OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39

October 10, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Claire Elizabeth Mouton LaFrance, **Respondent/Appellant,**

v.

Michael Leo LaFrance, **Appellant/Respondent.**

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

Opinion No. 4158
Heard September 12, 2006 – Filed October 2, 2006

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

J. Falkner Wilkes, of Greenville, for Appellant/Respondent.

Timothy E. Madden, of Greenville, for Respondent/Appellant.

ANDERSON, J.: In this domestic action, Michael Leo LaFrance ("Husband") appeals the family court's imputation of income, division of marital assets, calculation of child support, and award of attorney's fees. Claire Elizabeth Mouton LaFrance ("Wife") cross appeals the family court's awarding Husband a share in the future profits from the sale of the marital

home, classifying Wife's jewelry as marital property, and issuing the Supplemental Order dated September 29, 2004 that required each party to share guardian ad litem fees. We affirm in part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

Husband and Wife married in 1989 and had three children, who at the time of the final hearing were eight, five and four years old. During their fourteen-year marriage the parties relocated a number of times to pursue Husband's professional opportunities and to improve the parties' financial position.

In Lafayette, Louisiana, where the parties married, both worked for Comtel, a telecommunications company. Wife was employed as a sales representative and Husband was a senior executive. Her salary at the time was approximately $45,000.00 and Husband's was approximately $75,000.00.

Comtel merged in 1990 with a long distance telecommunications company, and the couple relocated to Jackson, Mississippi. Husband's salary at that time was approximately $80,000.00, plus stock options. Wife completed her college education during that time and, in addition, worked in a local boutique.

Early in the 1990s Husband started a wireless paging company in Covington, Louisiana. He earned approximately $40,000 per year in this two-year venture. Wife started a bridal registry business, which, though allegedly successful, did not result in any personal income because she put all profits back into the business.

In 1993 or 1994, the couple relocated to Rochester, New York, where Husband accepted an executive level management position with ACC Communications at an initial salary of approximately $150,000.00, plus stock options. Wife returned to work for a short time until the parties decided to buy a home and start a family. Both agreed Wife would not work outside the home.

In 1997 Husband left ACC, having acquired approximately four million dollars in assets generated by his stocks and options. The family moved to Greenville, South Carolina, where Husband entered a start-up telecommunications venture, "New South," and assumed the position of Chief Executive Officer (CEO). His initial annual salary was $70,000.00, plus stock options. When Husband was terminated from New South in 2001, his annual salary was $150,000.00, plus bonuses and stock options.

At the time of the final hearing in March of 2004, both parties resided in Greenville, South Carolina. Wife was thirty-eight years old and Husband was forty-three. Both graduated from college. Wife takes prescription medication for anxiety but claimed to be in good health otherwise. Husband has severe back problems, has had surgery, and continues to suffer chronic pain. Associated with Husband's back injury is a history of addiction to pain medication, for which he has received some rehabilitative treatment. Husband has not been employed since his termination from New South. Wife began working in the spring of 2003 as a Physician's Liaison with the Greenville Hospital System, earning approximately $75,000.00 annually.

On February 25, 2002, Wife petitioned for divorce on the ground of continuously living separate and apart for one year without intervening cohabitation. Subsequently, Husband and Wife agreed upon custody, visitation, family support, and division of certain marital assets.[1]

[1] Husband left New South with a severance package which included, in addition to other benefits, a gross income of $500,000.00 to be paid over an eighteen-month period. Parties initially agreed to use the after tax income from New South, which amounted to approximately $15,000.00 monthly, to pay the $3365.18 monthly mortgage payment on the marital home and to pay non-taxable family support to Wife in the amount of $7,500.00 per month. Husband received the balance for his use. The agreement was formalized by Temporary Order of Judge Amy C. Sutherland, dated April 10, 2002. At that time, only six months of income remained to be disbursed from the New South severance package. Consequently, the provisions of the order allowed for additional temporary relief when the New South income ended.

The parties had significant marital property, which, in addition to the marital home, included cash, checking accounts, retirement assets, investment accounts and securities, insurance policies and proceeds, potential income tax refunds and substantial personal property in the form of antiques, home furnishings, vehicles, firearms, coin collections, children's portraits, jewelry, and gold coins.

At the commencement of trial Wife withdrew her requests 1) for permanent alimony; and 2) that Husband maintain a life insurance policy as an incident of support. Instead, Wife sought equitable apportionment of the policy as one of the marital assets. The issues before the court for disposition on final hearing included: divorce; identification, valuation and apportionment of marital assets and marital debts; child support; modification of prior support orders; and attorney's fees.

The family court awarded Wife a divorce on the ground of one year's continuous separation without intervening cohabitation. The parties stipulated that Wife maintain custody of the three minor children, allowing Husband reasonable visitation. The litigants agreed to the permanent apportionment of New South interests in percentages consistent with the apportionment of the general marital estate. Stipulations of the parties were adopted, incorporated into and merged with the final decree and order. The family court identified, valued and equitably apportioned the parties' marital property and debts. The final order provided:

- Among the marital assets is the marital home . . . . [T]he greater and more credible evidence supports a fair market valuation of $700,000.00 . . . . The marital home is subject to mortgage indebtedness which has a date of filing balance due of $404,000.00 . . . . [A]fter considering this indebtedness, the

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Subsequent orders dated September 10, 2002, May 16, 2003, and September 10, 2003, modified the original support agreement, eventually relieving Husband of spousal support and reducing his obligation under the marital home mortgage to one-half.

net fair market value of the equity in this home is $296,000.00.

- [I]n the event the marital home is sold within six years of this Order, and the sales price exceeds $700,000.00, any excess net proceeds (resulting from a sales price over $700,000.00) shall be distributed equally to the parties, provided, that any increase in the value of the house that is the direct result of Wife's direct contribution or improvement to the house subsequent to this Order shall not be subject to distribution. This Court reserves jurisdiction to determine the extent of direct contributions in the event that the marital home sells within the six-year period.
- Without question or contest, Husband made the vast majority of the direct contributions to the marriage . . . . Wife clearly made the vast majority of the indirect contributions to the marriage . . . . When considered in their entirety, the contributions of each party to the marriage, both direct and indirect combined, are equal in value.
- Husband is either not employed or significantly underemployed.
- Based on all the credible evidence, Husband has the ability to earn in the lower range of the senior level salaries, or about $100,000.00 per year. Husband is therefore imputed with this level of gross income for purposes of this Order.
- Based on the findings of this Order, and all the credible evidence presented, Husband's gross monthly income for purposes of calculating child support is $8330.00. Wife's gross monthly income for child support purposes is $6250.00. Beginning with the first day of the first month following the filing of this Order, Husband shall pay child support directly to Wife in the amount of One Thousand Nine Hundred Thirty and 00/100 Dollars ($1930.00) per month.
- As an incident of child support, for so long as the children are enrolled in private school, Husband shall pay to Wife, on a monthly basis, 57% of the children's private school tuition.

- Husband shall contribute the sum of Fifty Thousand and 00/100 Dollars ($50,000.00) to Wife's attorney's fees and suit costs.
- Based on careful review of all the evidence, and consideration of all appropriate factors, the marital estate should generally be equally divided between the parties . . . . To effectuate an equal division of the marital estate, Wife shall pay Husband $48,925.00 . . . offset by the $50,000.00 contribution required by Husband to pay Wife's attorney's fees . . . with this offset Wife's obligation to pay Husband is satisfied and Husband owes Wife $1075.00 . . . .
- It does not appear that any of the nine listed pieces of jewelry was identified as being non-marital . . . . Based on the evidence presented, the marital jewelry has a fair market value of $46,400.00.

Both parties filed motions to alter or amend the family court's judgment, pursuant to Rule 59(e), SCRCP. Husband filed a motion to dismiss Wife's motion as not timely filed. The family court found Wife's motion was timely filed. Wife objected to Husband's motion to alter or amend on ground that Husband failed to properly serve the motion. The court ruled on both parties' motions and held:

- [T]he jewelry, as declared in the Final Order and Divorce Decree was appropriately declared marital property.
- The findings and conclusions regarding the marital home should not be altered or amended.
- In addition to the obligation to contribute to Plaintiff's attorney's fees and general litigation costs, Defendant shall contribute the sum Five Thousand Five Hundred Thirty-Two and 50/100 Dollars ($5532.50) to the expert fees incurred by Plaintiff. Therefore, Defendant's total contribution to Plaintiff's attorney's fees and costs is and shall be the sum of Fifty-Five Thousand Five Hundred Thirty-two and 50/100 ($55,532.50) . . . . This obligation shall be satisfied by Wife

offsetting this contribution for the balance due to Husband for the equitable apportionment of marital property.

- With the evidence before me . . . there is no need to alter or amend the findings regarding Defendant's earning capacity as determined in the Final Order and Divorce Decree.

By Supplemental Order dated September 29, 2004, the family court awarded guardian ad litem fees in the amount of $3,617.00, and ordered that each party share equally in paying the obligation, less any monies already paid in satisfaction of this obligation.

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) (citing Emery v. Smith, 361 S.C. 207, 213, 603 S.E.2d 598, 601 (Ct. App. 2004)). However, this broad review does not require us to disregard the family court's findings. Bowers v. Bowers, 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct. App. 2002); Badeaux v. Davis, 337 S.C. 195, 202, 522 S.E.2d 835, 838 (Ct. App 1999). Nor must we ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Scott v. Scott, 354 S.C. 118, 124, 579 S.E.2d 620, 623 (2003) (citing Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E. 2d 154, 157 (1996)).

LAW/ANALYSIS

Initially, we dispose of a procedural issue challenging this court's jurisdiction to consider Husband's appeal in this matter. Wife maintains the time for filing Husband's notice of intent to appeal lapsed because the time was not tolled by Husband's motion to alter or amend. Husband served his motion by facsimile, which Wife argues is not proper service in accordance with Rule 5(b)(1), SCRCP. We agree with the family court judge that, though Husband technically failed to properly serve his motion, "to refuse to address this motion based on this technical defect would not do substantial

justice in this action." "[T]he overriding purpose of service is notice" and Wife unquestionably had notice of Husband's motion.

HUSBAND'S APPEAL

I. Imputed Income

Husband contends the family court erred in imputing income to him. Specifically, Husband argues the record failed to demonstrate Husband's continued unemployment was voluntary because: 1) Wife did not establish that employment was available at the level of income imputed by the court; 2) Husband suffered both physical and mental limitations due to severe injury; and 3) the family court considered available out of state employment that would alienate Husband from his minor children.

The family court judge declared that "[w]hen one or more parties is unemployed or underemployed and issues of equitable distribution, child support and attorney's fees are presented, the family court judge must determine the party's reasonably anticipated income and earning potential." Consistent with that determination the court will impute income to the unemployed or underemployed party for purposes of calculating support obligations. See S.C. Code Ann. Regs. 114-4720 (Supp. 2005). The statutes addressing domestic matters in South Carolina mandate that the family court consider certain factors in dividing marital property and awarding spousal and child support. Section 20-7-472 of the South Carolina Code requires that, in making an equitable division of marital assets and debts, the family court give weight in such proportion as it finds appropriate to fifteen enumerated factors. Those particularly relevant for imputation of income include:

> 3) the value of the marital property, whether the property be within or without the State. The contribution of each spouse to the acquisition, preservation, depreciation, or appreciation in value of the marital property, including the contribution of the spouse as homemaker; provided, that the court shall consider the quality of the contribution as well as its factual existence;

> (4) the income of each spouse, the earning potential of each spouse, and the opportunity for future acquisition of capital assets;
> (5) the health, both physical and emotional, of each spouse; . . .
> (15) such other relevant factors as the trial court shall expressly enumerate in its order.

S.C. Code Ann. § 20-7-472 (Supp. 2005).

In awarding spousal support, the family court must consider thirteen factors. Those pertaining to the question of imputing income include:

> (2) the physical and emotional condition of each spouse . . .
> (4) the employment history and earning potential of each spouse . . .
> (6) the current and reasonably anticipated earnings of both spouses;
> (7) the current and reasonably anticipated expenses and needs of both spouses . . . .

S.C. Code Ann. § 20-3-130(C) (Supp. 2005).

For calculation of child support under guidelines promulgated pursuant to section 43-5-580(b) of the South Carolina Code, income is defined as "actual gross income of the parent, if employed to full capacity, or potential income if unemployed or underemployed." 27 S.C. Code Ann. Regs. 114-4720(A)(1) (Supp. 2005). Regarding the imputation of income, the guidelines provide:

> If the court finds that a parent is voluntarily unemployed or underemployed, it should calculate child support based on a determination of potential income which would otherwise ordinarily be available to the parent . . . .
> (b) In order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earnings level of the parent based on that parent's recent work history, occupational qualifications, and <u>prevailing job opportunities and earning levels in the community</u>.

27 S.C. Code Ann. Regs. 114-4720(A)(5)(B) (Supp. 2005) (emphasis added).

Given the general principles of imputation of income in family court litigation, we are instructed by our case law involving child support. South Carolina courts have not hesitated to impute income in child support cases where a parent is voluntarily unemployed or underemployed. In 1986, before the legislature mandated adherence to the child support guidelines, we held that a father's earning potential was properly considered in calculating his child support obligation where he voluntarily removed himself from the job market to attend law school. Chastain v. Chastain, 289 S.C. 281, 283, 346 S.E.2d 33, 35 (Ct. App 1986). Subsequently, in Eckstein v. Eckstein, 306 S.C. 167, 169-70, 410 S.E.2d 578, 580 (Ct. App. 1991), this court concluded the family court properly considered the wife's potential income in calculation of her child support obligation, though she had custody of two young children and was responsible for their care. We noted the record reflected the family court's appropriate inclusion of child care costs in its determination. Id. at 170, 410 S.E.2d at 580; see also, Patel v. Patel, 359 S.C. 515, 532, 599 S.E.2d 114, 123 (2004) (affirming family court's properly imputing minimum wage income to voluntarily unemployed or underemployed wife, though she had custody of two children, but was capable and energetic). In Holcombe v. Hardee, our Supreme Court reversed the family court's refusal to require child support from the wife who claimed she was unable to pay that obligation. 304 S.C. 522, 523, 405 S.E.2d 821, 822 (1991). The Court found the wife had potential income, investments, and many assets from which she could contribute to her child's support. Id. at 525, 405 S.E.2d at 822-23. Citing Miller v. Miller, 299 S.C. 307, 312, 384 S.E.2d 715, 716 (1989), the Court listed the following factors to be considered in determining child support obligations: both parents 1) incomes; 2) ability to pay; 3) education; 4) expenses; 5) assets; and the 6) the facts and circumstances surrounding each case. Id.

In Robinson v. Tyson, 319 S.C. 360, 361, 461 S.E.2d 397, 398 (Ct. App. 1995), the family court awarded an increase in child support based on income imputed to the husband after finding him voluntarily underemployed. The family court imputed an annual income of $30,000.00 even though the

husband claimed his income as an attorney was $700.00 per month. Evidence of voluntary underemployment included testimony that recent hires in the community started at yearly salaries of $35,000.00. Id. at 362, 461 S.E.2d at 398. Additionally, the University of South Carolina School of Law placement office reported the lowest starting salary for new attorneys in the community was $25,000.00 annually. Id. Eleven years prior to the court hearing and before attending law school, the husband had earned $17,000.00 annually. Id. Further, he made no efforts to find more lucrative employment, his present wife was unemployed, and he frequently borrowed money from his father. Id. This court, "[b]ased on the evidence of the father's occupational qualifications, prevailing job opportunities, earning levels in the community, and his insincere efforts to provide the trial court with evidence of his earning potential, [affirmed] the family court's finding that the father [was] voluntarily underemployed." Id. at 363, 461 S.E.2d at 399. Similarly, in Fisher v. Fisher, 319 S.C. 500, 506, 462 S.E.2d 303, 306 (Ct. App. 1995), we affirmed the family court's imputing $8.00 per hour income to the husband for purposes of calculating child support, although he was unemployed at the time of the hearing. Evidence in the record showed that the husband had been employed at $8.00 per hour for about eighty days, but voluntarily left that position because "it was too far away, too dirty" and unrelated to work he previously performed. Id. at 507, 462 S.E.2d at 307.

As in Chastain, 289 S.C. at 283, 346 S.E.2d at 35, we found no error in the family court's imputing income to the wife for child support purposes in Engle v. Engle, 343 S.C. 444, 450, 539 S.E.2d 712, 714 (Ct. App. 2000). The wife had a master's degree and had been employed as a department coordinator at Furman University earning $28,000.00 per year when she voluntarily chose to relocate to pursue graduate studies. The family court imputed $28,000.00 per year, reasoning she would have earned at least that much had she not voluntarily terminated her employment at Furman. Id.

In Mazzone v. Miles, 341 S.C. 203, 209, 532 S.E.2d 890, 893 (Ct. App. 2000), we affirmed the family court's imputation of income over the wife's objection that the imputed amount was less than the husband's earning potential. In Mazzone, the husband had voluntarily provided some financial support for the child before the commencement of the family court action.

Id. at 206, 532 S.E.2d at 892. When husband was terminated from his five-year employment where his income was $12.50 per hour, he started a tractor trailer repair business, which had been in operation for less than one year. The business was operating at a loss at the time of trial. Id. at 207, 532 S.E.2d at 892. The family court imputed minimum wage to the husband in calculating child support. Wife argued husband's employment potential was considerably greater. Id. at 208, 532 S.E.2d at 892. The family court found no evidence indicating the termination from his job was the result of any wrongdoing and no evidence the decision to start his own business was motivated by a desire to avoid support obligations. Husband testified he was fired for refusing to participate in fraudulent activity and few available jobs existed that were similar to his former employment. He further admitted that the expenses in his new business were greater than anticipated. Id. at 208-9, 532 S.E.2d at 893. We concluded the evidence reflected the husband's good faith effort to pursue self-employment. "The fact that the newly-formed business ha[d] not yet shown a profit does not constitute a showing the father's efforts at making the business a success [were] less than sincere." Id.

Messer v. Messer was a spousal support case in which the husband declared income he received from a covenant not to compete as capital gains, thus lowering his income and avoiding payment of alimony. 359 S.C. 614, 619, 598 S.E.2d 310, 313 (Ct. App. 2004). The family court found the covenant not to compete was ordinary income and imputed income to the husband, despite the fact he did not work. Id. at 626, 598 S.E.2d at 317. We held:

> [t]hough the terms of the decree grant Husband great latitude in his choice of employment and provide a standard measure for reporting income, Husband's right to manipulate his income must be governed by what is reasonable in light of the purpose of the agreement and the decree . . . . Read as a whole, one purpose of the decree was to provide a continuing means of support for Wife that kept pace with Husband's income. Therefore, we hold the family court did not err by ruling income should be imputed to Husband.

Id. at 628, 598 S.E.2d at 318.

Finding no evidence of earning potential impaired by age or health, the court of appeals imputed an annual salary to the husband in the amount of $86,000.00, based on his annual salary from 1988 though 1993. Id. at 630, 598 S.E.2d at 319. It is important to note we reversed the family court's finding that husband's minimizing his ordinary income and, consequently, his alimony obligation, violated the covenant of good faith and fair dealing. We agreed with the husband that he had not acted in bad faith by attempting to minimize his tax consequences, though it had the effect of decreasing the wife's support. Id. at 622, 598 S.E.2d at 315.

Contrastively, in Patrick v. Britt, we agreed with the family court in its finding that the husband "purposefully arranged his finances in a manner that would make it difficult to determine his actual income." 364 S.C. 508, 511, 613 S.E.2d 541, 542 (Ct. App. 2005). Husband was the owner and operator of a business that reported over $430,000.00 in income in 2002. Yet, he reported only $66.01 per month in income on his financial declaration, attributing his low income to high costs of running the business. Id. at 510, 613 S.E.2d at 542. The family court imputed income of $100,000.00 and we affirmed, based on the accountant's evidence, the applicable law and Britt's refusal to assist the court in resolving the issue. Id. at 513, 613 S.E.2d at 543 (citing Robinson v. Tyson, 319 S.C. 360, 364, 461 S.E.2d 397, 399 (Ct. App. 1995)).

Likewise, in Penny v. Green, we affirmed the family court's imputation of $120,000.00 to the husband, rather than the $100,000.00 income he claimed. 357 S.C. 583, 590, 594 S.E.2d 171, 175 (Ct. App. 2004). The family court correctly determined the husband relocated voluntarily, and his purported $100,000.00 salary was based on a three day work week. Therefore, the family court imputed $120,000.00 in income based on the husband's previous earnings. Id. at 591, 594 S.E.2d at 175. This court explained "[w]here a parent voluntarily lessens his or her earning capacity, this court will closely scrutinize the facts to determine the parent's capacity to earn, rather than his or her actual earnings." Id. (citing Robinson v. Tyson, 319 S.C. at 363, 461 S.E.2d at 399). Additionally, we reversed the family

court's reduction in husband's support obligation. 357 S.C. at 590, 594 S.E.2d at 174. Husband maintained his income decrease after his move was a substantial change in circumstances, warranting modification, because, during the pendency of the divorce proceedings, he underreported his income in his original financial declaration. Thus, the disparity between his true income and current income was substantial. We concluded the family court erred in allowing the husband to contradict his previous financial declaration in order to demonstrate a larger disparity from his present income. Id. at 591, 594 S.E.2d at 175. "A party cannot misrepresent income and expenses on a financial declaration for purposes of having an agreement approved and then refute the accuracy of that document in a subsequent modification action." Id. (citing Rogers v. Rogers, 343 S.C. 329, 332, 540 S.E.2d 840, 841 (2001)).

Most recently, we reversed the family court's imputation of the husband's income at over $9000.00 per month where there was no evidence in the record that his income was voluntarily depressed. Arnal v. Arnal, 363 S.C. 268, 281, 609 S.E.2d 821, 828 (Ct. App. 2005) cert. granted, March 23, 2006. Though the husband was well educated and could earn additional income, the amount of imputed income was not warranted without evidence that his "failure to make additional income was due to any wrongdoing on his part or motivated by a desire to decrease his support obligation." Id. (citing Mazzone v. Miles, 341 S.C. 203, 209, 532 S.E.2d 890, 893 (Ct. App. 2000). We opined that taking wife's contention that the husband was capable of earning more income to its logical conclusion, a family court could conceivably impute income to a spouse by merely finding he or she was capable of earning more income. "This is simply not the test for imputation of income in this state." Id. at 282, 609 S.E.2d at 828.

The principles distilled from Mazzone and Arnal suggest that voluntariness, for the purposes of imputing income, encompasses unemployment or underemployment that is not only intentional, but is additionally the result of some wrongdoing or effort to avoid a support obligation. Our neighboring jurisdictions are guided by similar principles. In North Carolina, "[t]he determination of whether to impute income to a parent who is voluntarily unemployed is a determination based in part on the conduct of the parent." Roberts v. McAllister, 621 S.E.2d 191, 198 (N.C. Ct.

App. 2005) (citing Wolf v. Wolf, 566 S.E.2d 516 (N.C. Ct. App. 2002)). The "earning capacity rule" is the basis for imputation of income articulated in the North Carolina Child Support Guidelines:

> If either parent is voluntarily unemployed or underemployed to the extent that the parent cannot provide a minimum level of support for himself or herself and his or her children when he or she is physically and mentally capable of doing go, and the court finds that the parent's voluntary unemployment or underemployment is the result of a parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual income. Potential income may not be imputed to a parent who is physically or mentally incapacitated or is caring for a child who is under the age of three years and or whom support is being determined.

Child Support Guidelines, 2003 Ann. R. (N.C.) 33, 35 (2003) (cited in Cook v. Cook, 583 S.E.2d 696, 698 (2003)).

Before earning capacity may be used as the basis of an award, there must be a showing that the actions which reduced the party's income were taken in bad faith, to avoid family responsibilities. Pataky v. Pataky, 585 S.E.2d 404, 415 (N.C. Ct. App. 2003) (citing Bowers v. Bowers, 541 S.E.2d 508 (N.C. Ct. App. 2001)); Sharpe v. Nobles, 493 S.E.2d 288 (N.C. Ct. App. 2001).

In Florida,

> [i]ncome on a monthly basis shall be imputed to an unemployed or underemployed parent when such employment or underemployment is found to be voluntary on that parent's part, absent physical or mental incapacity or other circumstances over which the parent has no control. In the event of such voluntary unemployment or underemployment, the employment potential and probable earnings level of the parent shall be determined

> based upon his or her recent work history, occupational qualifications, and prevailing earnings level in the community; however, the court may refuse to impute income to a primary residential parent if the court finds it necessary for the parent to stay home with the child.

Fla. Stat. § 61.30(2)(b) (2005).

Florida's standard for imputing income requires the family court to set forth specific findings on earning potential, source of income imputed and actual income. See Alich v. Clapp, 926 So. 2d 467, 468 (Fla. Dist. Ct. App. 2006) (holding the family court erred in imputing income where no evidence supported finding). The family court may only impute a level of income supported by the evidence of employment potential and probable earnings based on history, qualifications, and prevailing wages. Id.; see Edel v. Walker, 927 So. 2d 989, 990 (Fla. Dist. Ct. App. 2006) (finding record was sufficient to support family court findings of imputed income); Morin v. Morin, 923 So. 2d 582, 584 (Fla. Dist. Ct. App. 2006) (concluding family court erred in imputing income at level greater than level ever earned during the marriage).

Virginia adheres to similar evidentiary requirements. In Mir v. Mir, 571 S.E.2d 299, 301 (Va. Ct. App. 2002), the court held evidence was insufficient to support finding the former husband was voluntarily unemployed or to impute $5600.00 monthly income for purposes of child support. Nothing in the record suggested the husband ever made monthly income in the imputed amount or demonstrated jobs were available that would generate such an income. Id. at 303. Additionally, evidence indicated the husband had health problems preventing him from working longer hours or doing other jobs. Id. The court concluded the manner of imputation and the amount were inconsistent with the evidence in the record and remanded to the family court for further consideration. Id. at 304.

In Hatloy v. Hatloy, 588 S.E.2d 389, 390 (Va. Ct. App. 2003), the court held the evidentiary burden was satisfied that former husband's inability to pay his support obligation was not due to his own voluntary act. Husband

had previously worked for AOL, earning $55,070.00 yearly but was terminated through no fault of his own. Id. Though the husband sought employment with other high tech industries, he testified that no jobs were available to him at his level of education. Id. Consequently, he returned to work in the hospitality industry, earning a salary based on profits of a seasonal recreational resort. Id. The venture lost money during the first year, but the husband anticipated drawing a salary of $1000.00 per month in the near future. Id. at 391. The appellate court affirmed the family court's imputation of $1600.00 per month income rather than the amount previously earned from AOL. Id. at 392.

The Virginia Court of Appeals refused to impute income to a former wife in determining the parents' child support obligations. In Budnick v. Budnick, 595 S.E.2d 50, 59 (Va. Ct. App. 2004), the husband argued wife's refusal to accept a job transfer to a different geographical area constituted voluntary unemployment and the resulting loss of income should be imputed to her at the salary she would have earned. When wife's position was terminated and she was asked to relocate, the parties' daughter was a senior in high school and their son was enrolled in special education classes. The court found, "no authority for a *per se* rule which would hold that a supporting spouse always becomes voluntarily underemployed or unemployed when he or she refuses to accept an offer of comparable employment in another geographical location." Id. (quoting Reece v. Reece, 470, S.E.2d 148, 151 (Va. Ct. App. 1996)). Moreover, "whether failure to relocate constitutes voluntary unemployment or underemployment, sufficient to justify imputing income is a matter for a trial court to determine on the particular facts of the case before it." Id.

Virginia's child support guidelines, like North Carolina's, specifically articulate a good faith basis for determining the voluntariness of unemployment or underemployment. The statute reads, in pertinent part: "[A]ny consideration of imputed income based on a change in a party's employment shall be evaluated with consideration of the good faith and reasonableness of employment decisions made by the party . . . ." Va. Code. Ann. § 20-108.1 (2006).

Under South Carolina law, where an obligor voluntarily lessens his or her earning capacity, this court will closely scrutinize the facts to determine earning potential, rather than actual income. Camp v. Camp, 269 S.C. 173, 174, 236 S.E.2d 814, 815 (1977); Robinson v. Tyson, 319 S.C. 360, 363, 461 S.E.2d 397, 399 (Ct. App. 1995). However, the failure to reach full earning capacity, by itself, does not automatically equate to voluntary underemployment such that income must be imputed. Kelley v. Kelley, 324 S.C. 481, 488-89, 477 S.E.2d 727, 729 (Ct. App. 1996). Instead, when actual income versus earning capacity is at issue, the court should closely examine the payor's good faith and reasonable explanation for the decreased income. Arnal, 363 S.C. 268, 281, 609 S.E.2d 821, 828, (Ct. App. 2005), cert. granted, March 23, 2006. Furthermore, lack of evidence indicating unemployment or underemployment resulted from any wrongdoing or was motivated by desire to avoid support obligations is at least persuasive the unemployment or underemployment is less than voluntary. Mazzone, 341 S.C. at 209, 532 S.E.2d at 893. That Husband had at times earned incomes in the range of $100,000.00-$200,000.00 does not warrant the imputation of income in that range without evidence showing his "failure to make additional income was due to any wrongdoing on his part or motivated by a desire to decrease his support obligation." Arnal, 363 S.C. at 281, 609 S.E.2d at 828 (citing Mazzone, 341 S.C. at 209, 532 S.E. 2d at 893). Wife presented no evidence that any jobs for which Husband is qualified exist or are available in the community. Availability of employment in the community commensurate with the party's education and occupational history is, likewise, relevant to the inquiry of voluntariness. See 27 S.C. Code Ann. Regs. 114-4720; Robinson, 319 S.C. at 362, 461 S.E.2d at 398. Finally, Husband's poor health, combined with the fact he is making some efforts to either secure employment or establish a business persuade us that his continued unemployment or underemployment is not entirely voluntary. Earning potential, impaired by age or health, is relevant for imputing income. See Messer v. Messer, 359 S.C. 359 S.C. 614, 630, 598 S.E.2d 310, 319 (Ct. App. 2004).

In the case sub judice, the family court judge determined that Husband was "either not employed or significantly underemployed," and imputed $100,000 in income to Husband. The judge's order indicates he based the

imputed income amount on evidence he found credible. Wife's expert witness, Ron Morgan, a telecommunications recruiter, testified as to available jobs in the telecommunications industry which offered salaries in the range of $100,000.00-$200,000.00. Morgan explained his conclusions about potential jobs were derived from computer generated print outs from his recruiting company's database and an outside database. In addition, he reviewed Husband's New South "bio." However, few, if any of the positions Morgan identified presented opportunities at the senior executive level. Moreover, the positions Morgan observed were located in Tennessee, California, Minnesota, New Jersey, Texas, Colorado, Washington, and Arkansas, all of which would require Husband's relocation outside the community in which he currently lives and away from his three minor children. Morgan's testimony confirmed the telecommunications industry was depressed at the time of filing, and the climate for job opportunities in the industry in 2001 and 2002 was "flat." Morgan opined it would take someone "looking eight to ten hours per day, everyday, full time" to find reemployment in telecommunications.

Husband stated he was seeking employment in the film industry. He believed looking to the telecommunications industry for employment would be futile. He maintained the only position available to him would be a sales or technician position at a salary of $50,000.00, and that if he took such a position his prospects for returning to senior executive position in telecommunications would be "over." Husband declared he contacted all of the companies listed in Morgan's client database. He did not contact local independent telephone companies to inquire about positions because he had no experience in that particular area. Nor did Husband seek employment with other telecommunications entities in South Carolina that were former competitors because he surmised they would not consider hiring him. Additionally, he turned down a job as a CEO of a school renovation project. Husband testified he could obtain a job earning $50,000.00 annually and added he was involved in establishing a new company.

Even if senior executive positions were determined to be available in the Greenville area, evidence suggests Husband's poor health would prevent him from working at the level of intensity his previous occupation required.

Before his termination from New South in 2001, Husband was working fourteen to sixteen-hour days, seven days a week. The family court judge observed at trial that Husband's behavior was not consistent with a senior executive's behavior, noting Husband was habitually late and appeared "lethargic, either from pain or medication." The judge indicated "Husband walked with the assistance of a cane and outwardly exhibited pain."

Husband had severe back problems from an injury in 1985. A flare up in 1999 resulted in Husband's regular use of pain medication and his eventual addiction to oxycontin. Though Husband denied addiction and referred to his dependency as habituation, his medication use, nevertheless, interfered with his work and apparently led to his termination from New South in January of 2001. Husband had back surgery in May of 2001 but continued to experience problems associated with medication. Wife stated he attempted rehabilitation in Florida in October of 2001. Under direct examination by her attorney, Wife testified to the following about Husband's health:

> Q: You told us about his health, with respect to his back. Otherwise, how has his physical health been, prior to the back problem.
>
> A: It's horrible.
>
> Q; Prior to the back problems?
>
> A: Oh, it is - - it was pretty good. I mean, his back would go out, you know once a year, then it was once a month, you know. I mean, it's degenerative disk problem [sic], you know?
>
> Q: Other than, the back problems?
>
> A: You know, he had allergies. And he'd get bad colds, he'd get run down or whatever, but it was good.
>
> . . . .

Q: And how would you describe—other than what you've described, how would you describe your husband's psychological demeanor, prior to this last few years?

A: You know, he's always been a little crazy and different. But he was, you know, kind of normal, off center.

Q: Did he have anything that he took medication for?

A: Yes, he took Klonopin for—well he's taken Klonopin, since Jackson, Mississippi, for anxiety. He's got, I would say, an anxiety disorder.

Q: In this case, we took a deposition of his internist, Dr. Grover?[2]

A: Right.

Q: And we're going to submit that, as part of this record today by stipulation. Dr. Grover generally described him, as not being very healthy?

A: Right. He said, he was in pretty poor health.

Q: Is that consistent, with your current observations?

A: Yes, it is.

Q: And during the course of this litigation, has [Husband] discussed his health with you, on multiple occasions?

A: Yeah, he gives me a pity party, every time I talk to him, about how he's broken a rib, or he's broken a toe, or he's fallen down another flight of stairs. He's very accident prone. He—in fact, I understand he just fell down his attorney's stairs, last week. He's

[2] Dr. Grover's deposition was not included in the record.

always got something wrong. He said he had pneumonia; he had SARS, one time. He had, you know—he just, he's just got something all the time. He's, a hypochondriac.

Q: Despite all these issues, are you aware of anything that would keep him from working?

A: No.

Concluding from the testimony and observations at trial that the frenzied pace of Husband's efforts to save New South likely exacerbated his physical impairment, increased his reliance on pain medication, and accelerated his overall decline, it is doubtful he could realistically be expected to return to the demanding work environment of a senior executive at this time. In light of the circumstances of the case, the family court judge erred in the amount imputed to Husband. Concomitantly, we reverse the amount of imputation of income and remand for a calculation of imputed income consistent with this opinion. No evidence in the record substantiates that jobs exist in the community, commensurate with Husband's qualifications and experience, warranting the imputed amount. "[T]he court should determine the employment potential and probable earnings level of the parent based on that parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community." 27 S.C. Code Ann. Regs. 114-4720(A)(5)(b) (Supp. 2005) (emphasis added).

II. Marital Assets Division

With regard to the division of marital assets, Husband argues the family court erred by (1) assigning equal value to each party's contributions to the marital assets; (2) failing to consider he was forced to invade his property award to provide temporary support for Wife; and (3) awarding Wife the marital home as part of the equitable distribution of marital assets.

Section 20-7-472 of the South Carolina Code requires that "[i]n making apportionment, the court must give weight in such proportion as it finds

appropriate" to all of the fifteen enumerated factors. S.C. Code Ann. § 20-7-472 (Supp. 2005). When distributing marital property in a divorce action, the family court should consider all fifteen factors set forth in the applicable statute. Craig v. Craig, 365 S.C. 285, 290, 617 S.E.2d 359, 361 (2005). In reviewing the family court's equitable apportionment, an appellate court's role is to examine the fairness of the apportionment as a whole. Bragg v. Bragg, 347 S.C. 16, 24, 553 S.E.2d 251, 255 (Ct. App. 2001). "This court will affirm the family court judge if it can be determined that the judge addressed the factors under section 20-7-472 sufficiently for us to conclude he was cognizant of the statutory factors." Jenkins v. Jenkins, 345 S.C. 88, 100, 545 S.E.2d 531, 537 (Ct. App. 2001). The family court has broad discretion in determining how marital property is to be valued and distributed. Murphy v. Murphy, 319 S.C. 324, 329, 461 S.E.2d 39, 41 (1995); Phillips v. Phillips, 290 S.C. 455, 457, 351 S.E.2d 178, 180 (Ct. App. 1986). Therefore, the court may use any reasonable means to divide the property equitably, and its judgment will only be disturbed where abuse of discretion is found. Murphy, 319 S.C. at 329, 461 S.E.2d at 41-42; Barrett v. Barrett, 290 S.C. 453, 454, 351 S.E.2d 177 (Ct. App. 1986).

A. Contributions to the Marriage

Section 20-7-474 of the South Carolina Code provides that, in determining the value of each party's respective contributions, the court:

> (1) shall make findings of fact from credible evidence of the values of property and services, if any;
> (2) is empowered to take judicial notice of official reports of the federal and state governments, including official bulletins, publications, and reports of general public interest where these reports are made and published by authority of law or have been adopted by state statute;
> (3) has the authority to appoint experts as necessary for the purpose of valuation of property and contributions and to assess the cost against any or all parties to the action.

S.C. Code Ann. § 20-7-474 (Supp. 2005).

The doctrine of equitable distribution is based on the recognition that marriage is, among other things, an economic partnership. Morris v. Morris, 335 S.C. 525, 530, 517 S.E.2d 720, 723 (Ct. App. 1999); Walker v. Walker, 295 S.C. 286, 288, 368 S.E.2d 89, 90 (Ct. App.1988). It is well settled that in making an equitable distribution of marital property, the family court must (1) identify the marital property, real and personal, to be divided between the parties, (2) determine the fair market value of the property so identified, (3) identify the proportionate contributions, both direct and indirect, of each party to the acquisition of the marital property, and (4) provide for an equitable division of the marital property. Cannon v. Cannon, 321 S.C. 44, 48, 467 S.E.2d 132, 134 (Ct. App. 1996). Upon dissolution of a marriage, property acquired during the marriage should be divided and distributed in a manner which fairly reflects each spouse's contribution to its acquisition, regardless of which spouse holds legal title. Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 197, 612 S.E.2d 707, 715 (Ct. App. 2005). The ultimate goal of apportionment is to divide the marital estate, as a whole, in a manner which fairly reflects each spouse's contribution to the economic partnership and also the relative effects of ending that partnership on each of the parties. Johnson v. Johnson, 296 S.C. 289, 298, 372 S.E.2d 107, 112 (Ct. App. 1988). The family court has wide discretion in determining the contributions made by each spouse to the marital property. Ball v. Ball, 314 S.C. 445, 448 445 S.E.2d 449, 451 (1994).

Here, the family court judge properly concluded the contributions of each party, when considered as a whole, were equal in value. Though Husband unquestionably made the majority of the direct contributions to the marriage in terms of tangible assets, Wife made the majority of indirect contributions. In the beginning, both parties worked and contributed their respective salaries and income in support of the marriage. When Husband had an opportunity for professional advancement, Wife suspended her career and relocated. Wife worked at each new location until children were born and both parties agreed she would not continue outside employment. She maintained a household, enhanced the value of their home, performed social roles that benefited Husband's business, and had primary responsibility for the care of their three children.

The family court's ruling in the instant case is consistent with our precedent. We have previously held the family court's equal division of marital property was fair, even though the husband provided the majority of the income, where the wife was a homemaker and also worked outside the home, and her income assisted in meeting the family's needs. Kirsch v. Kirsch, 299 S.C. 201, 203, 383 S.E.2d 254, 255 (Ct. App. 1989). Similarly, we have concluded equal apportionment of the marital estate between the parties was equitable, even though most of the appreciation in the value of the assets was attributable to the husband's earnings and income during the marriage, where the wife faithfully performed her homemaker role during the marriage under the most trying of circumstances, and gave up her own career and dutifully contributed her labor to provide a good marital home for her husband. Johnson, 296 S.C. at 298-99, 372 S.E.2d at 112; see also Harlan v. Harlan, 300 S.C. 537, 541, 389 S.E.2d 165, 168 (Ct. App. 1990) (awarding wife fifty percent interest in the marital residence was not error where the marriage lasted eighteen years, the wife worked a significant portion of that time, and the wife was also the primary caretaker of the children); Smith v. Smith, 294 S.C. 194, 200, 363 S.E.2d 404, 408 (Ct. App. 1987) (awarding each party fifty percent of marital property despite expert's testimony that wife's contributions to accumulation of marital assets did not exceed thirty-seven percent was not error; trial court was not bound to accept expert's testimony regarding wife's contributions, and wife's testimony about her contributions indicated that during an eighteen-year marriage, wife provided homemaker services and on occasion worked either part-time or full-time, contributing monies she earned to support family); Leatherwood v. Leatherwood, 293 S.C. 148, 149, 359 S.E.2d 89, 90 (Ct. App. 1987) (awarding wife fifty percent of marital home, and fifty percent of joint savings account was not error; although husband made greater monetary contribution throughout marriage, wife did work at beginning of marriage, contributed her services as homemaker, and was therefore entitled to equitable interest in property acquired by wage-earner husband).

The family court judge did not err in finding each party's contributions, when considered as a whole, were equal in value. Consequently, the disposition of marital assets on a generally equal basis was not an abuse of discretion.

B. Invasion of Husband's Assets for Temporary Support

Husband complains the family court erred in failing to consider that in order to pay Wife temporary support, he was forced to invade the assets he received as a result of equitable distribution. Husband avers as a consequence his marital property distribution was substantially reduced.

Factors to be considered in making an alimony award include: (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 during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the parties; (8) marital and non-marital 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. Craig v. Craig, 365 S.C. 285, 292, 617 S.E.2d 359, 361 (Ct. App. 2005); see S.C. Code Ann. § 20-3-130(C) (Supp. 2005). Generally, alimony should place the supported spouse, as nearly as practical, in the same position as enjoyed during the marriage. Id.; Johnson, 296 S.C. at 300, 372 S.E.2d at 113. "Alimony" is a substitute for the support which is normally incident to the marital relationship. Craig, 365 S.C. at 292, 617 S.E.2d at 362. An award of alimony rests within the sound discretion of the trial court and will not be disturbed on appeal absent abuse of discretion. Allen v. Allen, 347 S.C. 177, 183, 554 S.E.2d 421, 424 (Ct. App. 2001); Doe v. Doe, 319 S.C. 151, 155, 459 S.E.2d 892, 894-95 (Ct. App. 1995).

The family court judge found no basis for retroactive modification in the amount of temporary support awarded to Wife during the pendency of this case. We agree. Modification of alimony is within the sound discretion of family court and will not be overturned absent an abuse thereof. Riggs v. Riggs, 353 S.C. 230, 236, 578 S.E.2d 3, 6 (Ct. App. 2003).

The April 10, 2002 temporary order incorporated the parties' agreement as to both the support and mortgage payments. At that time, six months remained during which Husband received a net $15,000.00 income

from the New South severance package. Husband agreed to make the monthly mortgage payment and pay Wife $7500.00 per month in family support. Husband requested relief on these issues in an amended motion on September 2, 2002, but failed to file a financial declaration or appear at the motion hearing. In its September 10, 2002 order, the family court reserved its ruling on modification of the April 10, 2002 temporary order pending review of Husband's financial declaration. By its order dated May 16, 2003, the family court found Husband's monthly income had been reduced warranting a modification of the April 10, 2002 temporary order. Husband was ordered to continue paying the monthly mortgage obligation, but his spousal support was reduced to $3000.00 per month, taxable to Wife and deductible by Husband. The September 10, 2003 order terminated Husband's spousal support and reduced his monthly mortgage payment by one-half. On final disposition, Wife was awarded the marital home and the responsibility for satisfying the mortgage debt. Wife did not seek permanent spousal support.

Husband alleges Wife enjoyed a $75,000.00 income during the entire pendency of these proceedings. However, according to the record, Wife only began work in April of 2003, more than a year after the commencement of this action and eleven months prior to the final hearing. Additionally, Husband either overlooks or misrepresents other pertinent facts in his argument for retroactive modification. The New South income from Husband's severance package continued through September of 2002. By order of the family court, Husband was to pay Wife $3000.00 from May of 2003 until the September 2003 order terminating all spousal support and one-half of the mortgage payment. At most, it appears Husband paid the $3000.00 for approximately five months, though he claims to have paid that amount monthly for a year and one-half. Prior to May, 2003, the April 10, 2002 temporary order ($7500.00 family support and full mortgage payment) was still in effect, presumably due, in part, to Husband's failure to file his financial declaration and failure to appear at the hearing on the motion requesting relief.

We discern nothing in the record to indicate the family court judge failed to consider the appropriate factors in determining temporary spousal support. Section 20-3-130(B)(6) affords the family court broad discretion in

awarding alimony and allows the court to fashion an alimony award which is just under the circumstances. Doe v. Doe, 319 S.C. 151, 155, 459 S.E.2d 892, 895Ct. App. 1995). "Our inquiry on appeal is not whether the family court gave the same weight to particular factors as this court would have; rather, our inquiry extends only to whether the family court abused its considerable discretion in assigning weight to the applicable factors. No one factor is dispositive." Pirri v. Pirri, 369 S.C. 258, 631 S.E.2d 279, 284 (Ct. App. 2006) (quoting Allen v. Allen, 347 S.C. 177, 186, 184, 554 S.E.2d 421, 425 (Ct, App. 2001)).

C. Award of Marital Home to Wife

Husband contends the family court erred in awarding Wife the marital home as part of the equitable division of marital property. We disagree.

The disposition of the marital residence as part of the equitable distribution of marital assets is largely within the discretion of the family court. Wooten v. Wooten, 364 S.C. 532, 542, 615 S.E.2d 98, 103 (2005); Nasser-Moghaddassi v Moghaddassi, 364 S.C. 182, 202, 612 S.E.2d 707, 718 (Ct. App. 2005). In order to effect an equitable apportionment, the family court may require the sale of marital property and a division of the proceeds. Wooten, 364 S.C. at 542, 615 S.E.2d at 103 (citing Donahue v. Donahue, 299 S.C. 353, 360, 382 S.E.2d 741, 745 (1989)). "Although the court is generally required to attempt an in-kind distribution of assets, an in-kind distribution of the marital home is not feasible." Nasser-Moghaddassi, 364 S.C. at 203, 612 S.E.2d at 718. "Accordingly, the court may either award the home to one of the parties, or order the home sold and the proceeds distributed." Id. Additionally, in deciding the disposition of the marital home, the family court must consider and give appropriate weight to the fifteen statutory factors. S.C. Code Ann. § 20-7-472 (Supp. 2005).

In his final order the family court judge observed:

> [t]here is compelling evidence to support Wife retaining the marital home as part of her share of the marital estate. This compelling evidence includes the desirability of maintaining the

> home for the minor children. With minor children who are 8, 5, and 4 years old, in a safe and comfortable home well-suited to their needs, which is the only home known to them, avoiding a sale of the marital home will enhance their stability and promote their best interests.

Conclusively, the family court judge, having given appropriate weight and consideration to the relevant statutory factors, did not abuse his discretion in awarding the marital residence to Wife.

III. Child Support Calculation

Husband challenges the family court's calculation of his child support obligation on the ground it erred by imputing income to Husband in the amount of $100,000.00. We have concluded the imputed amount was in error. Therefore, Husband is entitled to have child support recalculated and adjusted accordingly upon the family court's reassessment of Husband's imputed income.

Husband contends the family court erred by failing to consider substantial private school tuition in calculating child support under the child support guidelines.

In determining the amount of child support, the family court is generally required to follow the child support guidelines. Sexton v. Sexton, 321 S.C. 487, 488, 469 S.E.2d 608, 609 (Ct. App. 1996). Although the family court may deviate from the guidelines, any deviation must be justified and should be the exception rather than the rule. Id. Though the guidelines govern all actions involving questions of child support, the family court retains a certain amount of discretion when making the final award. Woodall v. Woodall, 322 S.C. 7, 13, 471 S.E.2d 154, 158 (1996).

"In any proceeding for the award of child support, there is a rebuttable presumption that the amount of the award which would result from the application of the guidelines required under Section 43-5-580(b) is the correct amount of child support to be awarded." S.C. Code Ann. § 20-7-852(A) (Supp. 2005). When a child support award varies significantly from

the amount resulting from the application of the guidelines, the family court must make specific, written findings of those facts upon which it bases its conclusion supporting that award. Among the factors which the family court may consider to justify deviating from the guidelines are the educational expenses for the child or children, including those incurred for private school tuition and related costs. S.C. Code Ann. Regs. 114-4710 (Supp. 2005).

In this case, the family court judge noted the application of the guidelines does not contemplate private school tuition. He found:

> [t]he parties have historically placed their children in private school. Both parties find and believe private school is in the best interest of the children. Private school is within the financial ability of the parties. The annual tuition costs for all three children is currently $9,400.00. Wife requests Husband's participation in this expense, and for Husband to pay for miscellaneous fees, books, uniforms, and school lunches.

Consequently, the family court judge ordered Husband to pay Wife, on a monthly basis, fifty-seven percent of the children's private school tuition only. The miscellaneous fees Wife requested were deemed to be items included in the child support guidelines calculations. The family court judge's written findings clearly describe the nature and extent of the deviation and are sufficient to support this requirement.

IV. Attorney's Fees

Husband claims the family court erred in awarding attorney's fees to Wife. We disagree.

Section 20-7-420(38) (Supp. 2005) of the South Carolina Code provides that "Suit money, including attorney's fees, may be assessed for or against a party to an action brought in or subject to the jurisdiction of the family court."

An award of attorney's fees lies within the sound discretion of the family court and will not be disturbed on appeal absent an abuse of discretion. Patel v. Patel, 359 S.C. 515, 553, 599 S.E.2d 114, 123 (2004); Bowen v Bowen, 327 S.C. 561, 563, 490 S.E.2d 271, 272, (Ct. App. 1997). The family court, in determining whether to award attorney's fees, should consider each party's ability to pay his or her own fees, the beneficial results obtained, the parties' respective financial conditions, and the effect of the fee on the parties' standards 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 reasonable amount of attorney's fees to award, the family court should consider the nature, extent, and difficulty of the services rendered, the time necessarily devoted to the case, counsel's professional standing, the contingency of compensation, the beneficial results obtained, and the customary legal fees for similar services. Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991); see also, Messer v. Messer, 359 S.C. 614, 633, 598 S.E.2d 310, 320 (Ct. App. 2004) (refusing to find an abuse of discretion as to award of attorney's fees when the family court analyzed each of the factors, detailed its findings in its final order, and those findings were supported by affidavits).

In his final order, the family court judge concluded:

> Wife obtained beneficial results from this litigation. She secured the best interest of her children and obtained significant economic advantage as the result of the distribution of the marital assets and the payment of support. While both Husband and Wife have significant assets from which to pay their fees and suit costs, any fees or costs paid by Wife will adversely impact the parties' children and their standard of living.

The judge evaluated the reasonableness of Wife's attorney's fees and costs, her attorney's extensive experience and standing in the Bar, and the number of hours involved in this litigation against the backdrop of Husband's failure to cooperate with discovery, failure to cooperate with the guardian ad litem, and apparent failure to cooperate with his own attorney. We, therefore, affirm the family court's award of attorney's fees.

WIFE'S APPEAL

I. Future Profits from Sale of Marital Home

Wife asserts the family court erred in awarding Husband a share in the profits of the sale of the marital home if the sale occurred within six years from the date of the divorce decree and exceeded the $700,000.00 value of the home.

Family court judges have wide discretion in determining how marital property is to be distributed; they may use any reasonable means to divide property equitably, and their judgment will not be disturbed absent abuse of discretion. Greene v. Greene, 351 S.C. 329, 341, 569 S.E.2d 393, 400 (Ct. App. 2002); Murphy v. Murphy, 319 S.C. 324, 329, 461 S.E.2d 39, 41 (citing Pierson v. Calhoun, 308 S.C. 246, 254, 417 S.E.2d 604, 608 (Ct. App. 1992)). There are many factors which the family court may consider in the apportionment of marital property. On review, the appellate court looks to the fairness of the overall apportionment, and if the end result is equitable, the fact the appellate court may have weighed specific factors differently than the family court is irrelevant. Pirayesh v. Pirayesh, 359 S.C. 284, 300, 596 S.E.2d 505, 514 (Ct. App. 2004); Pool v. Pool, 321 S.C. 84, 89, 467 S.E.2d 753, 756 (Ct. App. 1996) aff'd as modified, 329 S.C. 324, 494 S.E.2d 820 (1998); Johnson v. Johnson, 296 S.C. 289, 300-01, 372 S.E.2d 107, 113 (Ct. App. 1988)

The value of the marital home was the focus of considerable disagreement. Wife offered the testimony of a certified appraiser who opined the home had a fair market value of $700,000.00. Husband maintained the value was more accurately reflected by the sales price at which the home was marketed prior to this action. He believed the home had a fair market value of $825,000.00. In fashioning a remedy to account for the disputed value and potential additional equity in the home, the family court judge placed a condition on the award of the marital residence to Wife as part of equitable distribution. Given the judge's expressed concern that the property may be undervalued, he provided for Husband's share of profits from the sale of the marital home if the sale exceeded the Wife's valuation of $700,000.00 and

occurred within six years from the date of the final order. Wife and Husband were to share equally in the profits, less the value of any direct contributions Wife made to the appreciation of the home. The family court retained jurisdiction to determine the value of any such contributions should the home sell within the six year period.

Wife argues this apportionment constituted a distribution of future non-marital assets that the family court had no authority to value or apportion. S.C. Code Ann. § 20-7-473 (Supp. 2005) ("The court does not have jurisdiction or authority to apportion nonmarital property.") We disagree. If, as the family court judge suspected, there was a difference between Wife's valuation of the marital home and its true fair market value, then that difference, represented by profit if the home is sold for over $700,000.00, was additional equity in the home and subject to equitable distribution. If the home was undervalued, then the additional equity existed at the time the marital litigation commenced and was, therefore, marital property subject to equitable distribution. Section 20-7-473 defines marital property as "all real and personal property acquired by the parties during the marriage which is owned as of the date of filing or commencement of marital litigation, regardless of how legal title is held." S.C. Code Ann. § 20-7-473 (Supp. 2005).

Awarding Husband a share in future profits prevents any injustice that might result from undervaluation. As Husband points out, the remedy provided is to ensure a fair determination of Husband's additional equity in the home and to provide for its distribution. The family court reasonably considered the unique circumstances in this case. The judge was within his discretion in fashioning a remedy to preclude potential inequity. The family court did not err in awarding Husband a share in the profits of the sale of the marital home if the sale occurred within six years from the date of the divorce decree and exceeded the $700,000.00 value of the home.

II. Classification of Jewelry as Marital Property

Wife argues the family court erred in classifying all jewelry as marital property. We disagree.

Generally, property acquired by either party by gift from a party other than the spouse is nonmarital property. S.C. Code Ann. § 20-7-473(1) (Supp. 2005). Nonmarital property may be transmuted into marital property if: (1) it becomes so commingled with marital property as to be untraceable; (2) it is jointly titled; or (3) it is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property. Jenkins v. Jenkins, 345 S.C 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001) (citing Pool, 321 S.C. at 86, 467 S.E.2d at 756.). Transmutation of nonmarital property into marital property, for equitable distribution purposes, is a matter of intent to be gleaned from the facts of each case. Id. The spouse claiming an equitable interest in property upon dissolution of the marriage has the burden of proving that the property is part of the marital estate. If the spouse carries this burden, he or she establishes a prima facie case that the property is marital property. If the opposing spouse then wishes to claim the property so identified is not part of the marital estate, he or she has the burden of presenting evidence to establish its nonmarital character. Johnson v. Johnson, 296 S.C. 289, 295, 372 S.E.2d 107, 111 (Ct. App. 1988).

The family court judge instructed that Wife bore the burden of proving the jewelry in existence at the time of filing the marital litigation was owned prior to the marriage. Wife met that burden. Once it was established the jewelry was premarital, Husband bore the burden of proving transmutation in order for the jewelry to be considered marital. Husband met that burden by demonstrating that "the premarital items were mixed with other items of jewelry and modified using marital funds." Wife did not refute Husband's evidence. Therefore, the family court appropriately declared the jewelry marital property.

III. Jurisdiction to Issue Supplemental Order

Wife contends the family court judge did not reserve jurisdiction to issue the Supplemental Order awarding guardian ad litem fees. The order was issued on September 29, 2004, after both the final order dated March 11, 2004 and the order addressing post trial motions dated August 2, 2004. Wife relies on our holding in Heins v. Heins where, pursuant to Rule 59(e)

SCRCP, we held the family court did not have authority to alter or amend a judgment sua sponte once the judgment was more than ten days old. 364 S.C. 146, 157, 543 S.E.2d 224, 229 (Ct. App. 2001). We find Wife's reliance on Heins in the present case misplaced.

First, we note the final order dated March 11, 2004 contains a provision retaining and reserving jurisdiction to issue any and all orders necessary to effectuate the terms of the order and to effectuate compliance with the terms of this order. Arguably, guardian ad litem fees were not terms of the March 11, 2004 order, but, in light of the judge's Supplemental Order and recent legislation, this court determines the exclusion of the term for payment of guardian fees was an oversight.

An award of guardian ad litem fees lies within the sound discretion of the family court judge and will not be disturbed on appeal absent an abuse of that discretion. Nasser-Moghaddassi v. Moghaddassi, 364 S.C. 182, 196, 612 S.E.2d 707, 714 (Ct. App. 2005). Section 20-7-1545 of the South Carolina Code provides that, in a private action in which custody or visitation is an issue, a guardian ad litem may be appointed when both parties consent to the appointment. S.C. Code Ann. § 20-7-1545 (Supp. 2005). Additionally, section 20-7-1553 requires:

> (A) At the time of appointment of a guardian ad litem, the family court judge must set forth the method and rate of compensation for the guardian ad litem, including an initial authorization of a fee based on the facts of the case. If the guardian ad litem determines that it is necessary to exceed the fee initially authorized by the judge, the guardian must provide notice to both parties and obtain the judge's written authorization of the consent of both parties to charge more than the initially authorized fee.
>
> (B) A guardian appointed by the court is entitled to reasonable compensation, subject to the review and approval of the court. In determining the reasonableness of the fees and costs, the court must take into account:
>
> (1) the complexity of the issues before the court;

(2) the contentiousness of the litigation;
(3) the time expended by the guardian;
(4) the expenses reasonably incurred by the guardian;
(5) the financial ability of each party to pay fees and costs; and
(6) any other factors the court considers necessary.

S.C. Code Ann. § 20-7-1553 (A-B) (Supp. 2005).

In light of the legislature's direction for compensating guardians ad litem, the judge's omission of a provision for guardian's fees was an oversight. Rule 60(a), SCRCP, provides in pertinent part:

> [c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, leave to correct the mistake must be obtained from the appellate court. The ending of a term of court or departure from the circuit shall not operate to deprive the trial judge of jurisdiction to correct such mistakes.

(emphasis added). Therefore, the family court had jurisdiction to issue the September 29, 2004 Supplemental Order pursuant to Rule 60(a) SCRCP.

CONCLUSION

We affirm the ruling of the family court in regard to:

(1) the parties' contributions to the marriage;
(2) the invasion of Husband's assets for temporary support;
(3) the award of the marital home to Wife;
(4) Husband's share of children's private school tuition;
(5) Husband's share in future profits from the sale of the marital home;
(6) the classification of Wife's jewelry as marital property; and
(7) the award of guardian fees in the Supplemental Order.

We reverse the holding of the family court in reference to the **amount** of income imputed to Husband and remand for a determination consistent with this opinion as it relates to the calculation of the child support award.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

SHORT, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Thaddeus Curry, Appellant.

Appeal From Aiken County
Reginald I. Lloyd, Circuit Court Judge

Opinion No. 4159
Heard June 15, 2006 – Filed October 9, 2006

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, Office of Appellate Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Jeffery A. Jacobs, Office of the Attorney General, of Columbia;

and Solicitor Barbara R. Morgan, of Aiken, for Respondent.

HEARN, C.J.: Thaddeus Curry appeals his convictions for murder and possession of a firearm during the commission of a violent crime in connection with the death of Heath Hamilton. On appeal, Curry argues (1) the trial court erred in limiting the scope of his cross-examination of two co-defendants on sentencing exposure they faced for murder and other charges related to Hamilton's death, and (2) the trial court erred in charging the jury on "the hand of one is the hand of all" theory. We affirm.

FACTS

Shortly after midnight on March 18, 2003, Hamilton and Ronald Coursey drove to an apartment complex in Augusta, Georgia, to purchase marijuana. In the apartment complex's parking lot, they encountered Anthony Savage and Curry and asked if they had any marijuana to sell. Curry and Savage said they had no marijuana, but agreed to procure some and sell a quarter pound's worth to Hamilton and Coursey for $220.

Hamilton and Coursey drove to an ATM and withdrew money to pay for the drugs. Meanwhile, Curry, Savage, and Jeremy Simuel drove around Augusta looking for marijuana to sell to Hamilton and Coursey. They were unsuccessful. When they all returned to the apartment complex, Hamilton and Coursey followed Curry, Savage, and Simuel to Simuel's apartment. Hamilton and Coursey waited outside the apartment while the others went inside and closed the door. They were soon informed the transaction would occur later.

Hamilton and Coursey left the apartment complex and went to Hamilton's home in Beech Island in Aiken County, where they smoked marijuana and waited until Curry and Savage called. The parties spoke by phone and agreed to meet at a gas station in Beech Island. Although Curry, Savage, and Simuel failed to procure marijuana to sell Hamilton and Coursey, they apparently intended to meet under the guise of a drug sale in order to rob Hamilton and Coursey.

Hamilton and Coursey met Curry and Savage in a dark area behind the gas station. Curry and Savage exited their car, where Simuel remained seated. They approached the car in which Hamilton and Coursey waited. Savage told Hamilton they did not have any marijuana, but demanded to see the money. Within minutes, Hamilton was shot and killed while still seated in his vehicle with Coursey. Curry and Savage fled in the waiting car driven by Simuel.

Curry, Savage, and Simuel were charged in connection with the robbery and Hamilton's murder. At Curry's trial, Coursey, Savage, and Simuel implicated Curry in Hamilton's murder. Coursey testified he had not met Curry, Savage, or Simuel before the night of the murder. He stated they first met around midnight in the dark parking lot of the apartment complex, a short time later at the apartment complex, and finally in the dark parking lot of the gas station where Hamilton was killed. He testified he called 911 after the shooting but was unable to provide many details about the perpetrators, telling the 911 dispatcher, "I don't know, it's dark[,] man, I just don't know." However, at trial Coursey testified Curry had the gun in his hand and that Savage never had possession of the gun. Moreover, he unequivocally identified Curry as the shooter.

Savage testified Curry carried a gun with him on the night of the murder and claimed he saw Curry fire the gun three or four times at the murder scene. Savage further testified that after the shooting, Curry and he fled in a car driven by Simuel. According to Savage, Curry exclaimed, "I think I dome capped him," implying he shot Hamilton in the head. Savage testified Curry later told him he had disposed of the murder weapon. Simuel largely corroborated Savage's testimony but did not provide an eyewitness account of Curry firing the gun.

Curry sought to question the motives and biases of Simuel and Savage by cross-examining them on the possible sentences they faced in connection with Hamilton's murder. When Curry questioned Simuel about the possible sentences he faced, the trial court sustained the State's objection and instructed the jury to disregard the testimony.

Prior to Savage's testimony, Curry asked the trial court in limine to allow impeachment of Savage on bias and motive by questioning him about the possible sentences he faced for charges related to Hamilton's death. The trial court denied his request. In reaching its decision, the trial court considered Curry's request in light of State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), and stated:

> Under [the circumstances in Mizzell], sir, part of the problem I think in that case was that, as I read it, the witness was given an offer to plead to one particular charge versus the potential sentence, the maximum sentence on the other charges that the defendant would have faced had she been convicted or tried on the original charges, and we don't have that here. There's no deal between the State at all.

Curry later sought clarification, asking, "So the Court is ruling that he says he has no deal, then I am prohibited from asking about these penalties that he's facing, is that correct?" The trial court responded affirmatively. The trial court elaborated, "We're not going to bring him out here to elicit whether or not he knows what his potential sentences are. As I understand it there's no negotiations or deals between the State and this particular witness."

The jury convicted Curry on both charges. He received concurrent prison sentences of five years for the firearms charge and life in prison for the murder charge. This appeal followed.

LAW/ANALYSIS

I. Scope of Cross-examination

Curry argues the trial court committed reversible error in denying his request to cross-examine Simuel and Savage concerning possible sentences he faced in connection with Hamilton's death.[1] We disagree.

To constitute error, a ruling to admit or exclude evidence must affect a substantial right. Rule 103(a), SCRE; State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). However, error is harmless where it could not reasonably have affected the trial's outcome. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). In considering whether error is harmless, a case's particular facts must be considered along with various factors including:

> . . . the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-

[1] Curry also argues the trial court erred in refusing to allow him to cross-examine Savage about pending criminal charges unrelated to Hamilton's murder. Curry never proffered the evidence or even attempted to proffer it. The evidence is not part of the record. Thus, the issue is not preserved. See State v. Hawkins, 310 S.C. 50, 54, 425 S.E.2d 50, 57 (Ct. App. 1991) (declining to rule on alleged error in exclusion of evidence, where no proffer was made and excluded evidence was not part of record). Lastly, Curry argues the trial court erred in admitting evidence that he was incarcerated. This issue is not preserved for appellate review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal.").

> examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

State v. Clark, 315 S.C. 478, 482, 445 S.E.2d 633, 637 (1994). Thus, an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). A violation of a defendant's Sixth Amendment right to confront a witness is not per se reversible error if the error is harmless beyond a reasonable doubt. State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994).

In this case, Curry relied on State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), in support of his argument that he should be allowed to cross-examine his co-defendants as to any possible sentences they faced in connection with Hamilton's death. In Mizzell, our Supreme Court found error in the trial court's decision to exclude evidence of possible sentences faced by Mizzell's co-defendant where the parties faced the same charges and the co-defendant had not yet pled guilty or reached a plea agreement with the State. The court found:

> The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such evidence. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency.

Id. at 333, 563 S.E.2d at 318.

Similar to the scenario in Mizzell, Curry's co-defendants faced the same charges as Curry and had not pled guilty or reached a plea agreement. The trial court refused to allow Curry to cross-examine his co-defendants on the possible sentences they faced because Savage and Simuel had not pled guilty or reached a plea agreement with the State. We find this ruling contradicts the settled law established in Mizzell. Accordingly, we find the

trial court erred in barring the cross-examination of Simuel and Savage on the possible sentences they faced.

However, the refusal to allow Curry to cross-examine his co-defendants on any possible sentences they faced in connection with Hamilton's death was harmless. At trial, the testimony given by the co-defendants was not the only evidence of Curry's involvement in the shooting of Hamilton. Ronald Coursey, the other victim of the robbery, unequivocally identified Curry as the shooter. He testified:

> Coursey: And then the next I knew, he came up, Mr. Curry, over there had the gun.
>
> Q: You saw Mr. Curry with the gun?
>
> A: Yes, sir, he had the gun the whole time.
>
> Q: What did he do with the gun?
>
> A: … he started shooting.
>
> …
>
> Q: Could you describe the gun?
>
> A: …it was either automatic or semi-automatic. It went off real fast.
>
> Q: And how was [Curry] holding it?
>
> A: In one hand.
>
> Q: Okay. And so what did he say when he pulled the gun out?
>
> A: I don't think he said anything, it just happened too fast and he shot and hit [Hamilton] in the head.
>
> …

> Q: Did you see who pulled the trigger?
>
> A: Yes, sir. It was Mr. Curry over there.

Moreover, in addition to Coursey, Javon Rushon provided the following testimony regarding a conversation he overheard between Curry and Savage regarding the murder weapon:

> Q: What specifically did you hear Mr. Curry—what if anything, did you hear Mr. Curry mention about the gun?
>
> A: "They would never find it." "The hammer came off of it." You know, "It was chopped up."

On cross-examination, Rushon further clarified that it was in fact Curry who was talking about the gun, stating "Thaddeus Curry was talking to [Savage] about it."

The testimony of the co-defendants, Simuel and Savage, was merely cumulative to that given by Coursey and Rushon. As a result, Curry's guilt or innocence did not hinge solely on the testimony of his co-defendants; the testimony of Coursey and Rushon provided other competent evidence upon which a rational verdict of guilty could be based. Therefore, as the error on the part of the trial judge in limiting the scope of cross-examination could not have reasonably affected the outcome of the trial, it was harmless.

II. Jury Charge

Curry next argues the trial court erred in its charge on "the hand of one is the hand of all" theory. We disagree.

"A charge is sufficient if, when considered as a whole, it covers the law applicable to the case." State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996). "The substance of the law is what must be charged to the jury, not any particular verbiage." State v. Adkins, 353 S.C. 312, 318-19, 577 S.E.2d 460, 464 (Ct. App. 2003). "Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions

which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

At trial, Curry argued the court's proposed charge on "the hand of one is the hand of all" theory lacked "sufficient emphasis on the issue of probable or natural consequence . . . ." Based on language drawn from State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000), Curry suggested the following charge:

> [I]f two or more combine together to commit an unlawful act and a crime is committed by one of the actors as a **probable and natural consequence** of the acts done in pursuance of the common design, all present and participating in the unlawful undertaking are as guilty as the one who committed the act.

(emphasis added).

The trial judge rejected Curry's proposed charge. He subsequently charged the jury twice on "the hand of one is the hand of all" theory. The first charge, which he gave along with the other charges prior to jury deliberations, stated:

> It is my duty to charge you now that if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. If a person joins with another to accomplish an illegal purpose, he is criminally responsible for everything done by the other person which occurs as a **natural consequence** of the acts done in carrying out the common plan and purpose.

After the jury left to deliberate, Curry renewed his objection to the charge on the basis that "the instruction as given did not convey to the jury that the act in this case, a homicide, must be a **natural or probable consequence** of the

preexisting plan in order . . . for the theory of the hand of one, hand of all to apply. . . ." (emphasis added). The trial judge noted Curry's exception.

During its deliberation, the jury asked the court to re-charge "the hand of one is the hand of all." The court brought the jury out and charged accomplice liability as follows, in pertinent part:

> [I]f a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. I tell you further that a person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a **natural consequence** of the acts done in carrying out the common plan or purpose. When two or more people are acting together … assisting each other in committing the offense the act of one is the act of all, or as is sometimes said, the hand of one is the hand of all.

(emphasis added).

South Carolina courts frequently approve accomplice liability charges that lack language stating an accomplice's criminal act must be "a probable and natural consequence" of the accomplice's common plan. For instance, in State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999), our supreme court stated that under "the hand of one is the hand of all" theory, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." In State v. Kelsey, 331 S.C. 50, 76-77, 502 S.E.2d 63, 76 (1998), the supreme court approved a broader accomplice liability charge that stated, "… if a crime is committed by two or more persons who are acting together in the commission of a crime, then the act of one is the act of both." Moreover, in State v. Crowe our Supreme Court approved the following charge for accomplice liability:

> [T]wo or more combine together to commit an unlawful act, such as robbery, and, in the execution of that criminal act, a homicide is committed by one of the actors, as a **probable or natural consequence** of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act. This principle was stated in State v. Cannon, 49 S.C. 550, 27 S.E. 526: "The common purpose may not have been to kill and murder, but if it was unlawful, as, for instance, to break in and steal, and in the execution of this common purpose a homicide is committed by one, as a **probable or natural consequence** of the acts done in pursuance of the common design, then all present participating in the unlawful common design are as guilty as the slayer."

258 S.C. 258, 265, 188 S.E.2d 379, 382 (1972) (emphases added). Therefore, the approval of this charge demonstrates that the "natural and probable consequence" language need not be included in the charge, as requested by Curry, if the charge as a whole adequately conveys the law. Additionally, with the approval of the disjunctive "or" in the "probable or natural consequence" language of State v. Crowe, the trial court's charge arguably benefited Curry as it only included the "natural consequences" rather than the "natural or probable" language.

Therefore, when viewing the challenged portion of the jury charge as a whole with the rest of the trial court's instruction, we find the trial court adequately charged the law regarding "hand of one hand of all."

CONCLUSION

For the forgoing reasons, Curry's conviction is hereby

AFFIRMED.

GOOLSBY, J. concurs.

ANDERSON, J. dissents in a separate opinion.

ANDERSON, J. (dissenting in a separate opinion): I disagree with majority's reasoning and analysis. In my view, the trial court erred in (1) limiting his cross-examination of two co-defendants on sentencing exposure they faced for murder and other charges related to Hamilton's death; and (2) giving an erroneous charge on accomplice liability. I **VOTE** to **REVERSE**.

FACTUAL/PROCEDURAL BACKGROUND

Shortly after midnight on March 18, 2003, Hamilton and Ronald Coursey drove to an apartment complex in Augusta, Georgia, to purchase marijuana. In the apartment complex parking lot, they encountered Curry and Anthony Savage and asked if they had any marijuana to sell. Curry and Savage said they had no marijuana, but agreed to procure and sell a quarter-pound to Hamilton and Coursey for $220.

Hamilton and Coursey drove to an ATM and withdrew money to pay for the drugs. Meanwhile, Curry, Savage, and Jeremy Simuel drove around Augusta looking for marijuana. They were unsuccessful. When they returned to the apartment complex, Hamilton and Coursey followed Curry, Savage, and Simuel to Simuel's apartment. Hamilton and Coursey waited outside the apartment while the others went inside and closed the door. They were soon informed the transaction would occur later.

Hamilton and Coursey left the apartment complex and went to Hamilton's home on Beech Island in Aiken County, where they smoked more marijuana and waited until Curry and Savage called. The parties spoke by phone and agreed to meet at a gas station on Beech Island. Curry, Savage and Simuel failed to procure marijuana to sell Hamilton and Coursey, but apparently intended to meet under the auspices of a drug sale in order to rob Hamilton and Coursey of their money.

Hamilton and Coursey met Curry and Savage in a dark area behind the gas station. Curry and Savage exited their car, where Simuel remained seated. They approached the car in which Hamilton and Coursey waited. Savage told Hamilton they did not have any marijuana, but demanded to see the money. Within minutes, Hamilton was shot and killed while still seated in his vehicle. Curry and Savage fled in the waiting car driven by Simuel.

Curry, Savage and Simuel were all charged in connection with the robbery and Hamilton's murder. Curry was tried on the charges before a jury.

At trial, Coursey, Savage and Simuel implicated Curry in Hamilton's murder. Coursey attested that he saw Curry shoot Hamilton. He testified the first time he met Curry, Savage, and Simuel was the night of the murder when he saw them around midnight in the dark parking lot of the apartment complex, a short time later at the apartment complex, and finally in the dark parking lot of the gas station where Hamilton was killed. Coursey admitted he had been drinking alcohol and smoking marijuana throughout the evening. He averred he called 911 after the shooting but was unable to provide many details about the perpetrators, telling the 911 dispatcher, "I don't know, it's dark man, I just don't know." When he provided police a written statement one week later, he was only able to describe the gunman as "a black male with a white t-shirt on[.]"

Savage asseverated Curry carried a gun with him on the night of the murder, and claimed he saw Curry fire the gun three or four times at the murder scene. Savage further testified that after the shooting, Curry and he fled in a car driven by Simuel. According to Savage, Curry exclaimed, "I think I dome capped him," indicating he shot Hamilton in the head. Curry later told Savage he had disposed of the murder weapon. Simuel largely corroborated Savage's testimony, but did not provide an eyewitness account of Curry firing the gun.

Curry sought to question the motives and biases of Simuel and Savage by cross-examining them on the sentencing exposure they faced for

Hamilton's murder. When Curry questioned Simuel about the potential sentences he faced, the trial court sustained the State's objection and instructed the jury to disregard the testimony.

Prior to Savage's testimony, Curry asked that he be allowed to show motive and bias by questioning Savage on the possible sentence he faced in connection with Hamilton's death. In reaching its decision, the trial court considered Curry's request in light of State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), and stated:

> Under [the circumstances in Mizzell], sir, part of the problem I think in that case was that, as I read it, the witness was given an offer to plead to one particular charge versus the potential sentence, the maximum sentence on the other charges that the defendant would have faced had she been convicted or tried on the original charges, and we don't have that here. There's no deal between the State at all.

Curry later sought clarification, asking, "So the Court is ruling that he says he has no deal, then I am prohibited from asking about these penalties that he's facing, is that correct?" The trial court responded affirmatively. Further, the trial court declined Curry's request to proffer the testimony: "We're not going to bring him out here to elicit whether or not he knows what his potential sentences are. As I understand it there's no negotiations or deals between the State and this particular witness."

The jury convicted Curry on both charges. He received concurrent prison sentences of five years for the firearms charge and life in prison for the murder charge.

LAW/ANALYSIS

I. Limitation of Cross-Examination

A. Confrontation Right

Curry argues the trial court committed reversible error in denying his request to cross-examine Savage and Simuel concerning the possible sentences they faced in connection with Hamilton's death. I agree.

"Among other protections, the Sixth Amendment assures: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]' U.S. Const. amend. VI." State v. Davis, 364 S.C. 364, 372, 613 S.E.2d 760, 764 (Ct. App. 2005), cert. granted (Feb. 15, 2006). The Sixth Amendment was incorporated and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400 (1965); State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002); Davis, 364 S.C. at 372, 613 S.E.2d at 764. The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial. California v. Green, 399 U.S. 149 (1970); State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), cert. granted (Feb. 16, 2006). The primary interest secured by the Confrontation Clause is the right to cross-examination. Gillian at 450, 602 S.E.2d at 71 (citing State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001); Starnes v. State, 307 S.C. 247, 414 S.E.2d 582 (1991)); see also State v. Graham, 314 S.C. 383, 444 S.E.2d 525 (1994) (observing that specifically included in defendant's Sixth Amendment right to confront a witness is the right to meaningfully cross-examine an adverse witness).

The Confrontation Clause guarantees an accused the opportunity to cross-examine a witness concerning bias. Davis v. Alaska, 415 U.S. 308, 319-20 (1974); State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). Considerable latitude is allowed in cross-examining a witness for potential bias from which jurors could draw inferences relating to the

witness's liability. State v. Clark, 315 S.C. 478, 481, 445 S.E.2d 633, 634 (1994); Brown, 303 S.C. at 171, 399 S.E.2d at 594. However, the Confrontation Clause does not preclude the trial court from limiting a defendant's inquiry into the potential bias of a prosecution witness. Delaware v. Van Arsdall, 475 U.S. 673 (1986); Gillian, 360 S.C. at 451, 602 S.E.2d at 72. Rather, the trial court retains broad discretion to impose reasonable limits on such cross-examination based on concerns about issues including harassment, prejudice, confusion of the issues, witness safety, or interrogation that is repetitive or only marginally relevant. Id.

In State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), our supreme court found error in the trial court's decision to exclude evidence of possible sentences faced by the Mizzell brothers' co-defendants where all defendants faced the same charges and the co-defendants had not yet pled guilty or reached a plea agreement with the State. The Mizzell brothers were tried together on charges of first degree burglary, grand larceny, and possession of a firearm during the commission of a violent crime for breaking into the victim's home and stealing several guns. State's witness Donald Steele had been charged with the same crimes as the Mizzells. Steele testified that he and his wife drove the Mizzells to the victim's home and watched as they kicked in the door, entered the home, and returned carrying guns. On cross-examination, Steele admitted the State had charged him with the same crimes as the Mizzells. "The trial court excluded evidence of the possible sentence Steele faced but permitted petitioners to examine Steele about the sentence in general terms." 349 S.C. at 330, 563 S.E.2d at 317.

The issue for the court was whether the trial court had violated the defendants' confrontation rights by refusing to allow evidence of Steele's potential sentence if convicted of the same crimes as the Mizzells. The Mizzell court began by juxtaposing the right of a defendant to cross-examine a witness with the discretion of a trial judge to dictate reasonable limits on the scope of cross-examination:

> A criminal defendant may show a violation of the Confrontation Clause "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and

> thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674, 684 (1986). The trial judge retains discretion to impose reasonable limits on the scope of cross-examination. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); accord Delaware v. Van Arsdall, supra. Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate. State v. Graham, supra. If the defendant establishes he was unfairly prejudiced by the limitation, it is reversible error. State v. Brown, supra.

Mizzell, 349 S.C. at 331, 563 S.E.2d at 317. The court elaborated that "[t]he jury is, generally, not entitled to learn the possible sentence of a defendant because the sentence is irrelevant to finding guilt or innocence." Id. at 331, 563 S.E.2d at 318. "However," the court intoned, "other constitutional concerns, such as the Confrontation Clause, limit the applicability of this rule in circumstances where the defendant's right to effectively cross-examine a co-conspirator witness of possible bias outweighs the need to exclude the evidence." Id. at 331-32, 563 S.E.2d at 318.

The court discussed State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991), a case in which a witness admitted she testified in exchange for a conspiracy charge which carried a seven and one-half year maximum sentence, rather than a trafficking in cocaine charge. The trial judge refused to allow the defense to cross-examine the witness as to the maximum punishment she would have faced under the trafficking charge. The Brown court found that evidence the witness was avoiding a mandatory prison term of "more than three times the duration she would face on her plea to conspiracy" constituted "critical evidence of potential bias that appellant should have been permitted to present to the jury." Brown, 303 S.C. at 171, 399 S.E.2d at 594. Further, the witness's testimony was the only evidence linking Brown to trafficking cocaine.

The Mizzell court noted that unlike in Brown, Steele did not have a deal with the State. However, the court concluded that the lack of an agreement with the prosecution would make the potential for witness bias even more likely:

> The fact the witness has yet to reach a plea bargain or been found guilty should not prevent the admission of such evidence. The lack of a negotiated plea, if anything, creates a situation where the witness is more likely to engage in biased testimony in order to obtain a future recommendation for leniency.

Mizzell, 349 S.C. at 333, 563 S.E.2d at 318. Thus, Mizzell stands for the proposition that the lack of an agreement with the State may increase the likelihood of witness bias where the witness has been charged with the same crimes as the defendant.

Similar to the scenario in Mizzell, Curry's co-defendants faced the same charges as Curry and had not pled guilty or reached a plea agreement. Here, the trial court refused to allow Curry to cross-examine his co-defendants on their sentencing exposure because Savage and Simuel had not pled guilty or reached a plea agreement with the State. This ruling contradicts the law established in Mizzell.

State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), cert. granted (Feb. 16, 2006), likewise addressed the Confrontation Clause in the context of questioning a witness on a potential sentence. Gillian was convicted of murder. He had coordinated a burglary and recruited several teenagers, including State's witness Page, to break into the home. Among the items stolen was a .38 revolver which was later used to kill the victim, Michael Ward. At Gillian's trial, Page testified to Gillian's possession of the gun, to Gillian's statement that he was going to "do some dirt" with it, and to an altercation between Gillian and the victim on the night of the murder. "On direct examination, Page admitted he was currently charged with first-degree burglary and the Richland County Solicitor had agreed to advise his plea judge of his cooperation in Gillian's trial." 360 S.C. at 449, 602 S.E.2d at 70. Defense counsel sought to cross-examine Page on the possible sentence he faced, but the trial judge limited references to the sentence to "a lot of time"

and "serious time." Id. Relying on Mizzell and State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002), we inculcated:

> Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists "a substantial possibility [the witness] would give biased testimony in an effort to have the solicitor highlight to [a] future [court]" how the witness cooperated in the instant case. See Sims, 348 S.C. at 25, 558 S.E.2d at 523; see also Mizzell, 349 S.C. at 332-33, 563 S.E.2d at 318.

Gillian, 360 S.C. at 454, 602 S.E.2d at 73. Accordingly, we found the trial court had erred in excluding evidence of Page's potential sentence.

Apodictically, a defendant has a protected right under the Sixth Amendment's Confrontation Clause to cross-examine a witness as to the possible sentence he faces where there exists a substantial possibility of bias. In the case sub judice, where the witnesses were charged with the same crimes as the co-defendant against whom they were testifying, the requisite potential for bias was present. Curry had a right to question on the possible sentences Simuel and Savage were facing, and the trial court erred by refusing this inquiry.

B. Harmless Error Analysis

A determination that the trial court committed error does not end the inquiry. A violation of a defendant's Sixth Amendment right to confront a witness is not per se reversible error if the error is harmless beyond a reasonable doubt. State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994). In State v. Gillian, 360 S.C. 433, 454, 602 S.E.2d 62, 73 (Ct. App. 2004), cert. granted (Feb. 16, 2006), this Court stated the law of harmless error with exactitude:

> No definite rule of law governs the finding that an error was harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990);

State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004). Whether an error is harmless depends on the particular facts of each case and upon a host of factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case.

Mizzell, 349 S.C. at 333, 563 S.E.2d at 318-19 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)).

"Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. Mizzell, 349 S.C. at 334, 563 S.E.2d at 319; Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." Mizzell, 349 S.C. at 334, 563 S.E.2d at 319 (internal quotations omitted).

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); Mitchell, 286 S.C. at 573, 336 S.E.2d at 151; State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1,

> 377 S.E.2d 581 (1989); Adams, 354 S.C. at 381, 580 S.E.2d at 795; see also State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (noting that when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside conviction for insubstantial errors not affecting result).

Gillian, 360 S.C. at 454-55, 602 S.E.2d at 74-75.

The Mizzell court found the erroneous limitation of the cross-examination of a witness constituted reversible error under the facts of that case. Mizzell, 349 S.C. at 334, 563 S.E.2d at 319. The court noted the witness's testimony provided the only direct link between the defendant and the crime scene. Moreover, no physical evidence linked the defendant to the crime scene. In fact, nothing else corroborated the State's case.

Conversely, in State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 523 (2002), our supreme court found harmless error where the State's case was "strong" without the witness's testimony and exclusion of the testimony could not possibly have affected the trial's outcome. In considering the strength of the State's case, the Sims court noted the defendant's fingerprints were found at the crime scene, the victim's mother testified Sims threatened the victim on the date of her death, and Sims had "spontaneously confessed" to law enforcement officers investigating the incident. Id.

This Court found harmless error in Gillian, where the witness's testimony was "largely cumulative" to testimony from other witnesses and other evidence suggested Gillian's guilt. Gillian, 360 S.C. at 457-58, 602 S.E.2d at 74-75. We distinguished the facts in Gillian from those in Mizzell, noting the absence of the witness's testimony left "no material point of the State's case uncorroborated or unsupported by the testimony of other witnesses." Id. at 458, 602 S.E.2d at 75.

Here, Simuel and Savage's testimony was critical to the case's outcome. They testified to Curry's motive; to his possession of a gun similar to that used in the shooting; to his conduct before and after the shooting; and to self-incriminating statements Curry made about discarding the weapon.

Most significantly, Savage testified to seeing Curry fire the gun. Without their testimony, the only evidence linking Curry to the crime scene is Coursey's vague and unspecific testimony. Coursey provided few details of the gunman in the description he provided to the 911 dispatcher immediately after the shooting and in his written statement to police made one week later. Coursey testified the shooting occurred in a dark area, and that he met Curry and Savage for the first time hours before in another dark location. Moreover, Coursey testified he observed the shooting after spending several hours drinking alcohol and smoking marijuana. Consequently, the testimony of Simuel and Savage provided the crucial nexus establishing Curry as the gunman.

Accordingly, the trial court's error in limiting Curry's cross-examination could have reasonably affected the outcome of the trial. The error was not harmless.

II. Accomplice Liability Charge

Additionally, Curry maintains the trial court's charge on the hand of one is the hand of all theory was inadequate because it failed to specify that a crime committed by an accomplice must be a "probable or natural consequence" of the actions taken in pursuit of the accomplices' common plan. I agree. Although the court's charge included the words "natural consequence," the charge should have included both "natural" and "probable."

At trial, Curry argued the court's proposed charge on "the hand of one is the hand of all" theory lacked "sufficient emphasis on the issue of probable or natural consequence[.]" Based on language drawn from State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000), Curry suggested the following charge:

> [I]f two or more combine together to commit an unlawful act and a crime is committed by one of the actors as a **probable and natural consequence** of the acts done in pursuance of the common design, all present and participating in the unlawful undertaking are as guilty as the one who committed the act.

(Emphasis added.)

The trial judge rejected Curry's proposed charge and subsequently charged the jury twice on "the hand of one is the hand of all" theory. The first charge, which the judge gave along with the other charges prior to jury deliberations, stated:

> It is my duty to charge you now that if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. If a person joins with another to accomplish an illegal purpose, he is criminally responsible for everything done by the other person which occurs as a **natural consequence** of the acts done in carrying out the common plan and purpose.

(Emphasis added.) After the jury left to deliberate, Curry renewed his objection to the charge on the basis that "the instruction as given did not convey to the jury that the act in this case, a homicide, must be a **natural or probable consequence** of the preexisting plan in order . . . for the theory of the hand of one, hand of all to apply. . . ." (emphasis added). The trial judge noted Curry's exception.

During its deliberations, the jury asked the court to re-charge "the hand of one is the hand of all." The court brought the jury out and charged accomplice liability as follows:

> . . . if a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. I tell you further that a person who joins with another to accomplish an illegal purpose is criminally responsible for everything done by the other person which occurs as a **natural consequence** of the acts done in carrying out the common plan or purpose. When two or more people are acting together . . . assisting each other in committing the offense the act of one is the act of all, or as is sometimes said, the hand of one is the hand of all.

(Emphasis added.) After re-charging the jury on additional areas of law, including mere presence, the trial judge sent the jury back for continued deliberation. The judge stated to Curry's counsel, "I note your continuing objection to the charge on hand of one as stated earlier."

Curry argues the accomplice liability charge erroneously failed to specify that an accomplice's crime must be "a probable and natural consequence" of actions taken in pursuit of the accomplices' shared plan. The language advanced by Curry limits criminal liability for an accomplice's actions that are inconsequential to the execution of their common scheme or plan. As one treatise explains:

> When several persons are involved in the perpetration of one crime, and one of them goes outside the common purpose for which they combined or conspired in committing a fatal act which is not a **natural and probable consequence** of carrying out the common purpose, the others are not criminally liable for the homicide. There is a requirement of a direct causal connection between the underlying felony and the homicide which is something more than mere coincidence in time and place between the two. The actual legal relation between the killing and the crime committed or attempted must be such that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt to commit it; that is, the fatal act must have been the ordinary, probable, or necessary result or effect of the execution of the conspiracy, or of the concerted action, in which the defendant participated.
>
> Whether or not the act done was in furtherance of the common design, or whether it was a **natural and probable consequence** flowing from the execution of the common design is always a question for the jury.

3 Am.Jur. Proof of Facts 2d 551, Homicide Outside of Common Design, § 6 (2005) (emphasis added).

Our courts have approved of accomplice liability charges that lack language stating an accomplice's criminal act must be "a probable and natural consequence" of the accomplices' common plan. For instance, in State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999), our supreme court stated that under "the hand of one is the hand of all" theory, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate **incidental** to the execution of the common design and purpose." (Emphasis added.) In State v. Kelsey, 331 S.C. 50, 76-77, 502 S.E.2d 63, 76 (1998), the supreme court approved a broader accomplice liability charge that stated, ". . . if a crime is committed by two or more persons who are acting together in the commission of a crime, then the act of one is the act of both."

However, other cases present accomplice liability charges that include the language Curry requests. In State v. Crowe, 258 S.C. 258, 265, 188 S.E.2d 379, 382 (1972), our supreme court described accomplice liability as where

> . . . two or more combine together to commit an unlawful act, such as robbery, and, in the execution of that criminal act, a homicide is committed by one of the actors, as a **probable or natural consequence** of the acts done in pursuance of the common design, all present participating in the unlawful undertaking are as guilty as the one who committed the fatal act. This principle was stated in State v. Cannon, 49 S.C. 550, 27 S.E. 526: "The common purpose may not have been to kill and murder, but if it was unlawful, as, for instance, to break in and steal, and in the execution of this common purpose a homicide is committed by one, as a **probable or natural consequence** of the acts done in pursuance of the common design, then all present participating in the unlawful common design are as guilty as the slayer."

(Emphasis added.)

In State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985), rev'd on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), our supreme court considered the necessity of the "probable or natural consequence" language in an accomplice liability charge. Peterson involved the joint appeal of two accomplices who appealed their convictions for murder, armed robbery, grand larceny of a motor vehicle, and conspiracy. The court stated:

> The trial judge's charge was a correct statement of the general law of this jurisdiction concerning accomplice liability. In the present case, however, the jury reasonably could have found that the murder was not the probable or natural consequence of the larceny of a motor vehicle.
>
> Had the jury determined that either appellant conspired only to commit an unarmed larceny of a car, and had it further concluded that the state failed to establish beyond a reasonable doubt that a homicide was the natural or probable consequence of a plan to steal the victim's car, the appellant would have been entitled to an acquittal on the charge of murder.
>
> **It was therefore essential under the facts and circumstances of this case that the jury be instructed that it had to find that the homicide was a natural or probable consequence of the acts actually agreed on by the appellants before the law would hold him responsible for such a homicide.** The failure of the trial judge to so instruct was error because it permitted the jury to convict an appellant of murder merely by finding (1) that appellant had combined with another to commit the non-life threatening crime of grand larceny of a motor vehicle and (2) that appellant's accomplice thereafter took a life without appellant's prior knowledge, approval, or assistance.

Peterson, 287 S.C. at 246-47, 335 S.E.2d at 801-02 (emphasis added).

Thus, the facts and circumstances of a particular case ultimately dictate whether an accomplice liability charge must instruct the jury that an accomplice's actions be a "natural or probable consequence" of actions taken in pursuit of the accomplices' shared plan.

I would hold that here, as in Peterson, the facts and circumstances warrant the language requested by Curry. Evidence presented at trial suggested the possibility that the codefendants met Hamilton and Coursey under the pretense of selling them marijuana, but in fact had no marijuana to sell and only intended to rob them of their money. The testimony is not conclusive that the codefendants agreed to use weapons to accomplish the crime; only that one of them apparently had the intention and shot Hamilton during the commission of the crime. Had the jury determined that either codefendant conspired **only** to commit an unarmed robbery and had it further concluded that the State failed to establish beyond a reasonable doubt that a homicide was the natural or probable consequence of the robbery, the appellant would have been entitled to an acquittal on the charge of murder. Crowe and Peterson utilize both "natural" and "probable." Each word has a different meaning. Accordingly, the use of both words was necessary in the case sub judice. The court's failure to include the word "probable" here renders the charge inadequate.

Curry further alleges the trial court erred (1) by refusing to allow him to cross-examine Savage on possible sentence he faced for pending charges unrelated to Hamilton's death; (2) by allowing testimony regarding alleged bad acts; and (3) by allowing the State to elicit testimony that Curry was in jail at the time of the trial. Because I would reverse on the Confrontation Clause and accomplice liability charge issues, I decline to address these issues. I **VOTE** to **REVERSE**.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Leila Eugenia Auten, Personal Representative of the Estate of Millard Benton Parrish, Jr., deceased, Appellant,

v.

Sylvia Snipes, Respondent.

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

Opinion No. 4160
Submitted September 1, 2006 – Filed October 9, 2006

AFFIRMED

Philip E. Wright, of Lancaster, for Appellant.

Francis L. Bell, Jr. and William J. Nowicki, both of Lancaster, for Respondent.

GOOLSBY, J.: Leila Eugenia Auten, the sister of Millard Benton Parrish, Jr., and personal representative of his estate, instituted this action to recover funds from Parrish's retirement account that were disbursed to his ex-wife, Sylvia Snipes. The trial court held Auten failed to meet her burden of proving a separation agreement between Parrish and Snipes had the effect of extinguishing any interest Snipes had in the account. Auten appeals. We affirm.[1]

FACTS

On April 18, 2000, Parrish rolled his 401K into a Roth IRA with Signator Investments. Parrish named Snipes, his wife at the time, as primary beneficiary to receive the proceeds of the account upon his death.

Parrish and Snipes later separated. On April 9, 2001, they executed a separation agreement providing in pertinent part as follows:

> Husband and wife will each keep all money and bank accounts and 401K plans and profit sharing plans which are in his or her name. . . .
> . . .
>
> **LASTLY, IT IS UNDERSTOOD AND AGREED** that the Husband and Wife release and forever discharge the other of and from all causes of action, claims, property rights or any demands whatsoever in law or in equity . . . and the parties to each declare this to be a full, final and complete settlement of all of their property rights, and each party does hereby release and relinquish unto the other all of his or her rights, title, claim, interest and demand, rights of

[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

> dower in and to the property of the other, whether now in being or hereinafter acquired . . . .

(Boldface in original.) Contemporaneous with the separation agreement, Parrish executed a power of attorney, which allowed Snipes to proceed with a divorce in the Dominican Republic. By decree dated May 23, 2001, a judge in the Dominican Republic dissolved the marriage.[2] Soon after the divorce, Snipes remarried. Even after execution of the separation agreement and the divorce, Parrish never changed his will or the beneficiary designation on the Signator account.

Parrish died September 20, 2002. In May 2003, Snipes contacted Signator Investments and received the balance of the account, totaling $114,582.52.

On June 13, 2003, Auten, on behalf of Parrish's estate, sued Snipes for the proceeds of the Signator account and other relief. On August 26, 2003, Snipes filed her answer and counterclaim.

The trial court, sitting without a jury, held a final hearing in the case on November 16, 2004. By that time, the parties had dismissed or resolved all matters in this litigation except for Auten's claim for recovery of the funds in the Signator account.

On May 20, 2005, the trial court issued an order denying Auten the relief she requested. In the order, the trial court made the following findings: (1) because the agreement did not specifically address a retirement account in which one spouse possessed an expectancy as a named beneficiary, the general language of the separation agreement by which Snipes purportedly waived her beneficiary interest in the Signator account was ineffective; and

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[2] The divorce decree provided the "separation agreement entered into between the parties . . . shall survive in this judgment of divorce by reference but not be merged and that the parties are hereby ordered and directed to comply with each and every provision of said agreement."

(2) Parrish failed to change the beneficiary on the Signator account notwithstanding that he had both the ability and ample time to do so. This appeal followed.

STANDARD OF REVIEW

In South Carolina, the construction of a separation agreement is a matter of contract law.[3] Whether the language of a contract is ambiguous is a question of law for the court.[4] The construction of a clear and unambiguous contract is a matter for the court to decide.[5] "Where a contract is capable of legal construction, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it."[6]

LAW/ANALYSIS

1. We reject Auten's challenge to the trial court's conclusions that (1) the general release language in the agreement was not intended as a relinquishment of Snipes's claim to the proceeds in the Signator account; and (2) the agreement was not intended to operate as a relinquishment of Snipes's right to be the designated beneficiary of Parrish's retirement account.

In Stribling v. Stribling, this court recently observed that "[g]enerally, in South Carolina, divorce does not per se affect the rights of a beneficiary interest. . . . However, it is generally recognized that a beneficiary may contract away the beneficiary interest through a separation or property

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[3] McDuffie v. McDuffie, 313 S.C. 397, 399, 438 S.E.2d 239, 241 (1993).

[4] South Carolina Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).

[5] Pearson v. Church of God, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996).

[6] Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997).

settlement agreement, even if the beneficiary designation is not formally changed."[7]

Nevertheless, such a relinquishment requires more than "general language of release" in the separation or property settlement agreement.[8] As this court went on to state in Stribling:

> [I]n South Carolina, a separation agreement may preclude a named beneficiary from recovery of an expectancy interest in two ways. First, a named beneficiary may be precluded from recovery when a separation agreement specifically addresses a particular policy/account providing an expectancy interest and the agreement contains language of release applicable to the policy/account. Second, when a separation agreement provides general language of release without specifically addressing the policy/account providing the expectancy interest, a named beneficiary may be precluded from recovery when the policy/account owner intended for the general waiver to apply to the expectancy interest.[9]

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[7] Stribling v. Stribling, 369 S.C. 400, ___, 632 S.E.2d 291, 293 (Ct. App. 2006) (citing Estate of Revis v. Revis, 326 S.C. 470, 477, 484 S.E.2d 112, 116 (Ct. App. 1997)).

[8] Estate of Revis v. Revis, 326 S.C. 470, 478, 484 S.E.2d 112, 116 (Ct. App. 1997). Although Revis concerned a beneficiary interest in a life insurance policy rather than a retirement account, the two are analogous in that "[l]ike the beneficiary in a life insurance policy, the IRA beneficiary merely has an expectancy interest in the IRA until the owner's death." Stribling, 369 S.C. at ___, 632 S.E.2d at 294.

[9] Stribling, 369 S.C. at ___, 632 S.E.2d at 294 (emphasis added).

We hold the first method by which the agreement could have precluded Snipes's expectancy interest in the funds is inapplicable here. The trial court correctly determined the separation agreement did not specifically address a retirement account in which one spouse had an expectancy interest as a named beneficiary. Rather, the agreement merely awarded Parrish and Snipes the retirement accounts that were in his or her name respectively and had no explicit provisions regarding beneficiary interests.[10] Furthermore, the agreement had only general release language and did not specifically require Parrish and Snipes to waive their expectancy interests in each other's retirement accounts. Thus, by the terms of the separation agreement, Snipes did not waive her beneficiary interest in the Signator account.[11]

Likewise, Auten cannot rely on the second way that a separation agreement can prevent a named beneficiary from recovering an expectancy interest. We found no evidence in the record before us suggesting Parrish

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[10] In her brief, Auten argues the last paragraph of the agreement operated as a waiver of Snipes's beneficiary interest in the Signator account. We disagree. This paragraph provides that "each party does hereby release and relinquish unto the other all of his or her rights, title, claim, interest and demand, rights of dower in and to the property of the other, whether now in being or hereinafter acquired." Contrary to what Auten suggests, the phrase "whether now in being or hereinafter acquired" refers to property that Parrish or Snipes might receive after executing the agreement, not to after-acquired rights that either could obtain in the other's assets.

[11] We further disagree with Auten that the release language at issue here is sufficiently similar to that in Estate of Altobelli v. International Business Machines, 77 F.3d 78 (4th Cir. 1996), so as to warrant a finding that it amounted to a relinquishment of Snipes's right as the named beneficiary on the Signator account. The parties to the separation agreement in Altobelli, expressly "waive[d] and transfer[red]" to each other "any interest" each had in certain accounts awarded to the other spouse. Id. at 80. This language is more specific than the general release paragraph in the separation agreement between Parrish and Snipes.

intended the waiver to apply to a beneficiary interest in his retirement account. Significantly, Auten did not challenge the trial court's finding that Parrish never attempted to change the beneficiary designation on the Signator account during the seventeen months between the time of the divorce until his death even though he was able to do so.[12] In addition, although, as Auten argued, there were plausible reasons that Parrish would not desire to leave his retirement funds to Snipes,[13] these motives do not necessarily lead to the conclusion that he no longer intended her to be the beneficiary of those funds in the event she survived him.[14]

2. Auten argues the trial court erred in failing to make a "specific finding" that the separation agreement was unambiguous. Auten contends that, although the trial court found "[t]he appellant, through her attorney, presented in open court that the [a]greement was unambiguous," this was not a "specific finding." Assuming without deciding that Auten has preserved this matter for our review,[15] we hold this argument does not support a finding

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[12] See Estate of Revis, 326 S.C. at 479, 484 S.E.2d at 117 (suggesting one year to be a reasonable time for an insured to make a change in beneficiaries) (citing Aetna Life Ins. Co. v. Wadsworth, 689 P.2d 46 (Wash. 1984)).

[13] The reasons Auten cited were (1) the divorce, (2) Snipes's remarriage soon after, and (3) Parrish's terminal illness.

[14] See Snakenberg v. Hartford Cas. Ins. Co., 299 S.C. 164, 172-73, 383 S.E.2d 2, 7 (Ct. App. 1989) (distinguishing motive from intent and stating that, whereas motive "is the actor's subjective reason for doing the act," intent "is proved by showing that the actor acted willingly (volition) and that he knew or should have known the result would follow from his act").

[15] The record does not indicate Auten moved under Rule 59(e), SCRCP, to alter or amend the judgment on the ground that the trial court failed to make a specific finding that the separation agreement was unambiguous. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004) (stating an issue cannot be raised for the first time on appeal but must have been raised to and ruled on by the trial court); Hawkins v. Mullins, 359 S.C.497, 501-02, 597 S.E.2d 897, 899 (Ct. App. 2004) (finding an issue is not

of reversible error. Any failure by the trial court to make the desired finding did not inure to Auten's prejudice. Indeed, Auten's insistence that the separation agreement is unambiguous would, if anything, bar consideration of parol evidence as to whether or not Parrish intended that the agreement would prevent Snipes from receiving his retirement funds as the named beneficiary on the account.[16]

3. Auten further argues the trial court erred in interpreting the word "keep," alleging that, in the appealed order, the definition of the term appearing in the sixth edition of Black's Law Dictionary was selectively edited to fit Snipes's desired interpretation of the agreement. We disagree.

The definition quoted by the trial court excluded the phrases "to continue" and "not to lose or part with." Notwithstanding these omissions, we hold the trial court did not interpret the quoted part of the definition out of context.[17] Rather, it appears the trial court was following the well-established

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preserved when the trial court does not explicitly rule on it and the appellant does not move to alter or amend the judgment on that ground).

[16] See Estate of Revis, 326 S.C. at 478, 484 S.E.2d at 116 ("Where a property settlement agreement is ambiguous, the court may consider parol evidence to ascertain the intent of the parties."). We further note that Rushton v. Lott, 330 S.C. 418, 499 S.E.2d 222 (Ct. App. 1998), which Auten cites in her brief, is of questionable applicability to this case. In Rushton, extrinsic evidence in the form of a letter was admitted as evidence that the parties to the separation agreement at issue had intended to divest the husband's beneficiary interest in a particular asset. Id. at 421, 499 S.E.2d at 224.

[17] In the appealed order, the trial court stated as follows: "The word 'keep,' in its plain and ordinary meaning, means to 'have or retain in one's own power or possession; . . . ; to preserve or retain; to maintain, carry on, conduct, or manage." (Ellipses in original.)

principle that alienability is an intrinsic attribute of ownership.[18] Undue emphasis on the excluded portion of the definition would have the undesirable effect of compromising what was and should have been Parrish's unfettered right to dispose of his property as he wished. This right included the option of retaining Snipes as the beneficiary of his retirement funds upon his death.

4. Finally, we reject Auten's suggestion that Snipes's failure to testify or introduce evidence warrants a finding that she had no expectancy interest in the Signator account. The focus of this controversy is Parrish's intent with respect to his retirement funds. In any event, it is evident from the pleadings that Snipes herself contacted Signator Investments after Parrish's death for payment of his retirement account proceeds; therefore, it would appear that she had reason to believe she had a valid claim to the funds.

AFFIRMED.

BEATTY and WILLIAMS, JJ., concur.

[18] Cf. Alderman v. Alderman, 178 S.C. 9, 44, 181 S.E.2d 897, 911 (1935) ("One of the main incidents of property is its transferability. The power of disposing of stock, like the power of disposing of any other property, is a common right, and necessarily attaches to ownership.") (quoting 7 Rul. Case L. Corporations § 239, at 261 (1929)).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James F. Evans,	Appellant,
v.	
Blake C. Stewart and Melony A. Cusack,	Defendants,
Of whom Melony A. Cusack is the,	Respondent.

Appeal From Florence County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 4161
Formerly Unpublished Opinion No. 2006-UP-306
Submitted June 1, 2006 – Filed July 5, 2006

AFFIRMED

Daryl J. Corbin, of Florence, for Appellant.

Robert J. Thomas and William H. Bowman, III, of Columbia, for Respondent.

PER CURIAM: In this tort action, James F. Evans appeals from the trial court's order granting summary judgment to Melony A. Cusack under the family purpose doctrine. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

Evans brought this action against Blake C. Stewart and Blake's mother, Cusack, seeking damages arising from an automobile accident. Evans was a passenger in a car driven by Stewart when Stewart fell asleep at the wheel, causing a head-on collision with another car. At the time of the accident, Stewart, Evans and another friend were returning from a two day trip to the beach for spring break. Evans filed a complaint against Stewart and Cusack seeking damages from Stewart based on Stewart's negligence and damages from Cusack based on the family purpose doctrine and negligent entrustment. Cusack moved for summary judgment asserting there was no genuine issue of material fact and she was entitled to judgment as a matter of law.

At a hearing on the matter, the parties submitted the deposition of Stewart. Stewart testified that at the time of the accident, he was eighteen years old and had moved out of his mother's home two to three months prior to the accident. Stewart was working full time and was sharing a house with two roommates, paying approximately $150 a month in rent. He was entirely self-supporting. Stewart had moved out of his mother's home because he could not get along with his stepfather. Although he did move back in with his mother following the accident because he needed someone to take care of him, it was not his intention to return to her home after he moved. The truck Stewart was driving at the time of the accident was purchased by Stewart for a total of $1,200, with $1,000 from money he had in savings and $200 from his stepfather. Because Stewart was only seventeen at the time of purchase, the car was registered in Cusack's name. Cusack also paid Stewart's insurance until Stewart "could get on [his] feet." Stewart testified he drove the truck mostly and considered it his truck, and that he paid for gas and the maintenance of the truck. The truck stayed in Stewart's possession, he drove

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

it to and from work, and he used it for recreational purposes. When the accident occurred, Stewart did not feel he needed to ask his mother's permission to take the vehicle to the beach, and she did not know that he had gone on the trip.

Additionally, Cusack submitted her affidavit in which she swore, although the truck in question was titled in her name, she was not the true owner; that she and her husband gave Stewart $200 toward the purchase of the automobile but that Stewart used $1,000 of his own money to buy the truck; Stewart was still a minor at the time of purchase and the truck was therefore registered in her name; Stewart was responsible for all costs and expenses involved in operating the truck; Stewart was the sole user of the truck and he kept it for his own pleasure and convenience; and at the time of the accident, she had no control over Stewart's use of the truck and had no knowledge of his trip to the beach.

The trial judge noted that Stewart did not live with Cusack, he was self-supporting, the truck was kept at Stewart's residence and was in his sole possession, Stewart paid the insurance, maintenance and gas for the vehicle, and at the time of the accident, Stewart was on his way back from a beach trip of which Cusack had no knowledge. He found Evans had not presented any evidence to contradict the testimony of Stewart or the affidavit of Cusack, and thus found there was no basis to support Cusack's liability under the family purpose doctrine and Cusack was entitled to judgment as a matter of law. He further determined there was no basis to support a claim for negligent entrustment as there was no evidence Cusack had control over the truck, nor any evidence that Stewart was addicted to intoxicants or had the habit of drinking or drove while intoxicated. Accordingly, he also found Cusack was entitled to summary judgment on the negligent entrustment cause of action as well.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "A motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. (quoting Rule 56(c), SCRCP). When reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine. Durkin v. Hansen, 313 S.C. 343, 346, 437 S.E.2d 550, 552 (Ct. App. 1993). Although summary judgment is a drastic remedy which should be cautiously invoked, where a verdict is not reasonably possible under the facts presented, summary judgment is proper. Bloom v. Ravoira, 339 S.C. 417, 425, 529 S.E.2d 710, 714 (2000).

LAW/ANALYSIS

Evans contends the trial judge erred in granting summary judgment to Cusack under the family purpose doctrine. He asserts there were genuine issues of fact in dispute relating to ownership, control, and use of the vehicle such that summary judgment was inappropriate. We disagree.

"Under the family purpose doctrine, the head of a family who owns, furnishes, and maintains a vehicle for the general use and convenience of his

family is liable for the negligence of a family member having general authority to operate the vehicle for such a purpose." Thompson v. Michael, 315 S.C. 268, 272, 433 S.E.2d 853, 855 (1993). The doctrine has its genesis in the law of agency, and it will impose liability on a parent when a child is acting as his agent. Id. Thus, "one 'who has made it his business to furnish a car for the use of his family is liable as principal or master when such business is being carried out by a family member using the vehicle for its intended purpose, the family member thereby filling the role of agent or servant.'" Campbell v. Paschal, 290 S.C. 1, 8, 347 S.E.2d 892, 897 (Ct. App. 1986) (quoting 8 A.L.R.3d 1191 at 1196 (1966)). Even if a parent owns the car, it must be determined whether the parent provided the car for the general use and convenience of the family, and if the car was not provided for the general use and convenience of the family, there is no relationship of principal and agent at the time of the wreck to impose liability on the parent. Thompson, 315 S.C. at 273, 433 S.E.2d at 855. Further, while the applicability of the family purpose doctrine is ordinarily a question of fact for the jury, where no factual issue is created the question becomes one of law, properly decided by the trial judge. Lucht v. Youngblood, 266 S.C. 127, 133, 221 S.E.2d 854, 857 (1976).

Evans points to Stewart's deposition testimony in arguing genuine issues of fact exist. He asserts Stewart testified that while he drove the truck, it was titled in Cusack's name, and Stewart received no insurance proceeds from the loss of the vehicle. He also notes Stewart stated that Cusack could have driven the truck if she wanted to and she controlled who drove the truck, and that if Cusack had needed the truck to haul something somewhere, she could have used it. Finally, he asserts Stewart's testimony that Cusack had instructed him to bring the truck back to her once or twice while he lived away from home was evidence of her continued control of the use of the truck after he moved out of her home.

A review of Stewart's deposition reveals that, while the truck was titled in Cusack's name, Stewart provided the bulk of the funds to purchase the vehicle, he paid for the maintenance of the vehicle, the truck was titled in his mother's name merely because Stewart was a minor at the time of purchase, and Stewart considered the truck to be his. As to insurance proceeds from the

totaled truck, while Stewart testified he did not receive anything for it, neither did he know if his mother received anything for it. Stewart's testimony regarding the use of the truck by others reveals only that Cusack or her husband would have been allowed to use the truck if they had the need, as Stewart, "wouldn't tell [his] mom she couldn't use the truck," and would not tell his stepfather he could not use the truck because he "respect[ed] him too." Finally, concerning Cusack's directive that he return the truck to her home after Stewart moved out, the deposition testimony shows only that "maybe once or twice" Cusack instructed Stewart to bring the vehicle back to her when the two had argued, however, the truck was not in fact taken to Cusack on those occasions, but remained in Stewart's possession.

Even if we were to assume Cusack "owned" the vehicle since it was titled in her name, ownership alone is insufficient. There must also be evidence Cusack furnished and maintained the vehicle for the general use and convenience of her family. If the car was not provided for the general use and convenience of her family, there is no relationship of principal and agent at the time of the wreck to impose liability on Cusack. Viewing the evidence in the light most favorable to Evans, there is simply no evidence Cusack furnished and maintained the truck for the general use and convenience of her family such that she is liable as principal or master for Stewart's use of the vehicle as her agent or servant.

For the foregoing reasons, the order granting Cusack summary judgment is

AFFIRMED.

HUFF, STILWELL, and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Susan Reed-Richards, Respondent,

v.

Clemson University, Employer and State Accident Fund, Carrier, Appellants.

Appeal From Pickens County
John C. Few, Circuit Court Judge

Opinion No. 4162
Heard May 11, 2006 – Filed October 9, 2006

AFFIRMED

Cynthia B. Polk, State Accident Fund, of Columbia, Terry M. Mauldin, Cofield Law Firm, of Lexington, Thomas Carl Cofield, Cofield Law Firm, LLC, of Lexington, for Appellants.

Bryan D. Ramey, Bryan D. Ramey & Assoc., PA, of Piedmont, John S. Nichols, Bluestein & Nichols, LLC, of Columbia, for Respondent.

GOOLSBY, J.: This is a workers' compensation case. Clemson University, the employer, and the State Accident Fund, the carrier,[1] appeal the award of lifetime benefits to Susan Reed-Richards. We affirm.[2]

FACTS AND PROCEDURAL HISTORY

On November 13, 2000, Reed-Richards sustained an injury arising out of the scope of her employment as an administrative assistant at Clemson University. She sought lifetime medical care and weekly compensation benefits for life. Appellants denied Reed-Richards had become a paraplegic as a result of the accident and sought to limit her benefits to the normal statutory maximum of 500 weeks.

In 1973, Reed-Richards had sustained a compression fracture of her spine at the T-11/T-12 vertebrae level as the result of a motor vehicle accident. She did relatively well after the accident until 1978, when she developed difficulty with bladder control and walking.

In 1979, Reed-Richards had surgery for a posterior fusion and the placement of Harrington rods in her spine. She did well after this procedure until 1993, when she began having some bladder leakage at night. In 1994, she underwent additional surgery, which included removal of the Harrington rods and "an anterior two-level corpectomy with strutting and fusion with plate." Shortly after these procedures, she lost control of her bowel and bladder and developed urinary retention. Because of increasing pain and bowel and bladder difficulties, she had still more surgery in 1995, after which she was able to control her bowel functions.

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[1] Clemson University and the State Accident Fund will also be collectively referred to as "Appellants."

[2] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

On August 14, 2000, Reed-Richards began working for Clemson University, performing clerical work. Approximately three months later, on November 13, 2000, she fell after catching her leg on an open file drawer.

As a result of the accident, Reed-Richards has to use a walker, something she never needed before. She has also lost the ability to control her bowels; they empty at random times, forcing her to wear adult diapers and restricting her from going out in public because of odor problems. Her bladder condition originating from her 1973 accident has worsened, requiring her to catheterize herself more often than she had to in the past. Because of these problems, she is able to perform only menial tasks and cannot pursue additional vocational training. In addition, she has had to take medications for anxiety, pain, and leg spasms.

After a hearing on April 17, 2002, the single commissioner issued an order finding Reed-Richards totally and permanently disabled, but limited her benefits to 500 weeks. Reed-Richards appealed to the full commission, alleging she was entitled to lifetime benefits. The full commission vacated the single commissioner's order and remanded the matter for a de novo hearing.

On remand, the single commissioner held a hearing on April 8, 2003. On September 16, 2003, the single commissioner issued an order finding Reed-Richards was a paraplegic as a result of the accident and therefore entitled to lifetime benefits. This finding was based in large part on the deposition and notes of Dr. David Shallcross, one of Reed-Richards treating physicians, who on March 21, 2003, wrote a letter stating in pertinent part as follows:

> This patient has an incomplete paraplegia (is a paraplegic). 'Paraplegia', according to the International Standards of Neurologic Classification of Spinal Cord Injury, Revised Sixth Edition, dated 2000, is 'impairment or loss of motor and/or sensory function in the thoracic, lumbar, or sacral segments of the

> spinal cord secondary to damage of neural elements within the spinal canal.'

By order dated May 27, 2004, an appellate panel of the full commission upheld the single commissioner's order. Appellants sought judicial review in the circuit court, which issued an order dated August 15, 2002, affirming the full commission.

DISCUSSION

1. Appellants contend the circuit court erred in affirming the finding that Reed-Richards was a paraplegic and therefore entitled to lifetime workers' compensation benefits. We disagree.

The right of an injured worker to obtain lifetime workers' compensation benefits is controlled by South Carolina Code section 42-9-10. This section provides in pertinent part as follows:

> Notwithstanding the five hundred week limitation prescribed in this section or elsewhere in this title, any person determined to be totally and permanently disabled who as a result of a compensable injury is a paraplegic, a quadriplegic, or who has suffered physical brain damage is not subject to the five hundred week limitation and shall receive the benefits for life.[3]

We understand Appellants' arguments to be as follows: (1) the circuit court erred in determining that, because the statute did not differentiate between complete and incomplete paraplegia, the legislature would have to make that distinction; (2) had the legislature intended to include incomplete paraplegia as a condition under which a claimant was eligible for lifetime benefits, it could have done so; (3) a holding that incomplete paraplegia can entitle a claimant to lifetime benefits would lead to an absurdly inconsistent result when considered with other workers' compensation statutes that set out a compensation scheme distinguishing between total loss and less than total

[3] S.C. Code Ann. § 42-9-10 (1985 & Supp. 2005).

loss; (4) it was improper to rely on both a medical text and a common usage dictionary to determine that the term "paraplegic" could include a diagnosis of incomplete paraplegia; and (5) the "liberal purpose" of the workers' compensation legislation "is not an unbridled fiat to engage in judicial legislation in violation of the separation of powers."[4]

We do not fault the workers' compensation commission or the circuit court for relying on both a medical text and a common usage dictionary in determining that the term "paraplegic" could embrace one diagnosed with "incomplete paraplegia" as opposed to "complete paraplegia."[5]

First, Dr. Shallcross expressly stated, albeit parenthetically, that Reed-Richards "is a paraplegic," thus implying she was eligible for lifetime benefits under section 42-9-10. It was reasonable for the commission to consider the authority on which he based this pronouncement.[6]

Second, as the circuit court aptly noted, the only alternative definition offered by Appellants was their counsel's "lay person's definition" that "you

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[4] See Anderson v. Baptist Med. Ctr., 343 S.C. 487, 498, 541 S.E.2d 526, 531 (2001) (noting that even a liberal construction of workers' compensation statutes " 'does not authorize the amendment, alteration or extension of its provision beyond its obvious meaning' ") (quoting Gajam v. Bradlick Co., 355 S.E.2d 899, 902 (Va. Ct. App. 1987)).

[5] The commission cited the 2000 edition of the International Standards of Neurological Classification of Spinal Cord Injury, to which Dr. Shallcross referred in explaining his diagnosis, and Webster's Ninth Collegiate Dictionary for the "plain and ordinary meaning of 'paraplegia.' "

[6] As noted earlier in this opinion, Dr. Shallcross stated in his letter that the International Standards of Neurological Classification of Spinal Cord Injury defines paraplegia "as impairment or loss of motor and/or sensory function in the thoracic, lumbar, or sacral segments of the spinal cord secondary to damage of neural elements within the spinal canal." (Emphasis added.)

have total and full and complete loss of use of your lower extremities." We agree with Reed-Richards and the circuit court that this definition is not evidence at all, let alone substantial evidence upon which to base a reversal of the commission.[7] Moreover, we are unaware of any legal authority restricting "plain and ordinary" meanings to commonly held stereotypes of the terms they describe.

We therefore hold the commission and the circuit court correctly interpreted the term "paraplegic" to include a diagnosis of incomplete paraplegia. This interpretation, though consistent with the legislative purpose of construing workers' compensation laws in favor of claimants,[8] does not rise to the level of judicial legislation. There was no need for the legislature to specify that a claimant can recover lifetime benefits based on a diagnosis of incomplete paraplegia if the claimant is totally and permanently disabled as a result of this condition.

2. We do not address Appellants' contention that the interpretation of the term "paraplegic" endorsed by both the commission and the circuit court cannot be logically reconciled with other statutes within the South Carolina Workers' Compensation Act that set forth a partial loss ratio scheme on which statutory benefits are based. There is no explicit ruling on this argument by the single commissioner, full commission, or the circuit court, and the record does not indicate Appellants raised this omission in any post-trial motion; therefore, we cannot address it in this appeal.[9]

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[7] See Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2000) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence.").

[8] See Lizee v. South Carolina Dep't of Mental Health, 367 S.C. 122, 130 n.2, 623 S.E.2d 860, 864 n.2 (Ct. App. 2005) (noting "the principle that workers' compensation laws in general . . . are to be liberally construed in favor of claimants and coverage").

[9] See Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding an issue was not preserved for appellate review when the trial court

3. Appellants further challenge the finding that Reed-Richards was a paraplegic under section 42-9-10 as a result of the accident on November 13, 2000. We hold there is substantial evidence on the record as a whole to support this finding.[10]

Appellants correctly note that, before the November 2000 injury, Reed-Richards had a seventeen-year history of back and spinal problems that included pain, bladder and bowel incontinence, and ambulatory difficulties. They also point to Dr. Shallcross's description on July 30, 2001, of Reed-Richards's injury as "incomplete paraplegia due to T-12 fracture," and there is no dispute that she had suffered a T-11/T-12 vertebrae fracture in 1973. Nevertheless, before the November 2000 accident, Reed-Richards had never been diagnosed with paraplegia and was able to work full time, including overtime. Although she had experienced numbness in her right leg before her on-the-job injury, there is no evidence that she ever had a problem with both legs before this accident. Likewise, although she had temporary bowel problems in the past, she did not have any trouble controlling her bowels from the time she began working for Clemson until her injury several months later. The change in her bowel condition is significant because, as Dr. Shallcross testified, the loss of control of her anal sphincter, as evidenced in an anal EMG, further convinced him that her complaints were genuine.

Dr. Shallcross further stated that "based on the fact that [Reed-Richards] was fully ambulatory without any assisted device prior to the injury

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did not explicitly rule on the appellant's argument); United Dominion Realty Trust v. Wal-Mart Stores, 307 S.C. 102, 107, 413 S.E.2d 866, 869 (Ct. App. 1992) (holding that, when the circuit court sitting in an appellate capacity does not address an issue and the appellant fails to move to alter or amend on that ground, the alleged error is not preserved for further appellate review).

[10] See Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999) ("The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence.").

and based on the fact that she was not suffering from fecal incontinence prior to that injury, her inability to work is pretty much all related to the workers' comp injury." Significantly, when asked specifically about the cause of her present symptoms, Dr. Shallcross responded that Reed-Richards "had a pre-existing injury to the lower part of her spinal cord which was made worse by her workers' comp injury." (Emphasis added).[11]

Based on the foregoing, we hold the record in this case has substantial evidence to support the commission's finding that, pursuant to section 42-9-10, Reed-Richards became totally and permanently disabled as a result of the accident on November 13, 2000.

AFFIRMED.

BEATTY and WILLIAMS, JJ., concur.

[11] The contention that the November 2000 accident alone would not have caused Reed-Richards's present condition is no reason for Appellants to disclaim liability. See Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987) ("It is no defense that the accident, standing alone, would not have caused the claimant's condition, because the employer takes the employee as he finds him."). Likewise, a showing that the accident resulted only in the exacerbation of existing problems would not preclude recovery. See Mullinax v. Winn-Dixie Stores, 318 S.C. 431, 437, 458 S.E.2d 76, 80 (Ct. App. 1995) ("A condition is compensable unless it is due solely to the natural progression of a pre-existing condition.").