-Deutsche Bank v. Cora B. Wilks	Pending
2015-UP-111-Ronald Jarmuth v. International Club	Pending
2015-UP-115-State v. William Pou	Pending
2015-UP-119-Denica Powell v. Petsmart	Pending
2015-UP-126-First National Bank v. James T. Callihan	Pending
2015-UP-127-T.B. Patterson v. Justo Ortega	Pending
2015-UP-138-Kennedy Funding, Inc. v. Pawleys Island North	Pending
2015-UP-139-Jane Doe v. Boy Scout Troop 292	Pending
2015-UP-141-Gregory Ulbrich v. Richard Ulbrich	Pending
2015-UP-146-Joseph Sun v. Olesya Matyushevsky	Pending
2015-UP-150-State v. Jabarrie Brown	Pending
2015-UP-164-Lend Lease v. Allsouth Electrical	Pending
2015-UP-167-Cynthia Griffis v. Cherry Hill Estates	Pending
2015-UP-174-Tommy S. Adams v. State	Pending
2015-UP-178-State v. Antwon M. Baker, Jr.	Pending

2015-UP-191-Carmen Latrice Rice v. State	Pending
2015-UP-201-James W. Trexler v. The Associated Press	Pending
2015-UP-203-The Callawassie Island v. Arthur Applegate	Pending
2015-UP-204-Robert Spigner v. SCDPPPS	Pending
2015-UP-205-Tri-County Dev. v. Chris Pierce (2)	Pending
2015-UP-209-Elizabeth Hope Rainey v. Charlotte-Mecklenburg	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Arthur L. Jayroe, Jr., in his Capacity as Chief Magistrate of Newberry County, Plaintiff,

v.

Newberry County, South Carolina and Wayne Adams, Defendants,

and

The Honorable Hugh K. Leatherman, Sr., in his capacity as President Pro Tempore of the South Carolina Senate, Intervenor.

Appellate Case No. 2015-000373

IN THE ORIGINAL JURISDICTION

Opinion No. 27548
Heard June 16, 2015 – Filed July 22, 2015

QUESTION ANSWERED "NO"

Desa A. Ballard and Harvey M. Watson, III, both of Ballard & Watson, of West Columbia, for Plaintiff.

Steve A. Matthews and Sarah P. Spruill, both of Haynsworth Sinkler Boyd, P.A. and James E. Smith, Jr., of James E. Smith, Jr., P.A., all of Columbia, for Defendants.

Kenneth M. Moffitt, Edward H. Bender and Elizabeth H. Brogdon, Counsel to the South Carolina Senate, for Intervenor, President Pro Tempore Hugh K. Leatherman, Sr.

PER CURIAM: We granted plaintiff's request that we exercise our original jurisdiction to "determine whether [defendants] have the authority to abolish part-time magistrate positions in Newberry County." S.C. Sup. Ct. Order dated May 7, 2015. We hold defendants do not have such authority and therefore answer the question "No." We also note that no Newberry County magistrate position has been abolished.

FACTS

Plaintiff, formerly the part-time Chief Magistrate of Newberry County, brought this action in the Court's original jurisdiction to determine whether defendants Newberry County and Wayne Adams, County Administrator, have the authority to abolish part-time magistrate positions in Newberry County. In addition, the Court permitted the Senate President Pro Tempore to intervene in this action. Defendants and the Intervenor agree with plaintiff that defendants do not have such authority, contending that all of defendants' actions have been done in compliance with the South Carolina Constitution and applicable statutes.

Plaintiff was a part-time magistrate in Newberry County. Under the formula established by S.C. Code Ann. § 22-8-40(C) (2007), Newberry County is entitled to three magisterial positions. Under this statute, four part-time magistrates equal one full-time magisterial position. Section 22-8-40(E). During the four year period expiring April 30, 2015, Newberry's three magisterial positions were filled by two full-time magistrates and three part-time magistrates, one of whom was plaintiff. *See* S.C. Code Ann. § 22-1-10(A) (Supp. 2014) (last sentence of second paragraph). Defendant Newberry County is statutorily mandated to notify the senatorial delegation[1] representing Newberry County in writing of the number of magistrate positions available in the county, as well as other information, as the terms near expiration. S.C. Code Ann. § 22-1-10 (A) (third paragraph).

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[1] A single senator represents all of Newberry County.

Defendant Newberry County, acting through defendant Adams pursuant to a vote taken at a County Council meeting, wrote its senator invoking § 22-1-10(A) on August 21, 2014. In this August letter, the County requested its three magisterial positions be filled with three full-time magistrates, thus discontinuing the use of part-time magistrates. On June 2, 2015, the Governor appointed Magistrate Barry Koon as a full-time magistrate to fill the magisterial position formerly filled by three part-time magistrates, two of whom were petitioner and Koon. On that same date, the Senate confirmed the appointment. *See* S.C. Const. art. V, § 26.[2] The other two magisterial positions in Newberry County were also filled by full-time magistrates.

ISSUE

> Do defendants have the authority to abolish a part-time magistrate position in Newberry County?

ANALYSIS

Plaintiff argues that, in effect, § 22-1-10(A) delegates the authority to abolish part-time magistrate positions to Newberry County. He contends this statute violates this Court's decision in *Davis v. County of Greenville*, 322 S.C. 73, 470 S.E.2d 94 (1996). In *Davis*, the Court held that counties cannot "abolish" a magistrate's position, nor may a county, consistent with the unified judicial system, abolish magistrate courts entirely within a given county. *Davis*, *supra*. Neither of these constitutionally forbidden acts has occurred here.

Plaintiff contends this language in § 22-1-10(A) is an unconstitutional delegation of authority to the county government:

---

[2] This section provides:

> The Governor, by and with the advice and consent of the Senate, shall appoint a number of magistrates for each county as provided by law. The General Assembly shall provide for their terms of office and their civil and criminal jurisdiction. The terms of office must be uniform throughout the State.

> At least ninety days before the date of the commencement of the terms provided in the preceding paragraph and every four years thereafter, each county governing body must inform, in writing, the Senators representing that county of the number of full-time and part-time magistrate positions available in the county, the number of work hours required by each position, the compensation for each position, and the area of the county to which each position is assigned. If the county governing body fails to inform, in writing, the Senators representing that county of the information as required in this section, then the compensation, hours, and location of the full-time and part-time magistrate positions available in the county remain as designated for the previous four years.

According to plaintiff, this statute delegates to the county control over the number of magistrate positions in violation of the constitutional rule set forth in *Davis*. We disagree.

The number of magisterial positions in a given county is determined by the formula established in S.C. Code Ann. § 22-8-40(C) and (D) (2007), subject to an agreement pursuant to S.C. Code Ann. § 22-2-40(C) (Supp. 2014) or to "termination" pursuant to S.C. Code Ann. § 22-1-30(B) (Supp. 2014).[3] Here, there is no dispute that the number of magisterial positions in Newberry County is three, and that there was no agreement between Newberry County and its senator to increase or decrease this number as provided in § 22-2-40(C), nor was any magisterial position "terminated" in accordance with § 22-1-30(B). It is true that in their August 2014 letter, defendants asked that the county's three magisterial positions be filled by three full-time judges. That this letter contains merely a

[3] Plaintiff purports to challenge the constitutionality of these statutes, but lacks standing since there was no agreement pursuant to § 22-2-40(C) nor was he terminated pursuant to § 22-1-30(B). To the extent he seeks to invoke "public interest standing" to challenge the statutes, he ignores both the scope of the question we agreed to decide, and the Court's firm policy of declining to decide a constitutional challenge unless necessary to a resolution of the case. *E.g. S.C. Dep't of Soc. Servs. v. Cochran*, 356 S.C. 413, 589 S.E.2d 753 (2003).

request negates plaintiff's assertion that defendants "control" the number of magisterial positions in Newberry County. Further, in arguing that his position was abolished, plaintiff misapprehends the statutory scheme: the reallocation of Newberry County's three magisterial positions from a combination of full and part-time judges to three full time magistrates does not constitute a change in the number of magisterial positions in the county. In other words, no position has been "abolished."

We accepted this matter in our original jurisdiction to answer the question whether defendants have the authority to abolish part-time magistrate positions in Newberry County. We agree with all parties that defendants have no such authority, and further agree with defendants and the Intervenor that no part-time or full-time Newberry County magisterial position has been abolished. Rather, as permitted by § 22-4-80(E), the part-time magisterial positions, including the one previously held by plaintiff, have been combined into one full-time magistrate position, and the Newberry County magistrates have been lawfully appointed pursuant to S.C. Const. art. V, § 26. While we decline plaintiff's invitation to expand the scope of this case to address issues of an alleged constitutional conflict between S.C. Const. art V, § 26 and art. V, § 4, and his related statutory claims, we have reviewed all of plaintiff's arguments and find nothing of merit warranting the exercise of our authority to add necessary parties[4] and address these additional arguments.

CONCLUSION

Defendants Newberry County and Adams do not have the authority to abolish part-time magistrate positions in Newberry County.

QUESTION ANSWERED NO.

PLEICONES, Acting Chief Justice, BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

[4] For example, the Governor would be a necessary party.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kareem Harry, Appellant.

Appellate Case No. 2013-000336

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 5332
Heard May 5, 2015 – Filed July 22, 2015

AFFIRMED

Meliah Bowers Jefferson, of Wyche Law Firm, of Greenville, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General J. Anthony Mabry, all of Columbia, and Solicitor Jimmy A. Richardson, II, of Conway, for Respondent.

KONDUROS, J.: Kareem Harry appeals his murder conviction under the hand of one is the hand of all theory of accomplice liability. He argues the circuit court

erred in denying his motion for directed verdict, as the State failed to present any direct or substantial circumstantial evidence he acted in concert with Saire Castro, his associate and friend, who admitted shooting the victim and pled guilty to voluntary manslaughter. We affirm.

FACTS/PROCEDURAL BACKGROUND

Harry was dating a woman, Ashley Bledsoe, with whom he had a tumultuous relationship. According to Bledsoe, she and Harry dated for about eight or nine months, and, for the two weeks prior to the shooting in this case, they lived together in the apartment Bledsoe shared with a roommate, Evelyn. Bledsoe testified Harry became abusive to her. On February 26, 2011, Harry and Bledsoe fought, and Bledsoe called the police. When police arrived, Harry fled. The following day, Bledsoe met the victim, Kevin Bowens, through her roommate. Bowens took Bledsoe and Evelyn to dinner, and they all went to a club together. Bowens spent that night at Bledsoe's apartment. A friend of Bledsoe and Harry, Sage McPhail, owned a truck and helped move Harry's things out of her apartment the next day. McPhail took everything except a large plasma television to the home where Harry was staying with the mother of his children. According to Bledsoe, she had given the television to Bowens, and Bowens said he would pay her for it.

Harry contacted Bledsoe indicating he wanted his television or the money for it. Bledsoe told Harry she had sold it to a female friend. She texted Bowens asking for the money saying the television had belonged to a female friend who was demanding the money. Bowens did not return the television or pay Bledsoe. Eventually, Bledsoe told Harry the truth about what happened with the television. According to Bledsoe, Harry needed the television or the money the following day to pay probation fees that were due. While Bledsoe and Harry were talking on the phone, he told her to stop where she was, and he would come get her. Bledsoe, riding with Evelyn at the time, stopped at Waccamaw Hospital, and Harry picked her up in McPhail's red truck.[1] The two drove to Tommy Byrne's apartment, approximately 16.3 miles away, even though Bowens's house was in the Kings Grant subdivision only 2.9 miles away from the hospital. According to Byrne,

[1] According to McPhail, he did minor automotive repair work for friends and he had Harry's sport utility vehicle (SUV) to repair its brakes. McPhail testified he left his truck for Harry to drive while he worked on the SUV.

Harry came into the apartment and asked to see Castro. Castro and Harry had a five to eight minute conversation in the living room that Byrne could not overhear because he was in the kitchen with his father, who was preparing dinner. Harry then left, and Castro followed, asking Byrne if he wanted to go for a ride. Byrne testified that as they were leaving, Castro went back to the kitchen, where he kept his gun on top of a cabinet. Although neither Harry nor Byrne saw Castro retrieve the gun, Byrne testified it was well-known Castro had a firearm.[2]

Castro and Byrne, driving separately, followed Bledsoe and Harry to Bowens's neighborhood. Once there, Harry, Castro, and Byrne got out of their vehicles, and Bowens entered the yard area near his garage. According to Bowens's girlfriend, with whom he shared the home, the vehicles sped down the street in front of their house and pulled into the middle of the yard. Harry asked several times about getting the television back, but Bowens indicated he was not going to return the television. According to Bowens's girlfriend and neighbors, although it was unclear exactly what the parties were saying, the conversation was loud. Harry told Bledsoe to get out of the truck, and she stated Bowens had "stolen" the television. Harry instructed Bledsoe to get back in the truck, and Castro shot Bowens three times. Castro testified he saw Bowens reach for a gun he had in his waistband, the outline of which was visible through his shirt, and he shot in self-defense. Byrne indicated Bowens did not reach for his gun, and Bowens's girlfriend and a neighbor testified the gun was still in Bowens's waistband after he was shot.

Harry jumped into the truck with Bledsoe and instructed her to drive away. After a brief chase, Bledsoe stopped the vehicle and surrendered. Harry fled and police later captured him.

Castro pled guilty to voluntary manslaughter, and Harry was tried for murder under the hand of one is the hand of all theory of accomplice liability. At trial, Harry moved for directed verdict, arguing the State failed to present any direct or substantial circumstantial evidence Harry conspired or planned with Castro to murder Bowens over the television or to accomplish any illegal purpose. The

[2] Castro had been arrested for having drugs and guns in a vehicle a few weeks earlier. Because his child was also in the vehicle, the Department of Social Services required Castro and the child's mother to reside separately from the child, and they were staying with Byrne.

circuit court denied Harry's motion, and the jury convicted him. The circuit court sentenced him to thirty-one years' imprisonment. This appeal followed.

STANDARD OF REVIEW

"In cases where the State has failed to present evidence of the offense charged, a criminal defendant is entitled to a directed verdict." *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 408 (2013). "During trial, [w]hen ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *Id*. at 429, 753 S.E. 2d at 408-09 (alteration by court) (internal quotation marks omitted). "The trial court should grant the directed verdict motion when the evidence merely raises a suspicion that the accused is guilty, as [s]uspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Id*. at 429, 753 S.E.2d at 409 (alteration by court) (internal quotation marks omitted). "On the other hand, a trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id*. (internal quotation marks omitted).

"On appeal, [w]hen reviewing a denial of a directed verdict, this [c]ourt must view the evidence and all reasonable inferences in the light most favorable to the [S]tate." *Id*. (first alteration by court) (internal quotation marks omitted). "If the [S]tate has presented any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this [c]ourt must affirm the trial court's decision to submit the case to the jury." *Id*. (internal quotation marks omitted). "Circumstantial evidence . . . gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury." *State v. Rogers*, 405 S.C. 554, 567, 748 S.E.2d 265, 272 (Ct. App. 2013).

LAW/ANALYSIS

Harry maintains the circuit court erred in failing to direct a verdict of acquittal when the State did not present direct or substantial circumstantial evidence proving him guilty of murder under the hand of one is the hand of all theory of accomplice liability. We disagree.

"The doctrine of accomplice liability arises from the theory that the hand of one is the hand of all." *State v. Reid*, 408 S.C. 461, 472, 758 S.E.2d 904, 910 (2014)

(internal quotation marks omitted). "Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *Id*. "Where two persons combine to commit an unlawful act and in its execution a homicide is committed as a probable or natural consequence thereof, all present and participating in the unlawful act are as guilty as the one who committed the fatal act." *State v. Fields*, 314 SC. 144, 146 n.1, 442 S.E.2d 181, 182 n.1 (1994).

> Except in rare situations, a person committing an unlawful act is legally responsible for all natural or necessary consequences thereof. One combining and confederating with others to accomplish an illegal purpose is criminally liable for everything done by either him or his confederates which follows incidentally in the execution of a common design as one of the probable and natural consequences, *though not intended as a part of the original design or common plan*.

State v. McCall, 304 S.C. 465, 469-70, 405 S.E.2d 414, 416 (Ct. App. 1991), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999).

> The common purpose may not have been to kill and murder, but if it was unlawful, as, for instance, to break in, and steal, and in the execution of this common purpose a homicide is committed by one, as a probable or natural consequence of the acts done in pursuance of the common design, then all present participating in the unlawful common design are as guilty as the slayer.

State v. Cannon, 49 S.C. 550, 555, 27 S.E. 526, 530 (1897).

The hand of one is the hand of all theory of guilt is more often termed the natural consequences doctrine in other jurisdictions. *See State v. Delestre*, 35 A.3d 886, 896 n.11 (R.I. 2012) (referencing the acceptance of this theory of aiding and abetting by the Second Circuit, Ninth Circuit, Eleventh Circuit, District of Columbia, and South Carolina). "In order to establish the parties agreed to achieve an illegal purpose, thereby establishing presence by pre-arrangement, the State need not prove a formal expressed agreement, but rather can prove the same by

circumstantial evidence and the conduct of the parties." *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010).

While not controlling, we find the facts in *People v. Miller*, 2008 WL 1899560 (Cal. Ct. App. 2008), to be analogous to the facts of this case and its disposition, therefore, informative. In that case, Miller asked another man, Baillie, to accompany him to confront a third man (Victim) regarding Victim's refusal to provide Miller's sister with a bid for installing an air conditioner. *Id.* at *1. The prosecution argued Miller anticipated getting into a fight with Victim and wanted Baillie to go with him to back him up. *Id.* Miller knew Baillie normally carried a gun; Baillie was willing to use his gun; Baillie held resentment toward Victim; and Baillie would fight, if Miller needed help. *Id.* Miller was convicted of murder, and the appellate court affirmed that conviction founded upon the natural consequences doctrine. *Id.* at *3.

This court has similarly held circumstantial evidence establishing a defendant called for "backup" from someone with a gun in anticipation of an altercation could withstand a directed verdict motion. In *Gibson*, a disagreement between parties at a bar ended in one man's shooting death. 390 S.C. at 351-53, 701 S.E.2d at 768-69. In determining under the hand of one hand of all theory, the defendant, Adams Gibson, was not entitled to a directed verdict, this court found Adams called his brother, Jacques, to the bar and, instead of leaving with him, called Jacques inside the bar to point out the men with whom he had been arguing. *Id*. at 355, 701 S.E.2d at 770. Furthermore, [a witness] testified Adams went to Jacques's car and retrieved a gun moments before the shooting and although they left separately, both men fled the scene. *Id*. The court concluded this evidence was sufficient to withstand Adams's directed verdict motion.

> Here, at minimum, the evidence creates the inferences that Adams informed Jacques of the situation, that the reason for the call may not have been solely for the purpose of removing Adams from the scene, and that Adams was aware a firearm was available for him to retrieve from Jacques's white sedan. When viewed in the light most favorable to the State, the circumstantial evidence in this case infers Adams and Jacques may have acted in concert in assaulting the men from Winnsboro.

Id.

In the present case, the circuit court did not err in sending Harry's case to the jury. The State presented substantial circumstantial evidence from which the jury could infer Harry planned with Castro to confront Bowens regarding the television and his recent encounter with Bledsoe and assault him or otherwise take the television by force. The record demonstrates Bledsoe and Harry went out of their way to pick up Castro, and after a lengthy private discussion, Castro, an individual known to carry a gun, followed Bledsoe and Harry to Bowens's home. The group did not arrive at his residence by happenstance but by coordinated effort led by Harry. Once they conspired to confront a known drug dealer,[3] who approached them with a gun in his waistband, the natural consequences that flowed from that planned altercation are the responsibilities of both men. Additionally, Harry, Bledsoe, Castro, and Byrne all fled the scene together, with Harry and Bledsoe absconding in a borrowed vehicle. Viewing all inferences in the light most favorable to the State, we find the circuit court did not err in denying Harry's motion for directed verdict. Whether the evidence presented rose to the quantum of proof required for conviction was a question for the jury. Therefore, the ruling of the circuit court is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

[3] Bowens's girlfriend testified Bowens sold drugs. McPhail testified he purchased marijuana and cocaine from Harry on different occasions. Harry testified he spoke to Bowens on the phone prior to going to his house and determined they "had people in common" and the area where they live is a small place where people know each other.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Yancey Roof, Appellant,

v.

Kenneth A. Steele, Respondent.

Appellate Case No. 2013-002326

Appeal From Lexington County
Michelle M. Hurley, Family Court Judge

Opinion No. 5333
Heard June 3, 2015 – Filed July 22, 2015

AFFIRMED AS MODIFIED

Jean Perrin Derrick, of Lexington, for Appellant.

Max Nathan Pickelsimer, of Warner Payne & Black, LLP, of Columbia, for Respondent.

KONDUROS, J.: Yancey Roof (Wife) appeals the family court's alimony award, contending it erred in reducing her previously modified award and in requiring her to pay back, via offset of her attorney's fees award, the overpayment of alimony she received during the pendency of this case on remand. We affirm as modified.

FACTS/PROCEDURAL BACKGROUND

Wife and Kenneth Steele (Husband) married in 1993. Wife was diagnosed with multiple sclerosis (MS) in 2000, and the parties separated in 2004 resulting in a 2006 divorce. During the marriage, Wife worked as an employee at a frame shop that she and Husband eventually purchased with a partner. Husband worked for Blue Cross and Blue Shield and at the time of the divorce, earned approximately $60,000 per year. Wife worked in the frame shop and was earning $16,800 annually. The parties agreed Husband would pay Wife $300 per month in alimony and maintain health insurance on her through his employer at a cost of $87 per month. Wife also received child support for the parties' two children. After two years, Husband's employer stopped permitting ex-spouses to be covered on its health insurance plan. Wife petitioned the family court for a modification in her alimony based on the change in circumstances, primarily her lack of insurance coverage, and the expense for getting coverage while suffering from MS. Other changes in circumstances included a decrease in Wife's earnings, an increase in Husband's earnings, and the discontinuation of $200 per month in child support based on the children's majority.

The family court increased Wife's alimony to $1,547.65. The family court tied the award to the cost of Wife's insurance coverage. Husband appealed, and this court reversed and remanded, indicating although the change in circumstances warranted an increase in Wife's alimony, the agreement between the parties did not mandate that alimony be tied directly to the cost of health insurance. *See Roof v. Steele*, 396 S.C. 373, 389, 720 S.E.2d 910, 919 (2011).

On remand, Wife testified her most recent annual earnings at the frame shop were $12,000 and the partner with whom she operated the frame shop had retired. The frame shop operated approximately thirty-eight hours per week, and Wife stated she had to stay longer sometimes to complete her work. She indicated her health is "OK" and she does not like to think of herself as disabled. However, she also described her current physical and emotional condition as "a wreck" and admitted working is "challenging." She further testified she suffers from "optic neuritis a lot in [her] eyes, extreme fatigue, and massive headaches." She provided she had lost a lot of sensation on the right side of her body and indicated it "doesn't function very well." This lessening in function affected her ability to do some of the fine manual framing work as quickly. Additionally, her condition made her depressed. She testified she did not believe she could keep a job other than running the frame

shop because she needs to be able to work at her own pace and thus, she has not sought other employment. Wife stated she has gone to the Social Security website using her smartphone and completed a preliminary screening, which indicated she was not eligible. Wife testified she had not pursued disability or Medicaid further because she believed she should work and was unaware one could earn a certain amount of income and still qualify for benefits.

With regard to her insurance, Wife maintained her coverage through the Consolidated Omnibus Budget Reconciliation Act (COBRA) after Husband's employee insurance coverage ended, and she was able to obtain a private policy in the amount of $1,247.65 per month. Husband paid this premium pursuant to court directive. The cost of the policy increased by approximately $200 per month thereafter, and Wife dropped the insurance because she could not pay the premium. However, Wife still accepted the alimony payments from Husband and used them to pay other bills.

Wife indicated she was not living at the same standard as during the marriage when she took vacations with the family, spent time on the lake, purchased new clothing, and had health insurance. Additionally, Wife testified she had listed $3,600 as the annual alimony she received on two prior tax returns but acknowledged the money for her insurance premium should have been considered alimony as well. She further indicated those returns were prepared by her brother-in-law and Husband deducted the full amount paid on his tax returns.

Husband testified he suffers from diabetes and high blood pressure and had a heart attack requiring a stint in 2007. He is a network administrator with Blue Cross and Blue Shield and testified his earnings had increased from $5,000 per month during the marriage to approximately $6,755 per month plus an annual $7,600 incentive bonus. Husband also testified he had inherited approximately $300,000 to $350,000 since the divorce and had purchased some personal items, including a boat and a motorcycle, and had taken a few cruises and a trip to Mexico. He indicated he invested the remainder and purchased four rental properties that had yet to earn a profit. Additionally, he stated he pays for one child's college expenses and has paid the majority of the children's healthcare expenses.

Doris Ann Hozey, a self-employed insurance agent, testified the current cost to insure Wife would be $1,612.27 monthly. However, she anticipated once the

Affordable Health Insurance Act enrollment began, Wife could be covered for approximately $640 to $720 per month.

The family court determined "[e[ven though her expenditures exceed her income, [Wife] has done nothing to improve her financial circumstances. Although she earns much less than minimum wage, she was [sic] not considered closing her business and/or seeking other employment." With regard to not maintaining her health insurance most recently, the court stated "[i]t appears that [Wife] is complacent in her predicament, and instead of taking responsibility to improve her own income to at least cover necessities, so that she could use the alimony to cover insurance, she has sought increased alimony from [Husband]." "[Wife] did nothing to mitigate her future healthcare costs. She did not explore other employment, employment that would increase her earnings and/or provide health care coverage. She did not seek to improve her education; she did not apply for Medicaid or Social Security Disability."

Ultimately, the family court found "[Wife]'s disability does not affect her ability to work; she is capable of working full-time," and "capable of earning at least minimum wage." The family court therefore imputed a gross annual income to Wife of $15,072.00. The family court modified Husband's alimony payment to $796.51 per month and required Wife to repay the overpayment of alimony, $15,022.80, received since the date of remand.

With regard to attorney's fees, the family court found Wife had been successful in increasing her alimony payment overall from $300 per month and Husband was better able to pay attorney's fees although "[h]ad [Wife] put forth as much effort to improve her financial situation and become self-sufficient as she did to increase her alimony payment, she may not have had as much debt as she does today, as she would not owe as much in attorney's fees." Nevertheless, the family court awarded Wife $25,000 of her $29,753.31 attorney's fees. The family court ordered the award offset the repayment of Husband's alimony overpayment so Husband would actually pay $10,118.58 to Wife's attorney.[1]

[1] At the conclusion of a previous hearing, the family court had awarded Wife $10,000 in attorney's fees, which Husband deposited with the court until the ultimate conclusion of this matter.

STANDARD OF REVIEW[2]

The family court is a court of equity and on appeals therefrom the appellate court reviews factual and legal issues de novo. *Holmes v. Holmes*, 399 S.C. 499, 504, 732 S.E.2d 213, 216 (Ct. App. 2012). However, this broad standard of review does not require the appellate court to disregard the factual findings of the family court, and the appellant is not relieved of the burden of demonstrating error in the family court's findings of fact. *Id.* "Accordingly, we will affirm the decision of the family court in an equity case unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by this court." *Id.*

LAW/ANALYSIS

I. Alimony Award

Wife alleges the family court erred in failing to award her a higher amount of alimony. We agree.

Section 20-3-170(A) (2014) of the South Carolina Code provides:

> Whenever any husband or wife, pursuant to a judgment of divorce from the bonds of matrimony, has been required to make his or her spouse any periodic payments of alimony and the circumstances of the parties or the financial ability of the spouse making the periodic

[2] Wife characterizes the standard of review as an abuse of discretion standard. However, since *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011), this court has employed a de novo standard of review in alimony award and modification cases. *See Holmes v. Holmes*, 399 S.C. 499, 504, 732 S.E.2d 213, 216 (Ct. App. 2012) (citing de novo standard of review in considering the husband's appeal in change of circumstances alimony case); *Way v. Way*, 398 S.C. 1, 7, 726 S.E.2d 215, 219 (Ct. App. 2012) (citing de novo standard of review in the husband's appeal from permanent, periodic alimony award and equitable distribution to the wife); *McKinney v. Pedery*, 406 S.C. 1, 6, 749 S.E.2d 119, 122 (Ct. App. 2013) (citing de novo standard of review in the husband's appeal from the termination of the wife's alimony obligation), *cert. granted* (Aug. 6, 2014).

> payments shall have changed since the rendition of such judgment, either party may apply to the court which rendered the judgment for an order and judgment decreasing or increasing the amount of such alimony payments or terminating such payments and the court, after giving both parties an opportunity to be heard and to introduce evidence relevant to the issue, shall make such order and judgment as justice and equity shall require, with due regard to the changed circumstances and the financial ability of the supporting spouse, decreasing or increasing or confirming the amount of alimony provided for in such original judgment or terminating such payments.

"Many of the same considerations relevant to the initial setting of an alimony award may be applied in the modification context as well, including the parties' standard of living during the marriage, each party's earning capacity, and the supporting spouse's ability to continue to support the other spouse." *Holmes*, 399 S.C. at 505, 732 S.E.2d at 216-17 (internal quotation marks omitted). Per statute, the complete list of factors the family court can consider in setting alimony includes (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses and needs of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other factors the court considers relevant. S.C. Code Ann. § 20-3-130(C) (2014).

"Whether termed voluntary underemployment, imputation of income, or the failure to reach earning potential, the case law is clear that when a payor spouse seeks to reduce support obligations based on his diminished income, a court should consider the payor spouse's earning capacity." *Hawkins v. Hawkins*, 403 S.C. 228, 242, 742 S.E.2d 677, 684 (Ct. App. 2013) (internal quotation marks omitted). "Likewise, it is proper to consider a supported spouse's earning capacity and impute income to a spouse who is underemployed or unemployed." *Id.* (internal quotation marks omitted). "However, courts are reluctant to invade a party's

freedom to pursue the employment path of their own choosing or impose unreasonable demands upon parties." *Id*. (internal quotation marks omitted).

In this case, the preponderance of the evidence does not establish Wife is capable of working a full-time job for another employer for forty hours per week. While Wife asserts her health is "OK" and she is able to work in the frame shop, the greater weight of the evidence suggests she would not be able to work a full-time job elsewhere. Wife's desire to participate in the workforce in a way that was manageable with her MS simply does not compel that conclusion. The record shows Wife suffers myriad symptoms from MS and her work history consists of training horses and working in this frame shop. She has a high school diploma and no computer skills. No evidence was presented regarding prevailing job opportunities or earning levels in the community for an employee with Wife's skill set or for an employee with MS or other chronic illness. Requiring Wife to attempt working full-time in another, less flexible environment is an unreasonable demand based on Wife's long list of undisputed ailments and work history.

Other allegations of error include the finding Wife did not attempt to mitigate her healthcare expenses by pursuing Medicaid or Social Security benefits. The record shows Wife did some tentative inquiry into those programs that left her believing she would not qualify, particularly if she continued earning income on her own. The family court's order is unclear regarding how its finding on this issue affected the alimony award, but the record does not support the characterization of Wife's failure as willful complacency.

In examining the list of relevant factors, all militate toward a higher alimony award to Wife. The marriage was of a relatively lengthy duration during which the parties enjoyed a comfortable lifestyle Wife no longer enjoys. Husband has more education, a more lucrative employment history, and higher anticipated earnings, and although his health is not perfect, no testimony was presented it interferes with his ability to work. Additionally, Wife's expenses are not unreasonable or out of line with the lifestyle the parties enjoyed during the marriage, and her physical and emotional health is not as good as Husband's. The parties have no other support obligations and have never alleged misconduct in the breakup of their marriage.

Based on our review of the record presented and consideration of the requisite factors, we find a monthly alimony award of $1,550 to be appropriate. This award

is taxable to Wife and deductible to Husband and is retroactive to the date of Judge Hurley's final order.

II. Overpayment of Alimony

Wife appeals the portion of the family court's order requiring her to repay the excess alimony paid by Husband via offset of her attorney's fee award. Based on our increase in Wife's alimony award, we need not address this point as our ruling results in there having been no overpayment to Wife. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address an appellant's remaining issues when its determination of a prior issue is dispositive). We take this opportunity to clarify that Husband is to pay Wife's attorney fees in the amount of $25,000 as awarded by the family court. The $10,000 held by the clerk of court shall be disbursed immediately, and Husband shall make monthly payments to Wife's attorney in the amount of $500 per month on the fifteenth day of each month until the remaining balance of $15,000 is paid in full.

Based on all of the foregoing, the order of the family court is

AFFIRMED AS MODIFIED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kay Howell Jordan, Marion Howell Tolson, and Lewis Virgil Howell, Respondents,

v.

Betty L.S. Judy, Appellant.

Appellate Case No. 2013-002129

Appeal From Dorchester County
Maité D. Murphy, Circuit Court Judge

Opinion No. 5334
Heard March 11, 2015 – Filed July 22, 2015

AFFIRMED

Robert F. McCurry, Jr., of Horger Barnwell & Reid, LLP, of Orangeburg, and James B. Richardson, Jr., of Columbia, for Appellant.

Woodrow Grady Jordan, of Smith, Jordan and Lavery, P.A., of Easley, for Respondents.

KONDUROS, J.: In this boundary dispute action, Betty L.S. Judy appeals the trial court's setting of the boundary line, contending it was arbitrary and the only reasonable inference was the boundary should be set where prior plats and surveys showed it. We affirm.

FACTS/PROCEDURAL HISTORY

Wilbur L. Judy, Sr. and John A. Howell, Jr. owned adjoining tracts of land in Dorchester County (the Judy Property and the Howell Property, respectively). In the early 1970s, Interstate 95 was constructed next to their properties. They both allowed the Department of Transportation to remove dirt from their respective properties, in turn creating a pond on each property. Between the ponds was a strip of land known as the dike or dike road. Both owners used the dike.

John died, leaving the Howell Property to his wife, Marion S. Howell. Marion placed a gate across the road through the Howell Property leading to the Judy Property because she was concerned drugs were being used at the ponds. According to Kay Howell Jordan, John and Marion's daughter, Marion gave Wilbur a key to the gate but the problems continued. Marion changed the lock and gave Wilbur a new key. Because the problems still continued, she changed the lock again and according to Kay tried to give Wilbur a new key, which he refused. Wilbur and Betty's son, Wilbur Judy, Jr. (Roy), testified his family was eventually denied access through the Howell Property.

Wilbur died in 1993, leaving his property to his wife, Betty. According to Roy, he began investigating where the boundary line was located between the two properties after Marion blocked driving access to the Judy Property through the Howell Property. Roy had a survey prepared, which showed a billboard John had constructed was actually on the Judy Property. Betty filed a lawsuit against Marion and another neighbor, Ronnie Elrod,[1] for trespass and an easement. *See Judy v. Howell*, Op. No 2004-UP-199 (S.C. Ct. App. filed Mar. 24, 2004) (*Judy II*); *Judy v. Howell*, Op. No. 2001-UP-423 (S.C. Ct. App. filed Oct. 8, 2001) (*Judy I*). The master found and this court affirmed the easement action was barred by res judicata due to an earlier action Wilbur brought that was dismissed after his death. *Judy I* at 4. However, this court reversed the master's decision that the trespass action was barred by res jusdicata and remanded that action for trial. *Judy I* at 5. Following trial, this court affirmed the master's finding the billboard was on the Judy Property. *Judy II* at 3. The court noted the parties had not asked the master

[1] To access the Judy Property, the Judy family first had to cross Elrod's property before they could cross the Howell Property.

to determine the boundary of the properties and thus it was not preserved for this court's review on appeal. *Judy II* at 3.

Marion later died, leaving the Howell Property to her children, Kay, Marion Howell Tolson (Marion T.), and Lewis Virgil Howell (collectively, the Howells). At some point after losing access through the Howell Property, the Judy family began accessing their property by coming down a narrow path beside the railroad tracks, with the railroad's permission.[2] After Roy received the survey around 1995, he installed a fence along what he believed was the property line, which caused the Howells to lose vehicle access to the dike.

The Judy and Howell families met several times and reached a settlement in 2009 that allowed the Judy family to travel over the Howell Property to get to the Judy Property and to share the dike. The trial court found the settlement agreement unenforceable.

On August 12, 2010, the Howells filed a complaint against Betty, requesting a declaratory judgment that the boundary line of the properties is in the center of the dike or in the alternative, as shown in an attached plat. They also requested the court issue an order of quiet title declaring the property line as requested. Further, they contended if the court did not set the property line as they requested, they were entitled to an easement on the dike. Additionally, they asserted Betty should be estopped from denying them access to the dike. Betty filed an answer denying most of the complaint and requesting the court dismiss the complaint.

At trial, Roy was present on Betty's behalf with her power of attorney. Lewis Edward Jordan, Kay's husband, testified John and Wilbur had agreed the dike was the boundary line for the properties and had used it without any problems. Roy testified that "to the best of [his] knowledge," Wilbur and John had not "fussed about" the dike. The Howells and Kay's husband testified the Howell family and the Judy family both maintained the dike, but Roy testified only he did.

Betty sought to qualify Ben Coker, Jr. as an expert in land surveying, but the Howells objected. The trial court did not qualify him in surveying because he was not licensed as a land surveyor and was not formally educated in land surveying.

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[2] At trial, a letter and document were introduced showing an easement from the railroad to Wilbur but it was not executed or recorded.

The court did qualify him as an expert in the area of field work. He testified about the field work he did in 1995 for a plat (Ashley Plat) for the Judy family signed by Paul Clifton Lawson, Jr. He used a 1927 plat (F.A. Moorer Plat) as a basis for his plat, and his plat agreed with that plat. He testified the measurements on the F.A. Moorer Plat were "very crude measurements compared to our measurements now." Coker testified he also tried to locate points on a plat from 1867 (1867 Plat) but could not locate any of the points shown on it. He indicated the deeds for the two properties were ambiguous and did not show metes and bounds. He admitted on cross-examination one of the measurements he found in doing his field work did not match the F.A. Moorer Plat. He also stated his field work did not match with the 1867 Plat. The Ashley Plat showed the dike as being located completely on the Judy Property.

John David Bass testified as an expert in surveying on behalf of the Howells. He prepared a plat in 1998 (Bass Plat) for the Howells. He testified he used several old plats and surveys for the basis of his plat. He indicated he used the 1867 Plat, but it did not close perfectly because old compasses only measured to the nearest degree. He testified he took the error and "pushed" it into Interstate 95. He testified his plat agreed with the 1867 Plat while the Ashley Plat agreed with the F.A. Moorer Plat. On cross-examination, he testified he could have pushed the error anywhere. On redirect, Bass testified that by pushing the error into Interstate 95, it actually benefited the Judy Property. He testified he based his plat off of one iron. He testified the Ashley Plat relied on a sweetgum tree shown on the F.A. Moorer Plat but because the sweetgum tree was no longer there when the Ashley Plat was created, it relied on angles and bearings without knowing if it was correct. Because of that, the boundary line could have been moved either way. The Bass Plat shows the dike as approximately half on the Howell Property and half on the Judy Property, divided diagonally down the middle.

Coker testified that when Bass made his plat, because he could not find the corners shown on the plat he was using, he drove or set his own corners except for the one he found. Lawson testified he agreed with Bass the 1867 Plat did not close but thought Bass should not have placed all of the error in one spot because it was accumulated error.

Following the trial, the trial court found "the property line [was] located in the middle of the dike road." It noted the two professional surveyors who testified disagreed as to where the property line was located based on their field work and

prior surveys. It found "the parties[']' past actions and usage of the property are compelling evidence in [its] determination." It granted the parties "an easement right in and to the dike road for the purposes of ingress and egress over and across the earthen dike." Betty filed a motion for reconsideration, requesting the trial court reconsider the testimony regarding the usage of the dike, the fencing placed upon the dike, and the documentation and exhibits regarding those issues. She also requested the trial court reconsider the testimony, documentation, and evidence presented regarding the plats, witnesses, and surveyors. She contended the trial court erred in failing to rule the Ashley Plat correctly showed the boundary line. The trial court denied the motion. This appeal followed.

STANDARD OF REVIEW

"A boundary dispute is an action at law and the location of a disputed boundary line is a question of fact." *Bodiford v. Spanish Oak Farms, Inc.*, 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct. App. 1995) (citation omitted). On appeal of an action at law tried without a jury, we will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings. *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Additionally, the appellate court can correct errors of law. *Okatie River, L.L.C. v. Se. Site Prep, L.L.C.*, 353 S.C. 327, 334, 577 S.E.2d 468, 472 (Ct. App. 2003); *see also Linda Mc Co. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) ("In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." (internal quotation marks omitted)). The trial court's factual findings in a law action are equivalent to a jury's findings. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975). Questions regarding credibility and the weight of the evidence are exclusively for the trial court. *Sheek v. Crimestoppers Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989). "We may not consider the case based on our view of the preponderance of the evidence, but must construe the evidence presented to the [trial court] so as to support [its] decision wherever reasonably possible." *Id.* "We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." *Id.*

LAW/ANALYSIS

Betty argues the boundary line drawn by the trial court is arbitrary. She asserts the record contains no evidence either party acted as though the boundary between the properties was along the dike. We disagree.

"A disputed boundary line can be established by acquiescence of the parties." *Kirkland v. Gross*, 286 S.C. 193, 197, 332 S.E.2d 546, 548-49 (Ct. App. 1985), *receded from on other grounds by Boyd v. Hyatt*, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988). "[A]cquiescence is a question of fact determined by the intent of the parties." *Id.* at 198, 332 S.E.2d at 549.

> [I]f a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interest[s] are affected. His silence is acquiescence and it estops him.

McClintic v. Davis, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955) (internal quotation marks omitted).

"If adjoining landowners occupy their respective premises up to a certain line, which they mutually recognize and acquiesce in for a long period of time, they are precluded from claiming the boundary line thus recognized and acquiesced in is not the true one." *Gardner v. Mozingo*, 293 S.C. 23, 26, 358 S.E.2d 390, 392 (1987). "In other words, such recognition of, and acquiescence in, a line as the true boundary line, if continued for a sufficient length of time, will afford a conclusive presumption that the line thus acquiesced in is the true boundary line." *Knox v. Bogan*, 322 S.C. 64, 72, 472 S.E.2d 43, 48 (Ct. App. 1996) (internal quotation marks omitted). The length of time required is usually that prescribed by the statute of limitations. *Id.* However, acquiescence can be established even if the period of time is very short; acquiescence need not continue for the period necessary to establish adverse possession. *McClintic*, 228 S.C. at 384, 90 S.E.2d at 366. For a new boundary to be established by acquiescence, both parties must recognize a particular line constituted the true property line. *Croft v. Sanders*, 283 S.C. 507, 510, 323 S.E.2d 791, 793 (Ct. App. 1984).

In *Coker v. Cummings*, 381 S.C. 45, 55, 671 S.E.2d 383, 388 (Ct. App. 2008), the appellant "offered plats and an affidavit in support of his contention the boundaries on the ground are incorrect." However, this court found "the record contains nothing to dispute Respondents' evidence they have lived on their property with the boundaries as they claim for at least twenty years. The plats simply show that at some point, the boundaries may have been as [the appellant] asserts they were intended." *Id.*

Witnesses from both sides testified Wilbur and John operated as though the dike was the boundary between their two properties since the Department of Transportation created it. Kay's husband testified Wilbur and John decided where the boundary would be and operated as if it was the boundary. The location of a boundary in a boundary dispute is a question of fact. Also, whether the parties acquiesced is a question of fact. In an action at law, we are to affirm the trial court's findings of fact if any evidence supports those findings. Here, the record contains evidence to support the finding that Wilbur and John recognized or acquiesced that the dike was the boundary.[3] Accordingly, the trial court did not err in finding the parties' actions dictated the line be set along the dike.[4] Therefore, the trial court's order is

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[3] We note this court has previously held "a compiled line, created merely for the convenience of presently avoiding a dispute, is unacceptable as a basis for an order establishing a true boundary line." *Clements v. Young*, 310 S.C. 73, 75, 425 S.E.2d 63, 64-65 (Ct. App. 1992). In that case, a surveyor testified he created a tie line as a matter of convenience to complete a partition. *Id.* at 75, 425 S.E.2d at 64. The special referee determined the tie line was the boundary of the property, but this court reversed finding the record contained no evidence the tie line was the boundary between the two properties. *Id.* at 74-76, 425 S.E.2d at 64-65. The court found "the tie line is an artificially compiled line which does not evidence the true boundary between the properties." *Id.* at 75, 425 S.E.2d at 64. In *Clements*, no testimony or other evidence was presented the owners of the properties believed the tie line was the border of their properties. Here, all the parties testified they had always acted as though the dike was the boundary between their two properties. Therefore, we do not find *Clements* applicable here.

[4] Betty also contends the only reasonable inference from the evidence is the boundary line is located in the place identified in the F.A. Moorer Plat, the 1970 Highway Department maps, and the Ashley Plat. Based on our decision that the

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

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trial court properly found the parties had acquiesced in the boundary line, we need not address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).