OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 40

October 23, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Timothy Ross Howell, Plaintiff,

v.

United States Fidelity and
Guaranty Insurance Company, Defendant.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT
FOR SOUTH CAROLINA
Henry F. Floyd, United States District Judge

Opinion No. 26213
Heard September 19, 2006 – Filed October 16, 2006

CERTIFIED QUESTIONS ANSWERED

John S. Nichols, of Bluestein & Nichols, LLC, of Columbia; and Stuart G. Anderson, Jr., and Robert M. Ariail, Jr., both of Anderson, Fayssoux and Chasteen, PA, of Greenville, for Plaintiff.

C. Mitchell Brown and William C. Wood, Jr., both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Defendant.

JUSTICE BURNETT: We accepted three questions certified by the United States District Court for South Carolina pursuant to Rule 228, SCACR. The questions involve the applicability of S.C. Code Ann. § 38-77-

160 (2002) to an insurance policy providing liability coverage for only hired and non-owned vehicles used in the named insured's business.

FACTUAL/PROCEDURAL BACKGROUND

The facts are drawn from the district court's certification order. On June 2, 2002, Timothy Ross Howell (Plaintiff) was involved in an automobile accident while driving an automobile owned by his father. Plaintiff was acting in the course and scope of his employment as a pizza delivery driver for Perfect Delivery, Inc. ("Perfect Delivery"), a Papa John's franchisee, when the accident occurred.

On the date of the accident, Perfect Delivery had an insurance policy ("Fidelity policy") in effect with Fidelity and Guaranty Insurance Company (Defendant). Perfect Delivery was the named insured on the Fidelity policy, which provided liability coverage for non-owned and hired automobiles used in Perfect Delivery's business. Risk Services Corporation ("Risk Services"), a captive insurer of Papa John's International, issued the Fidelity policy to Perfect Delivery pursuant to a fronting agreement between Defendant and Risk Services. At no time did Defendant, Risk Services, or anyone acting on their behalf ever offer to Perfect Delivery the opportunity to select or reject UIM coverage for inclusion in the Fidelity policy.

Plaintiff asserts he is entitled to have the Fidelity policy reformed to include underinsured motorist (UIM) coverage up to the liability limit contained in the Fidelity policy because Defendant, or those acting on its behalf, failed to make an offer of UIM coverage to Perfect Delivery for that policy. Defendant denies that Plaintiff is entitled to reformation of the Fidelity policy, alleging it did not have a duty to offer UIM coverage.

STANDARD OF REVIEW

In answering a certified question raising a novel question of law, the Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right. See I'On, L.L.C. v.

Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. §§ 14-3-320 and -330 (1976 & Supp. 2005), and S.C. Code Ann § 14-8-200 (Supp. 2005)); Osprey, Inc. v. Cabana Ltd. P'ship, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same).

CERTIFIED QUESTIONS

1. Must an insurer offer underinsured motorist coverage to the named insured on an insurance policy covering only hired and non-owned vehicles which are utilized in the course and scope of the insured's business?

2. Is the Fidelity policy at issue a "policy" or a "policy of automobile insurance" as defined in S.C. Code Ann. § 38-77-30(10.5) (2002)?

3. Do S.C. Code Ann. §§ 38-77-160 and -350 (2002) apply to the Fidelity policy at issue in this case?

LAW/ANALYSIS

The question we must decide is whether an insurer which provides liability coverage for only hired and non-owned vehicles must make a meaningful offer of UIM coverage under S.C. Code Ann. § 38-77-160 (2002). Section 38-77-160 provides in relevant part:

> Automobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage in addition to the mandatory coverage prescribed by Section 38-77-150. Such carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In ascertaining the intent of the legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. Joiner v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994).

In the context of statutorily required automobile insurance, a person or corporation in South Carolina must provide proof of financial responsibility for potential accidents to legally operate a motor vehicle. This financial responsibility may consist of an insurance policy or surety bond with the required or optional coverages. S.C. Code Ann. §§ 56-10-10 to -40 and 56-10-210 to -280 (2006) (requiring proof of insurance or other acceptable security to register a motor vehicle and establishing fines and criminal penalties for failure to do so); S.C. Code Ann. §§ 38-77-140, -150, and -160 (2002) (establishing requirements of mandatory minimum insurance limits, mandatory uninsured motorist coverage, and requiring automobile insurers to offer additional uninsured and underinsured motorist coverage, respectively); see also Croft v. Old Republic Ins. Co., 365 S.C. 402, 416-17, 618 S.E.2d 909, 916 (2005) (reciting the same principles).

However, liability coverage for hired and non-owned vehicles is not statutorily required in this state and is provided by a voluntary contract between the insurer and the insured. Therefore, the parties may choose their own terms regarding coverage for hired and non-owned vehicles. Willis v. Fidelity & Cas. Co. of N.Y., 253 S.C. 91, 97, 169 S.E.2d 282, 284-85(1969); Kraft v. Hartford Ins. Cos., 279 S.C. 257, 258, 305 S.E.2d 243, 244 (1983); S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 522, 548 S.E.2d 880, 885 (Ct. App. 2001).

Regardless of whether an insurer is an automobile insurance carrier, Defendant contends because liability coverage for non-owned and hired vehicles is not statutorily required in this state, an insurer providing this type of voluntary coverage need not comply with § 38-77-160. We agree. Construing the relevant statutory provisions together, we conclude an insurer must offer UIM coverage pursuant to § 38-77-160 when the insurer extends statutorily required liability coverage. See generally Miller v. Aiken, 364 S.C. 303, 309, 613 S.E.2d 364, 367 (2005) (concluding "the 'meaningful offer' provision under § 38-77-160 is triggered only when an insurer offers liability insurance and does not require an insurer providing only collision coverage to make an offer of UIM."). However, we find an insurer providing solely voluntary liability coverage for hired and non-owned vehicles is not required to comply with § 38-77-160.

CONCLUSION

For the foregoing reasons, we conclude § 38-77-160 does not require an insurer providing only voluntary liability coverage for hired and non-owned automobiles to make an offer of UIM. Accordingly, we answer the first certified question: no. Our disposition of this issue makes it unnecessary to address the remaining certified questions. See Miller, 364 S.C. at 309, 613 S.E.2d at 367 (this Court does not need to address remaining questions when resolution of prior question is dispositive).

CERTIFIED QUESTIONS ANSWERED.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Doe Law Firm, Petitioner,

v.

Henry B. Richardson, Jr.,
Disciplinary Counsel, and
Henry Dargan McMaster,
Attorney General, Respondents.

ORIGINAL JURISDICTION

Opinion No. 26214
Heard October 5, 2006 – Filed October 23, 2006

Desa Ballard and Jason B. Buffkin, both of West Columbia, for Petitioner.

Michael James Virzi, of Columbia, for Respondent Disciplinary Counsel.

Assistant Deputy Attorney General J. Emory Smith, Jr., of Columbia, for Respondent Attorney General.

John S. Nichols, of Bluestein & Nichols, LLC, of Columbia, for Amicus Curiae South Carolina Bar.

Sue Berkowitz and Robert Thuss, both of Columbia, for Amicus Curiae South Carolina Appleseed Legal Justice Center.

James C. Harrison, Jr., and Andrew S. Radeker, both of Columbia, for Amicus Curiae South Carolina Financial Services Association, Inc.

Scott E. Lawrence and Brook B. Shuler, both of Lawrence Law Firm, and Michael Stephen Chambers, all of Greenville, and Matthew Allen Lewis, of Attorneys' Title Insurance Fund, of Columbia, for Amicus Curiae Attorneys' Title Insurance Fund, Inc.

PER CURIAM: We agreed to hear this matter in our original jurisdiction to decide whether the disbursement of loan proceeds in conjunction with a residential refinancing or credit line transaction is the practice of law.[1] We hold that disbursement is an integral step in the closing of a residential refinancing or credit line transaction which must be conducted under the supervision of an attorney. Since our decision today is a new rule, and since it is likely that lenders and attorneys may have established procedures which do not account for this step in the closing process, we delay the effective date of this opinion until January 22, 2007.

FACTS

The case is before us on the following stipulation of facts:

- Doe Law Firm is a South Carolina law firm employing attorneys licensed to practice here

- Lender is an out of state business which makes residential home loans to South Carolina consumers

[1] See In re Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1993) (Court will determine unauthorized practice of law questions in its original jurisdiction).

- Lender retains Doe to serve as its closing attorney for certain in-state refinancing and credit line transactions

- Doe represents both Lender and the borrower in connection with the transactions, after making proper disclosure to both regarding dual representation

- Doe supervises the title search and certifies title in accordance with South Carolina law

- A title company affiliated with Doe issues title commitments and policies to Lender

- Lender prepares the loan documents, including the appropriate HUD Statement, and forwards them to Doe. The documents include determining any existing mortgage payoffs and calculating *pro rata* expenses, including real property taxes

- The HUD Statements conform to federal requirements

- Doe is shown as the "settlement agent" on the HUD Statement and its address is shown as the "place of settlement"

- Doe reviews all closing documents before closing in a manner that satisfies South Carolina's legal requirements

- A lawyer from the Doe firm attends the closing, explains the loan documents to the borrower and supervises the execution of the documents, including the HUD Statements, as required by state law

- If the closing takes place other than at the Doe firm's office, the HUD Statement is amended to include that address as well as the firm's address

- Neither the Doe firm nor any individual lawyer signs the HUD form (and such signatures are not required by federal law)

- Doe records the mortgage and any other documents

- Doe returns the loan and closing documents to Lender with instructions to make disbursements as set forth in the HUD Statement

- Disbursements are made by Lender; Doe receives only its attorneys' fees and costs as provided in the HUD Statement. Doe does not have signatory authority over any of Lender's accounts, nor does it review or reconcile these accounts or retain any records of Lender's disbursements

ISSUE

Whether the disbursement of residential loan proceeds is the practice of law?

ANALYSIS

Both Doe and respondents acknowledge it is an open question in South Carolina whether the disbursement of residential loan proceeds is the practice of law. In Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003) (McMaster), we refined the definition of the unauthorized practice of law in the context of residential real estate closings first set forth in State v. Buyers Serv. Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987) (Buyers Service). In McMaster and Buyers Service the Court identified four steps in a residential real estate closing that involve the practice of law:

1) Title Search
   The title search and preparation of title documents for the lender and subsequent preparation of related documents is the practice of law which must be performed or supervised by an attorney.

2) Loan Documents
   A lender may prepare legal documents for use in financing or refinancing a real property loan so long as an independent attorney reviews them and makes any corrections necessary "to ensure their compliance with law."

3) Closing
   Real estate closings and mortgage loan closings should be conducted only under an attorney's supervision. The supervising attorney may represent both the lender and the borrower after full disclosure and with each party's consent.

4) Recordation of Documents
   The recording of documents is the "final phase" of the real estate loan process and must be done under the supervision of an attorney.

In both McMaster and Buyers Service the funds were disbursed directly by the lender pursuant to the HUD Settlement Statement, yet the Court did not define this step as one involving the practice of law. As the parties candidly acknowledge, however, the disbursement process was not at issue in either case. Similarly, several attorney disciplinary cases have implied, but not decided, that disbursement is the practice of law when performed in connection with a residential real estate loan closing. See In re Boulware, 366 S.C. 561, 623 S.E.2d 652 (2005); In re Fortson, 361 S.C. 561, 596 S.E.2d 461 (2004); In re McMillian, 359 S.C. 52, 596 S.E.2d 494 (2004); In re Arsi,

357 S.C. 8, 591 S.E.2d 627 (2004); In re Pstrak, 357 S.C. 1, 591 S.E.2d 623 (2004); see also In re Boyce, 364 S.C. 353, 613 S.E.2d 538 (2005).

Viewed in isolation, it cannot be said that the disbursement of loan proceeds in and of itself "entail[s] specialized legal knowledge and ability," such that it constitutes the practice of law. Buyers Service, 292 S.C. at 430, 357 S.E.2d at 17. In our view, however, the disbursement of funds in the context of a residential real estate loan closing cannot and should not be separated from the process as a whole. Accordingly, we hold that the disbursement of the funds must be supervised by an attorney. We do not specify the form that supervision must take, nor do we require that the funds pass through the supervising attorney's trust account. Rather, we hold that the attorney's obligation to both his clients if he represents the buyer and the lender, and to his individual client if he represents only one party, includes overseeing this step of the closing process. As explained above, we delay the effective date of this opinion until January 22, 2007 in order to afford persons with ongoing business relationships the opportunity to adjust their practices and procedures to conform to this new rule.

TOAL, C.J., MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Laura Lawton Arnal, Petitioner,

v.

David Emil Arnal, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Beaufort County
Robert S. Armstrong, Family Court Judge

Opinion No. 26215
Heard September 19, 2006 – Filed October 23, 2006

AFFIRMED AS MODIFIED

Donald B. Clark, Susan C. Rosen, and Robert N. Rosen, both of Rosen Law Firm, all of Charleston, for Petitioner.

Sally G. Calhoun, of Beaufort, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals' decision reversing the family court's imputation of income to

respondent. Arnal v. Arnal, 363 S.C. 268, 609 S.E.2d 821 (Ct. App. 2005). We affirm the Court of Appeals as modified.[1]

FACTS

A complete recitation may be found in the Court of Appeals' opinion. For purposes of this opinion, we briefly set forth the salient facts below.

Petitioner (Mother) and Respondent (Father) married in 1995. Shortly after the birth of their son, the parties separated in late 1999. After protracted and contentious litigation, the family court issued a final order in 2001.

In its final order, the family court imputed income[2] of $9,060.62 per month to Father for purposes of calculating child support. Father and his financial expert had testified that his monthly income, minus business expenses, totaled roughly $4,000 per month.

The Court of Appeals reversed the imputation of income, finding that Father was not voluntarily underemployed. In making this finding, the Court of Appeals emphasized the lack of any evidence that Father's failure to earn additional income was due to a bad faith motivation to decrease his support obligation. Arnal, 363 S.C. at 281, 609 S.E.2d at 828.

ISSUE

> Did the Court of Appeals err in reversing the family court's imputation of income to Father for the purposes of calculating child support?

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[1] We dismiss certiorari as improvidently granted on the issues concerning equitable division, exclusion of evidence, and additional visitation.

[2] Income may be imputed upon a finding that a party has voluntarily rendered himself underemployed. See 27 S.C. Code Ann. Regs. 114-4720(A)(5), amended by State Register Volume 30, Issue 6, effective June 23, 2006.

ANALYSIS

The Court of Appeals, exercising its own view of the facts,[3] correctly held that Father had not voluntarily lessened his earning capacity and reversed the family court's decision to impute income to Father. We affirm this finding but modify it to the extent that the Court of Appeals' opinion may be read to require a bad faith motive as a prerequisite to proof of voluntary underemployment.[4]

The motive behind any purported reduction in income or earning capacity should be considered, but prior South Carolina appellate decisions do not preclude a finding of voluntary underemployment in instances where a spouse reduces his earning capacity without doing so in bad faith. See Rimer v. Rimer, 361 S.C. 521, 605 S.E.2d 572 (Ct. App. 2004) (affirming, without any discussion of bad faith, the imputation of minimum wage to stay-at-home mother who had to return to work after divorce); Robinson v. Tyson, 319 S.C. 360, 461 S.E.2d 397 (Ct. App. 1995) (applauding Father's "charitable resolve" as a lawyer for indigent clients while nevertheless imputing income due to husband's voluntary underemployment); Kelley v. Kelley, 324 S.C. 481, 477 S.E.2d 727 (Ct. App. 1996) (affirming a finding of voluntary underemployment despite evidence that husband acted in good faith in leaving job as an accountant and later working as a delivery manager of telephone directories); and Engle v. Engle, 343 S.C. 444, 539 S.E.2d 712 (Ct.

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[3] See Allen v. Allen, 287 S.C. 501, 503, 339 S.E.2d 872, 873 (Ct. App. 1986) (stating Court of Appeals has jurisdiction in equity matters to find facts based on its own view of the evidence). In this case, the Court of Appeals also made a factual finding concerning Father's deductible business expenses and determined that Father's yearly income totaled $59,010, or $4,917.50 per month.

[4] The Court of Appeals' recent opinion, LaFrance v. LaFrance, Op. No. 4158 (S.C. Ct. App. filed October 2, 2006) Shearouse Adv. Sh. No. 34, also seems to require proof of a bad faith motivation to avoid a support obligation prior to a finding of voluntary underemployment. We overrule those portions of that opinion inconsistent with our holding today.

App. 2000) (noting that mother's decision to pursue graduate degree was "admirable" but nonetheless imputing income because she voluntarily decreased her earning capacity in pursuit of her education).

Accordingly, a parent seeking to impute income to the other parent need not establish a bad faith motivation to lower a support obligation in order to prove voluntary underemployment. The presence of bad faith is a factor in determining whether a parent is voluntarily underemployed, but the lack of such bad faith does not preclude a finding of voluntary underemployment.

We agree with the Court of Appeals that Father has not voluntarily lessened his earning capacity so as to justify the imputation of income due to voluntary underemployment. The decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

TOAL, C.J., MOORE, WALLER and BURNETT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Doctors Hospital of Augusta, L.L.C.,	Plaintiff,

v.

CompTrust AGC Workers' Compensation Trust Fund,	Defendant.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR SOUTH CAROLINA
G. Ross Anderson, Jr., United States District Judge

Opinion No. 26216
Heard October 3, 2006 – Filed October 23, 2006

CERTIFIED QUESTION ANSWERED

C. Mitchell Brown, of Nelson Mullins Riley & Scarborough, of Columbia, and Steven M. Wynkoop, of Nelson Mullins Riley & Scarborough, of Greenville, for Plaintiff.

Clinton Jason Echols and Nathan Montgomery Rymer, both of Houston, Texas, Sterling G. Davis and Weston Adams, III, both of McAngus Goudelock and Courie, of Columbia, and G. Thomas Chase, of McAngus Goudelock and Courie, of Greenville, for Defendant.

CHIEF JUSTICE TOAL: This is a certified question dealing with the workers' compensation commission's (the Commission's) jurisdiction to review a fee dispute between an insurance carrier and an out of state medical provider.

FACTUAL/PROCEDURAL BACKGROUND

Audrey Cooper (Employee), a South Carolina resident, suffered severe injuries when he encountered a high voltage electrical line in an on-the-job injury that occurred in South Carolina. For approximately two months, Doctors Hospital of Augusta (Doctors Hospital), a privately owned limited liability company providing medical care and related services in Augusta, Georgia, treated Employee for his extensive injuries.

Employee was injured while working for a South Carolina company that procured workers' compensation insurance from CompTrust, a South Carolina self-insured workers' trust fund. After admitting Employee to its facilities for treatment, Doctors Hospital contacted CompTrust to verify Employee's insurance coverage and to obtain a guarantee of payment. The insurance verification form used by Doctors Hospital provided in pertinent part:

> Georgia Workers Compensation Fee Schedule only applies to Georgia Workers Compensation claims. Out of state fee schedules do not apply to care rendered in Georgia hospitals. Please be aware that our hospital will not accept, in satisfaction of our charges, Fee Schedule payments made pursuant to the workers compensation fee schedule of other states.

Although the parties dispute the precise events relating to the guarantee of payment and verification of coverage, it is undisputed that CompTrust verified that it issued workers' compensation insurance covering Employee. Doctors Hospital began treating Employee, and although CompTrust paid a portion of Employee's medical bills associated with his treatment, at some

point, CompTrust and Doctors Hospital reached an impasse regarding the total bill for Employee's treatment. Consequently, Doctors Hospital sued CompTrust in the United States District Court for the District of South Carolina to recover the unpaid balance of Employee's medical bills.[1]

CompTrust moved to dismiss the complaint, or alternatively, to stay the action, arguing that the Commission's medical services division was the exclusive forum for resolving this fee dispute. Pursuant to Rule 228, SCACR, this Court accepted the following certified question from United States District Judge G. Ross Anderson, Jr.:

> Does the Commission have jurisdiction over fee disputes relating to fees charged by an out of state medical provider for services performed outside South Carolina relating to a workplace injury occurring in South Carolina, and, if it has jurisdiction, is it exclusive?

LAW/ANALYSIS

This certified question asks whether the statutorily created process for resolving fee disputes between a workers' compensation insurer and a medical provider applies to an out of state medical provider who performs medical services outside of South Carolina relating to a workplace injury occurring in South Carolina.[2] We answer "no."

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[1] Specifically, Doctors Hospital's sued for $911,430.58 outstanding on Employee's total bill of $1,332,355.92.

[2] S.C. Code Ann. § 42-15-90 (1985) provides that medical bills relating to injuries covered by workers' compensation are subject to the Commission's approval. This approval process is detailed in 25A S.C. Code Ann. Regs. 67-1305 (Supp. 2005), which provides that a fee dispute between a medical provider and an employer or insurance carrier is referred to the Commission's medical services division for a final resolution.

In *Ex parte First Pa. Banking & Trust Co.*, 247 S.C. 506, 507-08, 148 S.E.2d 373, 374 (1966), this Court addressed the question of whether a South Carolina resident involved in an automobile accident in North Carolina could enforce a South Carolina "collision lien" statute against the at-fault driver, a Pennsylvania resident. In holding that the statute did not apply, this Court stated "[w]ith such exceptions which are without significance here, the jurisdiction of a state is restricted to its own territorial limits." *Id.* at 508, 148 S.E.2d at 374 (citing 81A C.J.S. States § 34).

We are not alone in honoring this principle. Indeed, the United States Supreme Court has stated:

> The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

Pennoyer v. Neff, 95 U.S. 714, 722 (1877). Although the Supreme Court has redefined the scope of due process as it applies to a state's ability to exercise personal jurisdiction over a non-resident individual or entity since *Pennoyer*, *see Schaffer v. Heitner*, 433 U.S. 186, 196-204 (1977) (holding that due process does not require "physical presence" in the forum state, but extends to persons possessing sufficient contact with a state which makes it reasonable to require them to defend a lawsuit there), the principle that state statutes generally have no extra-territorial effect remains a foundation of the respect for individual sovereignty the states must share with one another.

It is a bit perplexing that a South Carolina court was ever involved in this case. This case involves a contract for medical services that was entered into and performed entirely in Georgia. As this Court has stated, "a contract is controlled by the laws of the State in which it is made and is to be performed." *Murphy v. Equitable Life Assurance Soc'y of the United States*,

197 S.C. 393, 407, 15 S.E.2d 646, 651 (1941). Of course, an out of state medical provider could contractually agree to be bound by the South Carolina workers' compensation statutes and procedures, but the construction of a contract is beyond the scope of the question certified to this Court.

Accordingly, we answer that the Commission does not have jurisdiction over fee disputes relating to fees charged by an out of state medical provider for services performed outside South Carolina relating to an injury occurring in South Carolina.[3]

CONCLUSION

For the foregoing reasons, we answer "no" to the certified question in this case.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

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[3] Because this case raises a question only of the territorial limits of the authority of state statutes, we are not asked to decide the impact of regulation 67-1305 on this Court's holdings in *Baker Hosp. v. Firemans Fund Ins. Co.*, 314 S.C. 98, 100-01, 441 S.E.2d 822, 823 (1994) (holding that the workers' compensation act does not preclude a suit in circuit court brought by a medical provider against a compensation insurance carrier for the balance of unpaid medical bills relating to an employee's treatment), and *Blue Cross & Blue Shield v. South Carolina Indus. Comm'n*, 274 S.C. 204, 262 S.E.2d 35 (1980) (holding that an employee's private insurance carrier lacks standing to intervene in proceedings before the Commission). Accordingly, we leave those questions for another day.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Allene Hardee and Kathleen Hardee, Appellants,

v.

Bio-Medical Applications of South Carolina, Inc., D/B/A Conway Dialysis Center, Respondent.

Appeal from Horry County
John L. Breeden, Circuit Court Judge

Opinion No. 26217
Heard March 21, 2006 – Filed October 23, 2006

REVERSED

John Dwight Hudson, of Hudson Law Offices, of Myrtle Beach, for Appellants.

John B. McCutcheon Jr., Lisa A. Thomas, Mary Ruth Baxter, and Arrigo P. Carotti, all of McCutcheon, McCutcheon & Baxter, of Conway, for Respondents.

Gray T. Culbreath and Christian Stegmaier, both of Collins & Lacy, of Columbia; and Wendy Raina Johnson Keefer, of Bancroft Associates, of Washington, D.C., for Amicus

Curiae South Carolina Defense Trial Attorneys' Association.

CHIEF JUSTICE TOAL: This appeal arises out of the trial court's decision to grant summary judgment in favor of Conway Dialysis Center (Respondent). The trial court held that Respondent was not liable for injuries Respondent's patient, Danny Tompkins (Patient), caused to be inflicted on Allene and Kathleen Hardee (Appellants) because South Carolina law does not recognize a duty running from a medical provider to a third party non-patient. We reverse.

FACTUAL / PROCEDURAL BACKGROUND

Appellants were badly injured in an accident which occurred in January of 1998. Appellants were traveling through the intersection of Highways 701 and 319 in Conway when Patient's automobile struck Appellants' automobile. The accident occurred minutes after Respondent administered dialysis treatment to Patient.

Patient is a Type 1 Insulin dependent diabetic whose diabetic condition is deemed "brittle." Patient took hemodialysis treatment three times a week and each treatment lasted almost four hours. The dialysis treatment required that Patient's blood be taken out of his system, run into a dialysis machine to be cleaned, and then returned to Patient's body.

After the completion of the dialysis treatment, Patient was released to go home. During the drive home, Patient lost control of his vehicle, and ultimately collided with Appellants. The accident resulted in Patient's death and devastating injuries to Appellants.

Following the accident, Appellants filed this suit against Respondent for negligence related to the treatment of Patient in the administration of dialysis treatment. Specifically, Appellants alleged that Respondent did not warn Patient of the ill effects that could result from his dialysis treatment, that Patient was experiencing insulin shock or suffering from low blood sugar

at the time he left Respondent's facilities, and that Respondent did not perform the normal post-treatment tests or monitoring prior to releasing Patient. Respondent filed a motion for summary judgment, which the trial court initially denied. Respondent requested that the trial court alter or amend its decision, however, and after further consideration, the trial court granted Respondent's motion for summary judgment.

At this point, Respondent forwarded a proposed order to Appellants' counsel for comment. Appellants' counsel advised Respondent of a number of problems with the proposed order, however, prior to Appellants' counsel having the opportunity to present these comments to the trial court, the court signed the order. Appellants made a motion to alter or amend the order to correctly reflect the facts in the case. The trial court denied Appellants' motion, and this appeal followed.

This case was certified to this Court pursuant to Rule 204(b), SCACR, and the following issues are before the Court for review:

I. Did the trial court err in determining that a medical provider does not owe a duty to a third party (non-patient), even if the medical provider negligently fails to warn a patient of the risks related to driving immediately following a medical procedure and the failure to warn the patient results in harm to the third party?

II. Should the trial court's order be vacated because opposing counsel did not have the opportunity to review the proposed order pursuant to Rule 5, SCRCP?

STANDARD OF REVIEW

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the trial court. *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361, 536 S.E.2d 331, 333 (2002). A grant of summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP;

Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). Because the trial court's order granting summary judgment focused only upon whether Respondent owed Appellants any duty of care, we limit our analysis accordingly.[1]

LAW / ANALYSIS

I. Duty to third parties

Appellant argues that the trial court erred in determining that, as a matter of law, a medical provider never owes a duty to a third party non-patient as a result of actions or omissions the provider takes in regard to a patient's treatment. We agree.

Although this Court has never addressed this issue directly, we have decided similar cases. Generally, an action against a doctor can only be maintained by the patient. *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 84, 502 S.E.2d 78, 91 (1998). However, this Court recognized in *Bishop* that a physician-patient relationship is not a requirement in every legal action against a medical provider. *Id.* at 84, 502 S.E.2d at 92. In that case, the Court stated that a physician's malpractice in treating a patient may form the basis of a negligence action against the physician by a third party in limited circumstances. *Id.* This Court has never defined what constitutes the limited circumstances in which a third party can maintain suit against a medical provider as outlined in *Bishop*.

At the outset, it is important to characterize the precise nature of the cause of action to which this statement in *Bishop* alluded. As we noted in *Bishop*, a medical malpractice action is instituted by a patient and is

[1] Specifically, the order granting summary judgment in this case focuses solely on the question of whether a medical provider owes a duty of care to a third party non-patient as a result of actions or omissions the provider takes in regard to a patient's treatment. Thus, our review of this particular decision does not call upon us to perform a duty typically associated with a review of a summary judgment decision – determining the existence of any triable issues of fact.

predicated upon a physician's deviation from accepted standards of professional care in treating that patient. Not every cause of action asserted against a medical provider, however, is an action for medical malpractice. Thus, our statement in *Bishop* affirms the validity of the general rule prescribing the class of permissible plaintiffs in medical malpractice actions, but also recognizes that causes of action may accrue in other contexts by virtue of a medical provider's actions or omissions.

In this case, Appellants argue Respondent knew that the medical procedure it performed on Patient could have substantial detrimental effects on Patient's ability to operate a motor vehicle. Thus, Appellants argue that if Respondent did not warn Patient of the risks of operating a motor vehicle, Respondent breached a duty a medical provider owes to those persons in the general field of danger (that is, the motoring public) which should reasonably have been forseen by Respondent when it administered the treatment.

We believe South Carolina tort law ought to recognize such a duty.[2] Generally, a medical provider has a duty to warn of the dangers associated with medical treatment. Thus, a medical provider who provides treatment which it knows may have detrimental effects on a patient's capacities and abilities owes a duty to prevent harm to patients and to reasonably foreseeable third parties by warning the patient of the attendant risks and effects before administering the treatment. Therefore, if Respondent knew that Patient could experience ill effects following dialysis treatment, Respondent owed Appellants a duty to warn Patient of the risks of driving.[3]

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[2] "'[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, 325-326 (4th ed. 1971).

[3] We note, however, that we do not make the determination that Respondent owed Appellants this duty of care. The trial court granted summary judgment holding that under no factual circumstances could a duty exist. We hold that, under some circumstances, a duty can exist. Determining the existence of a duty in a particular case, however, is another question. Our current responsibility is limited to construing the evidence and inferences in the light

We note that this is a very narrow holding that carves out an exception to the general rule that medical providers do not owe a duty to third party non-patients. Importantly, this duty owed to third parties is identical to the duty owed to the patient, i.e., a medical provider must warn a patient of the attendant risks and effects of any treatment. Thus, our holding does not hamper the doctor-patient relationship.

Accordingly, we reverse the trial court's decision granting summary judgment and remand the case for proceedings consistent with this opinion.

II. Motion to alter or amend

Appellants argue the trial court erred in denying their motion to alter or amend the judgment because the proposed order submitted by Respondent did not contain facts and legal issues that were raised before the trial court. As a result, Appellants argue the trial court's order should be vacated.

Although we decline to address this argument pursuant to *Futch v. McAllister Towing of Georgetown*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address additional issues if the resolution of another issue is dispositive), we note that Appellants properly made a motion to alter the trial court's decision granting summary judgment, which the trial court denied, and that Appellants appropriately appealed. As a result, all relevant facts were before this Court for review.

CONCLUSION

Based on the above cited authority, we reverse the trial court's decision granting summary judgment and hold that the trial court erred in determining that a medical provider never owes a duty to a third party non-patient as a result of actions or omissions the provider takes in regard to a patient's treatment.

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most favorable to Appellants and reviewing the trial court's decision made as a matter of law. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998)

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

Dycippa L. Garner, Petitioner,

v.

State of South Carolina, Respondent.

ORDER

Petitioner filed an application for post-conviction relief (PCR) alleging trial counsel was ineffective in failing to object to the sufficiency of the indictments, in failing to file a direct appeal, and in failing to object to the sentence enhancement at the time of sentencing. The State moved to dismiss the application as barred by the statute of limitations. Petitioner's PCR counsel argued the statute of limitations should not apply to the application if petitioner was granted the right to a direct appeal.

Following a hearing, the PCR judge found petitioner did not knowingly and intelligently waive his right to direct appeal and was entitled to a belated review of his direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). The PCR judge also granted petitioner's motion to dismiss the application without prejudice and found the statute of

limitations did not apply to petitioner's application since the PCR judge found petitioner was entitled to a belated appeal.

The State filed a motion to alter or amend the order. The PCR judge granted the motion "to the extent that the findings and conclusion [were] amended to determine that the statute of limitations does not apply to [petitioner's] allegation that he did not knowingly and voluntarily waive his right to an appeal of his guilty plea [sic]." The order was further amended to reflect the State's objection to petitioner's motion to dismiss the remaining allegations without prejudice and to preserve the State's right to raise any and all defenses, such as the statute of limitations and laches, to any and all allegations raised in any future PCR actions. Petitioner has filed a notice of appeal.

South Carolina Code Ann. § 17-27-80 (2003) states that a PCR court "shall make specific findings of fact, and state expressly its conclusions of law *relating to each issue presented. This order is the final order*." (Emphasis added). All grounds for relief available to an applicant must be raised in his original, supplemental or amended application. S.C. Code Ann. § 17-27-90 (2003). "Any ground finally adjudicated or not so raised, or

knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or an any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application." Id. A final judgment entered under the Uniform Post-Conviction Relief Act may be reviewed by writ of certiorari. S.C. Code Ann. § 17-27-100 (2003); Rule 227(a), SCACR.

An order in a PCR matter which does not include specific findings of fact and conclusions of law relating to each issue presented, but instead dismisses some of the issues without prejudice to them being raised in a future PCR proceeding, does not constitute a final order or judgment under the Uniform Post-Conviction Relief Act and therefore is not reviewable by writ of certiorari. Similar to the situation in Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), failure to finally resolve each of the issues presented in the PCR application when it is initially considered ultimately increases the

work load of all involved when a new hearing is required to secure the rulings which should have been made initially.[1]

Accordingly, we dismiss petitioner's notice of appeal without prejudice to his right to file another notice of appeal upon the issuance of a final order on his PCR application. We remand this case to the PCR judge to conduct a hearing, if necessary, and issue a final order which rules on all of the issues raised in petitioner's PCR application as well as the State's motion to dismiss. The final order shall be issued within sixty days of the date of this order.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

[1] We assume it was the PCR judge's reasoning that if petitioner's convictions are reversed after a belated review of his direct appeal issues, it would be unnecessary to address the remaining allegations in the PCR application. However, if the convictions are not reversed, it is likely another PCR application and another petition for a writ of certiorari will be filed, creating additional work for both the circuit court and the appellate court. Moreover, there could be a situation where the additional allegations raised in a PCR application lead to a new trial, obviating the need for a belated review of any direct appeal issues. Accordingly, the most efficient manner in which to handle PCR applications is to comply with the requirements of section 17-27-80 and rule on all of the issues raised in the application in a final order without leaving some issues to be determined at a later date.

s/ Costa M. Pleicones J.

Columbia, South Carolina

October 18, 2006

The Supreme Court of South Carolina

In the Matter of Kristine L. Esgar, Respondent.

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17(c), RLDE, Rule 413, SCACR. The petition also seeks appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

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

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

trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

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

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

Ms. Atkins' appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

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

Columbia, South Carolina

October 20, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Frances Walsh, as personal representative of the estate of Jerome Walsh, deceased, and in her individual capacity,	Appellant,

v.

Joyce K. Woods, f/k/a Joyce K. Walsh,	Respondent.

Appeal From Aiken County
Rodney A. Peeples, Circuit Court Judge

AFFIRMED

Opinion No. 4163
Heard May 11, 2006 – Filed October 16, 2006

Russell H. Putnam, Jr., of Hinesville, Georgia, for Appellant.

John S. Nichols and Kelli Lister Sullivan, of Columbia, for Respondent.

CURETON, A.J: Frances Walsh (Wife II), individually and in her capacity as personal representative of the estate of her deceased husband, Jerome J. Walsh (Husband), brought this action against Husband's former wife, Joyce K. Woods (Wife I), seeking relief pertaining to the disposition of surviving spouse benefits (SSB) made available through Husband's retirement plan. Wife II appeals the trial court's order granting Wife I's motion for summary judgment. We affirm.

FACTS

We note at the commencement that although some changes and additions have been made, the facts largely mirror those in Walsh v. Woods, 358 S.C. 259, 594 S.E.2d 548 (Ct. App. 2004), rev'd Walsh v. Woods, Mem. Op. No. 2005-MO-043 (S.C.Sup.Ct. filed Sept. 19, 2005). Husband married Wife I in 1957, and they separated in 1970. Although Husband and Wife I lived apart, they remained married for twenty years after their separation. In 1980, Husband met Wife II and they began dating. In 1989, after forty years of employment at E.I. du Pont de Nemours & Co. (DuPont), Husband retired. During his tenure at DuPont, Husband participated in a joint and survivor annuity plan governed by the Employee Retirement Income Security Act (ERISA). When he retired, Husband signed a Post Retirement Company-Paid Survivor Benefits and Spouse Benefit Option designating Wife I, to whom he was still married, as the beneficiary of his SSB plan in the event he predeceased her.

On August 24, 1990, Husband and Wife I divorced. Incident to the divorce, they entered into an agreement which the family court approved, adopted, and incorporated into the divorce decree. The decree provided, in relevant part:

> [T]he parties shall sign whatever documents or other paperwork that is necessary to enforce this Agreement. I find that the parties have further agreed that each shall retain what . . . retirement plans, pension plans . . . etc., that he or she has in his or her possession. If the wife is required to sign any papers concerning the husband's retirement or benefit options from DuPont of Westinghouse, then she shall sign those.

Husband never presented Wife I with any documents to sign regarding his retirement plan, and neither party obtained a Qualified Domestic Relations Order (QDRO) during Husband's lifetime.

On May 31, 1991, Husband wrote DuPont a letter informing the company that he had divorced Wife I and that his "ex-wife has waived any claim to my pensions . . . and this has been documented as part of the divorce decree." The letter further stated Husband wished to change his beneficiary to Wife II. In 1994, Husband and Wife II married. On November 30, 1994, Husband again wrote DuPont. Apparently, Husband believed his first letter to DuPont sufficed to change the beneficiary of his plan's SSB from Wife I to Wife II. Accordingly, his second letter advised DuPont he wished to change the beneficiary from Frances Dudley to Frances Dudley Walsh, inasmuch as he had married Wife II. Further, the letter stated "[i]f this letter does not suffice [to change the beneficiary], please send me the necessary paperwork to have my wife eligible for . . . spouse benefits." Despite the two letters to DuPont, the change Husband requested was never made legally effective.

On January 27, 1996, Husband died. His will named Wife II as the sole beneficiary and the personal representative of his estate. After Husband's death, DuPont began paying benefits to Wife I. In 1997, Wife II filed suit against DuPont, which was removed to federal court, seeking a judicial determination that the SSB should be paid to her rather than Wife I. DuPont successfully moved for summary judgment on the grounds no QDRO existed

terminating Wife I's right to receive benefits at the time of Husband's retirement.

Wife II then contacted John W. Harte, the attorney who represented Husband in his divorce from Wife I, and requested he prepare and submit a QDRO to DuPont. Harte prepared the QDRO, then contacted Vickie Johnson, the attorney who represented Wife I in the divorce action, and requested she obtain Wife I's signature on the document. Wife I did not sign the QDRO, but authorized Johnson to sign it on her behalf. Wife I noted on the document, however, that she authorized her signature under protest and out of concern she would be held in contempt of court if she refused to sign.

After Harte submitted the QDRO to DuPont, he received a letter from the company advising him that the document was not valid because it did not comply with the mandates of the Internal Revenue Code. Further, the letter stated that "[a] QDRO cannot be entered after the death of the participant. A participant must be a living person. There was no QDRO in effect at the participant's death that awarded any benefits to an alternate payee. Therefore, there are no benefits payable pursuant to a QDRO." In addition, DuPont's letter advised that even if the document had been prepared at some point after his retirement, but prior to Husband's death, it would nonetheless be ineffective to divest Wife I of her SSB because Wife I owned those benefits which vested upon Husband's retirement.

When DuPont refused to pay the SSB to Wife II, she commenced an action to recover all monies past, present and future paid to Wife I. Her suit, filed in the Court of Common Pleas for Richland County, was subsequently removed to the United State District Court for the District of South Carolina. DuPont then successfully moved for summary judgment.

On December 18, 2000, Wife II filed the instant action against Wife I seeking recovery under the following seven legal and equitable theories: (1) unjust enrichment; (2) "law of the case;" (3) res judicata; (4) collateral estoppel; (5) breach of contract; (6) bad faith breach of contract; and (7) conversion. Wife I answered, denying Wife II was entitled to the relief sought in her complaint, and asserted as defenses: (1) expiration of the statute

of limitations; (2) failure to state a claim upon which relief can be granted; (3) laches; and (4) res judicata.

The parties filed cross motions for summary judgment. Wife I argued, inter alia, that all of Wife II's causes of action failed because the SSB vested in Wife I in 1989, at the time of Husband's retirement, and could not now be divested. Wife I further asserted the applicable statute of limitations barred Wife II's claims. In support of her cross motion, Wife II asserted no genuine issues of material fact existed that Wife I had waived her rights to the benefits in the divorce proceeding. In addition, Wife II asserted that the trial court could enforce the property settlement agreement by requiring Wife I to disgorge herself of all SSB payments she had received in the past and will receive in the future by transferring the payments to Wife II.

The trial court, relying on Hopkins v. AT& T, 105 F.3d 153, 157 (4th Cir. 1997), granted Wife I's motion for summary judgment. Under Hopkins, the trial court reasoned that (1) SSB vests in a plan participant's current spouse on the date the participant retires, whether or not spouses are married at the time the participant dies, and (2) surviving spouse benefits may not be paid to a spouse who marries a participant after the participant's retirement. The trial court expressly determined the holding in Hopkins was determinative of the entire case and, therefore, declined to address Wife I's other grounds for summary judgment and further declined to reach Wife II's cross motion for summary judgment.

Wife II appealed, and this court reversed, finding the trial court erred in determining Hopkins was dispositive of all of the issues on appeal because given the facts, the case of Estate of Altobelli v. International Business Machines Corporation, 77 F.3d 78 (4th Cir. 1996), also applied. Further, we found the trial court erred in reasoning that ERISA governed the disposition of all of Wife II's legal and equitable claims. Wife I petitioned for rehearing on the grounds that the statute of limitations barred Wife II's claims. We withdrew our opinion reversing the trial court's grant of summary judgment and affirmed the trial court based on the statute of limitations. The Supreme Court reversed, finding the statute of limitations did not bar Wife II's claims

and remanded the case to this court to determine whether the trial court erred in granting summary judgment to Wife I.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, appellate courts apply the same standard which governs the trial court under Rule 56(c), SCRCP, which states that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Willis v. Wu, 362 S.C. 146, 150-51, 607 S.E.2d 63, 65 (2004); see also, Schmidt v. Courtney, 357 S.C. 310, 316-17, 592 S.E.2d 326, 330 (Ct. App. 2003) (stating all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party).

Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); Montgomery v. CSX Transp., Inc., 362 S.C. 529, 542, 608 S.E.2d 440, 447 (Ct. App. 2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 821 (Ct. App. 2004).

LAW/ANALYSIS

I.

As a threshold matter, we first turn our attention to Wife I's assertion that Wife II failed to properly preserve the issue of whether her legal and

equitable claims were barred by ERISA because the trial court expressly declined to rule on the issues. Wife I argues because Wife II failed to make a Rule 59(e), SCRCP motion requesting the trial court address such issues, she cannot argue them on appeal. We disagree.

The trial court found Hopkins v. AT& T, 105 F.3d 153, 157 (4th Cir. 1997), barred Wife II's claim and therefore, the court ruled that it was "unnecessary to reach Frances'[s] cross motion for summary judgment." In so ruling, the trial court adopted the analysis espoused by Hopkins and implicitly denied Wife II's claims. A Rule 59(e) motion is required to preserve issues that have not been ruled upon by the trial court. See Wilder Corp v. Wilke, 330 S.C, 71, 77, 497 S.E.2d 731, 734 (1998) (noting that proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court). We hold that a motion under Rule 59(e) is unnecessary in this case because the trial court's decision with respect to Wife II's claims was clear. These issues were clearly raised to and ruled upon by the trial court. Accordingly, Wife II was not required to move for relief under Rule 59(e) in order to preserve the issues for review. Finally, because, ERISA claims involve subject-matter jurisdiction, they may be raised at any time. Baker Hospital v. Isaac, 301 S.C. 248, 391 S.E.2d 549 (1990).

II.

Next, Wife II argues the trial court erred in granting Wife I summary judgment. She premises her claim upon the proposition that by virtue of Wife I's putative waiver of her rights to SSB, those benefits ipso facto became the property of Husband and thus passed to her under his will. We disagree.[1]

[1] We find it difficult, as a practical matter, to imagine that such an arrangement could ever happen because as explained in Dorn v. Int'l Brotherhood of Elec. Workers, et. al., 211 F.3d 938, 941 (5th Cir. 2000), an ERISA joint and survivor annuity is unlike a typical joint and survivor annuity "available in the commercial market, which commonly guarantees payment of a stipulated or determinable amount to two persons, frequently

We begin our analysis by discussing the function of ERISA preemption law in this case. In the case of Lewis v. Local 382, Int'l Brotherhood of Elec. Workers (AFL-CIO), 335 S.C. 562, 569, 518 S.E.2d 583, 596 (1999), our Supreme Court addressed the issue of preemption under ERISA:

> Any and all State laws insofar as they relate to employee benefits plans are preempted by ERISA. 29 U.S.C.§1144(a); Duncan v. Provident Mut. Life Ins. Co. of Philadelphia, 310 S.C. 465. 427 S.E.2d 657 (1993). This Court has recognized that the pre-emptive effect of ERISA is a broad one. Baker Hosp. v Isaac, 301 S.C. 248, 391 S.E.2d 549 (1990). A state law "relates to" an ERISA-governed employee benefit plan, "if it has a connection with or reference to such a plan." Shaw v. Delta air Lines, Inc., 463 U.S. 85, 90, 103 S. Ct. 2890, 2896, 77 L. Ed.2d 490 (1983). Further, a state law "relates to" an ERISA plan if the rights or restrictions it creates are predicated on the existence of such a plan. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). However, those state actions which affect employee benefits plans in "too tenuous, remote or peripheral a manner" do not relate to the plan. Shaw, 463 U.S. 85, 90.

Here, it is inescapable that Wife II's claim to the SSB, like the retirement benefits in Lewis, are predicated upon the existence of the

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spouses, while both are living and after the death of either person, to whichever of the two survives." In an ERISA annuity "(1) the QJ&SA's (qualified joint and survivor annuity) annuity payments cease at the death of the participant spouse, regardless of whether his death occurs before or after the death of the non-participant spouse; and (2) if, but only if, the non-participant spouse survives the participant spouse does the survivor's annuity kick in." Id. at 942.

husband's pension plan. While ERISA related claims involve subject-matter jurisdiction, 29 U.S.C. § 1132(3)(1) vests both state and federal courts with concurrent subject-matter jurisdiction of certain civil actions brought by participants or beneficiaries against an employee benefit plan. Nevertheless, under preemption principles, federal ERISA law must control our decision on the issue of Wife II's claim to the SSB. See Baker Hosp. v. Isaac, 301 S.C. 248, 391 S.E.2d 549 (1990)(holding ERISA preempted a hospital's contract, promissory estoppel, negligence, and misrepresentation claims); see also Dorn v. International Brotherhood of Electrical Workers, et. al., 211 F.3d. 938 (5th Cir. 2000) (holding a state law claim by an ex-wife regarding her rights to receive benefits from an ERISA plan necessarily "relates to" an ERISA plan and preempts Louisiana law of conversion).

The trial court concluded the ERISA provisions, as interpreted in Hopkins, were dispositive of Wife II's legal and equitable claims. On appeal, Wife II argues the case of Estate of Altobelli v. IBM Corp., 77 F.3d 78 (4th Cir. 1996) permits an ERISA participant's ex-spouse to waive, in a separate agreement, incorporated into a divorce decree, her interest as a beneficiary in her ex-husband's pension plan.

Altobelli analyzes the split among federal circuits on the issue of whether administrators of an ERISA plan are required to recognize a beneficiary's waiver of his or her benefits. The majority of circuits that have addressed this issue have held such waivers are valid under certain circumstances. See Id.; Mohamed v. Kerr, 53 F.3d 911 (8th Cir. 1995); Brandon v. Travelers Ins. Co., 18 F.3d 1321 (5th Cir. 1994); Metro. Life Ins. Co. v. Hanslip, 939 F.2d 904 (10th Cir. 1991); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir. 1990) (en banc). Only two courts of appeals have disagreed, holding plan administrators need not look beyond the documents on file with the plan to determine whether there has been a valid waiver effectuated in outside private documents. Krishna v. Colgate Palmolive Co., 7 F.3d 11 (2nd Cir. 1993); McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990).

In recognizing a split among the circuits, the Altobelli court followed the majority view and concluded that each of the parties in Altobelli "clearly

intended to relinquish all interests in the pension plan of the other." Id. at 81. The court stated a beneficiary may waive pension benefits where the waiver specifically refers to and modifies the beneficiary interest, or through specific language in a divorce decree. Id. at 81.

The Altobelli court agreed with the Seventh Circuit that the anti-alienation clause does not apply to a beneficiary's waiver. According to the majority of federal courts, because ERISA does not explicitly address "waiver" by a beneficiary, the Fourth Circuit turned to federal common law to determine whether, and under what circumstances, an individual may validly waive her benefits in an ERISA plan. See Altobelli, 77 F.3d at 81. Under federal common law, an individual's waiver is valid if, "upon reading the language in the divorce decree, a reasonable person would have understood that she was waiving her beneficiary interest. . . ." Clift v. Clift, 210 F.3d 268, 271-72 (5th Cir. 2000); see also Mohamed, 53 F.3d at 914-15 ("a property settlement agreement entered into pursuant to a dissolution may divest former spouses of beneficiary rights in each other's [ERISA benefits], if the agreement makes it clear that the former spouses so intend."). Moreover, "any waiver must be voluntarily made in good faith." Clift, 210 F.3d at 272.

However, Altobelli arose out of facts clearly distinguishable from those in the instant case. Altobelli dealt with a waiver of life insurance and pension plan benefits while the instant case deals with a waiver of SSB. The Altobelli decision only holds that the ex-wife of Altobelli had validly waived her rights to his pension benefits pursuant to a QDRO. We observe also that Hopkins, consistent with Altobelli, held that as far as Mr. Hopkins's pension benefits[2] were concerned, the first wife was entitled to them under the provisions of her QDRO. Hopkins, 105 F.3d at 155. The court noted, however, that "[b]enefits provided under a pension 'plan may not be assigned or alienated,'

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[2] The Hopkins court expresses in clear terms the operation of a qualified joint and survivor annuity: "Under the joint and survivor annuity, Mr. Hopkins receives a fixed income for life (pension benefits) and if his spouse survives him, she will receive 50% of the fixed income (Surviving Spouse Benefits) for the remainder of her life." Hopkins, at 155.

29 U.S.C.A. § 1056(d)(1), except pursuant to a 'qualified domestic relations order.'" Id. The court stated further that:

> ERISA defines a "domestic relations order" as any judgment, decree, or order which, "(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (II) is made pursuant to a state domestic relations law…." 29 U.S.C.A. § 1056(d)(3)(B)(ii). A domestic relations order is "qualified" if it, among other things, gives an alternate payee the right to "receive all or a portion of the benefits payable to a participant under an plan…." 29 U.S.C.A § 1056(d)(3)(B)(i)(I).
>
> …. AT&T contends that on the day Mr. Hopkins retired, the rights to Surviving Spouse Benefits vested in [Wife II), his current spouse. As a result, AT&T argues, the Surviving Spouse Benefits are no longer payable to a plan participant. Noting that a QDRO must relate to a benefit "payable with respect to a participant." 29 U.S.C.A. § 1056(d)(3)(B)(i)(I).

Id.

The Hopkins court agreed with AT&T's contention and held, as a matter of first impression in the federal courts, that Wife II's rights to the SSB vested upon Mr. Hopkins' retirement. Id. Moreover, the court cited with approval the case of Anderson v. Marshall, 856 F. Supp. 604, 607 (D. Kan. 1994) for the proposition that "upon retirement, the Surviving Spouse Benefits 'became irrevocable and could not be changed [even by a] waiver of the designated beneficiary.'" See also, Rivers v. Central and South West Corporation, et al., 186 F.3d 681, 683-84 (5th Cir. 1999) (finding SSB irrevocably vested in plan participant's current wife "on the date of his retirement and [former wife] is forever barred from acquiring an interest in [his] pension plan").

In the present case, at the time Husband retired in 1989, the SSB vested in Wife I because the two were still married. Although Husband had a ninety-day window prior to his retirement in which he could have, with Wife I's written consent, removed her as a beneficiary of the SSB, this was not accomplished. After Husband retired, even if Wife I had agreed to waive her SSB, she could not have done so under ERISA. Wife I's purported waiver in the divorce agreement was ineffective to waive the SSB because ERISA does not allow a beneficiary to waive SSB after a plan participant retires.

Moreover, even if Husband had divorced Wife I prior to retiring, or had never married Wife I to begin with, Wife II's position with respect to the survivor benefits would be no different: Wife II would not be entitled to any SSB because she married Husband after he retired. ERISA provides SSB "may not be paid to a spouse who marries a participant after the participant's retirement." Hopkins, 105 F.3d at 157 (citing 29 U.S.C.A. § 1055(f)) (emphasis added).

Therefore, because Wife I's rights vested upon Husband's retirement, those benefits belonged to her, not Husband. Under the terms of the property settlement agreement, each party was permitted to retain any pension plan in "his or her possession." Whether intended or not, the SSB were as much in Wife I's "possession" (control) as they could be. We agree with Wife I that even under the terms of the the parties' property settlement agreement, she was entitled to retain her SSB because they were in her "possession" at the time of the execution and approval by the court of the property settlement agreement. We therefore hold that Hopkins, not Altobelli is dispositive of the issues in this appeal.

It does seem untoward that Husband should not be able to have a component of his qualified joint and survivor annuity awarded to Wife II, rather than a woman from whom he was divorced and did not have a relationship with for years before his death. However, in keeping with our reading of federal law, there is no other resolution possible.

CONCLUSION

For the reasons stated herein, the trial court's decision is

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Nathan Albertson and Amanda Byfield-Albertson, Appellants,

v.

Brian William Robinson a/k/a Brian W. Robinson, Maureen Ann Robinson and American General Financial Services, Inc., Respondents.

Appeal from Dorchester County
Patrick R. Watts, Master-in-Equity

Opinion No. 4164
Heard September 12, 2006 – Filed October 16, 2006

REVERSED AND REMANDED

Robert A. Bernstein, of Charleston, for Appellants.

Christopher David Lizzi, of North Charleston, Maureen Ann Robinson, of Summerville and Thomas H. Brush, of Charleston, for Respondents.

KITTREDGE, J.: This appeal involves a claim of a fraudulent conveyance pursuant to the Statute of Elizabeth, as codified in section 27-23-10 of the South Carolina Code (Supp. 2005). The trial court found the challenged transfer of real property from Brian Robinson to his then wife, Maureen Robinson, was not a fraudulent transfer. The judgment creditors appeal, and we reverse and remand.

I.

Brian and Maureen Robinson were married on October 4, 1980. The Robinsons experienced difficulties throughout their marriage resulting from Mr. Robinson's abuse of alcohol. These difficulties eventually led to the couples' divorce on February 18, 2005.

The property at issue in this case is the Robinsons' former marital home, which was purchased on September 2, 1985. During their marriage, the Robinsons conveyed an interest in the marital home several times between one another. On June 2, 1992, Mr. Robinson conveyed his interest in the marital residence to Mrs. Robinson. On February 28, 1996, Mrs. Robinson re-conveyed a one-half interest in the marital residence to Mr. Robinson. The reason for the conveyances was Mr. Robinson's alcoholism and Mrs. Robinson's fears that this disease would ultimately harm the family.

The underlying action arises from Mr. Robinson's failure to complete work on a pool he contracted to build for Nathan and Amanda Albertson in August 2000. At the time, Mr. Robinson was the sole proprietor of a business called Southeast Pool Specialties. The contract price for the Albertsons' pool was $16,995, and the Albertsons paid $11,895 as a down payment. Mr. Robinson did not complete the construction of the pool. He attributed his failure to complete the contract to his alcoholism.

In February 2001, the Albertsons filed suit seeking damages for breach of contract. Mr. Robinson did not respond to the lawsuit, but on June 15, 2001, Mrs. Robinson submitted a response to the court in the form of a letter to Mr. Albertson. On September 25, 2001, an entry of default was lodged against Mr. Robinson. As of September 2001, the Robinsons' marital residence was titled jointly in their respective names.

On March 1, 2002, Mr. Robinson conveyed his one-half interest in the marital home to Mrs. Robinson. The stated consideration for this conveyance was $5.00 and "love and affection." The Albertsons contend this conveyance should be found void as a fraudulent transfer because the transfer occurred after Mr. Robinson became indebted to them. In this regard, the Albertsons assert the transfer by Mr. Robinson to Mrs. Robinson of his interest in the property was done with the purpose of avoiding payment of the debt.

On July 22, 2002, the court conducted a damages hearing in the underlying breach of contract action. Mr. Robinson failed to appear for the hearing and judgment was entered against him on August 27, 2002, in the amount of $42,134.

The Robinsons separated on June 16, 2003, and a Separation Agreement was finalized and entered on August 29, 2003. The Robinsons were divorced on February 18, 2005.

The Albertsons filed the present action in 2004. The Albertsons sought a declaratory judgment and relief based on the claim that the March 1, 2002, transfer of Mr. Robinson's interest in the property was void as a fraudulent transfer.

The trial court, following a hearing, denied the Albertsons' Complaint for declaratory relief. The trial court found that Mr. Robinson was not indebted to the Albertsons at the time of the March 1, 2002 transfer; there was no evidence Mr. Robinson failed to retain sufficient assets to pay the resulting judgment; the transfer was supported by adequate consideration; and there was no intent to defraud creditors with the transfer.

II.

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). An action to set aside a transfer as fraudulent pursuant to the Statute of Elizabeth is an action in equity. Future Group, II v. Nationsbank, 324 S.C. 89, 97 n.6, 478 S.E.2d 45, 49 n.6 (1996). This court therefore has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001).

III.

The Albertsons contend the March 1, 2002 conveyance between Mr. and Mrs. Robinson should be voided as a fraudulent transfer. We agree.

Though the Albertsons raise several arguments on appeal, this case is best dealt with by combining these arguments and examining the law concerning fraudulent transfers as a whole. To do so, we first look to the statutes and case law concerning fraudulent transfers.

The Statute of Elizabeth, as codified in section 27-23-10 of the South Carolina Code (Supp. 2005), governs fraudulent conveyances and provides in relevant part:

> Every . . . conveyance of lands . . . which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful . . . debts . . . must be deemed and taken . . . to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

South Carolina courts have held that under the Statute of Elizabeth conveyances may be set aside under two conditions: first, where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration; and, second, where a transfer is made without actual intent to defraud the grantor's creditors, but without valuable consideration. McDaniel v. Allen, 265 S.C. 237, 242-43, 217 S.E.2d 773, 775-76 (1975). We dispose of this appeal pursuant to the latter situation. We therefore do not reach the trial court's finding that Mr. Robinson (in transferring his interest in the property) did not intend to defraud the Albertsons. Cf. Royal Z Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999) (stating grossly inadequate consideration for a conveyance is a "badge of fraud" and creates a rebuttable presumption of intent to defraud).

We thus begin our examination with a determination of whether the challenged conveyance was supported by valuable consideration. We find the record compels a finding that the transfer in question was not supported by valuable consideration.

The record yields but one reasonable inference—the transfer from Mr. Robinson to Mrs. Robinson was not accompanied by valuable consideration. For example, Mrs. Robinson testified she has no recollection of actually transferring the stated consideration of $5.00. Moreover, the Robinsons' testimony indicates the couple did not have a clear understanding as to what constituted the consideration. Mrs. Robinson stated she gave "all of [her] years being married to him" as consideration for the property. Mr. Robinson never testified as to what he considered consideration, and instead asserted he was afraid if he did not convey his interest in the property to Mrs. Robinson, the family would lose everything because of his addiction to alcohol. Mr. Robinson stated he "was looking out for [his] kids" and hoped this conveyance would save his marriage.

The Robinsons' additional claim that they conveyed the property pursuant to the separation agreement simply holds no weight. The Robinsons did not separate until over a year after the conveyance, and Mr. Robinson testified he was attempting to avoid a separation in March of 2002. In fact,

there was testimony that Mr. Robinson may have still been living at the marital residence at the time the current declaratory action was commenced. We find no consideration was exchanged in the conveyance.

The absence of consideration does not end our inquiry. Where a transfer is made without valuable consideration being exchanged, the transfer will be set aside only when the creditor establishes the following: (1) the grantor was indebted to the creditor at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay his indebtedness to the creditor in full, not merely at the time of transfer, but in the final analysis when the creditor seeks to collect the debt. Mathis v. Burton, 319 S.C. 261, 265, 460 S.E.2d 406, 408 (Ct. App. 1995).

We must, therefore, determine whether the Albertsons were "existing creditors" at the time of the March 1, 2002 conveyance. The case of Matthews v. Montgomery, 193 S.C. 118, 133, 7 S.E.2d 841, 848 (1940) is instructive. Matthews states that it does not matter whether a creditor obtained the judgment against a property owner before the conveyance:

> It is only necessary that the debt should have been in existence or the right of action have accrued at or before the time of the transfer. It may be reduced to judgment at a later date. To determine whether a person is such an existing creditor as can invoke the protection of the statute the inception of the debt or obligation is the time which controls; and not the date of the subsequent entry of judgment.

Id.

"The inception of the debt or obligation" arose in 2000 when Mr. Robinson breached his contract with the Albertsons. The challenged conveyance came much later on March 1, 2002, after entry of default in the underlying breach of contract action. Application of Mathis and Matthews

obliges us to find that the Albertsons were existing creditors at the time of the March 1, 2002 conveyance.

The second prong shown in Mathis, that the conveyance be voluntary, is not in dispute. The conveyance was voluntary.

The third and final prong of Mathis requires a determination of whether sufficient funds existed to pay the judgment after the conveyance. If the debtor retains sufficient assets to satisfy the debt in full, the challenged conveyance will not be set aside. See Gardner v. Kirven, 184 S.C. 37, 42, 191 S.E. 814, 816-17 (1937).

Mr. Robinson's belief that the judgment would be between seven and ten thousand dollars is of no moment; however, he did not even maintain sufficient funds to pay this amount. Mr. Robinson testified he transferred his interest in the house to his wife because he was afraid he was going to lose everything, and it was "the last little bit I had. You know, there wasn't much there." He further testified that when he transferred the house, he did not keep anything other than his clothes. He stated he anticipated there would be a judgment against him, and while he thought he would be able to borrow enough money to pay the judgment, he did not have sufficient funds in the bank. Mr. Robinson apparently sold some tools, but he received around only $7,000 from the sale. Therefore, the evidence establishes that Mr. Robinson failed to retain sufficient assets to satisfy his debt in full to the Albertsons.

IV.

Accordingly, pursuant to the Statute of Elizabeth, we find the March 1, 2002 conveyance void as fraudulent. We reverse and remand for further proceedings.

REVERSED and REMANDED.

ANDERSON and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte:

Bruce Johnson,	Appellant,

In Re:

Bank of America, N.A.,	Respondent,

v.

Shuyler L. Moore and Yvonne R. Moore, as Trustees for the Moore Family Trust; Schuyler L. Moore and Yvonne R. Moore; Lyn-Rich Contracting Company, Inc.; Alice Guillemet; Scott Moore; Raymond Guillemet; Gordon Rockwell; Barbara Moore; Leslie Guillemet; Shawn G. Guillemet; Brandy G. Guillemet; Andre S. Moore; and Deanna M. Moore,	Defendants,

Of whom Shuyler L. Moore and Yvonne R. Moore, as Trustees for the Moore Family Trust; Schuyler L. Moore and Yvonne R. Moore; Lyn-Rich Contracting Company, Inc. are the Respondents.

Appeal From Richland County
Joseph M. Strickland, Master-In-Equity

Opinion No. 4165
Submitted September 1, 2006 – Filed October 16, 2006

AFFIRMED

Tobias G. Ward, Jr. and J. Derrick Jackson, both of Columbia, for Appellant.

Frederick A. Gertz, John M. A'Hern, and Robert F. Anderson, both of Columbia, George S. Nicholson, Jr. and Patrick J. Frawley, both of Lexington and James W. Sheedy and Susan E. Driscoll, both of Rock Hill, for Respondents.

KITTREDGE, J.: In this foreclosure action, the property was sold, by way of court order, subject to the successful bidder paying the past due property taxes and assessments. The sale resulted in surplus funds. Following the sale, Bruce Johnson, the successful bidder, sought to defeat the

previously unchallenged court order and avoid responsibility for the taxes and assessments. Johnson argued to the Master, and now to us, that section 12-49-60 of the South Carolina Code (Supp. 2005) requires the payment of the taxes and assessments from the surplus funds. The Master followed the order under which all parties and bidders operated and denied Johnson's motion to satisfy the taxes and assessments from the surplus funds. We affirm.

I.

Property on Lake Murray in Richland County was encumbered by a first mortgage held by Bank of America, a mechanic's lien held by Lyn-Rich Contracting Company, Inc., and a Richland County tax lien. The tax lien amounted to $229,138.37, approximately one-tenth of the total value of the property. The Moores, the property owners, defaulted under the mortgage for failure to make payments and Bank of America subsequently brought a foreclosure proceeding.

A foreclosure hearing was held on October 27, 2004. Bank of America, Lyn-Rich, and the Moores executed a Consent Order for Foreclosure and Sale. The foreclosure order granted Bank of America judgment against the Moores, including the right to foreclose the mortgage and judicially sell the property. In addition, the foreclosure order specifically provided that "the purchaser [is] required to pay . . . for any property taxes or assessment due and payable."

On December 30, 2004, before the scheduled date of the foreclosure sale, the Moores filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. The Bankruptcy Court granted Bank of America relief from the automatic stay to complete the foreclosure in accordance with state law. The property was then advertised pursuant to a Second Notice of Sale on May 14, 21, and 28, 2005.[1]

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[1] We further note that the Second Notice of Sale also addressed payment of taxes, ordering that "the purchaser be required to pay . . . for any property

On July 6, 2005, the property was sold. All prospective bidders had notice of the provision requiring the purchaser to pay the property taxes. Bids were made on this basis. Johnson was the highest bidder. He purchased the property for $2.2 million dollars, which resulted in surplus funds.

Johnson made the required five percent deposit on July 6, and by July 26 had deposited the remainder of the purchase price with the Court, at which point the Master issued a deed. This deed, consistent with the prior order, also noted the property was "subject to assessments, Richland County taxes, existing easements, easements and restrictions of record, and other senior encumbrances." Johnson filed his deed for the property on August 2, 2005.

Following the sale and after delivery of the deed, Johnson sought to defeat the foreclosure order and avoid his obligation to pay the taxes and related assessments. Johnson filed a motion, pursuant to section 12-49-60 of the South Carolina Code (Supp. 2005), in an attempt to have the taxes and assessments paid from the surplus proceeds. The Master issued an Order of Disbursement and denied Johnson's motion. This appeal followed.

II.

The express terms of sale, established in the foreclosure order, set the property for sale subject to outstanding tax liens. The foreclosure order stated the purchaser would be required to pay "any property taxes or assessments due and payable." This was confirmed, without challenge, at the public commencement of the sale on June 6 when all present were reminded that the property would be sold subject to any outstanding property taxes.

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taxes which become due and payable after the date of sale[.]" We view this Second Notice of Sale as consistent with the foreclosure order. Even assuming, however, that there is a conflict between the terms of the foreclosure order and Second Notice of Sale, the law is settled that the foreclosure order controls. See Bonney v. Granger, 300 S.C. 362, 364, 387 S.E.2d 720, 722 (Ct. App. 1990) ("[t]he Notice of Sale does not set forth the conditions of sale, but refers to the prior order authorizing the sale.").

The Master's deed issued to Johnson on July 26 also stated the property was "subject to assessments, Richland County taxes, existing easements, easements and restrictions of record, and other senior encumbrances." Thus, by the express terms of the sale, Johnson and all other bidders understood that liability for the outstanding tax liens would fall to the successful bidder.

Under these specific facts, we concur with the Master that it would be inequitable to allow Johnson to profit from his late motion. See BB & T of S. C. v. Kidwell, 350 S.C. 382, 387, 565 S.E.2d 316, 319 (Ct. App. 2002) ("An action to foreclose a real estate mortgage is an action in equity."); see also QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 202, 600 S.E.2d 105, 107 (Ct. App. 2004) (stating that while an appellate court is free to take its own view of the preponderance of the evidence in an action in equity, the court is not required to disregard the judge's findings).

At every stage of the proceedings, all interested parties were made aware that the property was being sold subject to tax liens. As noted, the foreclosure order specifically provided that "the purchaser [is] required to pay . . . for any property taxes or assessment due and payable." The Second Notice of Sale followed suit by placing responsibility for the taxes and assessments on the purchaser. The deed issued by the Master, which Johnson filed ten days prior to filing his motion under section 12-49-60, stated the property was "subject to assessments, Richland County taxes, existing easements, easements and restrictions of record, and other senior encumbrances."

To rewrite the terms of sale *after the sale* would be patently inequitable, especially to the other bidders who made bids knowing that a successful bid would result in the additional responsibility of approximately $230,000 in past due taxes. Johnson's post sale motion pursuant to section 12-49-60 came too late. By that time, Johnson had participated in the sale under the terms of the foreclosure order, failed to make any motion prior to sale, and filed a deed which further acknowledged the terms of sale.

Assuming Johnson may have invoked section 12-49-60 prior to the sale, equity must intervene when Johnson remained silent while all bidders

made bids based on the additional responsibility for the payment of the substantial past due taxes and assessments. Equity will not permit such an unwarranted windfall to Johnson under these circumstances. See generally Collins v. Sigmon, 299 S.C. 464, 468, 385 S.E.2d 835, 837-38 (1989) (applying the ancient maxim "equity aids the vigilant and diligent" and not those who sleep on their rights).

Furthermore, it is the long-established policy in South Carolina that "[t]he courts should be particularly jealous of the integrity of judicial sales." In re Wilson, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927). "[A]ny conduct on the part of those actively engaged in the selling or bidding [at a judicial sale] that tends to prevent a fair, free, open sale, or stifle or suppress free competition among bidders, is contrary to public policy[.]" Ex parte Keller, 185 S.C. 283, 291, 194 S.E. 15, 19 (1937). The filing of a motion under section 12-49-60 after the sale is contrary to such public policy under the circumstances here. Where all parties and potential bidders in a foreclosure sale have notice of, and do not challenge, a valid court order assigning responsibility for outstanding taxes to the successful bidder as a condition of the purchase, the successful bidder may not thereafter gain a windfall by a tardy attempt to invoke section 12-49-60.

III.

We further disagree with Johnson's argument that disbursement of sale proceeds must always track section 12-49-60. We find that the payment of taxes and related assessments from the sale proceeds under section 12-49-60 is not mandatory. Section 12-49-60 of the South Carolina Code (Supp. 2005) provides:

> When any real estate shall be sold under any writ, order or proceeding in any court, the court shall, on motion of any person interested in such real estate or in the purchase or proceeds of the sale thereof, order all taxes, assessments and penalties charged thereon

> to be paid out of the proceeds of such sale as a lien prior to all others.

The statute is not self-executing—it requires a "motion of any interested person . . . [w]hen any real estate shall be sold." The statute does not take effect unless a timely motion is made by an interested party. Just as section 12-49-60 protects and assigns priority to a tax lien, the consent order of foreclosure in this case protected the tax lien of Richland County. Thus, the policy underlying section 12-49-60 is similarly achieved by giving efficacy to the foreclosure order before us today. The foreclosure order here is in accord with well-established South Carolina law—"real property subject to taxes cannot be sold in foreclosure free of the existing tax liens, unless provision for payment is made and they are paid." Trustees of Wofford College v. Burnett, 209 S.C. 92, 107, 39 S.E.2d 155, 161 (1946). This was the law of the land in 1881, at the time the predecessor to section 12-49-60 was originally passed. See Smith v. Gatewood, 3 S.C. 333, 334 (1872) (finding purchaser of real estate purchased subject to tax lien when no provision provided otherwise and taxing authority not party to sale of property); See also 47 Am. Jur. 2d Judicial Sales § 160 (2006) ("The rule that, absent an express stipulation to the contrary in the terms of sale, a purchaser takes the property subject to valid liens ordinarily applies to liens for taxes and assessments accruing prior to the confirmation of the sale or arising after the completion of the sale.").

IV.

The judgment of the Master is

AFFIRMED.

ANDERSON and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John C. Hall, Claimant **Respondent,**

v.

United Rentals, Inc., Employer and Cambridge Integrated Services, Inc., Carrier, **Appellants.**

Appeal From Charleston County
Roger M. Young, Circuit Judge

Opinion No. 4166
Heard October 10, 2006 – Filed October 23, 2006

AFFIRMED

Darryl D. Smalls, of Columbia, for Employer/Carrier/ Appellants.

Thomas W. Greene, of Charleston, for Respondent.

ANDERSON, J.: In this workers' compensation case, the Appellate Panel of the Workers' Compensation Commission found Hall (the claimant) had not reached maximum medical improvement and ordered United/Cambridge (employer/carrier) to pay for additional medical treatment that United/Cambridge did not authorize. The circuit court affirmed and United/Cambridge appealed, contending (1) the Appellate Panel's requiring payment for unauthorized medical treatment violated section 42-15-60 of the South Carolina Code, and (2) the Appellate Panel's finding Hall had not reached MMI was not supported by "reliable, probative, and substantial evidence." We affirm.

FACTUAL/PROCEDURAL BACKGROUND

John Hall sustained a back injury while working for United Rentals Inc. on October 1, 1999. Hall was treated by Dr. James Aymond who performed a L5-S1 discectomy and a bilateral decompression. Following his back operation Hall began having right leg pain. In April 2000, Hall had additional surgery on his back. Subsequently, he began experiencing swelling and pain in his right knee. He was referred to Dr. John McCrosson, who performed a right total knee arthroplasty in February of 2001. Dr. McCrosson discharged Hall at maximum medical improvement with regard to his knee on June 29, 2001 with 37% impairment to the lower extremity. Additionally, Dr. Aymond observed that Hall had developed depression secondary to his chronic pain and referred him to Dr. Samuel Rosen for psychiatric treatment. United/Cambridge accepted the back injury and provided temporary benefits and medical treatment but denied compensability for the injury to his right leg and depression. In the initial workers' compensation action, the single commissioner found the injury to Hall's right leg and depression were causally related to the work injury. The Appellate Panel adopted the findings of the single commissioner and ordered payment of expenses related to the right leg injury and depression. The circuit court affirmed.

After the two back surgeries, Hall continued to experience back and lower extremity pain. A regimen of physical therapy, epidural steroid injections, and an array of medications, including Oxycontin, Oxycodone, Neurontin, and Bextra, was required to manage Hall's pain. The use of a temporary spinal stimulator reduced the pain in Hall's lower extremities but

did not alleviate any of his back pain. In March 2002, Dr. Aymond noted, "unfortunately, Mr. Hall is approaching the end of all possible options with respect to his discogenic pain. In my opinion, he is not a candidate for a lumbar decompression and fusion as he has multiple levels involved." Dr. Aymond indicated Hall would "likely be at maximum medical improvement" at the time of his next visit.

On June 14, 2002, Dr. Aymond opined Hall had reached maximum medical improvement and was not capable of returning to work. Dr. Aymond estimated Hall's impairment to be 14% of the spine. Hall sought a second opinion from Dr. Jeffrey Wingate regarding treatment for his back pain. Based on Dr. Wingate's review of Hall's x-rays, a previous MRI, and new discography studies, Dr. Wingate advised that conservative treatment had failed and suggested surgical intervention. After meeting with Dr. Wingate and discussing options, Hall requested United/Cambridge's authorization for surgical treatment by Dr. Wingate. United/Cambridge denied Hall's request. Nevertheless, Hall proceeded with the recommended surgery.

In June 2002, Hall underwent a posterior lumbar interbody fusion with instrumentation. Two weeks after surgery, Dr. Wingate reported "John has done well since going home. He has continued decreasing his pain medication and takes a single Lortab less than once every 6-8 hrs." On Hall's July 2002 follow up visit, Dr. Wingate noted, "[f]or the most part his back and legs feel much better." Dr. Wingate indicated Hall was "walking well and [had] return[ed] to a better activity level."

At his five-week follow up visit after surgery, Hall's chief concern was left shoulder pain. Dr. Wingate explained, "[h]e complained about the left shoulder early after surgery. He seems now to be developing a more global problem with it." Later records revealed Hall suffered a left brachial plexus injury which likely resulted from his positioning on the operating table during the back surgery performed by Dr. Wingate. In addition, Hall sustained paralysis of his left hemidiaphram during the surgery. Consequently, Hall consulted additional doctors, including Dr. Wayne Vial and Dr. George Khoury, to treat the diaphragm and shoulder injuries. However, Hall's shoulder pain continued to worsen and he experienced shortness of breath after minimal physical activity.

Notwithstanding the complications, Dr. Wingate's surgery reduced Hall's back and leg pain for a period of time. Three months after the surgery, Dr. Wingate observed, "[Hall's] having about half the level of back pain that he had pre-surgery. Overall he feels that his relief from the back and leg pain has been significant and worth the effort of going through surgery."

By May 2003, Hall was again reporting back and leg pain and it appeared the pain may be caused by the loosening of screws placed during the spinal surgery. Hall continued having shoulder pain as well, but the pain had decreased from previous reports.

Hall filed a Form 50, seeking workers' compensation coverage for Dr. Wingate's treatment. In addition, he sought payment for the treatment necessitated by the brachial plexopathy and the paralyzed diaphragm. The single commissioner found, "[t]he treatment by Dr. Wingate was necessary and tended to lessen Claimant's disability. No other alternative was offered by the Defendants." The single commissioner concluded:

> The Employer shall pay or cause to be paid all causally related medical treatment from the date of Claimant's accident and continuing. This responsibility includes but is not limited to those providers approved by Commissioner Catoe's Order of October 23, 2001, and shall in addition include the treatment of Doctors Wingate, Vial, and Khoury, and any other physician that has treated or evaluated the Claimant with reference to his back injury and his brachial plexopathy and collapsed diaphragm which resulted from complications from his two level fusion by Dr Wingate.

The Appellate Panel adopted the findings and conclusions of the single commissioner and incorporated the commissioner's order into the final decision. The circuit court affirmed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Section 1-23-380(A)(5) instructs that a reviewing court:

> may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;
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> (c) made upon unlawful procedure;
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> (d) affected by other error of law;
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> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion

S.C. Code Ann. § 1-23-380(A)(5) (Act No. 387, 2006 S.C. Acts 387, eff. July 1, 2006).

A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577,

580 (Ct. App. 2005). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005).

The substantial evidence rule of the APA governs the standard of review in a Workers' Compensation decision. Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct. App. 2002); see Lockridge v. Santens of Am., Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001) ("Any review of the commission's factual findings is governed by the substantial evidence standard."). Pursuant to the APA, this court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. Rodriguez v. Romero, 363 S.C. 80, 610 S.E.2d 488 (2005); Gibson v. Spartanburg Sch. Dist. # 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); see Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004) ("A reviewing court will not overturn a decision by the Workers' Compensation Commission unless the determination is unsupported by substantial evidence or is affected by an error of law.").

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999); Gadson, 368 S.C. at 222, 628 S.E.2d at 266. It is not within our province to reverse findings of the Appellate Panel which are supported by substantial evidence. Id.; Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004); Jones v. Georgia-Pacific Corp., 355 S.C. 413, 586 S.E.2d 111 (2003).

The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the single commissioner's findings of fact. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000); Frame, 357 S.C. at 528, 593 S.E.2d at 495. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); Smith v. NCCI Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006); DuRant v. S.C. Dep't of Health & Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct. App. 2004). Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. Brown v. Greenwood Mills, Inc., 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); see also Mullinax v. Winn Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995) ("Where the medical evidence conflicts, the findings of fact of the Commission are conclusive.").

LAW/ANALYSIS

I. Medical Treatment

A. Appellate Panel's discretion to prescribe additional medical treatment tending to lessen the period of disability.

United/Cambridge argues the Appellate Panel's order requiring United/Cambridge to pay for additional medical treatment by Drs. Wingate, Vial, Khoury, and any other physician with reference to Hall's back injury violates section 42-15-60 of the South Carolina Code. Specifically, United/Cambridge maintains Hall was required to receive only medical treatment prescribed by the authorized physician, Dr. Aymond. We disagree.

In this state, "[t]he construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason." Risinger v. Knight Textiles, 353

S.C. 69, 72, 577 S.E.2d 222, 224 (Ct. App. 2002) (quoting Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct. App. 2000)). "[T]he cardinal rule of statutory construction is that the court must ascertain and effectuate the intent of the legislature and in interpreting a statute, the court must give the words their plain and ordinary meaning without resorting to a tortured construction which limits or expands the statute's operation." Gattis v. Murrells Inlet VFW # 10420, 353 S.C. 100, 113, 576 S.E.2d 191, 198 (Ct. App. 2003) (quoting State v. Dickinson, 339 S.C. 194, 199, 528 S.E.2d 675, 677 (Ct. App. 2000)). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." Id., (quoting TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998)).

The Workers' Compensation Act does not limit the Appellate Panel's ability to order a change in medical care provided to a claimant when necessary. See id. at 114, 576 S.E.2d at 198. The Panel is afforded much discretion under Section 42-15-60. Id. Section 42-15-60 provides:

> Medical, surgical, hospital and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from the date of an injury to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability and, in addition thereto, such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer. In case of a controversy arising between employer and employee, the Commission may order such further medical, surgical, hospital or other treatment as may in the discretion of the Commission be necessary. During the whole or any part of the remainder of disability resulting from the injury the employer may, at his own option, continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept an attending physician, unless otherwise ordered by the Commission and, in addition, such surgical and hospital service and supplies as may be deemed necessary by such attending physician or the Commission. The refusal of an employee to accept

> any medical, hospital, surgical or other treatment when provided by the employer or ordered by the Commission shall bar such employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Commission the circumstances justified the refusal, in which case the Commission may order a change in the medical or hospital service.

S. C. Code Ann. § 42-15-60 (Supp. 2005) (emphasis added).

South Carolina has a rich jurisprudential history in the area of medical care. The medical benefits provision of the Workers' Compensation Act allows the Appellate Panel to award medical benefits beyond ten weeks from the date of injury only where it determines such medical treatment would tend to lessen the period of disability. Dykes v. Daniel Const. Co., 262 S.C. 98, 202 S.E.2d 646 (1974); Williams v. Boyle Const. Co., 252 S.C. 387, 166 S.E.2d 550 (1969); Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999). Generally, even though a claimant has reached maximum medical improvement (MMI), if additional medical care or treatment would "tend to lessen the period of disability," then the Appellate Panel may be warranted in requiring such treatment to at least maintain the claimant's degree of physical impairment. Lee v. Harborside Café, 350 S.C. 74, 81, 564 S.E.2d 354, 358 (Ct. App. 2002). "However, the fact a claimant has reached maximum medical improvement does not preclude a finding the claimant may still require additional medical care or treatment." Dodge, 334 S.C. at 581, 514 S.E.2d at 596. Therefore, "an employer may be liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability despite the fact the claimant has returned to work and has reached [MMI]." Lee, 350 S.C. at 81, 564 S.E.2d at 358 (quoting Dodge, 334 S.C. at 583, 514 S.E.2d at 598). Concomitantly, a finding of MMI does not necessarily establish that the claimant is no longer disabled; unless the Appellate Panel finds disability has ended, it is presumed to continue. See Swinton v. S.C. Dep't of Mental Health, 314 S.C. 202, 203-04, 442 S.E.2d 215, 216 (Ct. App. 1994) ("The single commissioner's finding of maximum medical improvement did not establish that [the claimant] was no longer disabled as of May 21, 1990. Without such a finding, [the claimant's] disability was presumed to continue."); see also O'Banner v.

Westinghouse, Elec. Corp., 319 S.C. 24, 28, 459 S.E.2d 324, 327 (Ct. App. 1995) (renewing prescriptions for pain killer was not inconsistent with finding MMI; rather physician's report concluding employee had reached MMI, coupled with continuation of prescriptive medicines constituted substantial evidence from which Appellate Panel could conclude medication helped alleviate employee's remaining symptoms, but medical condition would not improve); Scruggs v. Tuxcarora Yarns, Inc., 294 S.C. 47, 50, 362 S.E.2d 319, 321 (Ct. App. 1987) (finding substantial medical evidence existed that claimant, who was still undergoing physical therapy, had reached MMI with respect to her back injury);

In the seminal case of Dodge v. Bruccoli, Clark, Layman, Inc., the circuit court held the Appellate Panel erred as a matter of law in concluding Bruccoli was no longer required to pay Dodge's medical benefits because he had reached MMI. 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999). Citing section 42-15-60, this court agreed, instructing that "[t]his section clearly 'allows the [Appellate Panel] to award medical benefits beyond 10 weeks from the date of injury only where the [Panel] determines such medical treatment would tend to lessen the period of disability.' " Id. at 580, 514 S.E.2d at 596 (quoting Sanders v. Litchfield Country Club, 297 S.C. 339, 344, 377 S.E.2d 111, 114 (Ct. App. 1989)). Dodge's physician opined he required continued medication and treatment to maintain his level of functioning. On remand from the circuit court "[t]he [Appellate Panel] awarded Dodge further medical treatment and medication which would prevent his partially disabling condition from becoming incapacitating and lessen the ultimate period of disability." Id. at 578, 514 S.E.2d at 595.[1]

Subsequently, in Adkins v. Georgia-Pacific Corp., the Appellate Panel concluded a worker who suffered a weakening of the tympanic membrane, but had reached MMI with no permanent disability, was nevertheless entitled to ongoing medical benefits. 350 S.C. 34, 564 S.E.2d 339 (Ct. App. 2002). Adkins needed continued medical treatment for chronic ear infections which

[1] Bruccoli appealed the Appellate Panel's ruling on remand. This court then remanded the Appellate Panel's ruling for the purposes of determining whether continued medical care after MMI would lessen Dodge's period of disability.

her physician opined could be controlled by medication. The treatment eliminated Adkin's nausea and dizziness, allowing her to work at her normal occupation without interruption. The court of appeals reversed the circuit court's ruling that Adkins was not entitled to future medical benefits, concluding:

> [o]nce it is determined the claimant suffered a compensable injury, South Carolina law provides future medical costs can be awarded if the [Appellate Panel] determines the award will tend to lessen the time during which the claimant is unable to earn, in the same or other employment, the wages he or she received at the time of the injury.

Id. at 37, 564 S.E.2d at 340. Relying on section 42-15-60, this court decided the evidence supported the Appellate Panel's finding that, even though Adkins was not disabled, future medical treatment would tend to lessen her period of disability by keeping her from becoming disabled. Id. at 38, 564 S.E.2d at 341.

In the case of a permanently disabled claimant, the legislature anticipated the need for continuing medical care and treatment throughout the claimant's lifetime. When "total and permanent disability results, reasonable and necessary . . . treatment or care shall be paid during the life of the injured employee . . . ." S.C. Code Ann. § 42-15-60 (Supp. 2005). Accordingly, though a claimant may remain permanently disabled, "further medical treatment may improve [the claimant's] quality of life and ability to cope without improving the overall disability rating." Pearson v. JPS Converter & Indus. Corp., 327 S.C. 393, 399, 489 S.E.2d 219, 222 (Ct. App. 1997).

In the case sub judice, Hall sought treatment from United/Cambridge's authorized provider, Dr. Aymond. However, Dr. Aymond opined further surgical treatment was not advisable. Hall remained in pain and sought a second opinion. Upon receiving the opinion of Dr. Wingate indicating further surgical intervention may be helpful, Hall specifically requested authorization for the suggested treatment. In addition, Hall testified that if United/Cambridge had, instead, referred him to another doctor for an opinion or treatment, he would have complied with that referral. United/Cambridge

nevertheless denied Hall's request. Apodictically, as in Dodge and Adkins, the Appellate Panel had the discretion to authorize additional medical treatment that would tend to lessen Hall's period of disability.

The evidentiary record fully supports the Appellate Panel's finding that the treatment by Dr. Wingate was necessary and beneficial. The pain in Hall's back and lower extremities continued to worsen after the two surgeries performed by Dr. Aymond. The surgery by Dr. Wingate lessened this pain significantly for nine months or more. Unfortunately, while in surgery, Hall suffered complications necessitating additional medical treatment. Yet the main purpose of the surgery, to relieve the back pain, was successful. Hall testified, "I do not have the degree of pain that I had before I had the fusion. . . . I, in fact, can say I felt overall better." Dr. Wingate's medical reports indicate that shortly after surgery Hall experienced increasing relief from back pain and improved mobility. At just over three months after the operation, Hall reported significant relief, having about half the level of back and leg pain he had prior to surgery. Nine months after surgery, Hall's back and hip pain was no longer the severe pain he had before surgery. Conclusively, the Appellate Panel's decision to require additional medical treatment that tended to lessen Hall's period of disability and provided some relief for his intractable pain is in accord with the discretion authorized in section 42-15-60. Though Hall remained essentially disabled, the additional treatment improved his overall quality of life and ability to cope.

B. Appellate Panel's discretion to authorize medical providers.

United/Cambridge contends the Appellate Panel erred in requiring payment to unauthorized physicians because section 42-15-60 obligated Hall to accept treatment only from an authorized treating physician. We disagree.

The Worker's Compensation Act provides that the employer names the authorized treating physician once a case has been accepted. S.C. Code Ann. Regs. 67-509 (1976) ("The employer's representative chooses an authorized health care provider and pays for authorized treatment."); Clark v. Aiken County Gov't, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005). Generally, a claimant may obtain compensation only by accepting services from the employer's choice of providers. Id. However, a claimant is not required to

sacrifice much-needed treatment merely to comply with an employer's choice of physicians. See Risinger v. Knight Textiles, 353 S.C. 69, 73, 577 S.E.2d 222, 224-25 (2002) (holding "the language of S.C. Code Ann. § 42-15-60 does not allow an employer to dictate the medical treatment of injured employees.").

The Appellate Panel, when necessary, may override the employer's choice of providers and order a change in the medical or hospital service provided. Gattis v. Murrells Inlet VFW # 10420, 353 S.C. 100, 576 S.E.2d 191, (Ct. App. 2003). Ultimately, the Appellate Panel is authorized and empowered to order further medical care and payment for that medical care when controversies arise between a claimant and the employer. Clark, 366 S.C. at 112, 620 S.E.2d at 104-05; Gattis, 353 S.C. at 111, 576 S.E.2d at 196-97. The controlling language in section 42-15-60 provides:

> [i]n case of a controversy arising between employer and employee, the Commission may order such further medical, surgical, hospital or other treatment as may in the discretion of the Commission be necessary . . . and the employee shall accept an attending physician, unless otherwise ordered by the Commission and, in addition, such surgical and hospital service and supplies as may be deemed necessary by such attending physician or the Commission.

S.C. Code Ann. § 42-15-60 (Supp. 2005) (emphasis added).

In Clark, this court analyzed Ford v. Allied Chemical Corp., 252 S.C. 561, 167 S.E.2d 564 (1969) with regard to this issue. As explicated in Clark, the claimant in Ford sustained a neck and head injury. His treating physician determined nothing further could be done to alleviate the claimant's pain and "suggested only that he buy some aspirin and return to work." Ford, 252 S.C. at 565, 167 S.E.2d at 566. The claimant's family physician referred him to another orthopedic surgeon who placed claimant in the hospital for further treatment. Id. The South Carolina Supreme Court affirmed the Appellate Panel's conclusion the claimant was justified in seeking care from a doctor other than his employer's authorized medical provider and awarded compensation. Id. at 567, 167 S.E.2d at 567.

Under similar circumstances in Clark, this court reasoned: "Dr. Epstein [the authorized treating physician] indicated Clark was not a suitable candidate for treatment and referred him for pain management." Clark, 366 S.C. at 111-112, 620 S.E.2d at 104. That treatment was unsuccessful. Id. at 112, 620 S.E.2d at 104. "Because Clark related the continuing symptoms to the treating physicians and was unable to obtain relief, he was justified in seeking treatment elsewhere." Clark, 366 S.C. at 114, 620 S.E.2d at 105. We explained:

> Although the more appropriate procedure would have been for Clark to seek an order from the full commission before engaging Dr. Greenberg [unauthorized physician] for treatment and surgery, we find that under Ford the full commission was not outside its discretion in ordering the County to pay for the surgery and continuing treatment, once it determined the treatment was medically necessary.

Id.

In the present case, Dr. Aymond presented only conservative options to treat Hall's worsening condition, and United/Cambridge did not offer an alternative approach through another physician or allow Hall to seek a second opinion. On the other hand, Dr. Wingate, after conducting additional diagnostic studies, presented Hall with the possibility of relief from his intractable pain. Luculently, as in Clark and Ford, the Appellate Panel had discretion to authorize medically necessary treatment by Dr. Wingate and to require payment of Hall's treatment and causally related medical expenses.

United/Cambridge complains Hall's treatment by Dr. Wingate resulted in new injuries requiring additional medical treatment by Drs. Vial and Khoury. United/Cambridge asserts it should not be responsible for the medical costs associated with those consequential injuries. We disagree.

Section 42-15-70 of the South Carolina Code addresses the liability of the employer for medical treatment of injuries resulting from medical treatment of the work-related injury. Specifically, the statute states:

> the employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident and shall be compensated for as such.[2]

S.C. Code Ann. § 42-15-70 (Supp. 2005) (emphasis added); see Mullinax v. Winn Dixie Stores, Inc., 318 S.C. 431, 436, 458 S.E.2d 76, 79 (Ct. App. 1995) (citing Whitfield v. Daniel Constr. Co., 226 S.C. 37, 41, 83 S.E.2d 460, 462 (1954) for the proposition that new injuries resulting indirectly from treatment for the original injury are compensable).

Dr. Wingate's medical records show Hall sustained brachial plexopathy and paralysis of the left diaphragm that "most probably" resulted from positioning on the operating table during surgery. Drs. Vial and Khoury concurred with Dr. Wingate's assessment. Consequently, Hall's new injuries are deemed part of the injury resulting from the original accident and are, therefore, compensable by United/Cambridge.

II. MMI

United/Cambridge avers the circuit court erred when it affirmed the Appellate Panel's finding Hall had not reached MMI. United/Cambridge urges no "reliable, probative, and substantial evidence" existed to support the Appellate Panel's conclusion. We disagree.

MMI is a term used to indicate that a person has reached such a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment. Bass v. Kenco Group, 366 S.C. 450, 622 S.E.2d 577 (Ct. App. 2005); Lee v. Harborside Cafe, 350 S.C. 74, 564 S.E.2d 354 (Ct. App. 2002). "MMI is a factual determination left to the discretion of

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[2] There is no mention in the record of a malpractice claim, nor does this court address the viability of such a claim. We cite S.C. Code Ann. § 42-15-70 solely to illustrate the legislature's intention that injuries resulting from medical treatment of a work-related injury are to be compensated as such.

the [Appellate] [P]anel." Gadson v. Mikasa Corp., 368 S.C. 214, 224, 628 S.E.2d 262, 268 (Ct. App. 2006). "It is not within our province to reverse findings of the [A]ppellate [P]anel which are supported by substantial evidence." Bass, 366 S.C. at 458-59, 622 S.E.2d at 581. "Any disagreements in the evidence are to be resolved exclusively by the Appellate Panel." Martin v. Rapid Plumbing, 369 S.C. 278, 278, 631 S.E.2d 547, 553 (Ct. App. 2006) (citing Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999) (instructing that the Appellate Panel's findings of fact are conclusive as to conflicting evidence, whether from different witnesses or from the same witness,)); Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 535 S.E.2d 146 (Ct. App. 2000). "This court's review is restricted to the evidence considered by the [A]ppellate [P]anel in reaching its decision." Martin, 369 S.C. at 278, 631 S.E.2d at 553.

Substantial evidence supports the Appellate Panel's finding Hall had not reached MMI. When released by Dr. Aymond, Hall required a complex regimen of narcotic medication and epidural steroid injections to manage his pain. Dr. Wingate prescribed further diagnostic studies, including discography. Based on those results and Dr. Wingate's opinion that conservative treatment had failed, Hall underwent surgery. Approximately two months after surgery Hall was able to discontinue most narcotic pain medication and nearly one year post-operatively Hall's low back and hip pain remained better than before surgery. Dr. Wingate's diagnostic findings, the failure of conservative treatment in relieving Hall's intractable pain, and the significant, albeit temporary, improvement in Hall's back and leg pain is sufficient evidence to affirm the Appellate Panel's finding Hall had not reached MMI.

United/Cambridge claims the Appellate Panel improperly weighed the medical evidence in concluding Hall had not reached MMI. We disagree.

Expert medical testimony is designed to aid the Appellate Panel in coming to the correct conclusion. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); Tiller, 334 S.C. at 340, 513 S.E.2d at 846; Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Therefore, the Appellate Panel determines the weight and credit to be given to the expert testimony. Tiller, 334 S.C. at 340, 513 S.E.2d at 846; Hargrove,

360 S.C. at 293-94, 599 S.E.2d at 613; Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92 (Ct.App.2002). Once admitted, expert testimony is to be considered just like any other testimony. Tiller, 334 S.C. at 340, 513 S.E.2d at 846; Hargrove, 360 S.C. at 294, 599 S.E.2d at 613; Corbin, 351 S.C. at 624, 571 S.E.2d at 98. Although medical testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record. Hargrove, 360 S.C. at 294, 599 S.E.2d at 613; see Tiller, 334 S.C. at 340, 513 S.E.2d at 846 (confirming that medical testimony should not be held conclusive irrespective of other evidence).

In the instant case, the Appellate Panel was confronted with conflicting expert evidence. Dr. Aymond declared he believed Hall reached MMI and estimated 14% impairment of Hall's spine. Dr. Wingate, on the other hand, determined further treatment was possible and would alleviate some of Hall's pain and disability. Moreover, after the surgery by Dr. Wingate, Hall's condition improved with regard to his back pain, lower extremity pain, and mobility. Considering the record as a whole, evidence existed which would allow reasonable minds to reach the conclusion the Appellate Panel reached. Accordingly, the Appellate Panel did not improperly determine the weight and credit it assigned the expert evidence in finding Hall had not reached MMI.

CONCLUSION

We hold section 42-15-60 authorized the Appellate Panel, in its discretion: (1) to order additional medical care that tended to lessen the claimant's period of disability, and (2) to order treatment, when necessary, from medical providers not previously authorized by the employer.

Substantial evidence exists to substantiate that the treatment by Dr. Wingate was necessary and beneficial to lessen Hall's disability and to support the Appellate Panel's determination that Hall had not yet reached MMI at the time of the hearing. In addition, the treatment of the new injuries resulting from the medical treatment of Hall's work-related injury is compensable by United/Cambridge.

Accordingly, the decision is of the circuit court is

AFFIRMED.

HUFF, J. and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ed Frierson, IV, Virginia S. Frierson, and Allie S. Frierson,	Respondents,
v.	
David L. Watson, Patricia R. Watson, and Carolina First Bank,	Defendants,
of whom David L. Watson is the	Appellant.

Appeal From Pickens County
D. Garrison Hill, Circuit Court Judge

Opinion No. 4167
Submitted October 1, 2006 – Filed October 23, 2006

AFFIRMED

C. Nicholas Lavery, Christopher G. Olson and Ronnie L. Smith, all of Clemson, for Appellant.

James C. Alexander, of Pickens, for Respondents.

GOOLSBY, J.: Ed Frierson, IV, Virginia Frierson, and Allie S. Frierson (collectively, the "Friersons") brought this declaratory judgment action against David L. Watson and others to establish an easement for the use of a hallway between two adjoining buildings. The circuit court granted summary judgment to the Friersons, finding they had established an easement for the hallway. Watson appeals. We affirm.[1]

FACTS

The Friersons[2] have a two-story building at the corner of East Main Street and Pendleton Street in Easley, South Carolina. The building shares a common wall with an adjacent two-story building owned by Watson and his wife.[3] An outdoor stairway located on Watson's property provides access to the second floor of both buildings. This dispute arose when Watson began to construct apartments on the second floor of his building and proposed to close off a connecting hallway at the top of the stairs. The Friersons assert they have an easement to use the outdoor stairway as well as the hallway to access the second floor of their building.[4] They allege Watson's construction violates their easement because it would deny them access to the second floor. Watson does not dispute an easement exists for the stairway, but

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

[2] Virginia Frierson held title to the property when this litigation began. Virginia Frierson subsequently died and her sons, Ed Frierson, IV and Allie S. Frierson, as the personal representatives of her estate, were substituted for her in this action.

[3] Watson and his wife, Patricia, are the title holders to the property; however, the Notice of Appeal names Watson as the appealing party.

[4] According to the Friersons' Amended Complaint, the easement they seek is for the use of "28 feet up the stairway and 40 feet down the hallway."

maintains there is no easement for the hallway and the Friersons would not be denied access to the upper floor of their building because there is a stairway inside the Frierson building.

A review of the real estate records shows the Friersons' predecessors-in-interest, E.C., E.O., and D.M. Frierson, purchased the building in 1929 from the "Estate of R.F. Smith, Inc." The 1929 deed, dated January 14 and recorded on January 23, expressly conveyed "an easement in a certain four foot stair-way in the back of the building, with right of ingress and egress on said stairway to the second story of said building."

On January 21, 1929, two days before the deed was recorded, the parties to the sale executed a "Memorandum of Agreement" concerning an easement for the use of the hallway. Although the agreement was signed, it was never recorded. The agreement stated in relevant part:

> [T]he party of the first part [Estate of R.F. Smith, Inc.] has sold to the parties of the second part [E.C., E.O. and D.M. Frierson], a certain brick building at the corner of Main and Pendleton Streets, the second story of which is not partitioned, but one-half belongs to each of the parties hereto. There are offices constructed over the building of the parties of the second part covering practically the width of their building. As a part of the consideration of the sale of this property, the party of the first part grants to the parties of the second part, the right to use the hall-way on the second floor as long as the said room remains unpartioned [sic] by brick and continuous through to the roof.

The Friersons currently use the first floor of their building to operate a drug store. Over the years, the family used the second floor for a variety of purposes. At one point, it was a Masonic lodge. Later, the family rented the second story to doctors, dentists, and others as office space and visitors used the hallway to access those offices. The second floor eventually became

unusable and the family utilized it for storage and for private office space. The Frierson building passed through the estate of E.O. Frierson, one of the original parties named in the deed, to Virginia Frierson's husband, E.C. Frierson, III, and then through the husband's estate to Virginia.

In 2002, Watson and his wife purchased the two-story building adjacent to the Friersons' building from Goodwill Industries of Upper South Carolina, Inc. The deed, recorded June 6, 2002, noted an easement as follows: "This conveyance is made subject to an easement granted E.C. Frierson, et al. to use the stairway along this common line as ingress and egress to the second story of the Frierson building (See Deed Book 3-V at Page 229)." The 2002 deed also referenced "a plat prepared by J.C. Smith & Associates, Surveyors, for Goodwill Industries of Upper South Carolina, Inc. dated April 23, 2002 . . . ." The plat showed access to the second floor via an external door, a twenty-eight foot stairway, and a forty-foot portion of an upstairs hallway.

Watson's closing attorney wrote a title opinion on June 3, 2002, prior to the closing, noting Goodwill was the owner of the property subject to easements for use of the exterior door, stairway, and hallway:

> Goodwill Industries of Upper South Carolina, Inc. is the fee simple owner of said property subject, however, to the following exceptions . . . Easement as to Tract No. 2., granted to E.C. Frierson, E.O. Frierson and D.M. Frierson, their heirs and assigns . . . and such easements or rights-of-way to the exterior door, stairwell and hallway as [shown] on a plat dated April 23, 2002, by Smith Surveyors, Inc. for Goodwill Industries of Upper South Carolina, Inc.

Following the purchase, Watson began constructing apartments on the second floor of their building. He planned to place one of those apartments where the hallway was located. The Friersons brought this declaratory judgment action to establish an easement to the hallway. They also sought an injunction to stop Watson's construction and additionally asserted claims for trespass and breach of contract. The Friersons claimed Watson's

construction violated their easement by eliminating the hallway, which denied them access to the second floor of their building.

During his deposition for discovery, Watson testified that he saw the survey containing the hallway easement either at closing or up to one week prior to closing, but he did not realize until after closing that the survey was actually part of the deed. Watson further testified that he received (1) either a copy of the 1929 deed or a document including the same language as the deed that granted an easement for the stairway and (2) a copy of the subsequent Memorandum of Agreement from 1929 that granted an easement for the hallway. Also prior to the closing, Watson and a previous owner of the building had a conversation about an ongoing dispute with the Friersons about the hallway; during this conversation the previous owner informed Watson that the Friersons were claiming a right to use the hallway. Watson acknowledged that an easement to only the top of the stairway served no purpose for the Friersons without some way to access their second floor from it.

The Friersons moved for summary judgment. After a hearing, the circuit court determined the Friersons had established an easement for use of the hallway by grant and by prescription and granted the Friersons' motion. Watson appeals.

STANDARD OF REVIEW

Under the South Carolina Rules of Civil Procedure, the trial court may determine summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); see also Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.").

LAW/ANALYSIS

On appeal, Watson contends the circuit court erred in granting summary judgment to the Friersons and determining they had established an easement by grant to use the hallway. Specifically, Watson asserts the 1929 deed granting an easement for use of the stairway does not refer to the hallway and the Memorandum of Agreement granting the hallway easement was not recorded.

"An easement is a right which one person has to use the land of another for a specific purpose." Steele v. Williams, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944). This right of way over land may arise in three ways: (1) from necessity, (2) by grant, and (3) by prescription. Id. at 132, 28 S.E.2d at 647-48; see also Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965) ("One of the ways of creating an easement is by an express written grant.").

"A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." Sandy Island Corp., 246 S.C. at 419, 143 S.E.2d at 806.

" 'A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments.' " Binkley v. Rabon Creek Watershed Conservation Dist., 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (quoting 28A C.J.S. Easements § 57 (1996)). Both deeds and easements are valid to subsequent purchasers without notice when they are recorded. S.C. Code Ann. § 30-7-10 (Supp. 2005). The purpose of the

recording statute is to protect a subsequent buyer without notice. Burnett v. Holliday Bros., 279 S.C. 222, 225, 305 S.E.2d 238, 240 (1983). Additionally, one who already has notice of the existence of any instrument will be bound by such notice whether the instrument is recorded or not. First Presbyterian Church v. York Depository, 203 S.C. 410, 416, 27 S.E.2d 573, 576 (1943).

Notice of a deed is notice of its entire contents and whatever matters one would have learned upon the inquiry that the instrument made it one's duty to pursue. Binkley, 348 S.C. at 71, 558 S.E.2d at 909. Further, "where a deed describes land as is shown as a certain plat, such becomes a part of the deed." Carolina Land Co. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975). The law imputes to a purchaser of real property notice of the recitals contained in the written instruments forming the purchaser's chain of title and charges him with the duty of making such reasonable inquiry and investigation as is suggested by the recitals and references therein contained. McDonald v. Welborn, 220 S.C. 10, 16, 66 S.E.2d 327, 330 (1951); LoPresti v. Burry, 364 S.C. 271, 276, 612 S.E.2d 730, 732-33 (Ct. App. 2005); see also S. Ry., Carolina Div. v. Howell, 79 S.C. 281, 286, 60 S.E. 677, 679 (1908) (finding the equivalence of notice in circumstances where one has knowledge of such facts as were sufficient to put one on inquiry, which if pursued with due diligence, would have led to the knowledge of one's rights).

An easement by grant is not required to be recorded to be valid. Although notice is assumed when a document conveying an interest in real property is recorded, recording is not necessary if the buyer has actual notice. In this case, Watson testified regarding the numerous ways in which he knew about the hallway easement - his deed contained a survey noting the hallway easement and the previous owner had informed him of an ongoing dispute over the hallway. Further, Watson testified that he received a document that granted the easement to the stairway and that he knew an easement only to the stairway itself provided the Friersons with no way of accessing their second story from the stairway. Additionally, Watson's attorney prepared a title opinion which included the hallway easement and, most importantly, Watson actually received a copy of the unrecorded document granting the hallway easement. Watson, moreover, testified at his deposition that he has been involved in purchasing and developing real estate for at least ten years.

As the circuit court noted in its order, "Watson is a sophisticated businessman experienced in real estate." The unrecorded document clearly granted an easement to the hallway and Watson had the document prior to closing. We therefore hold the circuit court properly granted summary judgment to the Friersons on the basis they had established an easement by grant.[5] Accordingly, the order of the circuit court is

AFFIRMED.

BEATTY and WILLIAMS, JJ., concur.

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[5] Because we affirm the circuit court's award of summary judgment to the Friersons on the basis they established their right to an easement by grant, we need not address their entitlement to summary judgment on the additional basis that they had established the existence of an easement by prescription. See Matthews v. Dennis, 365 S.C. 245, 248 n.2, 616 S.E.2d 437, 439 n.2 (Ct. App. 2005) (noting where the court affirmed the existence of an easement by prescription, it was unnecessary to address whether there was also an easement by necessity); see also Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal); Weeks v. McMillan, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous.").