The Supreme Court of South Carolina

In the Matter of Janine Mary Zanin, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 5, 2001, Janine Mary Zanin was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 20, 2010, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Janine Mary Zanin shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 20, 2011

The Supreme Court of South Carolina

In the Matter of Etta Stearns Royer, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 8, 1979, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 28, 2010, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Etta Stearns Royer shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 20, 2011

The Supreme Court of South Carolina

In the Matter of Henry Arnold, III, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on June 22, 2004, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated December 24, 2010, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation. The records in the office of the Clerk show that he has returned his Certificate of Admission.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order.

The resignation of Henry Arnold, III, shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

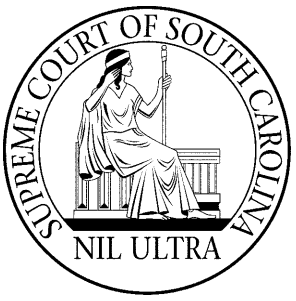
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 20, 2011



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 3
January 24, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sara Mae Robinson, Mary Ann Campbell, James Scott, Ellis Scott, William Scott, Shirley Pinckney Hughes, Julius Steven Brown, Leon Brown, Annabell Brown, Loretta Ladson, Kathleen Brown, Mozelle B. Rembert, Patricia Frickling, Ruth Mitchell, Gwendolyn Dunn, Angela Hamilton, Geraldine Jameson, Remus Prioleau, Julius Prioleau, Anthony Prioleau, Judy Brown, Franklin Brown, Kathy Young, Kenneth Prioleau, Willis Jameson, Melvin Pinckney, William "Alonzie" Pinckney, Ruth Fussell, Hattie Wilson, Marie Watson, Gloria Becoat, Angela T. Burnett, and Lawrence Redmond, Respondents,

v.

The Estate of Eloise Pinckney Harris, Jerome C. Harris, as Personal Representative and sole heir and devisee of the Estate of Eloise P. Harris, Daniel Duggan, Mark F. Teseniar, Nan M. Teseniar, David Savage, Lisa M. Shogry-Savage, Debbie S. Dinovo, Martine A. Hutton, The Converse Company, LLC, Judy Pinckney Singleton, Mary Leavy, Michelle Davis, Leroy Brisbane, Frances Brisbane, and John Doe, Jane Doe, Richard Roe and Mary Roe, who are fictitious names representing all unknown persons and the heirs at law or devisees of the following deceased persons known as Simeon B. Pinckney, Isabella Pinckney, Alex Pinckney,

Mary Pinckney, Samuel James Pinckney, Rebecca Riley Pinckney, James H. Pinckney, William Brown, Sara Pinckney, Julia H. Pinckney, Laura Riley Pinckney Heyward, Herbert Pinckney, Ellis Pinckney, Jannie Gathers, Robert Seabrook, Annie Haley Pinckney, Lillian Pinckney Seabrook, Simeon B. Pinckney, Jr., Matthew G. Pinckney, Mary Riley, John Riley, Richard Riley, Daniel McLeod, and all other persons unknown claiming any right, title, estate, interest, or lien upon the real estate tracts described in the Complaint herein, Defendants,

of whom The Estate of Eloise Pinckney Harris, Jerome C. Harris and Judy P. Singleton are Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 26914
Heard May 26, 2010 – Filed January 24, 2011

REVERSED

Edward M. Brown, of Charleston, for Petitioners.

Donald Higgins Howe, of Howe & Wyndham, of Charleston, George J. Morris, of Charleston, Walter Bilbro, Jr., of Charleston, for Respondents.

Charles M. Feeley, of Summerville, Guardian *Ad Litem*.

JUSTICE KITTREDGE: This is an heirs' property dispute regarding a ten-acre tract of land on James Island in Charleston County, South Carolina. The dispute came before the circuit court in February 2005, when Respondents brought an action to quiet title. The circuit court granted summary judgment to Petitioners. The court of appeals reversed. *Robinson v. Estate of Harris*, Op. No. 2008-UP-705 (S.C. Ct. App. filed Dec. 16, 2008). We reverse the decision of the court of appeals and reinstate the circuit court's order granting summary judgment to Petitioners.

I.

The facts of this case are, in significant part, the same as those set forth in the related matters of *Robinson v. Estate of Harris*, 388 S.C. 616, 698 S.E.2d 214 (2010); *Robinson v. Estate of Harris*, 388 S.C. 630, 698 S.E.2d 222 (2010); *Robinson v. Estate of Harris*, 388 S.C. 645, 698 S.E.2d 229 (2010) and *Robinson v. Estate of Harris*, 389 S.C. 360, 698 S.E.2d 801 (2010). As in these companion cases, the underlying dispute is about the identity of the true heirs of Simeon B. Pinckney. Simeon B. Pinckney owned a twenty-acre tract of land on James Island at the time of his death in the early 1920s. The companion cases concern a 4.3-acre tract derived from this property. At issue in this case is an adjacent ten-acre tract derived from the same property.

The ten acres at issue in this case were conveyed by Laura and Herbert Pinckney to Ellis Pinckney by deed dated October 26, 1946. Ellis Pinckney died in 1976. In his will, Ellis Pinckney bequeathed all of his personal and real property to his daughters, Eloise Pinckney Harris and Isadora A. Pinckney, "to share and share alike." Isadora Pinckney served as executrix,

and she was duly discharged of her duties by the probate court by Letters Dismissory dated January 9, 1978.

After Isadora Pinckney's death, Eloise Pinckney Harris served as the executrix for Isadora's estate. The probate court issued Letters Dismissory dated March 25, 1981 releasing Eloise Pinckney Harris from her duties. In addition, the probate court issued a "Devise/Descent of Real Estate and Description" on behalf of Isadora Pinckney, deceased, as grantor, to Eloise Pinckney Harris as the sole devisee and grantee. Through these circumstances, Eloise Pinckney Harris thus became the sole owner of the ten-acre tract now in contention.

The estates of both Ellis Pinckney and Isadora Pinckney were properly probated in the Charleston County Probate Court. Notice of the Letters Dismissory discharging the executrixes of the estates of Ellis Pinckney and Isadora Pinckney were given by publication. None of the Respondents filed any claims or objections regarding the estates pursuant to statutory requirements.

Eloise Pinckney Harris subsequently died, and her son, Petitioner Jerome C. Harris, was appointed as the personal representative of her estate. Eloise Pinckney Harris devised the bulk of her estate to Jerome C. Harris.

The dispute over ownership of the ten-acre area began in 2004 when Jerome C. Harris was appointed the personal representative of his mother's estate and reportedly sought to distribute the property to himself as the sole devisee. At that time, Respondents filed a petition to stay the issuance of a deed of distribution. Respondents claimed the property had been improperly willed to the decedent, Eloise Pinckney Harris, because her predecessors-in-interest, Isadora Pinckney and Ellis Pinckney, had no legitimate interest in the property.

Respondents filed an action seeking to quiet title to the ten acres. The essence of Respondents' complaint is that the 1946 conveyance to Ellis Pinckney was invalid. Specifically, Respondents claim their ancestor,

Isabella Pinckney, was the only lawful wife of Simeon B. Pinckney and that Laura, Herbert, and Ellis Pinckney committed fraud when they claimed to be Simeon's lawful heirs.

II.

The circuit court granted summary judgment to Petitioners because (1) Respondents' action was barred by South Carolina Code section 15-3-340 (2005) and (2) almost sixty years had passed since the conveyance to Ellis Pinckney and two estates were properly probated in Charleston County without any claims by Respondents. The court of appeals reversed and remanded, finding section 15-3-340 was not applicable to this case.[1] The court of appeals refused to uphold the circuit court's order on the basis of laches, finding "there is no mention of laches in the appealed order." While it is true the word "laches" does not appear in the circuit court order, we find it manifest that the circuit court considered, and relied on, laches. Moreover, we find this action, like the companion cases, is barred by laches. *See Hallums v. Hallums*, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988) ("Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of [the] facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches." (internal citation omitted)).

[1] Section 15-3-340 provides: "No action for the recovery of real property or for the recovery of the possession of real property may be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action." Petitioners did not raise any issue with regard to the applicability of this statute in their petition for writ of certiorari.

III.

The circuit court's order plainly referenced the excessive period of time that passed between the 1946 conveyance to Ellis Pinckney and Respondents' first objection to that conveyance in 2005. For example, the circuit court noted that Respondents "sat idlely [sic] by for a period in excess of fifty-five (55) years assumedly knowing that they may have a right in the real property of Ellis Pinckney." In addition, the circuit court observed that:

> It has been almost sixty (60) years since the real property that is the subject of this action was conveyed to Ellis Pinckney. There is no provision in the Code of Laws of South Carolina that accords anyone the right, legally or equitably, to bring an action sixty (60) years after the fact. [Respondents] knew of their rights well in advance of this day. It was incumbent upon the [Respondents] to file the appropriate action in a court of competent jurisdiction to have those rights adjudicated.

Accordingly, we believe that the doctrine of laches formed a part of the circuit court's reasoning in dismissing Respondents' complaint. Under the circumstances presented, Respondents' inaction for many decades constitutes laches.

IV.

Consistent with our decisions in the companion cases regarding the 4.3-acre tract derived from the same ancestor, we hold Respondents' action to quiet title was barred by the doctrine of laches. Accordingly, we reverse the decision of the court of appeals and reinstate the circuit court's order granting summary judgment to Petitioners.

REVERSED.

TOAL, C.J., and Acting Justices James E. Moore and E. C. Burnett, III, concur. BEATTY, J., dissenting in a separate opinion.

JUSTICE BEATTY, dissenting. Sara Mae Robinson and others ("Respondents") brought this action against numerous defendants in a dispute over heirs' property. Three of those defendants, The Estate of Eloise Pinckney Harris, Jerome C. Harris, and Judy P. Singleton ("Petitioners"), have petitioned this Court for a writ of certiorari to review a decision of the Court of Appeals that reversed a circuit court order granting summary judgment to Petitioners on the ground the complaint was untimely. See Robinson v. Estate of Eloise Pinckney Harris, Op. No. 2008-UP-705 (S.C. Ct. App. filed Dec. 16, 2008) ("Harris/Singleton appeal"). We granted the petition for review and the majority has now reversed the decision of the Court of Appeals. I respectfully dissent.

I. FACTS

The property at issue in this case is 10 acres located on James Island that was previously part of a 20-acre area owned by Simeon B. Pinckney at the time of his death in Charleston County in the early 1920s.[2] Simeon B. Pinckney died intestate, allegedly leaving a wife, Laura Pinckney, and two sons, Ellis and Herbert Pinckney, as his heirs.

The land held by Simeon B. Pinckney originated from a conveyance to him by deed executed in 1874 (and recorded in 1875) from Thomas Moore. The property was described as being 20 acres, more or less. In 1888, Simeon B. Pinckney conveyed 5 acres of this property to his wife, Isabella Pinckney, leaving approximately 15 acres. A survey conducted in 1923, however, found that exactly 14.3 acres remained.

By deed dated October 26, 1946, Laura and Herbert Pinckney conveyed 10 acres of this property to Ellis Pinckney. The 10-acre area is located in the western portion of the property formerly held by Simeon B. Pinckney. The dispute in this case concerns the ownership of these 10 acres.

[2] Simeon B. Pinckney's year of death is variously stated in the materials for this case as 1921, 1922, or 1923.

In a contemporaneous deed also dated October 26, 1946, Laura and Ellis Pinckney conveyed 4.3 acres to Herbert Pinckney. The 4.3-acre area was located in the eastern portion of the land formerly held by Simeon B. Pinckney.

A clear title action was brought in 1966 regarding the 4.3-acre area conveyed to Herbert Pinckney, and a deed emanating from that action was recorded in the Register of Mesne Conveyances for Charleston County. None of the Respondents or their predecessors-in-interest filed responsive pleadings in that proceeding. The 4.3 acres is the subject of companion cases before this Court.

Ellis Pinckney, who had received the 10-acre area in dispute via the 1946 deed, died in 1976. In his will he bequeathed all of his personal and real property to his daughters, Eloise Pinckney Harris and Isadora A. Pinckney, "to share and share alike." Isadora Pinckney served as his executrix, and she was duly discharged of her duties by the probate court by Letters Dismissory dated January 9, 1978.

After Isadora Pinckney's death, Eloise Pinckney Harris served as the executrix for Isadora's estate. The probate court issued Letters Dismissory dated March 25, 1981 releasing Eloise Pinckney Harris from her duties. In addition, the probate court issued a "Devise/Descent of Real Estate and Description" on behalf of Isadora Pinckney, deceased, as grantor, to Eloise Pinckney Harris as the sole devisee and grantee. Through these circumstances, Eloise Pinckney Harris thus became the sole owner of the 10-acre area now in contention.

The estates of both Ellis Pinckney and Isadora Pinckney were properly probated in the Charleston County Probate Court. Notice of the Letters Dismissory discharging the executrixes of the estates of Ellis Pinckney and Isadora Pinckney were given by publication. None of the Respondents filed any claims or objections regarding the estates pursuant to statutory requirements.

Eloise Pinckney Harris subsequently died and her son, Petitioner Jerome C. Harris, was appointed as the personal representative of her estate pursuant to the terms of her will. Eloise Pinckney Harris devised the bulk of her estate to Jerome C. Harris.

The dispute over ownership of the 10-acre area began in 2004 when Jerome C. Harris was appointed the personal representative of his mother's estate and reportedly sought to distribute the property to himself as the sole devisee. At that time, Respondents filed a petition to stay the issuance of a deed of distribution. Respondents claimed the property had been improperly willed to the decedent, Eloise Pinckney Harris, because her predecessors-in-interest, Isadora Pinckney and Ellis Pinckney, had no legitimate interest in the property.

While the probate of Eloise Pinckney Harris's estate was pending, Respondents filed the current action in the circuit court of Charleston County against Petitioners on February 1, 2005, seeking to quiet title to the property. The proceeding in the probate court was stayed by order of the probate court dated July 1, 2005 pending resolution of the circuit court matter.

In an amended complaint, Respondents sought to quiet title to property located on James Island, South Carolina that was originally part of the estimated 20 acres acquired by Simeon B. Pinckney in 1874. Respondents asserted they were the only surviving, legitimate heirs of Simeon B. Pinckney and that they were the fee simple owners of the property described in an attached lis pendens. They sought an order confirming their title. Respondents stated partitioning of the property was "not feasible" and asked that the property be sold and the proceeds be distributed among Respondents.

Respondents alleged Isabella Pinckney was the only lawful wife of Simeon B. Pinckney. They contended Simeon B. Pinckney died intestate and was survived by a son, Samuel James Pinckney, and a daughter, Mary Pinckney, but no proceedings were ever commenced to probate Simeon B. Pinckney's estate.

Respondents claimed Laura, Ellis, and Herbert Pinckney were not the true heirs of Simeon B. Pinckney as Laura Pinckney was never Simeon B. Pinckney's legal spouse. Respondents asserted the three "executed and recorded cross deeds to attempt to fraudulently divide the ownership between Ellis and Herbert [Pinckney] of the remaining" 14.3 acres that Simeon B. Pinckney had owned at his death and that should have passed to his heirs by intestacy, Samuel James Pinckney and Mary Pinckney. Respondents alleged the three fraudulently misappropriated the 14.3 acres and took them from the true owners, who could not read and write and were not aware of the conveyances. Respondents maintained they are the true heirs of Simeon B. Pinckney through their ancestor Samuel James Pinckney.

Respondents contended that, as a result of fraudulent cross-deeds in 1946 by individuals who had no lawful interest in the property, the 10-acre area was eventually conveyed to the late Eloise Pinckney Harris, who during her lifetime attempted to convey 1.3 acres of the 10 acres to Petitioner Judy P. Singleton.

In their answer, Petitioners asserted the running of the statute of limitations[3], the closing of the administration of the estates of Ellis Pinckney and Isadora Pinckney, as well as laches, waiver, and estoppel.

Petitioners herein, the Estate of Eloise Pinckney Harris; Eloise's son and personal representative, Jerome C. Harris, who claimed to be Eloise's only heir; and Judy P. Singleton, who claimed she received a portion of Eloise's interest in the 10-acre area during Eloise's lifetime, filed a motion for summary judgment dated April 11, 2006 "based upon the relevant case law and statutory enactments."

A hearing on Petitioners' summary judgment motion was held on November 6, 2006.[4] At the hearing, counsel for Petitioners argued

[3] A specific statute was not cited in the answer.

[4] The November 6, 2006 hearing was held both to reconsider prior orders granting summary judgment regarding the 4.3 acres at issue in the companion cases, as well as to

Respondents' complaint was barred by a statute of limitations that precluded claims for the recovery of real property after 40 years[5]; the time for filing a claim against an estate under the South Carolina Probate Code has expired for the two estates that have already been probated; and that Petitioners and their predecessors have occupied the property since at least 1922, so the complaint is barred by the doctrines of laches and waiver. Counsel argued Respondents sat "idly by" and were "asking this court by judicial fiat to . . . invoke or 'invent' a statute that allows them to now come in and claim their interest in this property."

In contrast, Respondents argued the 1946 deeds were fraudulent and therefore void and could not convey legal title; further, they had no notice that the deeds existed. Respondents averred Ellis and Herbert Pinckney were not the sons of Simeon B. Pinckney and that Laura Pinckney was not his wife, which could be shown by an examination of the public record. Respondents declared "there was extrinsic fraud that was perpetrated by Laura Pinckney, Ellis Pinckney, and Herbert Pinckney" because "[t]hey have no relationship whatsoever to [Simeon B.] Pinckney, the true owner of the property[,] and Samuel James Pinckney, the only legitimate child who survived at his father's death."

In response, Petitioners argued the two Letters Dismissory from the probate court ending the administration of the estates of Ellis Pinckney and Isadora Pinckney constituted an adjudication of sorts on the property that is

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hear the motion for summary judgment concerning the 10-acre area at issue in the current (Harris/Singleton) matter.

[5] Petitioners did not identify a specific statutory section during the discussion. However, section 15-3-380 of the South Carolina Code refers to a 40-year period. See S.C. Code Ann. § 15-3-380 (2005) ("No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period.").

the subject of this litigation, as the property was the main asset in both estates, and the notice by publication in the newspaper provided due notice to all parties of the disposition of the property.

At the end of the hearing, the circuit court orally granted Petitioners' motion for summary judgment based on the 40-year statute of limitations referenced by counsel. Subsequently, the circuit court formally granted summary judgment to Petitioners by written order filed January 9, 2007, finding Respondents' lawsuit to quiet title to the 10-acre area was untimely, but cited a different statute of limitations. The Court of Appeals reversed in an unpublished decision. Robinson v. Estate of Eloise Pinckney Harris, Op. No. 2008-UP-705 (S.C. Ct. App. filed Dec. 16, 2008). Petitioners filed a petition for a writ of certiorari seeking review of the decision of the Court of Appeals, which this Court granted.

II. LAW/ANALYSIS

A.

In its written order finding Respondents' lawsuit was untimely, the circuit court observed it was undisputed that two estates, those of Ellis Pinckney and Isadora Pinckney, "were properly and legally probated in Charleston County, [and Respondents] made no claims against either Estate." The court further determined the current action was barred by section 15-3-340 of the South Carolina Code:

> There can be no argument from these [Respondents] or otherwise that publication pursuant to the Probate statutes was not properly followed. It has been almost sixty (60) years since the real property that is the subject matter of this action was conveyed to Ellis Pinckney. There is no provision in the Code of Laws of South Carolina that accords anyone the right, legally or equitably, to bring an action sixty (60) years after the fact.
>
> . . . .

> Under section 15-3-340 of the Code of Laws of South Carolina, these [Respondents'] actions are barred. Section 15-3-340 states, "*no action for recovery of real property or recovery of the possession of real property may be maintained unless it appears that the Plaintiff, his ancestors, predecessors or grantors was seized or possessed of the premise in question within ten (10) years before the commencement of the action.*" The individual[s] that possess the property that is the subject matter of this action, were not the ancestors, predecessors or grantors of the Plaintiffs [i.e., Respondents]. Specifically, Ellis Pinckney and his daughters, Isadora and Eloise Pinckney, exclusively possessed this property to the exclusion of all others for more than ten (10) years prior to the commencement of this action.
>
> [Respondents] sat idlely by for a period in excess of fifty-five (55) years assumedly knowing that they may have a right in the real property of Ellis Pinckney. Simeon Pinckney, the father of Ellis Pinckney, possess[ed] this property prior to 1923, the date of his death. If that figure is used as a starting point insofar as the statute of limitation is concerned, the [Respondents] waited for a period of eighty-five (85) years.
>
> The purpose of the statutory scheme as set out by the Code of Laws of the State of South Carolina relative to the recovery of real property is to put an end to controversies about real property. There is no statute in the South Carolina Code of Laws which allows a Plaintiff to bring an action for recovery of property after a period of eighty (80) years.

Section 15-3-340, which was relied upon by the circuit court in its final, written order provides as follows:

> No action for the recovery of real property or the recovery of the possession of real property may be maintained unless it

> appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action.

S.C. Code Ann. § 15-3-340 (2005).

B.

The Court of Appeals reversed the grant of summary judgment and remanded the matter for further proceedings in an unpublished opinion. Robinson v. Estate of Eloise Pinckney Harris, Op. No. 2008-UP-705 (S.C. Ct. App. filed Dec. 16, 2008). As part of its initial analysis, the Court of Appeals first held the circuit court erred in finding the lawsuit was barred under section 15-3-340 because that statute is inapplicable. Id., slip op. at 1. The Court of Appeals explained:

> Whereas section 15-3-340 addresses actions for either the recovery of real property or the recovery of possession of real property, [the] amended complaint asserted the ownership interest[s] in the subject property asserted by the Estate of Eloise Harris and the devisees of Eloise Harris were based on "erroneous forgeries and fraudulent cross-deeds and devises." This allegation was the gravamen of [the] lawsuit insofar as it concerned the ten-acre tract. As such, any limitation period set by section 15-3-340 would be inapplicable.

Id. at 1.

In reaching this conclusion, the Court of Appeals cited McKinnon v. Summers, 224 S.C. 331, 79 S.E.2d 146 (1953), in which this Court held that a complaint for cancellation of deeds on the ground of forgery is distinguishable from an action for the recovery of real property and, thus, is not governed by the predecessor statute to section 15-3-340 (citing section 10-124 of the 1952 Code). Id. at 2. The Court of Appeals further stated that, even if Respondents' complaint was taken at face value as one to quiet title,

the action would not be governed by section 15-3-340 because an action to quiet title is in equity and statutes of limitations are not generally applicable to equitable actions, citing Fox v. Moultrie, 379 S.C. 609, 613, 666 S.E.2d 915, 917 (2008) ("An action to quiet title is one in equity."); Parr v. Parr, 268 S.C. 58, 67, 231 S.E.2d 695, 699 (1977) (stating statutes of limitation are generally not applicable in equitable actions). Id.

As a secondary point, the Court of Appeals noted the parties had addressed in their briefs the applicability of laches and the legal ramifications of Respondents' failure to file claims against the estates of Ellis Pinckney and Isadora Pinckney, but that "[n]either point, however, is a basis on which to affirm the appealed order." Id. at 2. The Court of Appeals stated the circuit court's reference to Respondents' failure to file claims against the two estates "was not presented as an independent ground for summary judgment, and there is no mention of laches in the appealed order." Id.

C.

Petitioners contend the decision of the Court of Appeals should be reversed, arguing the circuit court properly granted their motion for summary judgment because there are no genuine issues of material fact and as a matter of law Respondents' complaint is untimely. I disagree.

Petitioners have not challenged the holding of the Court of Appeals regarding section 15-3-340. As a result, the ruling that section 15-3-340 is not applicable to bar Respondents' action and that summary judgment cannot be granted on that basis is final. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (stating an unchallenged ruling, right or wrong, is the law of the case).

Petitioners argue, however, the Court of Appeals erred in reversing the grant of summary judgment because Respondents' complaint was barred on the grounds of laches and/or waiver, and these grounds were implicitly included in the circuit court's order. Petitioners concede the circuit court did not use the terms "laches" or "waiver" in its order, but argue the court was

referring to either or both of these concepts in its finding that "[t]he Plaintiff[s] sat idlely by for a period in excess of fifty-five (55) years assumedly knowing that they may have a right in the real property of Ellis Pinckney."

Petitioners note the circuit court also found the two estates, those of Ellis Pinckney and Isadora Pinckney, were properly probated without any claims or objections being filed. Petitioners argue that "given the broad language of the conclusion in the [circuit] [c]ourt's Order granting Summary Judgment to Petitioners, it is without question that there does exist, as evidenced by the very language of the Summary Judgment Order, an independent ground that was cited by the Trial Court as a basis for granting their Summary Judgment [motion]." Petitioners assert "[i]t is well established in South Carolina that the doctrine[s] of waiver and laches apply to actions such as in the instant case."

In contrast, Respondents contend the circuit court's written order was based solely on the statute of limitations set forth in section 15-3-340 and not upon the equitable defenses of laches and/or waiver. In support of this argument, they point to the transcript of the hearing in this matter where the circuit court stated Petitioners were entitled to summary judgment based "[o]n the statute of limitations."[6] They further assert that, even if the circuit court's order was implicitly based upon the equitable defenses of laches and/or waiver, the matter should be remanded for trial because the defenses have not been appropriately raised and supported by Petitioners.

[6] At the end of the hearing in the current matter, counsel for Petitioners argued Petitioners were entitled to summary judgment. The circuit court stated, "On the statute of limitations you are." The court explained, "It's a forty-year statute, it's applicable." At the conclusion of the hearing, the circuit court reiterated that it was granting summary judgment based on a 40-year statute of limitations. This is notable because section 15-3-340, which is cited in the circuit court's final, written order, is not a 40-year statute, it is a 10-year statute. Therefore, it appears the circuit court was referring to a different statute, possibly S.C. Code Ann. § 15-3-380 (which provides for a limitations period of 40 years) during the hearing.

I am persuaded by Respondents' arguments in this regard. After considering all of the circumstances, I believe the Court of Appeals correctly determined that the circuit court's order, while granting summary judgment based on the statutory ground of section 15-3-340, did not additionally rule upon any of the other grounds asserted by Petitioners. The circuit court referenced only a statute of limitations in its final, written order, without discussing the legal requirements to establish laches or any other theory set forth by Petitioners to bar Respondents' complaint.

As noted above, the circuit court expressly stated in its oral ruling from the bench that it was granting summary judgment based only on a "statute of limitations"; the citation for the statute was not discussed, but it was referred to as a 40-year statute. Since the final order clearly references a different statute than the one discussed at the hearing, it is apparent the circuit court changed the basis for its ruling to some extent.

However, it is not evident that the circuit court broadened its ruling to include laches and/or waiver. The circuit court did state at the hearing that it had expanded the basis for its order granting summary judgment in the companion cases so as to include laches. Nevertheless, it went on to orally rule that Petitioners were entitled to summary judgment based solely on a statute of limitations, without including laches or any other ground, even though the court had just discussed that additional ground in the context of the other, companion cases that concerned the 4.3-acre area. Although this oral ruling is not binding,[7] the circuit court's final, written order also omitted

[7] See, e.g., Rule 58(a), SCRCP ("Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record."); Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly. The written order is the trial judge's final order and as such constitutes the final judgment of the court." (citation omitted)); Doe v. Doe, 324 S.C. 492, 501, 478 S.E.2d 854, 859 (Ct. App. 1996) ("Judgments . . . are not final until written and entered."). Similarly, the circuit court noted at the hearing in the current, Harris/Singleton matter that it had expanded upon its original grounds for granting summary judgment in the order in the companion cases concerning the 4.3-acre area that had been part of Simeon B. Pinckney's estate.

any discussion of laches as a basis for granting summary judgment, and it did not include an analysis of the legal requirements for establishing laches. Rather, it expressly cited and relied upon the statute of limitations set forth in section 15-3-340. Therefore, although the order is somewhat ambiguous, I agree with the conclusion of the Court of Appeals that the circuit court did not base its ruling on the doctrine of laches or any other theory as no other basis was clearly and fully developed in the circuit court's order.

Moreover, even if the circuit court's order could be deemed to implicitly rule on laches or any other equitable theory asserted by Petitioners, such an implicit ruling, without any accompanying analysis or discussion, would not give this Court anything to review, and further development of the record is necessary in this regard. See Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n, 290 S.C. 409, 351 S.E.2d 151 (1986) (stating implicit findings, as well as general statements and conclusions, do not provide sufficient detail to enable appellate review); cf. Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (stating an appellate court should not be forced to "grope in the dark" to ascertain the precise nature of an issue on appeal); Carey v. Snee Farm Cmty. Found., 388 S.C. 229, 694 S.E.2d 244 (Ct. App. 2010) (vacating the trial court's grant of summary judgment and remanding the matter for additional factual findings and accompanying legal analysis where the basis for the trial court's grant of summary judgment could not be clearly determined from the record).

I am cognizant of the problems with heirs' property from both sides of the spectrum, i.e., the heirs whose ownership interests are infinitely difficult to untangle, and those who come many years after the events that gave rise to questions about ownership who desire the real estate records to have some sense of finality and reliability. A bright-line rule cannot be adopted setting forth an absolute time limit for such proceedings, as many variables are at stake, and even when legal statutes of limitation have expired, equitable considerations may come into play that cannot be determined from an undeveloped record. Cf., e.g., Mr. T. v. Ms. T., 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2008) (holding complicated decisions in family court

proceedings cannot be made in a vacuum with an undeveloped record based on strict notions of finality).

Because this case comes before the Court in the posture of a party seeking summary judgment, the allegations in the complaint are deemed true for purposes of this analysis. In their complaint, Respondents alleged there was extrinsic fraud committed in connection with the 1946 deeds. "Extrinsic fraud is collateral or external to the trial of the matter." Hagy v. Pruitt, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000). "It is fraud that 'induces a person not to present a case or deprives a person of the opportunity to be heard.'" Id. (quoting Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "Intrinsic fraud, on the other hand, is fraud presented and considered in the trial." Id. at 431-32, 529 S.E.2d at 718.

Under proper circumstances, an allegation of extrinsic fraud can be considered despite the existence of an applicable statute of limitations that would otherwise bar the claim. Id. at 431, 529 S.E.2d at 717. The avoidance of the statute of limitations does not mean, however, that an allegation of extrinsic fraud may be considered for an unlimited period, however, because the doctrine of laches will still apply in determining whether such an action may be maintained. Id. at 431 n.7, 529 S.E.2d at 717 n.7.

"In order to establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches." Historic Charleston Holdings, L.L.C. v. Mallon, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009). It is an equitable doctrine. Id.; see also Hallums v. Hallums, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988) ("Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches." (citation omitted)).

Although the circuit court stated Respondents should have filed an appropriate action in this case sooner, the court did not make specific findings of fact or analyze the requirements for establishing laches, and it would be unfair to hold as a matter of law that Respondents' complaint is barred on this basis or on any other equitable basis in light of the fact that the circuit court did not explicitly so rule, and in light of the fact that a question exists as to the applicability of an equitable defense. It is well-established that one who seeks equitable relief must act equitably in the first instance, and the allegation at issue is reportedly fraud and/or misconduct by Petitioners' ancestral predecessors-in-interest. See generally First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998) (observing the doctrine of unclean hands precludes a party from recovering in equity if the party acted unfairly in the matter that is the subject of the litigation to the prejudice of the opposing party). Consequently, I would hold the circuit court erred in granting summary judgment to Petitioners and affirm the opinion of the Court of Appeals.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Appellant,

v.

Harry Oxner, Respondent.

Appeal from Georgetown County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 26915
Heard September 21, 2010 – Filed January 24, 2011

AFFIRMED

Robert J. Stephenson, IV, of Columbia, for Appellant.

Deborah Harrison Sheffield, of Columbia, and Robert L. Lumpkin, Jr., of Lumpkin, Oxner & Stacy, of Georgetown, for Respondent.

JUSTICE PLEICONES: Respondent was convicted in magistrate's court of preparing a baited dove field in violation of S.C. Code Ann. § 50-1-10 (2008) and appealed to circuit court. After a hearing, the circuit court judge issued a written order requiring that respondent's conviction be "reversed and

dismissed" based upon her *sua sponte* conclusion that the magistrate's court lacked subject matter jurisdiction over the charge. The State did not challenge that order in the circuit court but instead brought this appeal. We affirm the circuit court's dismissal as the State has failed to preserve any issue related to that ruling for our appellate review.

The State argues, and respondent agrees, that the circuit court erred in concluding that respondent's magistrate's court conviction for violating § 50-1-10 was void for lack of subject matter jurisdiction. Respondent argues, however, and we agree, that review of the merits of the State's appeal is barred because the State failed to ask the circuit court judge to reconsider her decision before appealing.

ISSUE

Whether a party may appeal an erroneous subject matter jurisdiction ruling without first preserving the issue for appellate review?

ANALYSIS

We begin by correcting the State's mischaracterization of respondent's appeal in the circuit court. Specifically, the State argues this criminal appeal is not subject to the South Carolina Rules of Civil Procedure. In making that argument, the State ignores S.C. Code Ann. § 18-3-10 (Supp. 2009) which provides that criminal appeals from magistrate's court are made to the Court of Common Pleas. Further, under the SCRCP, these appellate "proceedings in the circuit court shall be in accordance with [the SCRCP]." Rule 74, SCRCP.[1]

[1] We overrule State v. Brown, 344 S.C. 302, 543 S.E.2d 568 (Ct. App. 2001) and Horry County v. Parbel, 378 S.C. 253, 662 S.E.2d 466 (Ct. App. 2008) to the extent they hold that Rule 74 has no application to criminal convictions appealed to the circuit court.

The State next argues that because subject matter jurisdiction can be raised at any point in the litigation, including *sua sponte* by the court,[2] it was not obligated to ask the circuit court judge to reconsider her ruling before appealing to this Court. We disagree.

"[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court." Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939). An argument that is not raised to an intermediate appellate court is not preserved for review by this Court. United Dom. Realty Trust v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App 1992). Even though subject matter jurisdiction may be raised at anytime, there is no error preservation exception allowing a party to bypass calling an erroneous ruling to the attention of the tribunal making it before appealing that ruling to a higher court. Compare Dunlap & Dunlap v. Zimmerman, 188 S.C. 322, 199 S.E. 296 (1938) (once the issue of subject matter jurisdiction has been decided adversely to a party, he must preserve his exception or be barred from raising the issue later); cf. DeTreville v. Groover, 219 S.C. 313, 65 S.E.2d 232 (1951) (party abandoned subject matter jurisdiction issue by failing to argue it in brief).

The State failed to ask the circuit judge to reconsider her subject matter jurisdiction ruling before appealing the order to this Court. Accordingly, it has failed to preserve any issue related to that ruling for our review. See City of Rock Hill v. Suchenski, 324 S.C. 12, 646 S.E.2d 879 (2007) (holding Rule 59(e) applies to circuit court sitting in appellate capacity to review criminal convictions); State v. Bailey, 368 S.C. 39, 626 S.E.2d 898 (Ct. App. 2006) *cert. denied* March 8, 2007 (circuit court's appellate error must be called to its attention by petition for rehearing in order to be preserved for further appellate review).

[2] See, e.g., State v. Tumbleston, 376 S.C. 90, 654 S.E.2d 849 (Ct. App. 2007).

CONCLUSION

The order dismissing the charge against respondent is

AFFIRMED.

KITTREDGE and HEARN, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which BEATTY, J., concurs.

CHIEF JUSTICE TOAL: I respectfully dissent. To my mind, issue preservation should be no bar to the judge's erroneous ruling on subject matter jurisdiction. Our case law is clear that a judge's erroneous assumption of jurisdiction, be it an explicit finding of jurisdiction or assumed jurisdiction, may be raised at any time on appeal and addressed *de novo* by the appellate court without regard to our customary issue preservation requirements. *See In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009) ("Issues related to subject matter jurisdiction may be raised at any time."); *Arnal v. Fraser*, 371 S.C. 512, 517 n.2, 641 S.E.2d 419, 421, n.2 (2007); *Carter v. State*, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998). I see no reason why a judge's erroneous ruling that she lacks subject matter jurisdiction should be treated differently from an erroneous ruling that she has subject matter jurisdiction. Here, the circuit court clearly had subject matter jurisdiction over this matter, and I would remand the case for the circuit court to exercise that jurisdiction.

BEATTY, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Department of Motor Vehicles, Respondent,

v.

Larry McCarson, Appellant.

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

Opinion No. 26916
Heard October 7, 2010 – Filed January 24, 2011

REVERSED

Carson McCurry Henderson, of Greenwood, Heath Preston Taylor, of West Columbia, for Appellant.

Deputy General Counsel Philip S. Porter, General Counsel Frank L. Valenta, Jr., Assistant General Counsel Linda A. Grice, of Blythewood, for Respondent.

JUSTICE BEATTY: Larry McCarson appeals the order of the Administrative Law Court (ALC) that resulted in the suspension of his

driver's license following an arrest for driving under the influence (DUI).[1] In his appeal, McCarson claims the ALC erred in reversing the decision of the Hearing Officer for the Division of Motor Vehicles Hearings (DMVH) that rescinded the initial license suspension. Specifically, McCarson contends his license should not have been suspended as there was no admissible evidence to establish probable cause for his DUI arrest. We agree and reverse the decision of the ALC.

I. Factual/Procedural History

At approximately 2:00 a.m. on January 1, 2006, First Sergeant Kimbrell was on routine patrol near the junction of US 221 and I-385 in Laurens County. While on patrol, Kimbrell observed McCarson drive his vehicle over a curb, fail to yield the right of way, make an improper turn, and make a wide turn on an entrance ramp of I-385 near a divider wall. Because his patrol vehicle was not equipped with a video camera, Kimbrell requested assistance after pulling McCarson over for the driving violations.

Shortly thereafter, Trooper Michael Jones arrived at the location where McCarson was being detained by his supervisor, Sergeant Kimbrell. Upon his arrival, Kimbrell advised Jones of the reason for the traffic stop. Jones then requested that McCarson step to the rear of the vehicle. After reading McCarson his Miranda[2] rights, Jones ordered McCarson to perform several field sobriety tests. According to Jones, McCarson performed "poorly" on the Horizontal Gaze Nystagmus (HGN) test and the "one-leg stand" test. As a result, Jones arrested McCarson for DUI and transported him to the Laurens County Law Enforcement Center.

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[1] S.C. Code Ann. § 56-5-2930 (2006 & Supp. 2009) (outlining offense of operating a motor vehicle while under the influence of alcohol or drugs).

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

After being read the Advisement of Implied Consent rights[3] and his Miranda rights, McCarson agreed to submit to a DataMaster breathalyzer test. The test results revealed that McCarson had a blood alcohol level of 0.17 percent. Because McCarson's blood alcohol level was greater than 0.15 percent, Jones issued McCarson a Notice of Suspension pursuant to section 56-5-2951(A) of the South Carolina Code.[4]

Within the statutorily-prescribed time period,[5] McCarson filed a request for an administrative hearing before the DMVH to challenge the license suspension.

On March 1, 2006, Hearing Officer Tracy Holland held a hearing on McCarson's license suspension.[6] Trooper Jones, but not Sergeant Kimbrell,

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[3] See S.C. Code Ann. § 56-5-2950(A) (2006) ("A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs.").

[4] See S.C. Code Ann. § 56-5-2951(A) (2006) ("The Department of Motor Vehicles must suspend the driver's license . . . of a person who has an alcohol concentration of fifteen one-hundredths of one percent or more.").

[5] See S.C. Code Ann. § 56-5-2951(B)(2) (2006) ("Within thirty days of the issuance of the notice of suspension, the person may request an administrative hearing.").

[6] Section 56-5-2951 provides that the scope of the administrative hearing must be limited to whether the person:

> **(1) was lawfully arrested or detained;**
> (2) was advised in writing of the rights enumerated in Section 56-5-2950;
> (3) refused to submit to a test pursuant to Section 56-5-2950; or
> (4) consented to taking a test pursuant to Section 56-5-2950, and the:
> **(a) reported alcohol concentration at the time of testing was fifteen one-hundredths of one percent or more;**
> (b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;

appeared on behalf of the Department of Motor Vehicles (the "Department"). At the hearing, Jones offered an Incident Report to supplement his own testimony. The Incident Report detailed Kimbrell's observations of McCarson's erratic driving prior to Jones's arrival at the scene. Jones also sought to introduce the following documents: his DataMaster certification, the implied consent advisement form, the notice of suspension, and the traffic ticket.

McCarson's counsel objected to the admission of the Incident Report on the ground it constituted inadmissible hearsay. In conjunction, counsel sought to exclude the other documents on the basis that "there is no foundation and in trying to lay the foundation, there's hearsay, without the other officer here." Holland agreed and, as a result, excluded the proffered evidence. In turn, Holland ruled:

> I find that the testimony of Trooper Jones failed to prove that [McCarson] was lawfully arrested for driving under the influence. Trooper Jones failed to present any testimony or other evidence which led him to believe that [McCarson] was operating a motor vehicle while under the influence of alcohol or drugs . . . There was no testimony about the reason for the stop, no testimony about attributes or behavior which typically lead an officer to believe someone is under the influence, and no testimony about [McCarson's] performance on the field sobriety tests. The only testimony given was that the field sobriety tests indicated he was under the influence.

(c) tests administered and samples obtained were conducted pursuant to Section 56-5-2950; and
(d) the machine was working properly.

S.C. Code Ann. § 56-5-2951(F) (2006) (emphasis added). We note that this code section was amended in 2006 and rewritten in 2008. Because there were no substantive amendments that would affect the outcome of this case, we have cited to the 2006 code section given McCarson was arrested on January 1, 2006, prior to the subsequent amendments.

Ultimately, Holland concluded that the Department failed to meet its burden of proof. Consequently, by order dated March 30, 2007, Holland rescinded McCarson's license suspension and ordered the Department to restore McCarson's driving privileges.

The Department appealed Holland's order to the ALC. In challenging the order, the Department primarily asserted Holland erred in excluding the documentary evidence that served as the basis for establishing probable cause for McCarson's arrest.

Based on the parties' briefs, the Honorable John McLeod considered the central question of whether Sergeant Kimbrell's statements should have been admitted pursuant to an exception to the rule against hearsay. Finding no enumerated hearsay exception,[7] Judge McLeod relied on the decision of the Court of Appeals in Summersell v. South Carolina Department of Public Safety, 334 S.C. 357, 513 S.E.2d 619 (Ct. App. 1999), vacated in part by 337 S.C. 19, 522 S.E.2d 144 (1999).

In Summersell, an officer responded to the call of a citizen who had witnessed Summersell drive an automobile into a ditch. When the officer arrived at the scene, she observed Summersell "passed out" in the driver's seat of the automobile with the keys in the ignition. The citizen assisted Summersell in exiting the vehicle because Summersell could not do so on his own. Id. at 361, 513 S.E.2d at 621. According to the officer, Summersell smelled strongly of alcohol, was unsteady on his feet, and had extremely red eyes. Id. at 362, 513 S.E.2d at 622. Although the officer did not witness Summersell driving the automobile, her investigation of the scene revealed the tire tracks near the automobile were "fresh" and the incident occurred "sometime that evening." Id.

As a result, the officer arrested Summersell for DUI. After refusing to submit to a breathalyzer test, the Department suspended Summersell's driving

[7] See Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Rule 803, SCRE (enumerating exceptions to the rule against hearsay).

privileges. The circuit court upheld the Hearing Officer's decision to sustain the suspension of Summersell's driver's license. Id. at 362, 513 S.E.2d 622.

On appeal to the Court of Appeals, Summersell raised several issues including whether the Hearing Officer erred in allowing the Department to elicit hearsay testimony during the administrative hearing. Because the citizen-witness did not testify at the hearing, Summersell claimed the officer could not testify as to the citizen's observations of Summersell driving the automobile into the ditch. Id. at 364, 513 S.E.2d at 623. Summersell's hearsay objection was overruled by the Hearing Officer. Id.

The Court of Appeals affirmed the decision of the circuit court, finding the officer's hearsay testimony was admissible as it was related to probable cause for the arrest of Summersell. Id. at 366, 513 S.E.2d at 624. The court stated:

> Although it is generally correct to state the purpose of a preliminary hearing is to "apprise the defendant of the nature of the State's evidence," its purpose is more specifically ". . . to establish that probable cause exists to continue the criminal process. The State has the burden of proving probable cause, but is not required to call all of its potential witnesses." To this end, we have previously held that hearsay testimony as to the nature of the State's evidence is permissible.

Id. at 365, 513 S.E.2d at 624 (quoting State v. Dingle, 279 S.C. 278, 283-84, 306 S.E.2d 223, 226 (1983)).

Relying on Summersell, Judge McLeod concluded that "South Carolina courts have promulgated a common law exception to hearsay, to wit, that hearsay testimony is admissible to establish probable cause to arrest." Thus, Judge McLeod concluded that the Incident Report as well as the other proffered evidence should have been admitted to establish probable cause for McCarson's arrest. Accordingly, Judge McLeod reversed Hearing Officer

Holland's order and remanded for a new hearing on the merits as the record on appeal was "woefully inadequate."

On remand, Hearing Officer Holland conducted a hearing on March 12, 2008. Trooper Jones appeared on behalf of the Department. At the onset of Jones's testimony, McCarson's counsel posited his hearsay objection to Jones testifying as to Sergeant Kimbrell's observations of McCarson's erratic driving. In support of this objection, counsel challenged Judge McLeod's reliance on Summersell given the subsequent history.[8] Because Kimbrell's observations, which were conveyed to Jones and included in the Incident Report, constituted inadmissible hearsay, counsel claimed this evidence and the resultant documentary evidence should be suppressed.

By order dated April 7, 2008, Hearing Officer Holland specifically rejected Judge McLeod's ruling and declined to consider the Department's hearsay testimony regarding probable cause for McCarson's arrest. In rejecting Judge McLeod's reasoning, Holland not only discounted the ruling in Summersell but declared it as without precedential value. Without the proffered evidence, Holland found that Trooper Jones failed to prove McCarson was lawfully arrested for DUI. Specifically, Holland found there was no evidence of probable cause for the initial stop as Jones failed to present testimony that McCarson was operating a motor vehicle while under the influence of alcohol. Consequently, Holland ordered the Department to restore Respondent's driver's license.

Subsequently, the Department appealed the order to the ALC. By order dated June 29, 2009, the Honorable Carolyn Matthews reversed the Hearing Officer's order and reinstated McCarson's license suspension.

Judge Matthews essentially adopted Judge McLeod's analysis and found the proffered evidence was admissible pursuant to Summersell. Based

[8] This Court vacated the decision of the Court of Appeals regarding the admissibility of the hearsay testimony on the ground the issue had not been properly preserved for appellate review as the trial court had not specifically ruled on the issue. Summersell, 337 S.C. at 21-22, 522 S.E.2d at 145-46.

on this ruling, Judge Matthews concluded "the only reasonable inference to be drawn from the Incident Report is that [Trooper Jones] had probable cause to arrest [McCarson] for driving under the influence." She explained, "The report established prima facie evidence that [McCarson] was driving erratically (driving over a curb, failed to yield right of way in front of the officer, and improper left) thereby justifying the stop."

Following the denial of his motion for reconsideration, McCarson appealed the ALC's order to the Court of Appeals. This Court certified this appeal pursuant to Rule 204(b), SCACR.

II. Discussion

A.

McCarson contends the primary question before this Court is "whether or not hearsay evidence, in the form of an incident report containing evidence that the testifying witness [cannot] independently testify to, can be admitted to establish probable cause in the context of an administrative hearing conducted pursuant to S.C. Code Ann. § 56-5-2951(F)(1) (2006)."

In answering this question, McCarson claims the ALC's decision to admit the challenged evidence was erroneous for the following reasons: (1) Summersell should not have served as the basis for the ALC's decision as it was vacated by this Court; (2) the Rules of Evidence, which are applicable in administrative hearings, expressly exclude the hearsay testimony; and (3) our state common law, which permits hearsay evidence to establish probable cause in preliminary hearings for criminal cases, does not apply to administrative, license-suspension hearings.

As will be more thoroughly discussed, we agree with each of McCarson's contentions.

B.

The DMVH is authorized to hear contested cases from the Department. S.C. Code Ann. § 1-23-660 (Supp. 2009); S.C. Dep't of Motor Vehicles v. Holtzclaw, 382 S.C. 344, 347, 675 S.E.2d 756, 757-58 (Ct. App. 2009), cert. denied (Mar. 9, 2010). Thus, the DMVH is an agency under the Administrative Procedures Act. Holtzclaw, 382 S.C. at 347, 675 S.E.2d at 758; S.C. Code Ann. § 1-23-310(2) (Supp. 2009). Accordingly, appeals from Hearing Officers must be taken to the ALC. Holtzclaw, 382 S.C. at 347, 675 S.E.2d at 758; S.C. Code Ann. § 1-23-660 (Supp. 2009). When reviewing a decision of the ALC, this Court's standard of review is governed by section 1-23-610 of the South Carolina Code. S.C. Code Ann. § 1-23-610 (Supp. 2009). An appellate court "may reverse or modify the decision only if substantive rights of the appellant have been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law." Holtzclaw, 382 S.C. at 347, 675 S.E.2d at 758 (citing section 1-23-610 of the South Carolina Code).

C.

Before addressing the merits of McCarson's appeal, we must initially consider a threshold issue regarding the appealability of the ALC's order.

The Department asserts McCarson's failure to appeal Judge McLeod's "remand" order of January 15, 2008, precludes him from challenging the admission of the Incident Report on hearsay grounds. Because McCarson had an opportunity to appeal Judge McLeod's order prior to the second hearing before Hearing Officer Holland, the Department claims Judge

McLeod's "outcome determinative" ruling as to the admissibility of the Incident Report is the law of the case.

Although the Department correctly cites the principle that an unappealed ruling constitutes the law of the case,[9] we find Judge McLeod's order was interlocutory. Because Judge McLeod remanded the case to Hearing Officer Holland and ordered a new hearing to be conducted in accordance with his evidentiary ruling, this order was not a final decision on the merits. See Foggie v. Gen. Elec. Co., 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008) (recognizing that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not final and, thus, not directly appealable). Thus, we find McCarson's challenge is still viable for this Court's consideration.

D.

Turning to the merits of McCarson's appeal, our analysis begins with a consideration of section 56-5-2951(F)(1). As we interpret McCarson's arguments, he only challenges this subsection with respect to his license suspension. Specifically, the determination of whether he was "lawfully arrested or detained" for DUI in order for the Department to suspend his driving privileges. S.C. Code Ann. § 56-5-2951(F)(1) (2006).

The key question for our determination is whether Sergeant Kimbrell's observations of McCarson's erratic driving were admissible through Jones's report and testimony in order to establish probable cause for McCarson's DUI arrest as required by section 56-5-2951(F)(1).

The dispositive question in determining the lawfulness of an arrest is whether there was "probable cause" to make the arrest. Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). "Probable cause is defined as a good faith belief that a person is guilty of a crime when this

[9] See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

belief rests upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." Id.

"Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime had been committed by the person being arrested." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006). "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officer's disposal." Id. In determining whether probable cause exists, "all the evidence within the arresting officer's knowledge may be considered, including the details observed while responding to information received." State v. Roper, 274 S.C. 14, 17, 260 S.E.2d 705, 706 (1979).

We find Sergeant Kimbrell's observations as conveyed through Jones's testimony and Incident Report constituted quintessential hearsay.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Hearsay is inadmissible except as provided by statute, the South Carolina Rules of Evidence, or other court rules." State v. LaCoste, 347 S.C. 153, 160, 553 S.E.2d 464, 468 (Ct. App. 2001) (citing Rule 802, SCRE).

The rule against hearsay prohibits the admission of evidence of an out-of-court statement by someone other than the person testifying that is used to prove the truth of the matter asserted. Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006). It is well settled that evidence is not hearsay unless offered to prove the truth of the matter asserted. State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994).

Based on the well-established definition of hearsay, Sergeant Kimbrell's observations of McCarson's erratic driving constituted hearsay as it was testified to by Trooper Jones and was offered to establish probable cause for the DUI arrest.

Because the Rules of Evidence are clearly applicable to driver's license-suspension hearings,[10] the question becomes whether the challenged evidence is admissible pursuant to a hearsay exception.

Like the ALC, we do not believe there are any enumerated hearsay exceptions that would permit the admissibility of this evidence.[11] Accordingly, the only potential avenue for admissibility is through our state's jurisprudence regarding probable cause.

Given this Court expressly vacated the analysis of the Court of Appeals in Summersell, we find the ALC erred in relying on this case as it was no longer precedential. Furthermore, a review of this state's appellate decisions reveals that our courts have permitted hearsay evidence to establish probable cause in the limited context of a preliminary hearing. See State v. Dingle, 279 S.C. 278, 306 S.E.2d 223 (1983) (holding an officer may present hearsay testimony in a preliminary hearing to establish probable cause for arrest),

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[10] See S.C. Code Ann. § 1-23-330(1) (2005) ("Except in proceedings before the Industrial Commission the rules of evidence as applied in civil cases in the court of common pleas shall be followed."); cf. Rule 1101(d)(3), SCRE (stating that the Rules of Evidence are inapplicable to "[p]roceedings for extradition; preliminary hearings in criminal cases; sentencing (except in the penalty phase of capital trials as required by statute), dispositional hearings in juvenile delinquency matters, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise").

[11] The Department urges this Court to find the evidence is admissible as it constitutes either a record that is kept in the course of regularly conducted business activity or a public record. A cursory review of these hearsay exceptions would appear to support the Department's position. However, a closer reading of the above-referenced rules reveals that Sergeant Kimbrell's observations in the form of the Incident Report are specifically excluded. See Rule 803(6), SCRE (providing that business records are admissible but stating "that subjective opinions and judgments found in business records are not admissible"); Rule 803(8), SCRE (providing that certain public records are admissible but stating that "investigative notes involving opinions, judgments, or conclusions are not admissible").

abrogated on other grounds by Horton v. California, 496 U.S. 128 (1990); see also State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981) (concluding the State, during a preliminary hearing, was permitted to offer hearsay testimony to establish probable cause for arrest; recognizing that the State is not required to present all of its witnesses and evidence during a preliminary hearing); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) (finding it was permissible for chief investigating officer to read into the record statements of other unavailable witnesses at a preliminary hearing given the direct testimony of the officer's investigation was offered as well as the hearsay testimony).

We find these cases are inapplicable to a driver's license suspension hearing. A preliminary hearing, as its name suggests, is not a final adjudication of a defendant's rights. Instead, a preliminary hearing merely serves as a determination of whether there is sufficient evidence to subject a defendant to further criminal proceedings. See Rule 2, SCRCrimP (providing for preliminary hearings and stating in part that "Any defendant charged with a crime not triable by a magistrate shall be brought before a magistrate and shall be given notice of his right to a preliminary hearing solely to determine whether sufficient evidence exists to warrant the defendant's detention and trial"); State v. Ramsey, 381 S.C. 375, 376, 673 S.E.2d 428, 428-29 (2009) ("The purpose of a preliminary examination is to determine whether probable cause exists to believe that the defendant committed the crime and to warrant the defendant's subsequent trial.").

In contrast, a license-suspension hearing may potentially terminate an important interest of the licensee. See Bell v. Burson, 402 U.S. 535, 539 (1971) ("Once licenses are issued, . . ., their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment."); Hipp v. S.C. Dep't of Motor Vehicles, 381 S.C. 323, 325, 673 S.E.2d 416, 417 (2009) ("A person's interest in his driver's license is property that a state may not take away without satisfying the requirements of due process.").

Because a license-suspension hearing constitutes a final adjudication of an important interest, we believe the Legislature promulgated section 56-5-2951 in such a way that guards against an automatic or rote elimination of this interest. Specifically, this section sets forth several statutory prerequisites that must be established before a Hearing Officer suspends a citizen's driver's license following an arrest for DUI. In the instant case, a determination of whether McCarson was lawfully arrested or detained for DUI. By including this element in section 56-5-2951, the Legislature placed the burden on the Department to present sufficient evidence of probable cause.

Given the significant difference between a preliminary hearing and a license-suspension hearing, we decline to extend the probable cause cases relied on by the Department to circumvent the well-established rules against hearsay. Thus, in proving that a driver was lawfully arrested or detained for DUI, the Department must present admissible evidence of probable cause. If we were to find otherwise, we would essentially render meaningless the procedure established by our Legislature in section 56-5-2951.

III. Conclusion

Based on the foregoing, we hold the Department failed to present admissible evidence that McCarson was lawfully arrested or detained for DUI. Accordingly, we find the ALC erred in reversing the Hearing Officer's order reinstating McCarson's driver's license privileges.

REVERSED.

TOAL, C.J., PLEICONES and HEARN JJ., concur.
KITTREDGE, J., concurring in result only.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

City of Rock Hill, Respondent,

v.

Tyler M. Harris, Appellant.

Appeal from York County
Lee S. Alford, Circuit Court Judge

Opinion No. 26917
Heard September 21, 2010 – Filed January 24, 2011

AFFIRMED

Bobby G. Frederick and Laura L. Hiller, both of Myrtle Beach, for Appellant.

Solicitor Paula Knox Brown, of Rock Hill, for Respondent.

CHIEF JUSTICE TOAL: In this case, Tyler M. Harris (Appellant) claims that section 20-7-8920 of the South Carolina Code, now section 63-19-2440 (hereinafter section 63-19-2440), is unconstitutional because it conflicts with Article XVII, section 14 of the South Carolina Constitution. Section 63-19-2440 makes it illegal for persons under the age of twenty-one to "consume, or knowingly possess beer, ale, porter, wine, or other similar malt or fermented beverage." Article XVII, section 14 of the our Constitution deems citizens over eighteen to have full legal rights and responsibilities, with the sole exception that the General Assembly may restrict the sale of alcoholic beverages to persons until the age of twenty-one. We construe the term "sale" broadly and therefore affirm Appellant's conviction.

FACTUAL/PROCEDURAL BACKGROUND

On October 10, 2007, Appellant was a rear passenger in a vehicle stopped for a traffic violation in the city of Rock Hill, South Carolina. After admitting to the officer that he had consumed two beers, Appellant, who was then twenty years old, was cited for possession of beer under twenty-one, pursuant to section 20-7-8920, and for public disorderly conduct.

The municipal court convicted Appellant of the possession charge. Appellant thereafter appealed his conviction to the circuit court, arguing three grounds: (1) the city of Rock Hill failed to prove jurisdiction over the matter, (2) beer is not an alcoholic beverage as defined by the statute, and (3) the statute under which Appellant was convicted is unconstitutional. The circuit court affirmed the conviction. Appellant then filed a timely appeal to the court of appeals. This case is before this Court under Rule 204(b), SCACR. Appellant preserves only the constitutional issue in this appeal.

STANDARD OF REVIEW

An issue regarding statutory interpretation is a question of law. *Jeter v. S.C. Dept. of Transp.*, 369 S.C. 433, 438, 146, 633 S.E.2d 143 (2006). In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. *Ex parte Capital U-*

Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006); *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005).

LAW/ANALYSIS

I. Construction of Article XVII, section 14 of the South Carolina Constitution

Appellant argues that section 63-19-2440 of the South Carolina Code conflicts with Article XVII, section 14 of the South Carolina Constitution because the statute restricts more than the sale of alcoholic beverages to eighteen to twenty year olds by also restricting their possession and consumption. We disagree.

A. Applicable Law

An amendment to the South Carolina Constitution originates by proposal before the General Assembly and, if passed by two-thirds vote in each House, is then submitted to the people of South Carolina in the next general election. S.C. Const. art. XVI, § 1. If the electorate votes in favor of the amendment, the General Assembly makes the final decision as to its ratification by securing a simple majority vote in each House. *Id.*

When this Court is called to interpret our Constitution, it is guided by the principle that both the citizenry and the General Assembly have worked to create the governing law. *See Miller v. Farr*, 243 S.C. 342, 133 S.E.2d 838, 841 (1962) (stating that the Court's efforts in construing the South Carolina Constitution are aimed at assessing the intent of its framers and the people who adopted it). Therefore, the Court will look at the "ordinary and popular meaning of the words used," *Richardson v. Town of Mount Pleasant*, 350 S.C. 291, 294, 566 S.E.2d 523, 525 (2002), keeping in mind that amendments to our Constitution become effective largely through the legislative process. *Miller v. Farr*, 243 S.C. 342, 347, 133 S.E.2d 838, 841 (1963). For this reason, "the Court applies rules similar to those relating to

the construction of statutes" to arrive at the ultimate goal of deriving the intent of those who adopted it. *Id.*

In determining whether a statute complies with the South Carolina Constitution, the Court will, if possible,

> construe[] [the statute] so as to render it valid; every presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.

Moseley v. Welch, 209 S.C. 19, 26-27, 39 S.E.2d 133, 137 (1946).

The power of our state legislature is plenary, and therefore, the authority given to the General Assembly by our Constitution is a limitation of legislative power, not a grant. *Id.* at 26, 39 S.E.2d at 137. This means that "the General Assembly may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitutions . . . ." *Id.* At the same time, when determining the effect of statutory language, "the canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or the alternative.'" *State v. Bolin*, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008) (quoting *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000)).

Absent ambiguity, the court will look to the plain meaning of the words used to determine their effect. *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. However, the plain meaning rule is subject to this caveat:

> However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe

> the statute so as to escape the absurdity and carry the intention into effect.

Id. (quoting *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)).

1. State v. Bolin

Appellant relies partly upon this Court's finding in *State v. Bolin*, 378 S.C. 96, 662 S.E.2d 38 (2008), to support its argument that section 63-19-2440 is unconstitutional. In *Bolin*, this Court held that the General Assembly exceeded its authority under Article XVII, section 14 by restricting hand gun possession among persons aged eighteen to twenty. 378 S.C. at 100, 662 S.E.2d at 40. The Court looked at the plain language of the amendment to find that the constitution's preservation of authority for the General Assembly to regulate this age group with respect to alcoholic beverages necessarily implied the exclusion of any authority the General Assembly may have had to restrict other rights of this age group. *Id.*

The same canons of statutory construction used in *Bolin* lead to a different conclusion here. Therefore, in reaching the conclusion that sale has a broad meaning, *Bolin* remains intact.

B. Construing "Sale"

Sale is defined as "the exchange of goods or services for money." *American Heritage Dictionary* (4th ed. 2001). It is our opinion, however, that the exchange of a good necessarily implies it will be possessed by the buyer. Further, if the Court were to narrowly read sale as authorizing the General Assembly to restrict only the exchange of alcoholic beverages for money, an absurd result could follow that might defeat the will of the people of South Carolina and the General Assembly. In this instance, the exchange of money would be the only technicality sitting between an eighteen year old and her access to alcohol. For example, bars could supply alcoholic beverages for free in efforts to attract older, paying patrons; retailers could give free beer in

exchange for the purchase of other store merchandise; and persons over the age of twenty could openly purchase alcohol for this age group with impunity. The possibility of an absurd result compels us to look beyond the face of the amendment to ascertain the intent of its adopters.

1. *Legislative History*

During the 1973 legislative session, the General Assembly considered and passed Joint Resolution H.1018 (Resolution) to submit a constitutional amendment to voters regarding the legal rights of eighteen year olds. H.R.J. Res. 1018, 100th Gen. Assemb., 1st Reg. Sess. (S.C. 1973). At the time the legislature considered this Resolution, it was unlawful in South Carolina for persons under the age of twenty-one to purchase or possess any alcoholic liquors. S.C. Code Ann. § 1-4-96.1 (1962). Retailers were similarly prohibited from selling, bartering, exchanging, giving, transferring, or delivering alcoholic liquors to minors. S.C. Code Ann. § 1-4-78(3)(c). The same rules applied to the purchase, possession, and sale of beer and wine, except that the prohibitions affected persons under age eighteen. *See* S.C. Code Ann. §§ 1-4-203 & 1-4-203.4 (1962).

The original reading of the Resolution gave unrestricted rights to eighteen year olds, providing that "persons eighteen years of age or older shall be endowed with full legal capacity." H.R.J. Res. 1018, 100th Gen. Assemb., 1st Reg. Sess. (S.C. Feb. 8, 1973). Incorporating this amendment into the constitution would have created a number of new rights for eighteen year olds,[1] including the right to purchase, possess, and consume alcoholic

[1] The statutory age of majority in 1973 was twenty-one, unless otherwise noted in the Code. *See* S.C. Code Ann. §§ 12-62-403(a)(11) (defining "minor" in the Uniform Gifts to Minors Act as "a person who has not attained the age of twenty-one years"), 5-19-417 (a person may not be an executor of an estate until attaining the age of twenty-one), 5-20-24.1 (providing that an applicant for a marriage license who is under the age of twenty-one and cannot show proof of age by birth certificate must obtain consent from a parent or guardian), 2-10-128(1) (a person below the age of twenty-one is considered disabled for purposes of the adverse possession statute), 2-11-153

liquors. The House passed this Resolution, and after three readings on the Senate floor, the Senate designated it to be carried over. *Id.* at Apr. 3, 1973. However, the motion to carry the Resolution forward was suddenly withdrawn and members of the Senate Judiciary Committee proposed to amend the Resolution by inserting, "*provided*, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one." *Id.* at Apr. 5, 1973 (emphasis in original). An original draft of this proposed change reveals that the Judiciary Committee first used the term "purchase," which was later stricken to substitute the word "sale." Memorandum to Senate Clerk to be entered in the Senate Journal (Apr. 4, 1973) (on file at the South Carolina State Archives). The description given to the Resolution for purposes of floor discussion was broader. *Id.* It read:

> A Joint Resolution proposing an amendment to Article XVII of the Constitution of South Carolina, 1895, which contains various miscellaneous provisions, so as to provide that person eighteen years of age or older shall be endowed with full legal capacity *except in relation to* alcoholic beverages.

Id. (emphasis added).

The House voted favorably upon this change, and the General Assembly ratified the Resolution on April 12, 1973. *Id.* The following language was submitted to voters in the general election of 1974:

> Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law, shall be deemed sui juris and endowed with full legal rights and responsibilities, *provided*, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one.

(while educational institutions can enforce contracts and promissory notes against persons over age sixteen, certain other contracts cannot be ratified until the undergraduate has reached the age of majority, twenty-one) (1962).

Id. (emphasis in original). Upon passage by the voters, the General Assembly ultimately ratified the amendment on February 6, 1975. H.R.J. Res. 1018, 102d Gen. Assemb., 1st Reg. Sess. (S.C. 1975).

The Journals of the House and Senate do not reflect the legislature's purpose for suddenly inserting a provision into the Resolution that reserved its power to regulate access to alcoholic beverages among this age group. It stands to reason, however, that a policy interest was at hand. The legislature's duty to promote the safety and welfare of the community could be curtailed by relinquishing its power to regulate the availability of alcoholic beverages to young people. The same cannot be said of other rights created by this amendment, such as the right to marry, enter into contracts, or administer estates. Because we believe the legislature reserved this power for health and safety reasons, we do not believe it would have retained this power if it had a hollow reach.[2] The broad description given to the Resolution on the House and Senate floor supports this notion. Further, subscribing to Appellant's narrow construction of sale insinuates that by inserting this language, the legislature only wished to retain its power over alcohol commerce among this age group. We do not believe this to be true.

With respect for the principle that every presumption will be made in favor of the constitutionality of a statute, we construe the term **sale**, as used in the South Carolina Constitution, broadly. Therefore, when the General Assembly reserved its power to restrict the **sale** of alcoholic beverages, it meant to also reserve its power to restrict the **purchase** and **possession** of

[2] We note that the South Carolina Code creates two schemes of alcoholic beverage regulation. Title 4 of the 1962 Code, Alcohol and Alcoholic Beverages, is divided into Chapter 1, which regulates alcoholic liquors, and Chapter 2, which regulates beer, porter, and wine. S.C. Code Ann. §§ 1-4-1 & 1-4-201 (1962). Thus, "alcoholic beverages" was an umbrella term in the Code. Accordingly, we believe that when the General Assembly used the term "alcoholic beverages" in the State Constitution, it intended to reserve a broad right to regulate alcohol usage among persons below the age of twenty-one; a right that included the regulation of both alcoholic liquors and beer, wine, and porter.

alcoholic beverages, thereby maintaining the statutory framework as it stood at the time.

CONCLUSION

For the foregoing reasons, we believe that Article XVII, section 14 of the South Carolina Constitution affords the General Assembly the power to restrict the sale, purchase, and possession of alcoholic beverages among persons under the age of twenty-one. Therefore, we hold that section 63-19-2440 of the South Carolina Code is constitutional.

Affirmed.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. In my view, we cannot construe the term 'sale' to embrace the terms purchase and/or possession. See City of Anderson v. Fant, 96 S.C. 5, 79 S.E. 641 (1913). I therefore reluctantly conclude that under S.C. Const. art. XVII, § 14, the legislature may only restrict the sale of alcoholic beverages to adults between the ages of eighteen and twenty-one.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Darrick Jackson, as Mayor of the Town of Timmonsville, Petitioner,

v.

Mark Sanford, Governor of the State of South Carolina and as Chairman and Ex-Officio Member of the State Budget and Control Board; Converse Chellis, Treasurer of the State of South Carolina, Richard Eckstrom, Comptroller General of the State of South Carolina, Hugh Leatherman, Chairman of the Finance Committee of the South Carolina Senate, Daniel T. Cooper, Chairman of the Ways and Means Committee of the South Carolina House of Representatives, as Ex-Officio Members of the State Budget and Control Board; Frank Fusco, Executive Director of the State Budget and Control Board; Glenn F. McConnell, President Pro Tempore of the South Carolina Senate; and Robert W. Harrell, Jr., Speaker of the South Carolina

House of Representatives, Respondents.

ORIGINAL JURISDICTION

Opinion No. 26918
Heard December 2, 2010 – Filed January 24, 2011

JUDGMENT FOR PETITIONER

James Emerson Smith, Jr., and Debra Sherman Tedeschi, both of Columbia, for Petitioner.

Kevin A. Hall, Karl S. Bowers, Jr., and M. Todd Carroll, all of Columbia, for Respondents Sanford and Eckstrom.

William F. Cotty, and Donald E. Jonas, both of Columbia, for Respondent Chellis.

Robert E. Stepp, Roland M. Franklin, Jr., and Tina M. Cundari, all of Sowell, Gray, Stepp & Laffitte, of Columbia, for Respondent Leatherman.

C. Mitchell Brown, and Michael J. Anzelmo, both of Nelson, Mullins, Riley & Scarborough, of Columbia, for Respondents Harrell and Cooper.

Vance J. Bettis, of Gignilliat, Savitz & Bettis, of Columbia, for Respondent Fusco.

Michael R. Hitchcock, John P. Hazzard, V, and Kenneth M. Moffitt, all of Columbia, for Respondent McConnell.

JUSTICE KITTREDGE: Petitioner Darrick Jackson, Mayor of the Town of Timmonsville, brought this action seeking a declaratory judgment in the Court's original jurisdiction that Governor Sanford's veto of certain appropriations to the State Budget and Control Board was unconstitutional.[1] Petitioner also challenged the Board's use of certain budget provisos to transfer funds out of the Rural Infrastructure Bank Trust Fund in order to cover the loss of funding that resulted from the veto.[2] We find the Governor's veto unconstitutional and therefore do not reach Petitioner's challenge to the Board's use of the budget provisos.

I.

The annual appropriations bill for fiscal year 2010-2011 allocated $248,882,042 to the State Budget and Control Board ("the Board"), $25,234,009 of which was to be drawn from the General Fund. Some of the Board's expenditures were to be financed entirely from the General Fund, while other expenditures were financed using other sources or a combination of sources. The bill set aside the amounts to be drawn from the General Fund in a separate column. In another column, the bill listed the total appropriation for each expenditure, reflecting both General Funds and funds from other

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[1] Respondents Fusco, Chellis, Leatherman, Harrell, Cooper, and McConnell join Petitioner in asserting that the veto was unconstitutional.

[2] Petitioner argued the transfer of funds violated the separation of powers mandated by article I, section 8 of the South Carolina Constitution because the Budget and Control Board transferred and expended money for a purpose other than the one assigned by the General Assembly. In addition, Petitioner argued the budget provisos, as applied, were an unconstitutional delegation of legislative power.

sources. The bill did not include separate columns delineating the amounts to be drawn from each of the other sources. *See* Act No. 291, Part 1A §§ 87-88, 2010 S.C. Acts ---- (identifying the various sources of funding reflected in the appropriations bill).

In his Veto 52, Governor Sanford purported to veto the entire amount of General Funds appropriated to the Board. In his accompanying veto message, Governor Sanford stated the Board had "over $1 billion in carry-forward funds" and could use "available funds and . . . cost-cutting measures" to "sustain [the] agency . . . over the next fiscal year." The House of Representatives sustained this veto.

Following the veto, the Board identified another source for part of the vetoed funds by using flexibility provisos included in the appropriations act. Relying on these provisos for authority, the Board transferred the full balance out of the Rural Infrastructure Bank Trust Fund (approximately $13.3 million) and used that money for "payroll and essential operating costs," which would have been funded by the General Funds appropriated by the General Assembly.

Petitioner brought this action seeking a declaratory judgment that the Governor's Veto 52 was invalid and that the transfer of funds from the Rural Infrastructure Bank Trust Fund via the provisos was unconstitutional.[3]

II.

[3] Petitioner asserted standing on the ground that the Town of Timmonsville is in need of financial assistance to improve its water and wastewater treatment infrastructure, and therefore, "interested in monies appropriated by the Legislature for rural infrastructure development." None of the Respondents have argued in their briefs that Petitioner lacks standing. *See Bardoon Properties, NV v. Eidolon Corp.*, 326 S.C. 166, 169-71, 485 S.E.2d 371, 373-74 (1997) (explaining that "a party's lack of standing as a real party in interest" does not deprive the court of subject matter jurisdiction).

Article IV, section 21 of the South Carolina Constitution provides in relevant part:

> Every bill or joint resolution which shall have passed the General Assembly . . . shall, before it becomes a law, be presented to the Governor, and if he approves he shall sign it; if not, he shall return it, with his objections, to the house in which it originated, which shall enter the objections at large on its Journal and proceed to reconsider it. . . .
>
> Bills appropriating money out of the Treasury shall specify the objects and purposes for which the same are made, and appropriate to them respectively their several amounts in distinct items and sections. If the Governor shall not approve any one or more of the items or sections contained in any bill appropriating money, but shall approve of the residue thereof, it shall become a law as to the residue in like manner as if he had signed it. The Governor shall then return the bill with his objections to the items or sections of the same not approved by him to the house in which the bill originated, which house shall enter the objections at large upon its Journal and proceed to reconsider so much of the bill as is not approved by the Governor. . . .

"The veto power can be exercised only when clearly authorized by the constitution, and the language conferring it is to be strictly construed." *Drummond v. Beasley*, 331 S.C. 559, 564, 503 S.E.2d 455, 457 (1998). The veto power is "a negative power to void a distinct item." *Id.*; *cf. State ex rel. Long v. Jones*, 99 S.C. 89, 92, 82 S.E. 882, 883 (1914) (holding that when a veto was sustained "everything embraced in that item failed to become law"). In *Drummond v. Beasley*, we explained that the Governor may not "modify legislation rather than nullify legislation" by removing conditions and restrictions on expenditures while leaving the expenditures themselves intact. 331 S.C. at 560 n.1, 563-64, 503 S.E.2d at 456-57. The Florida Supreme Court has explained:

> [T]he veto power is intended to be a negative power, the power to nullify . . . legislative intent. It is not designed to alter or amend legislative intent. . . . [T]he veto must, in effect, destroy the fund. Otherwise, the governor could legislate by altering the purpose for which the money was allocated.

Brown v. Firestone, 382 So. 2d 654, 664-65 (Fla. 1980).

We apply a "common sense construction" when interpreting the General Assembly's obligation to organize appropriation bills into "distinct items or sections" and when interpreting the power of the Governor to veto such "items or sections." *E.g., S.C. Coin Operators Ass'n v. Beasley*, 320 S.C. 183, 187, 464 S.E.2d 103, 105 (1995); *Cox v. Bates*, 237 S.C. 198, 218-20, 116 S.E.2d 828, 836-37 (1960).

III.

The dispositive question before the Court may be framed in one of two ways, either of which compels a finding of an unconstitutional veto. First, a Governor is constitutionally permitted to veto an item in its entirety, but not partially. Stated differently, we must determine whether Veto 52 was a nullification of legislation or a modification of legislation. Putting these concepts together, the rule of law is that a veto of an item in its entirety is a nullification, while a veto of only part of an item is a modification. If a nullification, Veto 52 is constitutional; if a modification, Veto 52 is unconstitutional.

We begin with defining an "item"[4] for constitutional purposes. Our constitution uses the term "item" to embrace a specified sum of money together with the "object and purpose" for which the appropriation is made. S.C. Const. art. IV, § 21. Our case law is in accord. *State ex rel. Walker v.*

[4] We are not presented with a dispute over the meaning of the term "sections."

Derham, 61 S.C. 258, 262, 39 S.E. 379, 380 (1901) (defining the act of appropriation as "to designate some specific sum of money for a particular purpose or individual"). Other jurisdictions have employed similar definitions for the term "item." *E.g.*, *Henry v. Edwards*, 346 So. 2d 153, 157 (La. 1977) ("[T]he word 'item' signifies a sum of money dedicated to a specific purpose, a separate fiscal unit."); *Brault v. Holleman*, 230 S.E.2d 238, 242 (Va. 1976) (defining an item of appropriation as "an indivisible sum of money dedicated to a stated purpose").

Petitioner's first argument focuses on the spatial format of the appropriations bill into *columns* as opposed to *lines*. Petitioner contends the Governor could veto only *lines* of an appropriation bill, not *columns*. This argument appears to be premised on the notion of a Governor's "line item veto." To be sure, the phrase "line item veto" has currency as a colloquial expression, but it is not part of our constitutional framework. Our constitution permits the Governor to veto "items or sections" of bills that appropriate money, but it does not require that these items or sections be organized into lines. Thus, we reject Petitioner's argument and agree with the Governor that the spatial arrangement of numbers on the page does not dictate the definition of an "item."[5]

While we agree that the arrangement of information in a column, rather than in a line, is irrelevant, we disagree with Governor Sanford and Respondent Eckstrom that the column designating the amount of General Funds to be expended was a standalone "item" that could be vetoed without

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[5] There is no assertion here that the General Assembly failed to comply with its constitutional mandate to "specify the objects and purposes for which the [appropriations] are made, and appropriate to them respectively their several amounts in distinct items and sections." S.C. Const. art. IV, § 21. It is axiomatic that the General Assembly cannot ignore its constitutional mandate and present an appropriations bill in a manner that forecloses the Governor's veto authority. *Cf. Henry*, 346 So. 2d at 158 ("The legislature cannot by location of a bill give it immunity from executive veto.").

vetoing the objects and purposes to which those General Funds were devoted. The Governor vetoed one source of appropriated funds while leaving the remainder of the total appropriation, and the specified "objects and purposes" of the appropriation, intact.[6]

The Governor attempted to veto funds arising from a particular source, but he did not veto the purpose to which those funds were allocated. The net result, then, was that the total appropriation for each of the Board's programs, positions, and expenses was reduced by the amount the General Assembly had designated to be drawn from the General Fund, but the programs, positions, and expenses themselves were not eliminated.[7] This was an improper modification of legislation. *See Drummond*, 331 S.C. at 564, 503 S.E.2d at 457 (finding a veto invalid because it "modif[ied] legislation rather than nullif[ied] legislation"). As the Florida Supreme Court has explained:

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[6] The Governor has argued that because the total amount appropriated to a particular purpose often includes both federal and state funds, it might be impossible as a practical matter to veto the entire amount. The Governor's power to veto "items or sections" expressly extends to all "[b]ills appropriating money out of the Treasury." S.C. Const. art. IV, § 21. Federal funds are deposited into the state treasury and allocated in the annual appropriations bill. S.C. Code Ann. § 2-65-20 (2005) (requiring the General Assembly to "appropriate all anticipated federal and other funds for the operations of state agencies in the appropriations act"); S.C. Code Ann. § 11-13-45 (Supp. 2009) ("All federal funds received must be deposited in the State Treasury, if not in conflict with federal regulations, and withdrawn from the State Treasury as needed . . . ."). Thus, we do not believe the Governor would be thwarted in the exercise of his veto power by the mere fact that a particular item included both federal and state funds.

[7] In some instances, the General Fund accounted for the entire budget for a particular program. Nevertheless, the Governor did not veto these programs; he vetoed only their funding.

> What the Governor requests is little different than the power to *reduce*. In each of the line items at issue here, the legislature has identified only one purpose, which will be achieved with sums taken from several separate funding sources. The Governor argues essentially that we must consider each of these sources to be a "fund" subject to veto. We, however, believe that the existence of such a fund cannot be determined solely by reference to the fact that a specific sum is stated in the Act itself. There also must be consideration of the legislature's *purpose*.
>
> . . . If the legislature's purpose is to expend a specific amount of money for a single stated purpose, then the Governor has no authority to reduce that amount by vetoing one of several funding sources. The Governor must veto all or none.
>
> Any requirement less than this would seriously erode the legislature's power to decide the level of appropriations. Permitting the vetoing of individual funding sources comes too close to authorizing the Governor to reduce appropriations.

Florida House of Representatives v. Martinez, 555 So. 2d 839, 845-46 (Fla. 1990) (emphasis in original); *see also Stong v. People ex rel. Curran*, 220 P. 999, 1000, 1003 (Colo. 1923) (holding the Colorado governor "ha[d] no power to veto a portion of a separate, distinct, and indivisible item," and therefore, did not have the power to veto part of a salary while leaving the salaried position intact).

The net effect of Veto 52 was a veto of *part* of an item, resulting in modification of legislation, which is an unconstitutional exercise of the veto power. *Cf. Colorado General Assembly v. Lamm*, 704 P.2d 1371, 1384 (Colo. 1985) ("[W]e conclude that the source of funding is as much a part of an item of appropriation as the amount of money appropriated and the purpose to which it is to be devoted. It cannot be removed from the bill without affecting the legislature's intendment in enacting the measure."). As

correctly stated in Senator McConnell's brief, "[i]f a line in the appropriations bill is vetoed in a constitutional manner and the veto is sustained, then the line is stricken and there is no longer any authority to expend state funds for the purpose stated on the line."

The Governor seeks refuge in the contention that Veto 52 is consistent with the historical practice of South Carolina Governors. Because other Governors have exercised their veto authority in a similar manner, the argument goes, the Court should defer to the historical practice. The Governor's position has ostensible merit, for "[l]ong established practice has great weight in interpreting constitutional provision[s] relative to executive veto power." *Coin Operators*, 320 S.C. at 188, 464 S.E.2d at 105. However, we are not persuaded that the practice of vetoing only one of several sources of funds without vetoing the corresponding objects and purposes is as well rooted in our history as the Governor suggests. The Governor cites in his brief to vetoes in 1935 and 1948 as similar to Veto 52. We do not read the cited 1935 and 1948 vetoes as similar. The acts at issue did not list General Funds separately from any other funds. *See* Act No. 347, 1935 S.C. Acts 505, 546; Act No. 849, 1948 S.C. Acts 2091, 2167-69. These examples and others present vetoes of the total funding and the corresponding objects and purposes. Thus, we are not convinced that the interpretation advanced by the Governor is as "long established" as he contends. In any event, a veto of only one of several sources of funds is patently in conflict with the Governor's authority under our constitution.

IV.

We find the Governor's veto of only the General Fund portion of the appropriation to the Budget and Control Board was unconstitutional because it exceeded the authority granted to him by article IV, section 21 of the South Carolina Constitution. The Governor is empowered to veto "items," which comprise both the designated funds and the objects and purposes for which the appropriation is intended. By vetoing only one of several sources of funds, the Governor vetoed only part of an item, rendering the veto unconstitutional. Having declared Veto 52 unconstitutional, we hold the

General Assembly's appropriation of General Funds to the Budget and Control Board is effective and has the force of law. We, therefore, need not reach Petitioner's challenge concerning the provisos.

JUDGMENT FOR PETITIONER.

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

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Appellate Court Rules

O R D E R

The Office of Commission Counsel has proposed several amendments to the Rules for Lawyer Disciplinary Enforcement (RLDE) and the Rules for Judicial Disciplinary Enforcement (RJDE), which are contained within Rules 413 and 502, SCACR. The Commission on Lawyer Conduct and the Commission on Judicial Conduct voted to approve the proposed amendments following the October 26, 2010, annual meeting of the Commissions.

First, Commission Counsel seeks amendments to the RLDE and the RJDE to eliminate the requirement that a letter of caution specify whether minor misconduct was committed. Second, Commission Counsel requests that the RLDE be amended to clarify that only the Chair or Vice Chair of the Commission on Lawyer Conduct has the authority to issue orders to assist attorneys to protect clients' interests. Finally, Commission Counsel seeks to amend the RJDE to make the definition of a "Serious Crime" within the RJDE identical to the definition of a Serious Crime within the RLDE.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend the South Carolina Appellate Court Rules as set forth in the attachment to this order. The amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 19, 2011

Rule 413, SCACR, is amended as follows:

RULE 2
TERMINOLOGY

. . .

(r) Letter of Caution: a written caution or warning about past or future conduct issued when it is determined that no misconduct has been committed or that only minor misconduct not warranting the imposition of a sanction has been committed. A letter of caution may be issued by disciplinary counsel, an investigative panel or the Supreme Court. The issuance of a letter of caution is not a sanction under these rules and does not constitute a finding of misconduct. The fact that a letter of caution has been issued shall not be considered in a subsequent disciplinary proceeding against the lawyer unless the caution or warning contained in the letter of caution is relevant to the misconduct alleged in the proceedings.

RULE 4
ORGANIZATION AND AUTHORITY OF THE COMMISSION

. . .

(f) Powers and Duties of Investigative Panel. An investigative panel shall have the duty and authority to:

(1) review the recommendations of disciplinary counsel after investigation and either issue a letter of caution, issue notice of intent to impose a confidential admonition, enter into a deferred discipline agreement, consider an agreement for discipline by consent, authorize formal charges, refer the matter to another agency, or dismiss the complaint;

(2) designate a member of the panel to preside over the investigative panel in the absence of the chair or vice-chair of the Commission;

(3) declare a matter closed, but not dismissed prior to the filing of formal charges; and,

(4) after proper notice, re-open a matter that has been previously dismissed or closed but not dismissed.

(g) Powers and Duties of Hearing Panel. A hearing panel shall have the duty and authority to:

(1) rule on pre-hearing motions, conduct hearings on formal charges and make findings, conclusions, and recommendations to the Supreme Court for the disposition of the case, pursuant to Rule 26;

. . .

RULE 5
DISCIPLINARY COUNSEL

. . .

(b) Powers and Duties. Disciplinary counsel shall have the authority and duty to:

(1) receive and screen complaints, dismiss complaints, issue letters of caution, refer complaints to other agencies when appropriate, conduct investigations, notify complainants about the status and disposition of their complaints, make recommendations to an investigative panel on the disposition of complaints after investigation, file formal charges when directed to do so by an investigative panel, prosecute formal charges, and file briefs and other appropriate petitions with the Supreme Court;

. . .

RULE 19
SCREENING AND INVESTIGATION

. . .

(d) Disposition After Investigation.

. . .

(2) If disciplinary counsel believes that no misconduct has been committed, but a written caution or warning is appropriate to conclude the matter, disciplinary counsel may issue a letter of caution.

. . .

Rule 502, SCACR, is amended as follows:

RULE 2. TERMINOLOGY

The following terminology is used throughout these rules:

. . .

(q) Letter of Caution: a written caution or warning about past or future conduct issued when it is determined that no misconduct has been committed or that only minor misconduct not warranting the imposition of a sanction has been committed. A letter of caution may be issued by disciplinary counsel, an investigative panel or the Supreme Court. The issuance of a letter of caution is not a sanction under these rules and does not constitute a finding of misconduct. The fact that a letter of caution has been issued shall not be considered in a subsequent disciplinary proceeding against the judge unless the caution or warning contained in the letter of caution is relevant to the misconduct alleged in the proceedings.

. . .

(aa) Serious Crime: any felony; any lesser crime that reflects adversely on the judge's honesty, trustworthiness or fitness as a judge in other respects; or, any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of

justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, willful failure to file income tax returns, or an attempt, conspiracy or solicitation of another to commit a serious crime.

. . .

RULE 4. ORGANIZATION AND AUTHORITY OF THE COMMISSION

. . .

(f) Powers and Duties of Investigative Panel. An investigative panel shall have the duty and authority to:

> **(1)** review the recommendations of disciplinary counsel after investigation and either issue a letter of caution, issue notice of intent to impose a confidential admonition, enter into a deferred discipline agreement, consider an agreement for discipline by consent, authorize formal charges, refer the matter to another agency, or dismiss the complaint;

. . .

(g) Powers and Duties of Hearing Panel. A hearing panel shall have the duty and authority to:

> **(1)** rule on pre-hearing motions, conduct hearings on formal charges and make findings, conclusions, and recommendations to the Supreme Court for the disposition of the case, pursuant to Rule 26;

. . .

RULE 5. DISCIPLINARY COUNSEL

. . .

(b) Powers and Duties. Disciplinary counsel shall have the authority and duty to:

> **(1)** receive and screen complaints, dismiss complaints, issue letters of caution, refer complaints to other agencies when appropriate, conduct investigations, notify complainants about the status and disposition of their complaints, make recommendations to an investigative panel on the disposition of complaints after investigation, file formal charges when directed to do so by an investigative panel, prosecute formal charges, and file briefs and other appropriate petitions with the Supreme Court;

. . .

RULE 19. SCREENING AND INVESTIGATION

. . .

(d) Disposition After Investigation.

. . .

> **(2)** If disciplinary counsel believes that no misconduct has been committed, but a written caution or warning is appropriate to conclude the matter, disciplinary counsel may issue a letter of caution.

. . . .

The Supreme Court of South Carolina

In the Matter of Teresa Davis Bulford, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

IT IS FURTHER ORDERED that Alexander Cash, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Cash shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Cash may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law

office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

IT IS SO ORDERED.

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

Columbia, South Carolina

January 20, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Neeltec Enterprises, Inc. d/b/a Fireworks Supermarket, Appellant,

v.

Willard Long d/b/a Foxy's Fireworks, and d/b/a Fireworks Superstore, Respondent.

Appeal From Colleton County
A. Victor Rawl, Special Referee

Opinion No. 4756
Submitted September 1, 2010 – Filed October 27, 2010
Withdrawn, Substituted and Refiled January 19, 2011

APPEAL DISMISSED

Robert J. Thomas and Robert P. Wood, both of Columbia, for Appellant.

Bert Glenn Utsey, III, of Walterboro, for Respondent.

PER CURIAM: Neeltec Enterprises, Inc. d/b/a Fireworks Supermarket (Neeltec) appeals the special referee's order substituting two corporations, Foxy's Firework Superstore, Inc. and Hobo Joe's, Inc., as defendants in Neeltec's action against Willard Long d/b/a Foxy's Fireworks and d/b/a Fireworks Superstore.[1] We dismiss[2] Neeltec's appeal because the special referee's order is not immediately appealable.

"An appeal ordinarily may be pursued only after a party has obtained a final judgment." Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993)). "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final." Ex parte Wilson, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005).

Absent some specialized statute, the immediate appealability of an interlocutory order depends on whether the order falls within section 14-3-330 of the South Carolina Code (1977). Under section 14-3-330(1), this court may review any intermediate order that involves the merits of the action. "An order involving the merits must finally determine some substantial matter forming the whole or a part of some cause of action or defense in the case in which the order is entitled." Duncan v. Gov't Emps. Ins. Co., 331 S.C. 484, 485, 449 S.E.2d 580, 580 (1994) (quoting Knowles v. Standard Sav. & Loan Ass'n, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979)). Further, an interlocutory order that affects a substantial right and in effect determines the action and prevents a judgment from which an appeal may be taken or discontinues the action may be reviewed by this court. See S.C. Code. Ann. § 14-3-330(2)(a).

Although neither this court nor the South Carolina Supreme Court has addressed whether an order granting a motion to substitute a party is

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[1] At the commencement of this action, the corporate name was Hobo Joe's, Inc. After the filing of the complaint, a separate corporation, Foxy's Firework Superstore, Inc., was formed to operate the Fireworks Superstore.

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

immediately appealable, we find that in the present case, the special referee's order granting Long's motion to substitute does not fall within either section 14-3-330(1) or (2).[3] The special referee's order does not involve the merits, nor does the order involve a substantial right or prevent a judgment from which an appeal can be taken. A review of the complaint indicates Neeltec only alleged causes of action against the corporate defendants. Neeltec did not specifically assert any claim against Long individually, but rather, sued Long d/b/a Foxy's Fireworks and d/b/a Fireworks Superstore. The special referee's order simply granted Long's motion to substitute the two corporate defendants for Long d/b/a Foxy's Fireworks and d/b/a Fireworks Superstore, as business entities under the corporate umbrella. The special referee's order also specifically permitted Neeltec to amend its complaint to assert an individual claim against Long. Accordingly, because the order on appeal is not final, nor does the order fit within a statutory exception permitting an appeal from an interlocutory order, the order is not immediately appealable.

APPEAL DISMISSED.

WILLIAMS, PIEPER, and KONDUROS, JJ., concur.

[3] We note that a motion to substitute may be immediately appealable if it falls under section 14-3-330(1) or (2).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Department of Social Services, Appellant,

v.

Donellivin Polite, Respondent.

Appeal From Berkeley County
Henry T. Woods, Family Court Judge

Opinion No. 4774
Submitted April 1, 2010 – Filed January 19, 2011

REVERSED

Paul Fredrick LeBarron, of Charleston, for Appellant.

Donellivin Polite, pro se, for Respondent.

WILLIAMS, J.: Donellivin Polite sought modification of his child support payments when one of his three children reached the age of majority. After the parents agreed to a reduced amount of support for the remaining children, the family court ordered the support be retroactively reduced to a

date prior to the filing of the modification action. The South Carolina Department of Social Services (DSS) appeals. We reverse.

FACTS

On August 5, 2005, the DSS Child Support Division (Division) served a Notice of Financial Responsibility upon Polite to establish his child support obligation for his three children. Polite appeared without representation at a September 2005 conference where he was ordered to pay bi-weekly support in the amount of $354 beginning September 30, 2005. The eldest child turned eighteen years old on December 17, 2005.

Polite testified his last phone call to the Division regarding modification was sometime in June 2006, and DSS conceded Polite called at this time. DSS stated a review was not completed until September 2007, and an administrative process negotiation was held on December 13, 2007. At the negotiation, the parents agreed to bi-weekly support payments of $304.62 for the two remaining children, but Polite sought retroactive application. The matter was continued for a judicial hearing on January 18, 2008.

At the January hearing, Polite testified he went to the Division sometime in July 2005,[1] received paperwork, and was told the Division would get back in touch with him. However, Polite also stated the Division told him at that time that he would have to "come back in for a reevaluation for the oldest kid [who] was going to turn 18 six months later." Polite said the Division never called or scheduled anything. Polite, however, never stated he returned to the Division six months later for a reevaluation as previously instructed. Evidence was admitted showing the eldest child had dropped out of high school. The family court stated, "In light of the fact the child was not in school, I'm going to make [the reduction] retroactive . . . the State collects [support] for the child. And if the child is not doing what he or she is supposed to be doing, he doesn't get it."

[1] We note a discrepancy in Polite's testimony as he testified he first called the Division in July 2005, six months prior to the eldest child's December 2005 birthday, but he was not served with his Notice of Financial Responsibility until August 2005 and only began paying ordered support in September 2005.

DSS objected, arguing the action was not filed until December 13, 2007, and modification of child support is improper on amounts accrued before filing and service of a modification action. DSS further contended when there are multiple children, the support will continue at the ordered rate unless changed by a court order. However, the family court found Polite contacted the Division, which then told Polite it would get back to him, and the Division did not advise him he had to file anything. Although the family court found the Division formally filed the action on December 13, 2007, it ruled the reduction would be made retroactive to July 1, 2006. In doing so, the family court stated, "I'm not supposed to give [Polite] that, but I'm giving [him] a break."

DSS filed a motion to reconsider, arguing Polite's phone call on or about July 1, 2006, did not initiate the modification action and the family court lacked authority to retroactively modify child support that accrued before the filing and service of a modification action. DSS cited South Carolina cases and statutes in support of its position, but the family court questioned whether Polite, as an unrepresented lay person, had an obligation to know the legal precedents.

The family court noted Polite asked to be notified of the procedures he needed to take to reduce his payments. However, DSS did not give him the requested notice, and Polite continued to pay the full amount of child support until the family court's ruling. The family court observed that when the family court orders a parent to pay child support, it generally includes a provision anticipating emancipation. Finding no such evidence here, the family court called Polite's case one that "slipped through the cracks." The family court questioned whether:

> [I]n light of the overall facts of this case, should [Polite's prior phone calls] have been sufficient to place the [Division] on notice or given them reason to give him an answer prior to . . . January of 2007, some eighteen months after he made his request[?] Is that reasonable for him to have to pay eighteen

months of child support for failure to respond to his inquiry?

The family court affirmed its earlier order, acknowledging Polite's ignorance of the law was no excuse, but reasoning the Division's failure to provide Polite with instructions worked an injustice. The family court held Polite's phone call was notice to the Division, and the Division had a duty to provide Polite with information upon his request. This appeal followed.

ISSUES ON APPEAL

1. Did the family court err in expanding the Division's duty to justify the retroactive modification?

2. Did the family court err in granting a retroactive modification to a time before filing and service of the modification action?

STANDARD OF REVIEW

On appeal from the family court, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Carpenter v. Burr, 381 S.C. 494, 501, 673 S.E.2d 818, 822 (Ct. App. 2009). Nevertheless, this broad scope of review does not relieve the appellant of the burden of proving the family court committed error. Divine v. Robbins, 385 S.C. 23, 31, 683 S.E.2d 286, 290 (Ct. App. 2009).

LAW/ANALYSIS

1. The Division's Duty in Modification Actions

DSS argues the family court erred in finding Polite's phone call was sufficient notice requiring action by the Division, and DSS asserts this finding expanded the Division's duty to act. DSS further argues the Division complied with its duty under South Carolina Code section 63-17-830 (2010). We agree.[2]

[2] Polite did not submit a brief in response to this appeal.

Section 63-17-830(A)[3] of the South Carolina Code (2010) provides in part:

> The obligor or obligee may file a written request for modification of an order issued under this article or an existing order of the court with the division by serving the division by certified mail. If the division does not object to the request for modification based upon a showing of changed circumstances as provided by law, the division shall serve the obligor with a notice of financial responsibility . . . and shall proceed as set forth in this article.

Subsection (B) states, "A request for modification made pursuant to this section does not preclude the division from enforcing and collecting upon the existing order pending the modification proceeding." S.C. Code Ann. § 63-17-830(B) (2010). Subsection (C) explains, "Only payments accruing subsequent to the modification may be modified." S.C. Code Ann. § 63-17-830(C) (2010).

DSS and the family court agreed the action was formally filed by the Division on December 13, 2007, and the record contains no evidence of a different date of filing and service.[4] Regardless, the family court retroactively modified the child support to the stipulated date that Polite telephoned the Division. Section 63-17-830(A) plainly states if an obligor seeks modification, the proper step is to serve the Division by certified mail. See Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007) ("When a statute's terms are clear and unambiguous on their face, there is no room for

[3] S.C. Code Ann. § 63-17-830 (2010) was formerly codified as § 20-7-9565 (Supp. 2007). While the Legislature has recodified this section since the filing of this action, the substantive statutory language applicable to Polite's case remains unchanged.

[4] This finding is apparently based on the Notice of Financial Responsibility directing Polite to appear at the December 13, 2007 conference.

statutory construction and a court must apply the statute according to its literal meaning."). Although the family court essentially treated Polite's phone call as a filing, this decision is contrary to section 63-17-830(A)'s mandates.

While it is regrettable Polite was unaware of proper procedure, no statute or case law places a duty upon the Division to instruct obligors how to pursue modification. Rather, statutory law provides an obligor seeking modification may file a written request by certified mail. Affirming the family court's finding that a phone call was notice would abandon the statute's specificity and replace it with a casual, circumstance-driven means of initiating a modification action. Moreover, from a practical standpoint, allowing a modification action to be commenced by a phone call, even if in good faith, potentially opens a Pandora's box, which we find untenable. Upholding a rule of law that permits a phone call to be the official means of notice would be difficult, if not impossible, to verify, leaving the issue of whether notice was properly given in many instances to a swearing match. Accordingly, we reverse the family court's finding that Polite's phone call to the Division was sufficient to initiate this modification action.

2. Retroactive Modification Before Time of Filing and Service

DSS argues section 63-17-310 of the South Carolina Code (2010) provides that modifications by the family court are not effective to any installment accruing prior to filing and service of an action for modification.[5] DSS further argues the statutory bar is absolute against retroactive child support decreases, and modifications of multi-child support orders are prospective by court action rather than at the time of an older child's emancipation.

Under South Carolina law, a parent's obligation to pay child support generally extends until the child reaches majority then ends by operation of law. Thornton v. Thornton, 328 S.C. 96, 109, 492 S.E.2d 86, 93 (1997). The family court has exclusive jurisdiction:

[5] S.C. Code Ann. § 63-17-310 was previously codified in identical language as § 20-7-933 (Supp. 2007).

> 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 without further order, past the age of eighteen years if the child is enrolled and still attending high school, ...

S.C. Code Ann. § 63-3-530(A)(17) (2010).[6] Nevertheless, "where one of multiple children reaches majority, a parent's child support obligation will not be affected absent a family court order modifying the amount of support owed." Blackwell v. Fulgum, 375 S.C. 337, 343-44, 652 S.E.2d 427, 430 (Ct. App. 2007).

> Where one of multiple children becomes emancipated, the family court does not extend the parent's support obligation on behalf of the emancipated child. The court simply continues the existing support agreement for the benefit of the other minor child[ren] until such time as the court, upon request of the supporting parent, can calculate a proper reduction in the support obligation based on a showing of changed circumstances.

Id. at 344, 652 S.E.2d at 430.

Section 63-17-310 provides that the family court has the authority to modify child support as the court finds necessary upon a showing of changed circumstances; however, "[n]o such modification is effective as to any

[6] S.C. Code Ann. § 63-3-530 was previously codified as § 20-7-420 (Supp. 2007). When Title 63 was enacted in 2008, the Legislature incorporated language into 63-3-530(A)(17) that expressly permitted child support to run past the age of eighteen, even without further court order, if the child is enrolled and still attending high school as long as the support does not exceed high school graduation or the end of the school year after the child reaches nineteen years of age.

installment accruing prior to filing and service of the action for modification." Nonetheless, our supreme court has found family courts may award retroactive increases of child support in special circumstances. Harris v. Harris, 307 S.C. 351, 415 S.E.2d 391 (1992).

In Harris, the mother petitioned for a retroactive increase after learning the father earned $400,000 annually for a number of years, rather than the $48,000 he previously claimed. Id. at 352-53, 415 S.E.2d at 392-93. Citing section 63-17-310, the family court believed it lacked jurisdiction to order retroactive modifications. Id. at 352, 415 S.E.2d at 392. The supreme court disagreed, finding section 63-17-310 "does not bar retroactive child support increases in special circumstances where, to do so, would result in serious injustice." Id. at 353, 415 S.E.2d at 392-93. The Harris court noted the child's best interests are the family court's paramount concern. The case was remanded to the family court for a determination of whether a retroactive increase of child support should be awarded for the three years preceding the filing for modification. Id. at 354, 415 S.E.2d at 393.

In contrast, in Blackwell, a mother unilaterally reduced her child support payments after the eldest of two children turned eighteen and graduated from high school. The father sent letters to the mother, explaining she was in default and must seek a reduction by contacting his attorney, her attorney, or the family court. Id. at 341, 652 S.E.2d at 429. The mother did not respond. Approximately eighteen months later, the father filed a rule to show cause motion, and the mother failed to appear at the subsequent hearing. Id. at 342, 652 S.E.2d at 429. Ultimately, the family court held the mother was not entitled to unilaterally reduce her child support payments and was responsible for the full amount of support until the date she filed her motion for temporary relief, approximately twenty-two months after the eldest child turned eighteen. Id.

While we commend Polite for continuing to make timely child support payments in compliance with the child support order, we find Harris had more compelling circumstances and its holding was limited to special circumstances. Here, the family court's ruling was not similarly driven by a child's best interests; rather, the family court feared a strict application of the relevant statutes would work an injustice on Polite. However, Blackwell

instructs that an existing support agreement continues for the benefit of other minor children until the court calculates a proper reduction. Because Polite's minor children continued to benefit during this time, we find the rationale espoused in Blackwell controlling in this situation. Accordingly, we find the family court improperly awarded a retroactive reduction of child support.

CONCLUSION

Based on the foregoing, the family court's decision is

REVERSED.[7]

SHORT, J., concurs. LOCKEMY, J., dissents in a separate opinion.

LOCKEMY, J.: I respectfully dissent. In my view, limited to the facts of this case, the Division put upon itself a commitment to assist Polite in properly seeking modification. Polite first encountered the Division when it served him with Notice of Financial Responsibility to establish support for his three children. Polite appeared without representation at a conference with the Division and signed an administrative process order requiring him to pay support. Polite expressed his concern that his oldest child would reach the age of eighteen four months later. Polite testified the Division promised to contact him to reevaluate his support obligation after his oldest child turned eighteen. As Judge Woods noted, if this matter was handled in court, the support order would have likely provided for an automatic reduction in Polite's support obligation upon the oldest child's eighteenth birthday.

Despite its assurance, the Division failed to contact Polite after his oldest child reached the age of eighteen and Polite telephoned the Division on several occasions seeking assistance. Judge Woods found that during Polite's last call in June or July 2006, Polite asked the Division what steps to take in order to have his support obligation modified and the Division informed him it would contact him at a later date. Based upon the Division's control of the situation since the beginning, and its assurances it would handle the

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

modification, Polite reasonably relied on the Division to assist him in seeking modification.

Polite is pro se and has been since this action began. Polite has always complied with the Division's instructions. Unlike the mother in Blackwell v. Fulgum, 375 S.C. 337, 652 S.E.2d 427 (Ct. App. 2007), he did not unilaterally reduce his support payments and continued to pay the full amount of his support obligation. Judge Woods correctly observed if Polite unilaterally reduced his support obligation like the mother in Blackwell, he may have successfully reduced his support obligation earlier because the family court would have likely ordered him to appear on a rule to show cause. In fact, Polite was not able to have his support obligation reduced until two years after his oldest child turned eighteen. Furthermore, Judge Woods also noted because Polite continued to pay the full amount of his support obligation his other two children were assured of receiving the appropriate amount of support. I believe Polite has suffered a serious injustice because he reasonably relied on the Division's assurances.

I do not believe section 63-17-310 of the South Carolina Code (2010) precluded the family court from retroactively reducing Polite's support obligation. In Harris v. Harris, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992), the supreme court held section 63-17-310 does not bar a retroactive child support modification in special circumstances where refraining from modification would result in a serious injustice. Like in Harris, refraining from modification here results in a serious injustice. The Division took it upon itself to process Polite's request and assured him it would handle the matter. As an agency of the State it assumed responsibility and Polite relied upon the Division taking the action it assured him it would. Although pro se litigants are not entitled to special treatment, the Division was aware of Polite's reliance and failed to inform him of the proper way to seek modification.

I agree with the majority that a phone call is not sufficient to meet the standard for notifying the Division of a request to seek modification in section 63-17-830(A) of the South Carolina Code (2010). However, where an agency of the State, tasked with administering a statute, assures a person seeking access to justice that it will assist in properly complying with that

statute, it is a serious injustice to allow that agency to use the statute as a shield to protect itself against its failure to follow through on its promise.

Judge Woods held two thorough hearings on this matter, determined the credibility of the witnesses, weighed all the evidence, and determined Polite "should not be punished for following the procedures of the Division and the delay that [that] caused." Although Judge Woods acknowledged under normal circumstances it may be improper to give Polite credit, he recognized the delay of "bureaucracy at work" created special circumstances in Polite's case and acted accordingly. For these reasons, I would affirm the family court's decision to credit Polite the amount he over paid from July 1, 2006.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Margaret M. Reiss,	Respondent,
v.	
Paul W. Reiss and Pamela Buck a/k/a Pamela Evans,	Defendants,
of whom Pamela Buck a/k/a Pamela Evans is the	Appellant.

Appeal From Charleston County
Judy L. McMahon, Family Court Judge

Opinion No. 4775
Heard June 22, 2010 – Filed January 19, 2011

AFFIRMED

Donald Bruce Clark, of Charleston, and Emily G. Johnston, of Mount Pleasant, for Appellant.

Stephanie Pendarvis McDonald, of Charleston, for Respondent.

LOCKEMY, J.: In this domestic case, Pamela Buck, paramour of Paul W. Reiss (Husband), argues the family court erred in finding she was jointly and severally liable to Margaret M. Reiss (Wife) for $262,000 of the proceeds from the sale of marital property. We affirm.

FACTS

Husband and Wife were married in 1990. During the course of their marriage, Husband was a commercial fisherman, and the parties lived together on Kiawah Island in Charleston County. In 2005, Wife filed for divorce, alleging Husband was involved in an adulterous relationship with Buck.

In her complaint, Wife requested an equitable division of the couple's investment property located on Seabrook Island (the Seabrook Property). Wife alleged Husband sold the property without her knowledge for $830,000, and sought an accounting of the proceeds from the sale and to restrain Husband from "selling, wasting, encumbering or disposing of the proceeds as they will be part of the equitable distribution of the marital estate."[1]

A month later, Wife filed a motion for temporary relief. The family court found Husband sold the Seabrook Property in December 2004, and retained the net proceeds of $436,000 and ordered Husband pay Wife $100,000 as an advance on the equitable distribution. The family court granted Wife leave to join Buck as a party to the divorce pursuant to section 63-3-530(A)(19) of the South Carolina Code (2010) as a person interfering with marital rights. Although properly served, Buck failed to respond, and Wife filed a motion for default judgment against Buck. At the final hearing, the family court granted Wife's motion for default judgment as to Buck's liability.

Based on the testimony at the final hearing the family court found Husband and Wife purchased the Seabrook Property in 1999; however, in 2002 Wife deeded her interest to Husband. Husband sold the property in 2004 without Wife's knowledge and used a portion of the $436,210 in

[1] The proceeds from this sale are the only issue in this appeal.

proceeds to purchase a pickup truck and pay "marital and certain [] individual bills." Husband deposited the remaining $362,000 in a joint bank account he opened with Buck. Buck then utilized the funds to aid the purchase of property located at 8 Island Drive, Paradise Island, Florida (Florida Property I).[2] One day later, Buck transferred Florida Property I to PBR Holdings, Inc. for no consideration. Husband was the president/managing member and registered agent of PBR Holdings. Buck was also a managing member of PBR Holdings.

One day after the family court issued the temporary order, PBR Holdings transferred Florida Property I to Buck for no consideration. Approximately a month later, Buck sold Florida Property I for $750,000. Buck gave Husband $382,000—Husband's original investment of $362,000 plus $20,000 in equity from the sale.[3] Husband invested $20,000 into his fishing boat, paid Wife $100,000 pursuant to the temporary order, and deposited the remaining $252,000 into a certificate of deposit owned by Buck. However, $10,000 of the proceeds remained unaccounted for.

The family court found Buck used some or all of the $252,000 to purchase a second property in Florida (Florida Property II). According to Husband and Buck, Buck obtained a line of credit against Florida Property II and repaid Husband $100,000. However, neither Buck nor Husband produced any evidence of this repayment, and the family court specifically found Husband's and Buck's testimonies regarding the proceeds from the Seabrook Property were not credible. Finally, the family court concluded Husband's and Buck's actions were "designed and intended to deprive and to defraud [Wife] of her lawful interest in the marital proceeds from the [Seabrook Property]."

The family court concluded the proceeds from the sale of the Seabrook Property equaled $436,210 and credited Husband $100,000 for the advance on the equitable distribution that he paid pursuant to the temporary order. The family court ordered "$336,210[] shall be paid to [Wife] by [Husband]

[2] The total purchase price of Florida Property I was $602,000.
[3] Buck netted $330,046 from the sale of Florida Property I.

and [Buck] . . . provided, however, [Buck's] joint and several responsibility to return and to pay such sum to [Wife] shall be limited to $262,000."

Thereafter, Buck filed a motion to alter or amend the judgment or in the alternative for a new trial, arguing the family court's conclusion she is liable for $336,210 but only jointly and severally liable for $262,000 is inconsistent. Buck also maintained her liability "should be limited to $106,147.50 and then further reduced by [her] payment of $100,000." The family court denied Buck's post-trial motions. This appeal followed.

ISSUE ON APPEAL

Did the family court err in finding Buck was jointly and severally liable to Wife for $262,000?

LAW/ANALYSIS

Buck argues there is no factual or legal basis for finding she was jointly and severally liable to Wife for $336,210 or $262,000. In the alternative, Buck maintains she is only liable for $152,000 because she repaid Husband $100,000 of the $252,000 deposited in her certificate of deposit. We disagree.

On appeal from the family court, this court has jurisdiction to correct errors of law and find facts in accordance with its own view of the preponderance of the evidence. Epperly v. Epperly, 312 S.C. 411, 414, 440 S.E.2d 884, 885 (1994). However, this broad scope of review does not require this court to disregard the findings of the family court that saw and heard the witnesses and was in a better position to evaluate their credibility. Gartside v. Gartside, 383 S.C. 35, 41, 677 S.E.2d 621, 624 (Ct. App. 2009). Accordingly, "[b]ecause [this court] lacks the opportunity for direct observation of witnesses, it should give great deference to the family court's findings where matters of credibility are involved." Pirayesh v. Pirayesh, 359 S.C. 284, 292, 596 S.E.2d 505, 510 (Ct. App. 2004).

Initially, in her brief, Buck points out the family court's order is inconsistent, appearing to hold her and Husband jointly and severally liable

for $336,210 while also limiting her liability to $262,000. However, at oral argument, Wife conceded Buck is liable for $262,000 only. Accordingly, we conclude the family court found Husband was liable to Wife for $336,210, while Buck was jointly and severally liable for $262,000 of the $336,210.

Although both Husband and Buck testified Buck repaid Husband $100,000 of the $252,000 deposited in her certificate of deposit, the family court specifically found their testimonies were not credible. Based on the credible testimony presented at the final hearing the family court determined Buck was jointly and severally liable for $262,000. Because this is an issue of credibility, and the family court was in a better position than this court to judge the witnesses' credibility, we defer to the family court's finding. See Avery v. Avery, 370 S.C. 304, 315, 634 S.E.2d 668, 674 (Ct. App. 2006) (deferring to the family court's equitable distribution when issue was one of witness credibility). Accordingly, the decision of the family court is

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Martha Joy Culbreth Myers, Respondent,

v.

Andrew Michael Myers, Appellant.

Appeal From Greenville County
R. Kinard Johnson, Jr., Family Court Judge

Opinion No. 4776
Heard December 7, 2010 – Filed January 20, 2011

AFFIRMED IN PART, AFFIRMED AS MODIFIED IN PART, AND REVERSED IN PART

W. D. Yarborough, Jr., of Greenville, for Appellant.

Timothy E. Madden, of Greenville, for Respondent.

WILLIAMS, J.: On appeal, Andrew Myers (Husband) claims the family court erred in (1) awarding Martha Myers (Wife) $3,000 in permanent periodic alimony; (2) dividing certain assets in the marital estate; and (3)

ordering Husband to pay sixty percent of Wife's attorney's fees. We affirm in part and reverse in part.

FACTS

Husband and Wife were married for nine years prior to Wife filing for divorce. This was the third marriage for both Husband and Wife, and no children were born of the marriage. As of the date of trial, Wife was sixty-two years old and Husband was sixty-five years old.

During the parties' marriage, they lived in Husband's home located in an upscale neighborhood in Greenville, South Carolina. Wife, a high school graduate, was a part-time teller at a local bank and earned approximately $2,455 per month. Husband was an insurance salesman and the sole owner and operator of an insurance agency, Advanced Health Insurance Service, Inc. According to Husband's W-2 and financial declaration, he earned approximately $7,116 per month or $85,399.20 per year. As owner of his business, Husband received other economic benefits apart from his salary, such as rental income from his office building and expense and travel reimbursements. By the parties' agreement, Wife used her salary exclusively for her own benefit while Husband paid all the bills and their living expenses from his earnings. Both parties testified they had a comfortable lifestyle during their marriage. Husband enjoyed golfing and hunting on a routine basis, and Wife's leisure activity of choice was shopping.

Wife testified she filed for divorce after Husband walked out on the marriage. Wife filed for separate support and maintenance and subsequently amended her complaint to request attorney's fees as well as a divorce based on Husband's desertion. At the one-day trial, Husband moved to amend his answer to request a divorce based on one year's continuous separation, and Wife did not contest this motion.

In its final order, the family court granted the parties a divorce based on one year's continuous separation. The family court found Husband's business and the parties' marital home were nonmarital assets, but it awarded Wife a

special equity interest in the amount of $19,000 based on renovations to the house using Wife's premarital funds. The court granted Wife certain marital property, which was given to Wife by Husband during the parties' marriage. Specifically, the court awarded Wife a 2001 Acura MDX vehicle, her diamond engagement ring, a full-length fur coat, and other furniture and personal property in Wife's possession. The family court then awarded Wife one-third of the remainder of the marital estate.

In its decision to award Wife alimony, the family court stated it considered the factors set forth in section 20-3-130 of the South Carolina Code. In setting Wife's alimony, the court found Wife's reasonably anticipated expenses were approximately $6,000 per month based on Wife's lifestyle during the marriage. The court noted Husband's expenses were approximately $6,000 per month but found several of these expenses were "double counted" because Husband reimbursed himself for those expenses through his business. As a result, the family court found Husband's income was closer to $100,000; thus, he could afford to contribute towards maintaining Wife's lifestyle and consequently awarded Wife $3,000 per month in permanent periodic alimony.

Husband filed a Rule 59(e), SCRCP, motion, which the family court denied. This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, this court may find facts in accordance with its own view of the preponderance of the evidence. Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 189, 612 S.E.2d 707, 711 (Ct. App. 2005). However, this broad scope of review does not require this court to disregard the family court's findings. Id. at 189-90, 612 S.E.2d at 711. When evidence is disputed, the appellate court may adhere to the findings of the family court, who saw and heard the witnesses. Id. at 190, 612 S.E.2d at 711. The family court was in a superior position to judge the witnesses' demeanor and veracity and, therefore, its findings should be given broad discretion. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996).

Moreover, the court's broad scope of review does not relieve the appellant of the burden of proving to this court that the family court committed error. Nasser-Moghaddassi, 364 S.C. at 190, 612 S.E.2d at 711.

LAW/ANALYSIS

I. Alimony

Husband does not argue Wife should not receive any alimony; rather, he contends the family court's award of alimony to Wife was excessive. We agree.

An award of alimony rests within the sound discretion of the family court and will not be disturbed absent an abuse of discretion. Dearybury v. Dearybury, 351 S.C. 278, 282, 569 S.E.2d 367, 369 (2002). Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage. Craig v. Craig, 365 S.C. 285, 292, 617 S.E.2d 359, 362 (2005). However, alimony should not "serve as a disincentive for spouses to improve their employment potential or to dissuade them from providing, to the extent possible, for their own support." McElveen v. McElveen, 332 S.C. 583, 599, 506 S.E.2d 1, 9 (Ct. App. 1998). Thus, "[i]t is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." Allen v. Allen, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001).

When awarding alimony, the family court considers the following factors: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; (12) prior support obligations; and (13) other factors the court considers relevant. S.C. Code § 20-3-130(C)

(Supp. 2009). No one factor is dispositive. Allen, 347 S.C. at 184, 554 S.E.2d at 425.

In awarding Wife alimony, the family court stated it considered the relevant statutory factors from section 20-3-130(C). Specifically, the court noted the following in finding Wife was entitled to alimony: the parties' current and reasonably anticipated expenses; the needs of both parties; the standard of living established during the marriage; and the tax consequences of the alimony award on Husband and Wife.

Despite the family court's findings, we find its award of alimony to Wife was excessive. Wife claimed she had monthly expenses of $6,000, but a review of her financial declaration reveals that many of her expenses were inflated for purposes of calculating Wife's entitlement to alimony. For example, Wife claimed she spent $2,300 per month on clothing, entertainment, trips, clubs, hair care, cosmetics, pet care,[1] nails, tanning, and gifts. Further, despite having no children or dependents living in Wife's home, she claimed almost $1,000 per month for "food and household supplies." When questioned about this expense at trial, Wife admitted she actually only spent $400 per month on food, and many of the other household expenses were one-time expenditures associated with settling into her new home.

The record indicates the parties enjoyed a comfortable standard of living during their marriage, but these expenditures are overstated. While Wife is entitled to a reasonable amount of alimony, it is error to award her permanent alimony substantially in excess of her needs. See McElveen, 332 S.C. at 600, 506 S.E.2d at 10 (finding wife's living expenses, as stated in her financial declaration, were unnecessarily inflated, thereby reducing Husband's monthly alimony obligation from $11,000 per month to $7,500 per month); Brandi v. Brandi, 302 S.C. 353, 358, 396 S.E.2d 124, 127 (Ct. App. 1990) (finding family court abused its discretion in award of alimony to wife

[1] Wife claimed she spent $185 per month in pet care, despite Husband having custody of the parties' dog during the pendency of this action and being awarded the dog in the final order.

because wife's expenses were clearly excessive); Woodward v. Woodward, 294 S.C. 210, 217, 363 S.E.2d 413, 417 (Ct. App. 1987) (finding permanent alimony of $3,000 per month was excessive when wife had been awarded fair percentage of marital estate and her expenses exceeded income by only about $600 per month). To sustain this alimony award would effectively penalize Husband and reward Wife. See Donahue v. Donahue, 299 S.C. 353, 362, 384 S.E.2d 741, 746 (1989) (Alimony "is not intended to penalize one spouse while rewarding the other.").

In support of its award, the family court noted Husband's expenses were slightly more than $6,000 but apparently discounted these expenses by finding Husband "double counted" his house insurance and was reimbursed by his business for his automobile payment and automobile expenses. However, Husband noted on his declaration that his house insurance was included in his loan payment and expressly deducted his house insurance from his monthly expenses. Furthermore, even if we exclude the automobile expenses from Husband's declaration, an award of this size is unfairly structured in Wife's favor, particularly when other factors militate against a $3,000 monthly alimony award. See Allen, 347 S.C. at 184, 554 S.E.2d at 424 ("It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded.").

Specifically, the following relevant evidence supports this conclusion: (1) Wife and Husband's marriage was not a long-term marriage; (2) the parties were granted a no-fault divorce; (3) it was each party's third marriage; (4) no children were born of the marriage; (5) both parties were employed throughout the marriage; and (6) Wife maintained a comfortable lifestyle prior to the parties' marriage as illustrated by her waterfront home and the savings and investments she had accrued prior to the parties' marriage. We find precedent is in accord with our decision. See, e.g., Hatfield v. Hatfield, 327 S.C. 360, 364-65, 489 S.E.2d 212, 215 (Ct. App. 1997) (denying wife alimony when it was both parties' fourth marriage, the marriage lasted for nine years, husband was seventy-one and wife was fifty-seven, wife was a part-time bank teller, and husband was a retired aircraft mechanic); Lassiter v. Lassiter, 289 S.C. 341, 343 n.1, 345 S.E.2d 504, 505 n.1 (Ct. App. 1986),

rev'd in part on other grounds, 291 S.C. 136, 352 S.E.2d 486 (1987) (affirming denial of alimony to wife when it was wife's third marriage and both parties worked); Eagerton v. Eagerton, 285 S.C. 279, 284, 328 S.E.2d 912, 915 (Ct. App. 1985) (finding rehabilitative alimony in the amount of $2,500 for a period of three years as opposed to permanent alimony was appropriate, despite wife's extravagant lifestyle during the marriage when parties were married for only four-and-a-half years, wife had a four-year degree, no children were born of the marriage, and wife retained substantial personal property given to her by husband during the marriage).

Our decision should not be construed to hold that a $3,000 monthly alimony award is always excessive as we have upheld similar amounts when circumstances warranted such an award. See Craig, 365 S.C. at 292, 617 S.E.2d at 362 (upholding $3,000 permanent periodic alimony when parties were married for twenty-five years, they had a high standard of living, and husband's infidelity led to the break-up of the marriage); Rimer v. Rimer, 361 S.C. 521, 523, 605 S.E.2d 572, 573 (Ct. App. 2004) (finding $2,600 permanent periodic alimony award to wife was not excessive when husband earned $7,000 per month, wife earned $260 per month as a substitute teacher, wife's monthly expenses were $3,500, and parties were married for twenty-five years); Mallett v. Mallett, 323 S.C. 141, 148-49, 473 S.E.2d 804, 809 (Ct. App. 1996) (increasing alimony award to $6,300 when parties were married for seventeen years, the parties enjoyed a very affluent lifestyle, wife had only been employed for four years of the marriage, and the parties' son would benefit from wife staying at home).

After a careful review of Wife's financial declaration and monthly expenses, we reduce Wife's alimony from $3,000 per month to $2,000 per month. We hold this alimony award sufficiently covers Wife's living expenses and is proper and reasonable under the circumstances.

II. Equitable Division

Next, Husband contests the family court's division of certain assets. Specifically, Husband claims the family court erred in (1) awarding three

substantial marital assets to Wife without accounting for their value in Wife's one-third share of the marital estate; (2) finding Husband's F-150 truck was a marital asset when it was exclusively purchased with Husband's inheritance from his father; and (3) finding the money in Husband's First Citizens bank account to be all marital property. We address each argument in turn.

The division of marital property is within the family court's discretion and will not be disturbed on appeal absent an abuse of that discretion. Craig, 365 S.C. at 290, 617 S.E.2d at 361. "An appellate court should approach an equitable division award with a presumption that the family court acted within its broad discretion." Dawkins v. Dawkins, 386 S.C. 169, 172, 687 S.E.2d 52, 53 (2010). The appellate court looks to the overall fairness of the apportionment. Deidun v. Deidun, 362 S.C. 47, 58, 606 S.E.2d 489, 495 (Ct. App. 2004). If the end result is equitable, the fact that the appellate court would have arrived at a different apportionment is irrelevant. Id.

1. Division of the Acura, Wife's Engagement Ring, and Wife's Fur Coat

First, Husband contends the family court erred when it awarded Wife the Acura, her diamond engagement ring, and her fur coat but failed to account for those items in its overall apportionment of the marital estate. We disagree.

In apportioning the marital estate, the family court was required to divide the Acura, the ring, and the fur coat because those items were purchased by Husband for Wife during the parties' marriage and thus were marital property.[2] See S.C. Code Ann. § 20-3-630 (Supp. 2009) (stating marital property is "all real and personal property which has been acquired by

[2] We note our courts have previously found engagement rings to be nonmarital property. See McClerin v. McClerin, 310 S.C. 99, 104, 425 S.E.2d 476, 478 (Ct. App. 1992) (finding engagement ring given to wife before wedding ceremony was nonmarital property of the wife). However, Wife never argued the nature of the ring rendered it nonmarital property, so we express no opinion on the propriety of its inclusion in the marital estate.

the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . ."). Because of the indivisible nature of those assets and Husband's testimony that he bought those items for Wife's use, the family court was within its discretion to apportion those assets entirely to Wife. See Marsh v. Marsh, 313 S.C. 42, 46, 437 S.E.2d 34, 36 (1993) ("[T]he family court [has] the flexibility to view each case based on the individual circumstances peculiar to the parties involved and to fashion a division of the parties' assets in a manner that is uniquely fair to the parties concerned.").

Awarding those assets entirely to Wife results in Wife receiving greater than a one-third share of the marital estate, but we do not view this outcome as reversible error. We find the family court intended to apportion Wife more than one-third of the estate, and it effectuated the division by awarding Wife the Acura, ring, and fur coat and then awarding her additional assets that represented one-third of the marital estate's value. This finding is supported by the family court's final order, which stated, "Although marital property, Husband intended Wife to receive these items [Acura, ring, and coat] and they should be apportioned one hundred (100%) percent to [Wife]. Wife should receive about thirty-three (33%) percent of the other marital assets." (emphasis added).

The family court valued the Acura, ring, and fur coat at $22,200, which represented roughly fifteen percent of the marital estate's value of $148,513.08. Adding those assets to Wife's one-third portion of the estate resulted in Wife receiving approximately forty-eight percent of the marital estate. While this award is generous considering the length of the parties' marriage and Wife's direct contributions to the marital estate, we do not find this division amounted to an abuse of discretion. Because the end result is equitable, we affirm the family court on this issue. See Deidun, 362 S.C. at 58, 606 S.E.2d at 495 ("If the end result is equitable, it is irrelevant that the appellate court would have arrived at a different apportionment.").

2. Husband's F-150 Truck

Next, Husband claims the family court erred in classifying his F-150 truck as a marital asset because it was purchased solely with inheritance from his father. We agree.

Section 20-3-630 defines marital property as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . regardless of how legal title is held . . . ." However, "property acquired by either party by inheritance, devise, bequest, or gift from a party other than the spouse" is exempted as marital property under section 20-3-630. See § 20-3-630(A)(1).

The nonmarital character of inherited property may be lost if "the property becomes so commingled as to be untraceable; is utilized by the parties in support of the marriage; or is titled jointly or otherwise utilized in such manner as to evidence an intent by the parties to make it marital property." Hussey v. Hussey, 280 S.C. 418, 423, 312 S.E.2d 267, 270-71 (Ct. App. 1984). The phrase "so commingled as to be untraceable" is important because the mere commingling of funds does not automatically make them marital funds. Wannamaker v. Wannamaker, 305 S.C. 36, 40, 406 S.E.2d 180, 182 (Ct. App. 1991).

Wife contends the F-150 truck was purchased with funds from the parties' joint checking account, which automatically rendered the truck a marital asset. We find Wife's assertion is misplaced because even if the inheritance was deposited into the parties' joint account, this does not automatically render the inherited funds or the F-150 truck to be marital property. See Miller v. Miller, 293 S.C. 69, 71, 358 S.E.2d 710, 711 (1987) ("An unearned asset that is derived directly from nonmarital property also remains separate unless transmuted, as does property acquired in exchange for nonmarital property.").

When questioned at trial, Wife admitted Husband told her that he purchased the truck with his inheritance. However, Wife stated that she included the truck on her financial declaration because she did not know whether Husband bought it with his inheritance "for sure." Wife's testimony is inadequate in light of Husband's testimony that he purchased the truck with nonmarital funds. See Wannamaker, 305 S.C. at 39, 406 S.E.2d at 182 (holding that to show transmutation, the spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties regarded the property as the common property of the marriage). Specifically, Husband testified at trial that he deposited a $64,000 check from his father's estate and then wrote a check for the F-150 less than twenty-four hours after he made this deposit. This testimony was corroborated by the parties' asset sheet submitted to the family court. Because Husband was the only party who ever withdrew or deposited funds into this account, and the transaction for the truck occurred within twenty-four hours of the inheritance funds being placed in the account, Wife failed to establish that these funds were so commingled as to be "untraceable." See id., 305 S.C. at 40, 406 S.E.2d at 183 (holding that although money used to purchase stocks was commingled in same account with funds used for marital purposes, the stock money was accounted for and thus traceable); see also Brooks v. Brooks, 289 S.C. 352, 355, 345 S.E.2d 510, 512 (Ct. App. 1986) (finding $16,000 inheritance that was partially used for marital purposes did not render the remaining $10,000 marital property because using a portion of an inheritance in furtherance of the marriage does not result in the entire sum losing its independent status). Accordingly, we reverse the family court's inclusion of this asset in the marital estate.[3]

[3] Excluding the truck from the marital estate decreases the estate's value to $111,688.08, which excludes the fur coat, Acura, and ring that were awarded solely to Wife as part of her share of the marital estate. The family court awarded Wife one-third interest in the "other marital assets," which included the F-150 truck valued at $14,625. Her one-third interest in the truck would have been $4,826.25. Because we refund this amount to Husband, Husband now owes Wife $1,911.75 in cash instead of the $6,738 owed to Wife pursuant to the family court's final order.

3. First Citizens Bank Account

Last, Husband claims the family court erred in finding the First Citizens bank account was a marital asset. This issue is not preserved for our review because Husband failed to raise any issues regarding the family court's classification of this account in his Rule 59(e), SCRCP, motion. See Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006) (holding that the wife's argument regarding the family court's identification and valuation of marital property was not preserved for appellate review because she failed to point out the alleged error to the family court in her Rule 59(e) motion); see also Arnal v. Arnal, 363 S.C. 268, 609 S.E.2d 821 (Ct. App. 2005) (finding wife's failure to raise family court's exclusion of parcel of land from marital estate in a Rule 59(e) motion precluded review of the issue on appeal).

III. Attorney's Fees

Last, Husband argues the family court erred in requiring Husband to pay sixty percent of Wife's attorney's fees. We agree in part.

"An award of attorney's fees and costs is a discretionary matter not to be overturned absent abuse by the trial court." Donahue, 299 S.C. at 365, 384 S.E.2d at 748. However, it is not improper for this court to reverse an attorney's fees award when the substantive results achieved by trial counsel are reversed on appeal. See Sexton v. Sexton, 310 S.C. 501, 503-04, 427 S.E.2d 665, 666 (1993).

In order to award attorney's fees, a court should consider several factors including: (1) ability of the party to pay the fees; (2) beneficial results obtained; (3) financial conditions of the parties; and (4) the effect a fee award will have on the party's standard of living. E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). In determining the amount of attorney's fees, the family court should consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, the professional standing of counsel, 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).

At the final hearing, Wife's attorney submitted a fee affidavit documenting fees and costs of $42,957. Citing to Glasscock in its final order, the family court required Husband to pay sixty percent of Wife's attorney's fees for a total of $25,774.20. In requiring Husband to pay this amount, the family court analyzed each factor from Glasscock.

We find an adjustment of Wife's entitlement to attorney's fees is merited because our decision to decrease Husband's alimony obligation to Wife and exclude the F-150 truck from the marital estate diminishes Wife's beneficial results. Thus, we modify the family court's decision and order Husband to pay fifty percent of Wife's attorney's fees. Our decision to require Husband to still contribute towards Wife's attorney's fees is three-fold. First, despite Husband's success on many issues, Wife obtained beneficial results regarding her share of the marital estate and her special equity interest in the home. See Golden v. Gallardo, 295 S.C. 393, 395, 368 S.E.2d 684, 685 (Ct. App. 1988) (finding the family court properly awarded the mother a portion of her fees and costs in suit brought by father to enforce visitation rights when both parties prevailed on some issues). Second, although we modify Husband's alimony obligation to Wife, Husband is still responsible for paying Wife permanent periodic alimony, which we view as a partial success for both parties. Third, as noted by the family court, Husband has a greater income than Wife and greater nonmarital wealth. Thus, contributing towards Wife's fees will have less of an effect on Husband's standard of living than it will on that of Wife. Taking these factors into consideration, we modify the family court's order and require Husband to pay $21,478.50 towards Wife's attorney's fees.

CONCLUSION

Based on the foregoing, the family court's order is

AFFIRMED IN PART, AFFIRMED AS MODIFIED IN PART, and REVERSED IN PART.

FEW, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Alba Matute, Employee, Appellant,

v.

Palmetto Health Baptist,
Employer, Respondent,

and

Key Risk Management
Services, Inc., Carrier, Respondent.

Appeal From Richland County
Appellate Panel, Workers' Compensation Commission

Opinion No. 4777
Submitted December 1, 2010 – Filed January 19, 2011

AFFIRMED

C. Daniel Vega, of Columbia, for Appellant.

Michael E. Chase and Carmelo B. Sammataro, both of Columbia, for Respondents.

WILLIAMS, J.: Alba Matute (Matute) appeals the appellate panel of the Workers' Compensation Commission's (appellate panel) decision to deny her benefits after she fell on the sidewalk outside Palmetto Health Baptist Hospital (Palmetto Baptist) and broke her wrist. Matute claims the appellate panel erred in reversing the single commissioner's decision to award her temporary total disability benefits and causally related medical treatment on two grounds: (1) Palmetto Baptist failed to timely appeal the single commissioner's order; and (2) Matute established she suffered a compensable work-related injury. We affirm.

FACTS

At the time of Matute's injury, she was fifty-three years old and had been a resident of the United States for nineteen years. She emigrated from Honduras to Miami, Florida, and subsequently moved with her husband to Columbia, South Carolina, more than six years ago. Since residing in Columbia, Matute has worked in the housekeeping department at Palmetto Baptist.

On March 20, 2008, Matute completed her shift at Palmetto Baptist, clocked out, and approximately ten minutes later, she exited the emergency room lobby onto Sumter Street. After turning right onto Sumter Street, Matute fell on the sidewalk and broke her right wrist. She testified it was "an unexpected stumble," and she fell because she "brushed the end of the shoe one against the other." At the hearing before the single commissioner, Matute stated the sidewalk was level and free of defects. When questioned, Matute testified her route out of Palmetto Baptist was neither the exclusive nor required means of ingress and egress, but she typically used that exit because the bus stop was located across the street from that exit. On the day of her accident, she was not taking the bus home. Matute subsequently returned to work and resumed using the same exit.

After her accident, Matute timely filed a Form 50, requesting a hearing and seeking temporary total disability benefits as well as medical treatment for her right wrist. Palmetto Baptist responded with a Form 51, denying

Matute suffered a compensable work-related injury. After a hearing on August 15, 2008, the single commissioner found Matute's injury was compensable on the ground that she injured herself within a reasonable time and distance after her shift ended. The single commissioner issued a written order bearing a "received" stamp dated September 22, 2008, and a certificate of service stamp dated September 24, 2008. Palmetto Baptist asserted it never received the order on that date and was not in receipt of the order until it inquired to the single commissioner on October 24, 2008, as to whether an order had been filed. After receiving the order by facsimile, Palmetto Baptist promptly filed a Form 30 to request commission review on October 28, 2008. Palmetto Baptist's appeal was administratively dismissed because its appeal was filed outside the fourteen-day appeal period prescribed by South Carolina Code of Regulations 67-701(A) (Supp. 2009).

Palmetto Baptist appealed, and the full commission of the Workers' Compensation Commission (full commission)[1] found good cause existed to reinstate the appeal. The appellate panel then reversed the single commissioner on the merits, finding Matute's injury was not compensable on three grounds: (1) Matute was not on Palmetto Baptist's premises at the time of her injury; (2) Matute's injury did not fall within any recognized exception to the "going and coming" rule; and (3) no causal relationship existed between Matute's fall and her employment. This appeal followed.

STANDARD OF REVIEW

When reviewing an appeal from the Workers' Compensation Commission, this court may not weigh the evidence or substitute its judgment for that of the appellate panel as to the weight of evidence on questions of fact. Therrell v. Jerry's Inc., 370 S.C. 22, 25, 633 S.E.2d 893, 894-95 (2006).

[1] A six-member full commission panel, exclusive of the original hearing commissioner, determines whether good cause exists to reinstate an appeal that has been administratively dismissed; whereas, a three-member appellate panel, exclusive of the original hearing commissioner, reviews an order on appeal from a single commissioner. See S.C. Code Ann. § 42-3-20 (Supp. 2009).

However, this court may reverse the appellate panel's decision if it is based on an error of law. Id.

LAW/ANALYSIS

1. Jurisdiction to Reinstate Appeal

Matute claims the full commission erred in reinstating Palmetto Baptist's appeal because Palmetto Baptist failed to timely appeal the single commissioner's decision. We disagree.

Regulation 67-701 states:

> Either party or both may request Commission review of the Hearing Commissioner's decision by filing the original and three copies of a Form 30, Request for Commission Review, with the Commission's Judicial Department within fourteen days of the day the Commissioner's order is received. . . . The Commission will not accept for filing a Form 30 that is not postmarked or delivered to the Commission by the fourteenth day from the date of receipt of the Hearing Commissioner's order.

25A S.C. Code Ann. Regs. 67-701 (Supp. 2009) (emphasis added). Despite the mandates of Regulation 67-701, "[a]n appeal administratively dismissed by the Judicial Department may be reinstated for a good cause upon motion to the Commission." 25A S.C. Code Ann. Regs. 67-705(H)(4) (Supp. 2009).

The full commission's determination that Palmetto Baptist demonstrated good cause to reinstate its appeal is supported by the record. The single commissioner received Matute's proposed order on September 22,

2008, as evidenced by the "received front desk" stamp on the order.[2] The certificate of service on the order stated a copy of the order was mailed first-class to all parties on September 24, 2008. However, Palmetto Baptist claimed it never received an order, either due to inadvertent improper service or nonservice, until it inquired to the single commissioner on October 24, 2008. Palmetto Baptist timely filed a Form 30 four days after it received the order as required by Regulation 67-701. See Regs. 67-701 (stating a party may request commission review "within fourteen days of the day the Commissioner's order is received") (emphasis added).

Because the full commission has the discretion to reinstate an appeal pursuant to Regulation 67-705, and Palmetto Baptist demonstrated good cause as to why it did not file its Form 30 until October 28, 2008, the full commission was within its discretion to reinstate Palmetto Baptist's appeal.

2. Compensability of Injury

Matute contends the appellate panel erred in reversing the single commissioner's award because Matute suffered a compensable work-related injury. We disagree.

As a general rule, an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment, and, therefore, an injury sustained by accident at such time does not arise out of and in the course of his employment. Gray v. Club Group, Ltd., 339 S.C. 173, 188, 528 S.E.2d 435, 443 (Ct. App. 2000). However, South Carolina has recognized a number of exceptions to this rule, including the following: (1) in going to and returning from work, the means of transportation is provided by the employer, or the time that is consumed is paid for or included in the wages; (2) the employee, on his way to or from his work, is still charged with some

[2] Despite the commissioner's office receiving the order on September 22, 2008, the cover letter from Matute's counsel that accompanied the proposed order was dated September 23, 2008, the day after it was purportedly received by the single commissioner.

duty or task in connection with his employment; (3) the way used is inherently dangerous and is either the exclusive way of ingress and egress to and from his work or constructed and maintained by the employer; (4) the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment of its use by the employee in going to and coming from work; or (5) an employee sustains an injury while performing a special task, service, mission, or errand for his employer, even before or after customary working hours, or on a day on which he does not ordinarily work. Id. at 188-89, 528 S.E.2d at 443.

None of the exceptions to the "going and coming" rule apply under these circumstances. The following evidence supports this conclusion: (1) Palmetto Baptist did not provide Matute with transportation to and from work nor did it pay for her transportation; (2) Matute was not fulfilling any duty or task in connection with her employment at Palmetto Baptist when she fell; (3) Matute's route into and out of the hospital was neither the exclusive nor the required means of entry or exit nor was it inherently dangerous; (4) the Sumter Street crosswalk was open to pedestrian traffic on the date of Matute's fall, but she chose not to use the crosswalk when exiting the hospital; (5) Matute was on a public sidewalk when she fell; and (6) Palmetto Baptist does not own, maintain, or control the sidewalk on which Matute fell. Thus, we hold the appellate panel properly reversed the single commissioner.

CONCLUSION

Accordingly, the appellate panel's decision is

AFFIRMED.[3]

FEW, C.J., and SHORT, J., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ESA Services, LLC (formerly ESA Services, Inc.) c/o Extended Stay, Inc., Respondent,

v.

South Carolina Department of Revenue, Appellant.

Appeal From the Administrative Law Court
Marvin F. Kittrell, Administrative Law Court Judge

Opinion No.4778
Heard October 6, 2010 – Filed January 19, 2011

AFFIRMED

Carol I. McMahan, Thomas A. McDermott, Ronald W. Urban, and Andrew L. Richardson, Jr., all of Columbia, for Appellant.

David B. Summer, Jr., and Faye A. Flowers, both of Columbia, for Respondent.

WILLIAMS, J.: On appeal from the administrative law court (ALC), the Department of Revenue (the Department) argues ESA Services, LLC (ESA) is not entitled to claim certain Job Development Credits (JDCs) pursuant to the South Carolina Enterprise Zone Act of 1995[1] (the Act) because ESA failed to meet specific obligations as required by the Revitalization Agreement (the Agreement) executed between ESA and the Advisory Coordinating Council for Economic Development (Council). We affirm.

STATUTORY BACKGROUND

In 1995, the Legislature passed the Act to provide tax incentives for businesses seeking to locate or expand to "rural, less developed counties" in South Carolina. See S.C. Code Ann. § 12-10-20 (2000 & Supp. 2009). To qualify for tax incentives under the Act, businesses were required to meet the eligibility requirements established by section 12-10-50(A)(1)-(4) of the South Carolina Code (Supp. 2009). Particularly, section 12-10-50(A)(3) required businesses to enter into a revitalization agreement with Council. The Act gave Council absolute discretion in deciding whether to enter into a revitalization agreement. S.C. Code Ann. § 12-10-60(A) (Supp. 2009). Although the terms of each individual agreement differed, every revitalization agreement uniformly required each business to create a minimum number of jobs and to make a minimum capital investment by a certain date to claim JDCs. § 12-10-50(A)(3); S.C. Code Ann. § 12-10-80(A) (Supp. 2009). Pursuant to the Act, once a business met the minimum job requirement and minimum capital investment set forth in the revitalization agreement, the business was eligible to claim JDCs. § 12-10-80(A).

FACTS

ESA is a limited liability company authorized to do business in South Carolina.[2] At some point prior to 2001, ESA began negotiations with the

[1] S.C. Code Ann. §§ 12-10-10 to -110 (2000 & Supp. 2009).

[2] During the time period that ESA sought JDCs, it was doing business as ESA Services, Inc. and was a member of a group of publicly traded companies that

State of South Carolina in an attempt to relocate its national corporate headquarters from Fort Lauderdale, Florida, to Spartanburg, South Carolina, as well as to expand its South Carolina operations. In furtherance of these negotiations, ESA submitted an application to Council[3] on July 19, 2001, seeking approval to participate in the South Carolina Enterprise Zone Program. In its application, ESA stated it intended to build a $13 million corporate headquarters facility as well as to create an estimated two hundred new jobs in South Carolina.

One week after receiving ESA's application, Council sent a letter to Bill Kastler, an accountant with Pricewaterhouse Coopers in Spartanburg, who assisted ESA in the application process. In the letter, Council stated that it approved ESA's application "with the contingency that only positions paying above $11.58 an hour would qualify for Job Development Credits." The letter further stated that Council intended to enter into a final agreement with ESA within eighteen months of the date of the original application, and ESA could accept the terms, as outlined in the letter, by signing and returning a copy of the letter to Council. Despite Council's contention that it sent this letter to ESA, no evidence was presented that ESA received the letter, and the

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owned and/or operated extended stay lodging facilities. Its parent company was Extended Stay America, Inc., and ESA was a wholly-owned subsidiary. In May 2004, ESA was purchased by the Blackstone Group and became a private company, and while ESA changed its name and income tax status, this had no effect on its operations or ability to qualify for JDCs. ESA subsequently merged into HVM, LLC, a sister company owned by the Blackstone Group, and the resulting corporation, HVM, LLC withdrew any future claims for JDCs under the Agreement. Apart from the three pending claims for refunds in this appeal, no further claims for JDCs can be made by ESA.

[3] Pursuant to section 1-30-25 of the South Carolina Code (Supp. 2009), Council is statutorily incorporated in and administered as part of the Department of Commerce.

Department never established that an executed copy of the letter was signed and returned to Council.[4]

Subsequently, on August 15, 2002, ESA notified Council that it would increase its capital investment from $13 million to $14.49 million and could commit to the creation of two hundred fifteen as opposed to two hundred new jobs. Council agreed to this increase by letter dated August 29, 2002, which also discussed wages and JDCs, but did not mention the $11.58 minimum wage contingency. During the final negotiations between ESA and Council, ESA relocated to Spartanburg, South Carolina. Each party executed their respective portion of the Agreement, and Council returned the fully executed Agreement to ESA on July 16, 2003, with an effective date of July 19, 2001. Council attached a cover letter to the Agreement, in which Council stated that ESA could begin claiming JDCs after it had certified to Council, in writing, that it had created the minimum two hundred fifteen full-time jobs and had met the minimum $14.49 million capital investment. No other requirements or contingencies were stated in the cover letter.

The body of the Agreement set forth certain stipulations regarding ESA's entitlement to JDCs. The Agreement specifically defined what constituted the "Minimum Job Requirement" and permitted ESA to fall below the minimum requirement by 15% or exceed it by 50% and still remain eligible to claim JDCs. ESA also agreed that prior to making a claim for JDCs, it would notify Council when it met the minimum job requirement and the minimum capital investment and would provide all documentation Council required to verify compliance. Within thirty days of Council's satisfaction that the requirements were met, Council was required under the Agreement to certify to the Department that ESA was eligible to begin claiming JDCs.

The Agreement also included four exhibits. Exhibit A, entitled "Project Details," was referred to numerous times in the Agreement and reiterated the

[4] The letter was addressed to Bill Kastler, whose office is in Spartanburg, South Carolina, but it was actually mailed to ESA's headquarters in Fort Lauderdale, Florida.

cover letter's requirement that ESA create a minimum of two hundred fifteen new jobs at its headquarters and invest a minimum of $14.49 million in the project. Exhibit B, entitled "Approved Employment Positions," listed three job titles--officers, managers, and staff--with each title employing ten, forty, and one hundred sixty-five individuals, respectively. Within each job title, Exhibit B set forth the wage bracket for that position with officers earning $220,000 per year, management earning $73,000 per year, and staff earning $30,000[5] per year. Exhibit B also delineated the estimated job development credit percentages created by these positions. Exhibit C was a blank copy of the Employer Quarterly Report, which ESA had to file with Council to claim JDCs. Exhibit D, entitled "Special Provisions and Amendments," listed several amendments to the Agreement, but it contained no reference to a minimum wage contingency.

The Agreement expressly stated that it, along with its attached exhibits, constituted the entire agreement as to matters contained in the Agreement and superseded all prior agreements and understandings, written or oral, between the parties. Nowhere in the Agreement or in the four attached exhibits did the Council or ESA expressly define a minimum wage contingency.

Soon after the parties executed the Agreement, ESA submitted documentation to Council to prove it had met the minimum job requirement and minimum capital investment under the Agreement.[6] On September 30, 2003, Council responded and informed ESA it had reviewed ESA's documentation and approved ESA's request to claim JDCs. Further, Council stated it would begin calculating JDCs, effective October 1, 2003, and it would notify the Department of the certification.

[5] Or $15.00 per hour based on a 2,000-hour work year, exclusive of benefits.

[6] At the time ESA submitted its documentation, it had created two hundred thirty new jobs and had made a capital investment of $14,506,927.

Council approved ESA's first two claims for refunds.[7] However, when ESA submitted a refund claim for the second quarter of 2004 for $933,962 based upon the payment of $27,110,506 in wages to one hundred ninety eligible employees, the Department did not issue a refund.[8] Council then reviewed ESA's quarterly report and determined ESA had claimed JDCs for some jobs that paid less than the Spartanburg per capita hourly wage of $11.58 per hour.

Thereafter, Jackie Calvi, the program manager for Council's Grants Management Team, spoke with representatives of ESA and requested ESA amend its returns to delete any JDC claims for jobs that ESA had paid hourly wages less than $11.58. However, Calvi told ESA that all the new jobs it had created, including those paying $11.58 or less, could be counted toward the two hundred fifteen minimum job requirement required by the Agreement. Calvi relayed this information to the Department. ESA amended its returns, deleting any claims for new jobs that paid less than $11.58 per hour. The amendments resulted in excess refunds owed to the State in the amounts of $2,833 (fourth quarter of 2003) and $3,397 (first quarter of 2004).

After ESA filed its amended returns, the Department notified ESA it intended to conduct a field audit of ESA.[9] In late June 2005, Edward Barwick conducted the audit at ESA's headquarters in Spartanburg and issued a report on September 14, 2005. In his report, Barwick found the following: (1) ESA's amendments to its quarterly returns resulted in taxes owing to the State in the amount of $2,833 for the fourth quarter of 2003 and $3,397 for

[7] ESA requested a refund in the fourth quarter of 2003 for $136,706 and a refund in the first quarter of 2004 for $80,623, both which were refunded in their entirety.

[8] The large increase in employee compensation was due to the exercise of employee stock options for approximately sixteen executives.

[9] A field audit is permissible pursuant to section 12-10-80(A)(9) of the South Carolina Code (Supp. 2009), which states, "The department shall audit each qualifying business with claims in excess of ten thousand dollars in a calendar year at least once every three years to verify proper sources and uses of the funds."

the first quarter of 2004; (2) all JDC claims should be denied because ESA failed to create the two hundred fifteen required jobs pursuant to the Agreement; and (3) ESA was not entitled to claim JDCs under the Agreement because it ceased to exist as a taxpayer during the claims period.

ESA timely filed a protest of the findings and proposed assessment contained in the Department's report. In its final agency determination, the Department affirmed the field auditor's findings and denied ESA's claims. ESA appealed to the ALC. On October 6 and 7, 2008, the ALC conducted a hearing and subsequently reversed the Department's denial of ESA's claims on the grounds that ESA had fully complied with the terms of the Agreement. The ALC denied the Department's motion to reconsider, and this appeal followed.

ISSUES ON APPEAL

The Department raises three issues on appeal:

(1) Did the ALC err in finding ESA complied with the terms of the Agreement because the ALC failed to properly construe Exhibit B?

(2) Are the ALC's findings of fact supported by substantial evidence?

(3) Did the ALC err in failing to defer to the Department's longstanding administrative practices?

STANDARD OF REVIEW

This court's scope of review is set forth in section 1-23-610(B) of the South Carolina Code (Supp. 2009). That section provides:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals

> may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

LAW/ANALYSIS

I. Terms of the Agreement

The Department first contends the ALC erred in concluding ESA abided by the terms of the Agreement when a plain reading of the Agreement demonstrates ESA was required to create two hundred fifteen jobs paying at least $30,000 per year. We disagree.

When a contract or agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement. Smith-Cooper v. Cooper, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001). However, when an agreement is ambiguous, the court should determine the parties' intent. Ellie, Inc. v. Miccichi, 358 S.C. 78, 94, 594 S.E.2d 485, 493 (Ct. App. 2004). A contract is ambiguous when it is capable of more than one meaning

or when its meaning is unclear. Jordan v. Sec. Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975).

It is a question of law for the court whether the language of a contract is ambiguous. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. Id. at 592, 493 S.E.2d at 878-79. The determination of the parties' intent is then a question of fact. Id. at 592, 493 S.E.2d at 879. On the other hand, the construction of a clear and unambiguous contract is a question of law for the court. Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987).

The crux of the Department's argument is the Agreement expressly included a wage contingency and because ESA failed to comply with this contingency, the Department properly denied ESA's claim for JDCs. Specifically, the Department highlights Exhibit B in the Agreement, entitled "Approved Employment Positions," which lists three job categories, each having their own wage bracket.[10] The Department contends the $30,000 wage bracket in Exhibit B proves ESA was required to create two hundred fifteen positions paying at least $15 per hour to be eligible to claim JDCs.

Despite the Department's argument, we find the plain language of the Agreement is silent regarding an established wage contingency. The parties agreed upon two material terms in their Agreement: a minimum capital investment of $14.49 million and the creation of at least two hundred fifteen

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Job Title	No. of Positions	Wage Bracket	Job Dev. Credit %
Officers	10	$220,000/year	5%
Management	40	$73,000/year	5%
Staff	165	$30,000/year	4%

jobs. This conclusion is supported by the plain language of the Agreement and its respective exhibits.

While the Department urges this court to construe Exhibit B as mandating a minimum wage contingency of $15 per hour, we find the Department's construction of Exhibit B would require us to read a term into the contract that does not exist. Exhibit B fails to state that ESA must create the exact number of "Approved Employment Positions" at the stated wage brackets to fulfill ESA's minimum job requirement.[11] Moreover, the definition of "Minimum Job Requirement" in the main body of the Agreement does not reference Exhibit B and does not include any mention of a wage contingency as a prerequisite to fulfilling the minimum job requirement. If the parties intended to incorporate a minimum wage contingency as a material term in the Agreement, we find this contingency would have been clearly set forth and defined as such in Exhibit B or within the main body of the Agreement.

A reading of other sections in the Agreement leads us to this same conclusion. See S. Atl. Fin. Servs. Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) (finding a contract should be read as a whole document so that "one may not, by pointing out a single sentence or clause, create an ambiguity"). Paragraph 3.4 of the Agreement states ESA must "maintain the Project substantially as proposed in the [initial] [a]pplication and as outlined in Exhibit A . . . ." Exhibit A does not mention a wage contingency, but it does reference the minimum job requirement and minimum capital investment. Additionally, the initial application, which is also referenced in Paragraph 3.4 of the Agreement, contains a Section K entitled, "Projected New Jobs and Payroll." (emphasis added). Section K from the initial application sets forth the same job categories as Exhibit B in the Agreement and instructs ESA to complete the section by listing the "average wage per

[11] We recognize that the two hundred fifteen approved employment positions from Exhibit B correlate to the two hundred fifteen jobs that must be created as part of the minimum job requirement. However, we fail to see how the $15 per hour wage bracket in Exhibit B is expressly incorporated into the minimum job requirement based on the contract's stated terms.

hour and estimated annual payroll for new jobs." (emphasis added). While describing the wages and payroll as "average" and "estimated," Section K, in no uncertain language, instructs ESA that the total number of jobs listed in that section should reflect the minimum job requirement.

Accordingly, we hold the ALC properly determined the Agreement's plain language did not impose a wage contingency on ESA. See Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) ("In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed.") (internal citation and internal quotation marks omitted).[12]

ESA concedes in its brief that its interactions with Council after entering into the Agreement modified the contract between the parties. ESA claims that while the Agreement did not state a wage contingency, ESA agreed after it submitted its claims for JDCs to impose an $11.58 wage contingency. This concession was based on Council's assurance that although ESA's jobs paying less than $11.58 would not be included when calculating its JDCs, those jobs would still count towards the minimum job requirement. We agree and find Council and ESA's decision to amend the Agreement to include a wage contingency was a valid modification of the contract.

Written contracts may be orally modified by the parties, even if the writing itself prohibits oral modification. S.C. Nat'l Bank v. Silks, 295 S.C.

[12] In light of our determination that the contract is unambiguous, we do not address the Department's alternative argument that the ALC failed to properly apply the parol evidence rule. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive).

107, 109-10, 367 S.E.2d 421, 422 (Ct. App. 1988). Any modification of a written contract must satisfy all fundamental elements of a valid contract in order for it to be enforceable, including a meeting of the minds between the parties with regard to all essential terms of the agreement. Player v. Chandler, 299 S.C. 101, 104-05, 382 S.E.2d 891, 893 (1989). Thus, "[w]hile a written contract can be orally modified, there must be a meeting of the minds as to the modification." First Union Mortgage Corp. v. Thomas, 317 S.C. 63, 70, 451 S.E.2d 907, 912 (Ct. App. 1994).

Here, ESA and Council,[13] as parties to the Agreement, mutually agreed to modify the Agreement to include an $11.58 wage contingency with the express understanding this amendment would not affect ESA's ability to meet the minimum job requirement. Both ESA and Council testified before the ALC they were in agreement on this modification and its effect on ESA's ability to claim JDCs for those jobs paying less than $11.58. This course of conduct between ESA and Council demonstrates they had a "meeting of the minds" as to the modified terms of the Agreement.

To reiterate, we hold the plain language of the Agreement, including Exhibit B, did not contain a wage contingency. Despite the lack of a stated wage contingency, we find the parties mutually agreed to orally modify the Agreement to include the $11.58 wage contingency with the understanding this contingency would have no effect on ESA's ability to satisfy its minimum job requirement. Accordingly, we hold the ALC properly construed Exhibit B in concluding ESA complied with the terms of the Agreement.

[13] As program manager, Calvi was authorized by Council and the program guidelines to interact with ESA on matters pertaining to the Agreement. Because the Department failed to present any evidence she was acting outside the course of her employment or the scope of her authority in dealing with ESA, we find Calvi had the authority to amend the terms of the Agreement.

II. ALC's Findings of Fact

The Department next argues the ALC erred as a matter of law because its findings of fact were not based on the plain language of the Agreement, which prevented its decision from being based on substantial evidence. We disagree.

In an appeal from the final decision of an administrative agency, the standard of appellate review is whether the ALC's findings are supported by substantial evidence. S.C. Code Ann. § 1-23-610(B) (Supp. 2009). Although this court shall not substitute its judgment for that of the ALC as to findings of fact, we may reverse or modify decisions that are controlled by error of law or are clearly erroneous in view of the substantial evidence on the record as a whole. Id. In determining whether the ALC's decision is supported by substantial evidence, this court need only find, considering the record as a whole, evidence from which reasonable minds could reach the same conclusion that the ALC reached. DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 420, 604 S.E.2d 704, 706 (Ct. App. 2004).

The Department takes issue with several findings of fact in the ALC's order. However, the Department failed to raise these discrepancies in its motion to alter or amend pursuant to Rule 59(e), SCRCP. Because the ALC was never allowed to clarify any discrepancies in its order, these issues are not properly before this court on appeal. See Home Med. Sys., Inc. v. S.C. Dep't of Revenue , 382 S.C. 556, 563, 677 S.E.2d 582, 586 (2009) (permitting Rule 59(e), SCRCP, motions in ALC proceedings); Revis v. Barrett, 321 S.C. 206, 210, 467 S.E.2d 460, 463 (Ct. App. 1996) (holding issue was not preserved on appeal when appellants never filed a motion to alter or amend the judgment to clarify the order pursuant to Rule 59, SCRCP, nor sought clarification pursuant to Rule 60(a), SCRCP); Nelums v. Cousins, 304 S.C. 306, 307-08, 403 S.E.2d 681, 681-82 (Ct. App. 1991) (finding trial court's alleged failure to clarify discrepancies in written order was not preserved when party made no motion to amend the judgment).

Even if these issues were preserved for our review, any inaccuracies in the ALC's findings of fact were not material and thus did not amount to prejudicial error in view of the substantial evidence on the whole record. See McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

III. Deference to the Department's Administrative Practices

Last, the Department contends the ALC erred in failing to defer to the Department's longstanding administrative practice of auditing qualifying businesses under the Act. We disagree.

To resolve this issue, it is instructive to identify the role of Council, the Department, and a qualifying business under the Act. Pursuant to the Act, "the terms and provisions of each revitalization agreement must be determined by negotiations between [C]ouncil and the qualifying business." § 12-10-60(A) (emphasis added). Furthermore, Council may establish criteria for the determination and selection of qualifying businesses and the approval of Agreements. S.C. Code Ann. § 12-10-100(A) (2000). "The decision to enter into a revitalization agreement with a qualifying business is solely within the discretion of [C]ouncil based on the appropriateness of the negotiated incentives to the project and the determination that approval of the project is in the best interests of the State." § 12-10-60(A) (emphasis added).

Once a qualifying business has certified to Council the business has met the minimum job requirement and minimum capital investment provided for in the revitalization agreement, the business may claim job development credits. § 12-10-80(A). If a qualifying business claims greater than ten thousand dollars in a calendar year, it must furnish to Council and to the Department a report that itemizes the sources and uses of the funds. § 12-10-80(A)(9). The Department shall audit each qualifying business with claims greater than ten thousand dollars in a calendar year at least once every three years to verify proper sources and uses of the funds. Id.

Moreover, in the event a qualifying business fails to achieve the level of capital investment or employment set forth in the revitalization agreement, Council may terminate the revitalization agreement and reduce or suspend all or any part of the incentives until the time the anticipated capital investment and employment levels are met. S.C. Code Ann. § 12-10-90 (2000).

While the Department argues the ALC erred in failing to give it deference in its interpretation and administration of the Act,[14] this issue was not before the ALC. Rather, the ALC was faced with determining whether Council and ESA had expressly agreed to a wage contingency as part of fulfilling the minimum job requirement in the Agreement. The Legislature charged Council with the task of negotiating the terms of the Agreement and approving ESA's project if it was in the best interests of the State. See § 12-10-60. Only after Council had made that decision and executed the Agreement could the Department exercise its authority to audit ESA and accordingly adjust ESA's entitlement to JDCs. As set forth in section 12-10-80(A)(9), the Department's duty was to ensure ESA was properly using the JDCs by "verify[ing] proper sources and uses of the funds," and the Department never asserted ESA was not properly using the JDCs.

This court is aware the Department has the statutory authority to audit qualifying businesses pursuant to the Act and make appropriate adjustments when a qualifying business is not complying with the terms of its revitalization agreement as agreed upon by Council and the business. However, the Department's authority does not extend to negotiating or interpreting the terms of a revitalization agreement because the Act clearly assigns Council with this responsibility. See §§ 12-10-60(A), -100(A).

[14] See Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 149, 694 S.E.2d 525, 530-31 (2010) ("An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons, but the interpretation will not be sustained if it contradicts a statute's plain language.").

Accordingly, the ALC was not required to defer to the Department's interpretation of the Agreement.

CONCLUSION

Based on the foregoing, the ALC's order is

AFFIRMED.

PIEPER and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

AJG Holdings LLC, Stalvey Holdings LLC, David Croyle, Linda Croyle, Jean C. Abbott, Lynda T. Courtney, Sumter L. Langston, Dian Langston, Carl B. Singleton, Jr., Virginia M. Owens and Stoney Harrelson, Respondents,

v.

Levon Dunn, Pamela S. Dunn and Helen Sasser, Appellants.

Appeal From Georgetown County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4779
Heard September 16, 2010 – Filed January 19, 2011

AFFIRMED

Stephen P. Groves, Sr., and Thomas S Tisdale, Jr., both of Columbia; for Appellants.

Jack M. Scoville, Jr, of Georgetown; for Respondents.

FEW, C.J.: This appeal involves restrictive covenants prohibiting commercial use of property absent the developer's approval and whether the developer's rights can be sold after the developer no longer owns any of the property. The Respondents, landowners who purchased property originally owned by developer Helen Sasser, filed this action against Levon and Pamela Dunn seeking to enforce the restrictive covenants against the Dunns, who planned to operate a bed and breakfast on their property. The Dunns filed several counterclaims, and both parties filed motions for summary judgment. The circuit court granted partial summary judgment to Respondents, finding Sasser's attempt to sell the developer's rights to the Dunns was invalid and Respondents were entitled to judgment as a matter of law on the Dunns' counterclaims for civil conspiracy and intentional infliction of emotional distress. We affirm.

FACTS/PROCEDURAL HISTORY

In 1978, Helen Sasser acquired land from the partition of Woodland Plantation, located along the Great Pee Dee River in Georgetown County. Sasser later subdivided the land and began selling lots. The deeds to these lots included the following restrictive covenant: "No lot shall be used for commercial purposes without express written consent from the Developer." The term "Developer" was defined as "Helen Sasser, her heirs and assigns." Sasser sold her last remaining lots in the subdivision in 1991.

In 1994, the Dunns purchased lots 9 and 10, and in 2003, they purchased lots 7 and 8. The Dunns also acquired nine acres of land outside the subdivision; these nine acres abut the Dunns' property in the subdivision, but are not governed by the subdivision's restrictive covenants. In 2005, the Dunns began renovation of an existing house (the guest house) on lots 7 and 8 in preparation for the opening of a bed and breakfast inn and wedding venue.

Tommy Abbott, a member of Respondent AJG Holdings, LLC and the husband of Respondent Jean Abbott, wrote to the Dunns, objecting to the commercial use of their property and pointing out the restrictive covenants.

He then visited the local planning and zoning commission to inquire about the building permit issued to the Dunns for the guest house. The commission later mistakenly issued a stop work order for the Dunns' work on their primary residence, but the order was lifted within a few hours. Rupert Stalvey, a member of Respondent Stalvey Holdings, LLC, contacted the Dunns' insurance agent to advise her of their commercial use of the guest house. As a result, the agent contacted the Dunns to advise them that they needed to obtain commercial coverage for the guest house. The Dunns further allege Respondents contacted the U.S. Army Corps of Engineers to falsely report the Dunns were filling in wetlands.

Several Respondents also signed a petition to amend the restrictive covenants so that the covenants would govern the Dunns' nine acres bordering the subdivision. One of the Respondents told the Dunns that if they refused to sign the petition, the other subdivision landowners would file an action to enjoin the Dunns' commercial use of their property. The Dunns did not sign the petition.

Respondents then filed this action against the Dunns, seeking an injunction against the commercial use of the property. After receiving notice of the action, the Dunns obtained from Sasser a written assignment of any developer's rights she may have remaining in the subdivision. The Dunns also executed a document asserting that, as the assignee of Sasser's developer's rights, they consented to the commercial use of their own property. Respondents sought and obtained a temporary restraining order against the commercial use of the property, which was affirmed by this court on appeal. AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009).

Respondents filed an amended complaint to add Sasser as a defendant and to add several additional causes of action. The Dunns and Sasser filed counterclaims for tortious interference with prospective business relations, interference with a contractual relationship, civil conspiracy, and intentional infliction of emotional distress. The parties filed cross-motions for summary judgment, and the circuit court ruled that Respondents were entitled to partial

summary judgment because Sasser no longer retained any developer's rights to assign to the Dunns. Accordingly, the Dunns' subsequent execution of a written consent to commercial use was meaningless.

The circuit court also granted Respondents summary judgment on the counterclaims for interference with prospective contractual relations, civil conspiracy, and intentional infliction of emotional distress. The circuit court stated that the issue of whether the restrictive covenants run with the land and all remaining issues were matters to be decided by the fact-finder. The circuit court later denied Appellants' motion to alter or amend the judgment.

LAW/ANALYSIS

I. Restrictive Covenants

Appellants make two distinct arguments with regard to the restrictive covenants: first, that Sasser lawfully assigned her developer's rights to the Dunns, and second, that Respondents have no right to enforce the restrictive covenants in any event. The circuit court granted summary judgment only with regard to the assignment of developer's rights, specifically holding that the second issue – whether the covenant was personal to Sasser or ran with the land (the answer to which will determine whether Respondents can enforce the covenant) – was to be determined by the fact-finder at trial.

A. Assignment of Developer's Rights

Appellants first argue the circuit court erred in granting summary judgment to Respondents with regard to the assignment of developer's rights. We disagree.

In Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006), our court set forth five conditions which must be met in order for a developer to reserve the right to amend or impose new restrictive covenants running with the land:

> (1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants; (2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development; (3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants; (4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and as otherwise may be provided by law; and (5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy.

368 S.C. at 350, 628 S.E.2d at 907 (emphasis added). Focusing on the second condition of Queen's Grant, the circuit court found that because Sasser conveyed all the property she owned in the subdivision in 1991, she no longer retained a sufficient property interest in the subdivision to convey developer's rights to the Dunns. Therefore, the circuit court granted partial summary judgment to Respondents, finding the Dunns' purported consent to commercial use was legally insignificant.

On appeal, Appellants are unable to point to any interest Sasser retained in the property other than her purported right to amend the restrictive covenants.[1] Their argument is a circular one: Sasser has a sufficient property interest in the development to allow her to reserve developer's rights because

[1] During oral arguments, Appellants argued for the first time that Sasser retained rights to use a fishing pond in the development. This argument is not preserved because it was never raised or ruled upon below, nor was it argued in the Appellants' brief. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n issue . . . must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); First Savings Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) (holding issues not argued in the brief will not be considered on appeal).

she reserved to herself developer's rights. As Queen's Grant makes clear, the reservation itself is allowed only when the five conditions are met, and one of those conditions is that the developer possesses a sufficient property interest in the development. For this condition to be a meaningful one, the property interest must necessarily be something more than a purported reservation of developer's rights. This is so regardless of whether the restrictive covenants run with the land or are personal to Sasser. See McLeod v. Baptiste, 315 S.C. 246, 433 S.E.2d 834 (1993) (holding a restrictive covenant that was personal to the grantor may not be enforced against a remote grantee when the grantor owns no real property which would benefit from enforcing the covenant).[2]

Because Sasser did not retain any property interest in the development, she did not retain developer's rights. Accordingly, we affirm the trial court's grant of summary judgment with regard to Sasser's inability to assign developer's rights to the Dunns.

B. Denial of Appellants' Summary Judgment Motion

Appellants further argue that even if Sasser had no developer's rights to assign, the circuit court erred in denying their motion for summary judgment because Respondents have no authority to enforce the restrictive covenants. For later purchasers like Respondents to benefit from a restriction imposed by a developer, the developer must have intended for the benefit to run with the lots subsequently sold. See Charping v. J.P. Scurry & Co., 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988). The circuit court found the issue of whether the restriction ran with the land or was personal to the developer could not be disposed of by summary judgment, but must "be decided at the trial." Because the circuit court denied summary judgment, we are prohibited from reviewing that ruling pursuant to Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003).

In Olson, two issues were before the supreme court: (1) whether the court of appeals erred on the merits in affirming the granting of summary

[2] The Dunns are remote grantees because they did not acquire their property through Sasser.

judgment and (2) whether the court of appeals erred in declining to address the merits of the appeal from a denial of summary judgment. Despite the immediate appealability of the first issue, the supreme court unequivocally held the denial of summary judgment was never subject to review, not in an interlocutory appeal nor even after final judgment. Id. Accordingly, we may not address this issue on its merits.

II. Summary Judgment on Counterclaims

Appellants contend that summary judgment on their counterclaims for civil conspiracy and intentional infliction of emotional distress was inappropriate.[3] We disagree.

A. Civil Conspiracy

In order to recover for civil conspiracy, the Dunns were required to demonstrate that two or more persons combined for the purpose of injuring and causing special damage to them. City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund, 382 S.C. 535, 546, 677 S.E.2d 574, 579 (2009). To prove special damages, the Dunns had to show that the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in the complaint. See Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981). Special damages must be properly pled, or the claim for civil conspiracy will be dismissed. Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115-16, 682 S.E.2d 871, 875 (Ct. App. 2009); see also Rule 9(g), SCRCP (requiring special damages to be specifically stated in the pleadings).

[3] Appellants also argue the circuit court erred in granting summary judgment on their counterclaim for interference with a contractual relationship; however, the circuit court denied summary judgment on this counterclaim. Therefore, we do not address this argument.

In their pleadings, the Dunns allege that Respondents conspired "for the purpose of injuring [the Dunns] and such conspiracy has resulted in special damages, insofar as [the Dunns] have lost the quiet use and enjoyment of their property, have suffered damage to their reputations in the community, as well as other injury in an amount to be proven at trial." At the summary judgment hearing, the circuit court pointed out that these damages were no different from the damages alleged in the Dunns' other causes of action. At that point, the Dunns argued that their payment of attorney's fees and costs constituted special damages. Every litigant represented by a lawyer incurs attorney's fees and costs. However, the Dunns never pointed out to the circuit court specific attorney's fees or costs they contended qualified as special damages, nor did they seek permission to amend their counterclaim to include the specificity required by Rule 9(g). In granting summary judgment, the circuit court noted the damages the Dunns alleged did not "go beyond the damages alleged in other causes of action."

At oral argument before this court, the Dunns conceded that the damages pled in their civil conspiracy counterclaim mirrored those alleged in their interference with a contractual relationship counterclaim. They argued, however, that Respondents' contact to the Corps of Engineers caused them to incur specific attorney's fees and costs associated with the accusation the Dunns had filled in wetlands, and those expenses qualified as special damages. Because that argument was not presented to the circuit court, we may not consider it. See Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733 (requiring issue to be raised below to be preserved for appellate review). Because the Dunns failed to plead a sufficient claim for special damages unique to the civil conspiracy claim, the circuit court properly granted summary judgment. See Rule 9(g), SCRCP.

B. Intentional Infliction of Emotional Distress

In their counterclaim for intentional infliction of emotional distress, the Dunns had the burden of establishing a prima facie case as to each element of the claim in order to survive summary judgment. Hansson v. Scalise Builders of S.C., 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007). To establish

such a claim, the plaintiff must show the defendant: (1) "intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct"; (2) that the conduct was so outrageous it exceeded "all possible bounds of decency" and so "atrocious" it was "utterly intolerable in a civilized community"; (3) such actions actually caused plaintiff's emotional distress; and (4) the emotional distress was so severe "no reasonable man could be expected to endure it." 374 S.C. at 356, 650 S.E.2d at 70 (citing Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981)).

We affirm the circuit court's determination that the Dunns did not establish a prima facie case that their emotional distress was "severe such that no reasonable man could be expected to endure it." Hansson, 374 S.C. at 356, 650 S.E.2d at 70 (internal quotes omitted). In Hansson, our supreme court found that the plaintiff's testimony he lost sleep and developed a habit of grinding his teeth was not sufficient to survive summary judgment:

> To permit a plaintiff to legitimately state a cause of action by simply alleging, 'I suffered emotional distress' would be irreconcilable with this Court's development of the law in this area. In the words of Justice Littlejohn, the court must look for something 'more' – in the form of third party witness testimony and other corroborating evidence – in order to make a prima facie showing of 'severe' emotional distress.

374 S.C. at 358-59, 650 S.E.2d at 72.

Here, Levon Dunn testified that Respondents' actions caused him to develop high blood pressure and digestive problems. He also testified that his nerves were "shot" and that he took medication for his high blood pressure and nervousness. Pamela Dunn testified that she had been "emotionally ill" and that she had lost twenty pounds. Like in Hansson, we find this evidence, even when viewed in the light most favorable to the Dunns, is not sufficient to survive a motion for summary judgment.

C. Standard of Review

In affirming the circuit court's determination that the evidence is insufficient to survive summary judgment on the Dunns' counterclaims, we are mindful of our limited standard of review. We may affirm an order granting summary judgment only if "no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). Our supreme court has recently stated that where the burden of proof is the preponderance of the evidence, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The supreme court has never specifically applied the "mere scintilla" standard to a cause of action for civil conspiracy. However, our ruling that the Dunns failed to plead a sufficient "claim" for special damages means that any factual issue as to civil conspiracy is not "material." Thus, because our ruling is not based on the sufficiency of the evidence it is unnecessary for us to determine whether the "mere scintilla" standard applies to civil conspiracy.

However, we do base our ruling affirming the circuit court as to intentional infliction of emotional distress on the sufficiency of the evidence. As recognized in Hansson, a cause of action for intentional infliction of emotional distress carries a "heightened burden of proof."[4] 374 S.C. at 356, 650 S.E.2d at 71. Accordingly, the "mere scintilla" rule of Hancock does not apply to this cause of action. See Hancock, 381 S.C. at 330-31, 673 S.E.2d at 802-03 (stating "where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment"). Rather, the court must determine "whether the defendant's conduct may reasonably be regarded" as meeting the requirements of Ford v. Hutson. Hansson, 374 S.C. at 357, 650 S.E.2d at 71 (quoting Holtzscheiter v.

[4] In this opinion we address the burden of proof as it affects the summary judgment stage. We do not address the burden of proof to be charged to the jury.

Thomson Newspapers, 306 S.C. 297, 302, 411 S.E.2d 664, 666 (1991)). The court must determine whether "reasonable minds could differ as to whether [the] conduct was sufficiently 'outrageous'" and "whether [the] resulting emotional distress was sufficiently 'severe.'" Hansson, 374 S.C. at 358, 650 S.E.2d at 71-72. This responsibility, which the supreme court has called "a significant gatekeeping role in analyzing a defendant's motion for summary judgment," Hansson, 374 S.C. at 358, 650 S.E.2d at 72, requires the circuit court to determine whether a prima facie case has been established. See Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994) ("Initially . . . the [circuit] court determines whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and only where reasonable persons might differ is the question one for the jury."). Upon careful review of the record before us, we find the circuit court exercised its gatekeeping responsibility within its discretion when it determined that the Dunns failed to establish a prima facie case for intentional infliction of emotional distress.

CONCLUSION

Based on the reasoning above, we decline to address the circuit court's denial of summary judgment with regard to Respondents' authority to enforce the restrictive covenants. Otherwise, we affirm the circuit court's partial grant of summary judgment in all respects.

AFFIRMED.

LOCKEMY, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Brian E. Thornton and Catherine S. Thornton, on behalf of themselves and all others similarly situated, Appellants/Respondents,

v.

South Carolina Electric & Gas Corporation (SCE&G), a subsidiary of SCANA Corporation, Respondent/Appellant.

Appeal From Lexington County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 4780
Heard September 15, 2010 – Filed January 19, 2011

DISMISSED

A. Camden Lewis and Peter D. Protopapas, both of Columbia; and William P. Walker, of Lexington; for Appellants/Respondents.

Sarah P. Spruill, of Columbia, for Respondent/ Appellant.

FEW, C.J.: Brian and Catherine Thornton brought this lawsuit as a class action for negligence, strict liability, and nuisance arising out of blasting activities conducted by South Carolina Electric and Gas Corporation (SCE&G) at the Lake Murray dam. SCE&G made a motion titled "Motion for Summary Judgment and to Strike Class Action Allegations." In substance, the motion sought three rulings relevant to this appeal. First, in what it labeled "motion to strike," SCE&G claimed "Plaintiffs cannot establish the requisite elements required for this case to be certified as a class action under Rule 23, SCRCP." Second, SCE&G moved for summary judgment based on the statute of limitations. Third, SCE&G argued the South Carolina Mining Act[1] does not create a private cause of action. The Thorntons appeal the circuit court's ruling in favor of SCE&G on the first and third points, and SCE&G cross-appeals the denial of summary judgment as to the statute of limitations. We dismiss the appeal because the order is not immediately appealable.

I. Appealability

An interlocutory order not governed by a specialized appealability statute is not immediately appealable unless it fits into one of the categories listed in section 14-3-330 of the South Carolina Code (1976 & Supp. 2009). Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). The Thorntons contend the portion of the order dealing with class action allegations is appealable under section 14-3-330(2)(c) because it affects a substantial right by striking a pleading. They contend the portion of the order granting summary judgment that no private right of action exists under the Mining Act is also appealable under section 14-3-330(2)(c), and under section 14-3-330(1) because it involves the merits. We disagree. Under the circumstances of this case, neither portion of the order is immediately appealable. The portion of the order denying SCE&G's motion for summary

[1] S.C. Code Ann. §§ 48-20-10 to -310 (2008 & Supp. 2010).

judgment on the statute of limitations is not appealable under any circumstance.

A. Order Granting a Motion to Strike Class Action Allegations

The Thorntons' complaint defined the class to include: "All residents of Lexington County, South Carolina who suffered property damage as a result of the construction and blasting of the Lake Murray dam expansion project." After discovery, SCE&G filed its motion addressing the class action allegations. Though the motion was filed under Rule 12, SCRCP,[2] and was captioned as a motion "to strike class action allegations," the motion actually raised the merits of class certification. The motion states: "Plaintiffs cannot establish the requisite elements required for this case to be certified as a class action under Rule 23, SCRCP." The applicable heading of SCE&G's memorandum in support of its motion states: "Plaintiffs cannot satisfy the elements to proceed as a class action under Rule 23(a), SCRCP," and the text of the memorandum addresses the merits of class certification under the rule. The Thorntons noted in their responsive memorandum that "Defendants' Motion reads more as a Memorandum in opposition to class certification," and proceeded to address the merits of the criteria for class certification. The order also addressed the merits of class certification:

> Defendants raise the argument that Plaintiffs fail to satisfy the elements set out in Rule 23(a), [SCRCP]. The court has determined that the defenses of the representative party are not typical of the defenses of the class. As indicated in the records, each member has unique damages which will require unique defenses. Accordingly, Defendants' Motion to Strike Class Action Allegations is granted.

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[2] Rule 12(f), SCRCP, provides in part: "**Motion to Strike.** Upon motion pointing out the defects complained of, . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

We believe the Thorntons' contention that this portion of the order is immediately appealable because it affects a substantial right by striking a pleading mistakenly equates an order granting a Rule 12(f) motion to strike with an order that is appealable under section 14-3-330(2)(c). We do not believe the two are necessarily the same. In particular, we find the use of the word "strike" in both Rule 12(f) and section 14-3-330(2)(c) does not mean that an order granting a Rule 12(f) motion is automatically immediately appealable.[3]

In P.J. Construction Co., Inc. v Roller, 287 S.C. 632, 340 S.E.2d 564 (Ct. App. 1986), this court heard an appeal from an order striking two defenses from the answer. Before proceeding to the merits of the appeal, the court stated: "An order striking a portion of a pleading is immediately appealable." 287 S.C. at 633, 340 S.E.2d at 565 (citing Harbert, 74 S.C. at 16, 53 S.E. at 1002).[4] Other than that general statement, however, no South Carolina appellate court facing an appeal from an order granting a motion to strike has defined what constitutes an order affecting a substantial right by

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[3] The word "strike" in § 14-3-330(2)(c) and Rule 12(f) has different origins. In section 14-3-330(2)(c), the word "strike" comes from its code pleading predecessor enacted in 1870. S.C. Acts Part I., tit. I., sec. 11, Gen. Assemb., Reg. Sess. (S.C. 1869-70). That section, which has not changed since 1902, includes the phrase "strikes out an answer or any part thereof, or any pleading in any action." Harbert v. Atlanta & Charlotte Air Line Ry. Co., 74 S.C. 13, 16, 53 S.E. 1001, 1001-02 (1906). On the other hand, a motion to strike pursuant to Rule 12(f), SCRCP, originated in the federal rules of civil procedure decades after and without any reference to the use of the word "strike" in section 14-3-330(2)(c). See Rule 86, SCRCP ("These rules shall take effect on July 1, 1985.").

[4] The lower court's order in Roller apparently was not entered pursuant to Rule 12(f), as this court's opinion does not mention the rule, and the appeal was heard on December 17, 1985, less than six months after the effective date of the Rules of Civil Procedure. 287 S.C. at 632, 340 S.E.2d at 564.

striking a pleading under section 14-3-330(2)(c).[5] Generally, section 14-3-330(2) has "been narrowly construed and immediate appeal of various orders issued before or during trial generally has not been allowed." Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). We believe a narrow construction of section 14-3-330(2)(c) requires us to focus on the effect of the order, not the label given to the motion or to the order granting it.[6]

We find support for this view in several opinions of our supreme court. In Miles v. Charleston Light & Water Co., 87 S.C. 254, 69 S.E. 292 (1910), the supreme court considered the defendant's appeal from an interlocutory order denying its motion to make the plaintiff's complaint more definite and certain. 87 S.C. at 255-56, 69 S.E. at 293. After noting that such an order was not immediately appealable, the court heard the appeal anyway because

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[5] In several cases, our courts have discussed the immediate appealability of orders denying motions to strike. See, e.g., Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000); Bowden v. Powell, 194 S.C. 482, 10 S.E.2d 8 (1940); Miles v. Charleston Light & Water Co., 87 S.C. 254, 69 S.E. 292 (1910). We have been able to find only one other decision addressing, under section 14-3-330(2)(c), the immediate appealability of an interlocutory order granting a motion: Murphy v. Owens-Corning Fiberglas Corp., 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001), overruled on other grounds by Farmer v. Monsanto Corp., 353 S.C. 553, 556-57, 579 S.E.2d 325, 327 (2003). We discuss each of these cases below.

[6] Our courts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability. See, e.g., Wetzel v. Woodside Dev. Ltd. P'ship, 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (holding on unique facts that an order granting a motion to set aside default was immediately appealable because it had "the effect of . . . granting a motion to dismiss under Rule 12(b)(5), SCRCP, since it ends the action as to [one party]"); Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 114-15, 682 S.E.2d 871, 874 (Ct. App. 2009) (analyzing a "motion to strike" which actually challenges a theory of recovery as a motion to dismiss under 12(b)(6) rather than as a motion to strike).

"appeal has also been taken from the order upon the [defendant's] demurrer, which in effect strikes out a portion of the complaint," making it appealable under the predecessor to section 14-3-330(2)(c). 87 S.C. at 257, 69 S.E. at 293 (emphasis added). In Bowden v. Powell, 194 S.C. 482, 10 S.E.2d 8 (1940), the supreme court considered a post-judgment appeal from a pretrial order denying a motion to strike allegations in a complaint. 194 S.C. at 484, 10 S.E.2d at 9. In holding the order was not appealable, the court quoted Harbert to draw a distinction between the order before the court and an order granting a motion to strike a pleading, which the court noted is appealable:

> If the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading, and on appeal from the final judgment this court could not say there was error of law in confining the evidence and charge to the pleadings.

Id. (quoting Harbert, 74 S.C. at 16, 53 S.E. at 1002); see also Caldwell v. McCaw, 141 S.C. 86, 91, 139 S.E. 174, 175 (1927).

Under the reasoning of Miles and Bowden, an appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c). An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial.[7]

[7] Our holding is also supported by the supreme court's decision in Breland. 339 S.C. at 93, 529 S.E.2d at 13. In Breland, the court ruled that an order denying a motion to change venue was not immediately appealable under section 14-3-330(2)(c), stating: "Immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case." 339 S.C. at 93, 529 S.E.2d at 13. The court held that "[t]he trial court's order did not 'affect' the Defendant's right to

Whether an order granting a Rule 12(f) motion to strike is appealable under section 14-3-330(2)(c) depends on the effect of the individual order under the facts and circumstances of the case. Here, rather than asking the court to remove an issue from the case, SCE&G's motion to strike actually raised the merits of class certification.[8] Rather than preventing the Thorntons from litigating the issue, the order had the effect of denying class certification on the merits. "The general rule established by [the supreme c]ourt is that class certification orders are not immediately appealable." Salmonsen v. CGD, Inc., 377 S.C. 442, 448, 661 S.E.2d 81, 85 (2008) (citing Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992)). We find this order is not immediately appealable because its effect was not to strike a pleading, as its label suggests, but rather to deny class certification on the merits of Rule 23(a), SCRCP.[9] On remand, the order shall be treated as an order denying class certification which, under Rule 23(d)(1), "may be altered or amended before the decision on the merits." See Salmonsen, 377 S.C. at 454, 661 S.E.2d at 88 ("[C]lass certification may be altered at any time prior to a decision on the merits.").

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venue in the county of its residence because any error in the order can be corrected on appeal following the trial." Id.

[8] Although the question of whether a class action should be certified is typically raised by the plaintiff in a motion for class certification, either party may prompt the court to make this determination. Rule 23(d), SCRCP ("As soon as practicable, after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.").

[9] In Murphy, this court looked to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c). 346 S.C. at 44-45, 550 S.E.2d at 593. Though the order granting the Rule 12(b)(1), SCRCP, motion was not a final order, the court found it immediately appealable because it had "the practical effect . . . that it strikes out the Murphys' complaint with respect to [some but not all defendants]." 346 S.C. at 44, 550 S.E.2d at 593.

The decision we reach in this case is consistent with a recent opinion of the supreme court on an interlocutory appeal from an order granting a motion to strike class allegations: Grazia v. South Carolina State Plastering, LLC, Op. No. 26882 (S.C. Sup. Ct. filed Oct. 4, 2010) (Shearouse Adv. Sh. No. 40 at 13). In Grazia, the plaintiffs' claim for defective stucco work fell under The Notice and Opportunity to Cure Construction Dwelling Defect Act,[10] which "*requires* the claimant to serve written notice no later than ninety days before filing the action." Id. at 19 (emphasis in original). Neither the Grazias nor any member of the class complied with the notice provision before filing. Id. at 15. Even after the Grazias personally complied with the notice requirement, the trial court granted the defendants' motion to strike class allegations based on its conclusion as a matter of law that the Act is incompatible with class action procedure. Id. at 15, 18. Although the supreme court did not discuss the appealability of the order, it was immediately appealable.[11] By ruling as a matter of law that no class action could be filed under the Right to Cure Act, the lower court order had the effect of removing the issue of class certification from the case and preventing the Grazias from litigating the issue on the merits of Rule 23, SCRCP.

B. Order Granting Summary Judgment Under the Mining Act

Generally, orders granting partial summary judgment may be immediately appealable under either the "involving the merits" or "substantial right" categories of section 14-3-330(1) and (2)(c). See Link v. Sch. Dist. of Pickens County, 302 S.C. 1, 6, 393 S.E.2d 176, 178-79 (1990) (holding an order granting partial summary judgment may be appealable under either category). To decide whether a particular summary judgment order fits into either subsection, however, the court must examine the order to determine if

[10] S.C. Code Ann. §§ 40-59-810 to -860 (Supp. 2009).

[11] "The fact that an appellate court may have decided an appeal of a particular type of order on the merits is not dispositive of whether the order is appealable when the issue of appealability was not raised." Breland, 339 S.C. at 95, 529 S.E.2d at 14.

it meets the subsection's criteria for appealability. We find the order granting summary judgment that no private cause of action exists under the Mining Act does not meet the criteria for either, and is therefore not immediately appealable.

The Thorntons asserted causes of action for negligence, strict liability, and nuisance. They did not plead a cause of action under the Mining Act. At oral argument, the Thorntons conceded they still have no intention of asserting a cause of action under the Mining Act. SCE&G stated in memoranda addressing appealability that its "motion for summary judgment was limited to the extent the Thorntons might try to assert a claim under the Act." This appeal thus presents the unique situation in which the trial court granted a motion for summary judgment as to a cause of action the Thorntons never pled. The Thorntons did include two violations of the Mining Act as specific allegations of negligence. SCE&G conceded at oral argument that the Thorntons' negligence cause of action, including the subsections referring to the Mining Act, remains in place as it was before the motion was granted.

We find that this order does not involve the merits under section 14-3-330(1). An order "involves the merits" when it finally determines a substantial matter forming the whole or a part of some cause of action or defense. Mid-State Distribs., Inc. v. Century Imps., Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). The Thorntons may still pursue their negligence claim as originally pled in their complaint. If the trial judge permits it in the exercise of discretion, they may introduce evidence that SCE&G violated the Mining Act and argue the alleged violations are evidence of negligence. All of this is left to the discretion of the trial judge, just as it would be if the motion had never been filed.

Further, because the Thorntons never asserted a cause of action under the Act, the order does not have the effect of removing any material issues from the case, and therefore does not affect a substantial right by striking a pleading. The Thorntons may still offer evidence of SCE&G's alleged violations of the Act in attempting to prove their negligence claim as pled. Because the order granting summary judgment neither involves the merits nor affects a substantial right, it is not immediately appealable.

C. Statute of Limitations Cross-Appeal

In the cross-appeal, SCE&G contends the trial judge erred in denying its summary judgment motion as to the statute of limitations. SCE&G further contends the circuit court's order actually granted summary judgment for the Thorntons as to that issue. To the extent the judge merely denied summary judgment, the order is not appealable. Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003) (explaining the denial of summary judgment will not be considered on appeal even in the context of an otherwise proper appeal). The order is also not appealable as having granted summary judgment. As the Thorntons conceded at oral argument, the order does not grant summary judgment on this issue, and the question of whether the Thorntons complied with the statute of limitations remains one the circuit court must answer at trial.

II. Conclusion

An interlocutory order which is not governed by a specialized appealability statute may not be appealed before the entry of final judgment unless the order fits into one of the categories set forth in section 14-3-330 of the South Carolina Code. The order appealed in this case does not fit into any of the categories, and therefore is not immediately appealable.

APPEAL DISMISSED.

HUFF and GEATHERS, JJ., concur.