The Supreme Court of South Carolina

RE: Attorney Information System

ORDER

Last year, the first phase of the Attorney Information System (AIS) was implemented. As part of the initial implementation, members of the South Carolina Bar (including those holding limited certificates to practice law) and foreign legal consultants licensed by this Court were required to update and verify their contact information before paying their license fees for 2012.

On January 1, 2013, amendments to Rules 405, 409, 410, 414, 415, 419 and 424 of the South Carolina Appellate Court Rules (SCACR) will become effective. Under these amendments, attorneys and foreign legal consultants will have a membership class and status as defined by Rule 410, SCACR. The license fees for 2013 for each attorney or foreign legal consultant will be based on this new membership class and status.

In the second phase implementation of the AIS, the AIS information for each attorney or foreign legal consultant now includes the new membership class and status for that attorney or foreign legal consultant. Further, in addition to the contact, admission, law school and certification information that was included in the first phase, AIS has been further enhanced to show specializations under Rule 408, SCACR, and any court actions such as suspensions, disbarments, transfers to incapacity inactive status and reinstatements that are related to the attorney or foreign legal consultant.

To facilitate the implementation of the second phase of the AIS, attorneys and foreign legal consultants licensed in this State shall, by ***December 13, 2012***, log-

on, update and verify their AIS information. Instructions for doing so will be sent out with the 2013 license fee statements from the South Carolina Bar. Attorneys and foreign legal consultants who have not verified their AIS information will not be allowed to pay their license fees for 2013 until they have done so.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
November 13, 2012

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41
November 14, 2012
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Richard Bill Niles, Jr., Appellant.

Appellate Case No. 2009-121246

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Published Opinion No. 5034
Heard February 14, 2012 – Filed September 12, 2012
Withdrawn, Substituted and Refiled November 14, 2012

REVERSED AND REMANDED

Robert Michael Dudek, South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Brendan J. McDonald, all of Columbia, for Respondent.

WILLIAMS, J.: On appeal, Richard Bill Niles, Jr. (Niles) argues the circuit court erred in declining to charge the jury on voluntary manslaughter because there was evidence that Niles was not the first aggressor. Niles asserts the circuit court incorrectly reasoned Niles was either acting in self-defense or shot the decedent during the commission of an armed robbery. Because voluntary manslaughter and

self-defense are not mutually exclusive, Niles contends he was entitled to a charge on voluntary manslaughter.[1] We reverse and remand.

FACTS/PROCEDURAL HISTORY

On April 9, 2007, James Salter (Salter) was shot in a Best Buy parking lot in Myrtle Beach, South Carolina. Salter later died from his injuries. Niles, his fiancé Mokeia Hammond (Hammond), and Ervin Moore (Moore) were arrested and charged with murder, armed robbery, and possession of a firearm during the commission of a violent crime. Moore entered into a plea agreement with the State whereby Moore pled guilty to armed robbery, voluntary manslaughter, and possession of a firearm during the commission of a violent crime in exchange for his testimony against Niles and Hammond. Niles and Hammond were tried jointly on March 9, 2009.

At Niles' and Hammond's trial, Moore testified that on April 9, 2007, Niles and Hammond picked up Moore and headed to the beach where the trio "made a couple of drug sales at a couple of motels." Moore stated, "[W]e were smoking blunts in the car . . . [and when] we ran out of weed . . . we said we wanted to get some more weed." Moore maintained Niles "made a couple of phone calls," and they "ended up in the Best Buy parking lot." Moore testified Niles said "he was going to do a lick," which Moore understood to mean they were going to rob the drug dealer, later identified as Salter. Moore stated his job in the robbery was "to identify the weed" for Niles.

Upon arriving at the Best Buy parking lot, Moore exited his vehicle and got into Salter's vehicle. Moore stated Salter pulled a large ziploc bag of marijuana out from under his seat so Moore could see it. Moore maintained that by the time he inspected the marijuana, exited Salter's vehicle, and returned to the vehicle with Hammond, Niles had exited their vehicle. Moore testified he informed Niles that he saw the marijuana and stated, "The next thing I knew, I just heard two shots and I seen [Niles], he jumped back in the back seat behind [Hammond]." Moore further stated "after . . . [Niles] jumped in [the vehicle], after them two shots then the other guy fired a shot." Moore testified that after both Niles and Salter continued to fire shots at each other, Hammond drove out of the parking lot.

[1] Niles did not appeal his convictions for armed robbery and possession of a firearm during the commission of a violent crime.

Though Moore testified on direct examination "the other guy didn't shoot until after [Niles] shot," on cross-examination, Moore admitted he did not actually see Niles shoot first. Moore stated he originally testified Niles shot first because Niles admitted he shot first when Niles jumped back into the vehicle.

Niles testified in his own defense. He denied he told Moore he was "going to do a lick" and testified Moore asked him to purchase a pound of marijuana for him. Niles affirmed that when they pulled into the Best Buy parking lot, Moore got out of the vehicle and into Salter's vehicle. Niles testified he was talking to Hammond about their upcoming wedding when Hammond suddenly told him, "Baby, they are fighting." Niles stated he looked over to Salter's vehicle and observed Moore and Salter "tussling in the car." Niles stated he noticed Moore trying to exit Salter's vehicle and heard Salter state to Moore, "[Y]ou ain't getting out of this car with my weed without no money." Niles maintained that when Moore exited Salter's vehicle and jumped into the vehicle with Niles and Hammond, Salter pulled out a gun and began shooting at the vehicle that Niles, Hammond, and Moore occupied. Niles testified, "I grabbed my pistol and that's when I shot two times." Niles maintained he was being shot at constantly by Salter and he shot back.

The circuit court charged the jury on self-defense, but it refused Niles' request to charge the jury on voluntary manslaughter. The circuit court refused the voluntary manslaughter charge reasoning that "either the victim started shooting and Mr. Niles was acting in self-defense or Mr. Niles started shooting . . . [and] killed the victim during the commission of an armed robbery."

Niles was convicted of murder, armed robbery, and possession of a firearm during the commission of a violent crime.[2] Niles received a thirty-year sentence for murder and armed robbery and a five-year sentence for the conviction of possession of a firearm during the commission of a violent crime, all to be served concurrently. Niles appeals.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the circuit court's factual findings unless they are clearly erroneous. *Id.* If any evidence supports a jury charge, the circuit court should grant the request.

[2] While Niles was convicted of all charges, Hammond was only convicted of armed robbery and sentenced to fifteen years' imprisonment.

State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). To warrant reversal, a circuit court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant. *Id.*

LAW/ANALYSIS

Niles argues the circuit court erred in failing to charge the jury on voluntary manslaughter because conflicting testimony was presented to support a jury charge on voluntary manslaughter.

To the contrary, the State asserts a jury charge of voluntary manslaughter was not appropriate in this case. The State argues only two scenarios are possible from the evidence presented at trial: (1) Salter shot first, and Niles acted in self-defense by returning fire; or (2) Niles shot at Salter first, committing murder during the commission of an armed robbery. The State contends that Niles failed to present evidence showing legal provocation or sudden heat of passion, which are both prerequisites to support a charge on voluntary manslaughter. We agree with Niles.

"The evidence presented at trial determines the law to be charged to the jury." *State v. Hernandez*, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010). "To warrant a court's eliminating the offense of [voluntary] manslaughter, it should very clearly appear that there is *no evidence whatsoever* tending to reduce the crime from murder to [voluntary] manslaughter." *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000) (emphasis added). In determining whether the evidence requires a charge of voluntary manslaughter, the circuit court views facts in a light most favorable to the defendant. *State v. Byrd*, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996).

"Voluntary manslaughter is the unlawful killing of a human being in [a] sudden heat of passion upon sufficient legal provocation." *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). Both sufficient legal provocation and heat of passion must be present at the time of the killing to support a jury instruction on voluntary manslaughter. *Hernandez*, 386 S.C. at 660, 690 S.E.2d at 585.

Furthermore, a court is permitted to charge a jury on both voluntary manslaughter and self-defense if supported by the evidence. In *State v. Gilliam*, 296 S.C. 395, 396-97, 373 S.E.2d 596, 597 (1988), our supreme court held a jury charge on self-defense and voluntary manslaughter are not mutually exclusive, stating:

> Both self-defense and the lesser included offense of voluntary manslaughter should be submitted to the jury if supported by the evidence. The rationale for this rule is that the jury may fail to find all the elements of self-defense but could find sufficient legal provocation and heat of passion to conclude the defendant was guilty of voluntary manslaughter.

(internal citation omitted).

Here, we find Niles' testimony that Salter fired the first shot at him, and he subsequently returned fire provides sufficient evidence to support a jury charge on voluntary manslaughter. Viewing the evidence in a light most favorable to Niles, we believe a jury could find Niles acted in a heat of passion upon sufficient legal provocation, thus supporting a voluntary manslaughter jury charge.

I. Legal Provocation

First, we find there is evidence, albeit conflicting, that Salter sufficiently provoked Niles.

An unprovoked attack with a deadly weapon or an overt threatening act can constitute sufficient legal provocation to support a jury charge on voluntary manslaughter. *State v. Starnes*, 388 S.C. 590, 597-98, 698 S.E.2d 604, 608 (2010). In *Gilliam*, our supreme court found adequate legal provocation to support a jury charge on voluntary manslaughter from the defendant's testimony that the victim made threatening statements to the defendant, drew a gun, and shot at the defendant. *Gilliam*, 296 S.C. at 396-97, 373 S.E.2d at 597. Further, in *State v. Linder*, 276 S.C. 304, 306-07, 278 S.E. 2d 335, 337 (1981), our supreme court held the evidence supported a jury charge on voluntary manslaughter when, under the defendant's version of the facts, a patrolman began shooting at the defendant before the defendant reached for his weapon, returned fire, and killed the patrolman.

Here, Niles testified:

> [W]hen [Moore] was getting out of the car and Salter was reaching underneath his seat I seen him pulling the gun and that's when he start[ed] firing off as [Moore] was jumping in the back seat and when he pulled the door to that's when . . . [Salter] was shooting in the car. That's

> when my fiancé started screaming. [Hammond] ducked in my lap. She was screaming. So, while [Salter] was shooting in the car . . . I grabbed my pistol and that's when I shot two times.

We find Niles' testimony provided evidence that he shot Salter after Salter pulled a gun and began shooting at Niles. Accordingly, viewing the evidence in a light most favorable to Niles, we find his version of the facts provided sufficient legal provocation to support a jury charge on voluntary manslaughter. *See State v. Pittman*, 373 S.C. 527, 573, 647 S.E.2d 144, 168 (2008) ("This court has previously held that an overt, threatening act or a physical encounter may constitute sufficient legal provocation."); *see also State v. Gadsden*, 314 S.C. 229, 233, 442 S.E.2d 594, 597 (1994) ("In determining whether the evidence required a charge of voluntary manslaughter, we view the facts in a light most favorable to the defendant.").

II. Heat of passion

Second, we find evidence was presented at trial to show Niles acted in a heat of passion when he shot Salter.

To mitigate murder to voluntary manslaughter, sudden heat of passion, while it need not dethrone reason entirely, must be such that would "naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." *State v. Lowry*, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (internal quotation marks and citation omitted). "However, even when a person's passion is sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary person would have cooled, the killing would be murder and not manslaughter." *Hernandez*, 386 S.C. at 661, 690 S.E.2d at 585 (internal quotation marks and citation omitted). "Whether an accused cooled off prior to a violent act must be determined by a review of all the circumstances surrounding the event and the people involved." *Id.*

Niles testified that after Salter began shooting at his vehicle, Niles reached for his gun and returned fire. He stated:

> So, while he was shooting in the car . . . I grabbed my pistol and that's when I shot two times. My eyes were closed. I wasn't even looking. I shot two times. I went pow, pow. I wasn't trying to hit nobody . . . I was just trying to get him to stop shooting. That's all I was trying to do. I didn't know if my fiancé got shot or nothing. That's the first thing that came to my head, you know.

From Niles' testimony, we find there is evidence Niles acted in a sudden heat of passion. Looking at the totality of the circumstances, there is no evidence Niles had a period of time to cool down or reflect before reaching for his gun and firing back at Salter. *See State v. Knoten*, 347 S.C. 296, 307-09, 555 S.E.2d 391, 397-98 (2001) (holding it is error to refuse a jury charge on voluntary manslaughter when in viewing the evidence in the light most favorable to the defendant, there is no evidence that a significant period of time elapsed between the attack of the defendant by the decedent and the defendant's fatal blows). Further, Niles' testimony that grabbing the gun and returning fire was the "the first thing that came to . . . [his] mind" supports that he was acting on impulse upon being shot at by Salter. *See Starnes*, 388 S.C. at 598, 698 S.E.2d at 609 (holding to constitute sudden heat of passion to warrant a jury charge of voluntary manslaughter, a defendant's fear immediately following an attack or threatening act must cause the defendant to lose control and create an uncontrollable impulse to do violence).

Accordingly, viewing the evidence in the light most favorable to Niles, we find evidence sufficient to support a charge on voluntary manslaughter; therefore, the circuit court erred in failing to charge the jury on voluntary manslaughter. *See State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding that if there is any evidence to support a jury charge, the circuit court should grant the request).

III. Prejudice

Furthermore, the error of the circuit court in failing to charge the jury with voluntary manslaughter prejudiced Niles. "The [circuit] court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v. Harrison*, 343 S.C. 165, 173, 539 S.E.2d 71, 75 (Ct. App. 2000). However, even if the circuit court "refuses to give a specific charge, there is no error if the charge actually given sufficiently covers the substance of the request." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (internal citation omitted). The party complaining of the circuit court's refusal to give the requested instruction

bears the burden of demonstrating prejudice to warrant a reversal. *Otis Elevator, Inc. v. Hardin Const. Co. Group, Inc.*, 316 S.C. 292, 299, 450 S.E.2d 41, 45 (1994).

We find Niles met his burden of showing he was prejudiced by the circuit court's refusal to give the requested jury instruction. Here, the circuit court failed to give any instruction on voluntary manslaughter. The jury charges the circuit court gave regarding self-defense, murder, armed robbery, and possession of a firearm during the commission of a violent crime do not cover the substance of voluntary manslaughter, nor do they explain the elements of voluntary manslaughter. Based on the evidence presented at trial, viewed in a light most favorable to the defendant, a jury could have found Niles guilty of voluntary manslaughter. *See Harrison*, 343 S.C. at 175, 539 S.E.2d at 76 (holding defendant was prejudiced when based on the evidence at trial, a different verdict might have been reached if the jury had been charged with the instruction requested by the defendant). Therefore, Niles was prejudiced by the circuit court's failure to instruct the jury on voluntary manslaughter. *See id.*, 343 S.C. at 173, 539 S.E.2d at 75 ("To warrant reversal, a [circuit court's] refusal to give a requested jury charge must be both erroneous and prejudicial.").

CONCLUSION

Based on the foregoing, we find the circuit court erred in refusing to charge the jury on voluntary manslaughter, and thus, we **REVERSE** Niles' conviction for murder and remand for a new trial.

Accordingly, the circuit court's decision is

REVERSED AND REMANDED.

THOMAS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant/Respondent,

v.

Kendra Samuel, Respondent/Appellant.

Appellate Case No. 2010-180226

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5046
Heard October 16, 2012 – Filed November 14, 2012

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., and Solicitor Daniel E. Johnson, all of Columbia, for the State.

Richard A. Harpootlian and Graham L. Newman, both of Richard A. Harpootlian, P.A., of Columbia, for Kendra Samuel.

LOCKEMY, J.: In this appeal, the State argues the trial court erred in suppressing one of Kendra Samuel's statements to law enforcement. The State

claims the record contains no basis for the trial court's decision, and the trial court's failure to exercise any discretion constituted an abuse of discretion. Alternatively, the State claims the trial court erred in excluding the statement pursuant to a Rule 403, SCRE analysis. Samuel cross-appeals the trial court's denial of her motion to suppress her statements to law enforcement. She maintains the statements were taken in violation of her *Miranda*[1] rights because her pre-custodial *Miranda* warning and waiver was not effective after custody was established. We affirm in part, reverse in part, and remand.

FACTS

On July 31, 2008, Samuel babysat Jessica Davis's two-year-old son. Samuel took the child to the park and returned home around 7 p.m., at which time she placed the child in his crib. When Davis checked on her son at some time after 11 p.m., she discovered he was not breathing and had passed away.

When Samuel and Davis gave their initial statements at the Columbia Police Department (CPD) on August 1, 2008, they were not considered suspects of a crime. After further investigation, Investigators Kevin Reese and A.L. Thomas requested additional statements from Samuel and Davis, and they voluntarily returned to the CPD on August 6, 2008.

Samuel was first interviewed by Investigator Joe Gray, who read Samuel her *Miranda* rights and had her sign an "Advice of Rights" form prior to conducting a polygraph examination. This occurred at approximately 10:30 a.m. Investigator Gray indicated Samuel was free to leave at any time before, during, or after his examination. Around 12:16 p.m., after conducting the polygraph examination, Investigator Gray informed Samuel the results showed deception in some of her answers. He then pulled his chair in front of Samuel, who was still seated and unrestrained in her chair, and continued to question her. These follow-up questions were not part of the polygraph examination, but were done as a result of the polygraph examination. She proceeded to give a statement of the events that transpired on July 31 (Statement 1), in which she discussed injuries occurring to the child, which was a change from the story she initially gave law enforcement. Investigator Gray subsequently notified Investigators Reese and Thomas that

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

Samuel had provided an additional statement and concluded his interview with Samuel at about 1 p.m.

Investigator Thomas testified that because there were indications Samuel had changed her story, he and Agent Greg Shockley, who was with the South Carolina Law Enforcement Department's (SLED) Child Fatality Task Force, conducted an interview with Samuel in a different room from where her polygraph examination and first interview were administered. He testified Samuel was free to leave and not in custody, but he never explicitly told Samuel she was free to leave. He was also aware she had previously been advised of her *Miranda* rights. A portion of their interview with Samuel was recorded on a digital recorder (Statement 2). The digital recorder stopped recording due to memory shortage, so they continued memorializing her answers by having her write the remainder of her statement. She also answered some questions in her written statement (Statement 3). The interview with Investigator Thomas and Agent Shockley was concluded around 2:30 p.m. Investigator Thomas's opinion was that Samuel was free to leave until approximately 5:40 p.m., when he contended she was taken into custody.

Investigators Thomas and Reese conferred with each other following the second interview, and after discussing the child autopsy results and information provided by Davis, they determined the evidence did not corroborate Samuel's story. They concluded it was necessary to ask Samuel some additional questions. Samuel was asked if she needed a break to use the restroom or get some water or food. Further, Investigator Reese asked Samuel if she had been advised of her rights and if she still wished to speak with them. She confirmed that she had been advised of her rights and indicated she was willing to continue talking. Samuel gave another taped statement (Statement 4), as well as handwritten answers to Investigator Reese's follow-up questions (Statement 5). In her final statements, Samuel admitted the child would not stop crying while in her care, so she picked him up and shook him until he stopped. After shaking him, the child was unresponsive. Instead of calling for help, Samuel left the house with the child and went to the park. She explained that her boyfriend picked them up from the park and brought them home. Davis was at the home when Samuel returned, but Samuel did not alert anyone to the child's condition and placed him in the crib. Investigator Reese testified Samuel had been free to leave and they could not have stopped her until her confession at some point between 3:58 p.m. and 5:17 p.m. This interview ended at 5:30 p.m.

On November 29, 2010, a pre-trial, *Jackson v. Denno*[2] hearing was held to determine whether Samuel's multiple statements to law enforcement were given knowingly and voluntarily. Samuel cited *State v. Bradshaw*, 457 S.E.2d 456 (W. Va. 1995), to support her argument that because she was not re-advised of her *Miranda* rights after custody was established, any statements made during custodial interrogation were not voluntary or admissible in trial. Samuel conceded that staleness of her waiver was not an issue under these facts. The trial court held that by the preponderance of the evidence, Samuel was fully advised of her *Miranda* rights before any interrogation, and the constitutional safeguards were sufficiently met. Further, it found South Carolina case law supported the position that statements given after a polygraph examination are voluntary and admissible under certain circumstances, and in the present situation, the police were not "excessive or overbearing." After determining that all of Samuel's statements were given knowingly and voluntarily, the trial court held they were admissible into evidence.

Following the trial court's *Denno* ruling, the State assured the trial court Investigator Gray would not reference the polygraph in any manner, and he would only testify about advising Samuel of her rights and her post-*Miranda* statements to him. At that point, Samuel interjected and stated she wanted to bring in the polygraph, but maintained she was not allowed to do so under case law. Specifically, defense counsel said, "We want to bring in the polygraph. . . . We want the polygraph. We want to show that he says to her, 'You lie'. Now how can we do that when the Supreme Court has prohibited the mention of the polygraph?" She then argued a Rule 403 analysis dictated Statement 1 should be excluded. She contended that "[Investigator Gray] can testify that he Mirandized her, but anything that comes after – he says, 'I gave you a polygraph exam and you lie," at which time the trial court interrupted Samuel and agreed with her. It ruled that Investigator Gray would only be allowed to testify that he advised Samuel of her *Miranda* rights at 10:30 a.m. and then "turned her over to the other officers at 1:30." The State immediately stopped the hearing and requested the opportunity to file an appeal because Investigator Gray's testimony was "crucial" in explaining the three-hour time period in which he interviewed Samuel.

[2] 378 U.S. 368 (1964).

On December 1, 2010, the State served a notice of appeal from the trial court's oral order,[3] and Samuel served a cross-appeal on December 8, 2010.

THE STATE'S APPEAL

Did the trial court err in finding a knowing and voluntary confession must be excluded based on a Rule 403, SCRE analysis?

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *State v. Wills*, 390 S.C. 139, 142, 700 S.E.2d 266, 267 (Ct. App. 2010) (citing *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law." *Id.* (citing *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265).

LAW/ANALYSIS

The State asserts the trial court correctly found Statement 1 was given knowingly and voluntarily but abused its discretion in subsequently suppressing it and only allowing Investigator Gray to testify he read Samuel her *Miranda* rights. Specifically, the State maintains the trial court did not provide a legal or factual basis for the statement's suppression, or alternatively, the trial court erred in excluding the statement under Rule 403, SCRE. We agree the trial court erred in finding Statement 1 should be suppressed based on the improper belief that polygraph evidence is *per se* inadmissible.

As a threshold matter, Samuel contends the State did not preserve its argument regarding the lack of a legal or factual basis for suppression of Statement 1. *See State v. Porter*, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal."); *Queen's*

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[3] *See State v. McKnight*, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) ("A pre-trial order granting the suppression of evidence which signficantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976).").

Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law and arguments." (citing *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004))). The record establishes the State's only argument was that the statements made to Investigator Gray were "crucial" to the State's case, and thus, it wanted to appeal the decision immediately. This statement did not preserve the State's appellate argument regarding the trial court's lack of a legal or factual basis for suppression. The State had the opportunity to request a more specific basis for the trial court's ruling, thereby preserving the argument, but the State only said, "based on your ruling, as I understand it that Investigator Gray would only be allowed to testify to the *Miranda* rights and none of the statement she made to him would be admissible, we would respectfully choose to appeal that at this time." Accordingly, we find the State did not preserve this particular argument.

We now analyze whether the trial court erred in suppressing the statement pursuant to Rule 403, SCRE. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The record does not contain a significant Rule 403 analysis. It consisted of the trial court agreeing with Samuel that Statement 1 is prejudicial because Samuel could not present the polygraph to the jury, improperly preventing her from showing the full circumstances surrounding the voluntariness of Statement 1. *See State v. Miller*, 375 S.C. 370, 379, 383, 652 S.E.2d 444, 451 (Ct. App. 2007) ("Once the trial judge determines [by the preponderance of the evidence] that the statement [was given voluntarily and] is admissible, it is up to the jury to ultimately determine, beyond a reasonable doubt, whether the statement was voluntarily made."); *see also State v. Pressley*, 290 S.C. 251, 252, 349 S.E.2d 403, 404 (1986) ("Evidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible.").

We find error in the trial court's reliance upon Samuel's assertion that polygraph evidence is *per se* inadmissible. Samuel cites *Pressley* on appeal in support of her argument that polygraph results are not admissible in trial, but we disagree with her reliance on that case. 290 S.C. at 252, 349 S.E.2d at 404.

Following its decision in *Pressley*, our supreme court found in *State v. Wright*, 322 S.C. 253, 256, 471 S.E.2d 700, 702 (1996),[4] that a trial court did not abuse its discretion in admitting the post-polygraph confession into evidence while prohibiting the appellant from mentioning the polygraph. Although the appellant's polygraph results showed deception, he wanted to admit it to show the jury his post-polygraph confession was not voluntary beyond a reasonable doubt. *Id.* at 254-55, 471 S.E.2d at 701. While recognizing "the authority against admitting evidence of polygraph examinations and the potential prejudice to appellant," the court indicated some flexibility to the general rule and stated the "appellant did not suggest at trial nor on appeal what limitation could have been placed on the disclosure to limit prejudice to appellant." *Id.* at 256, 471 S.E.2d at 702. "Without some limitation, the only inference the jury could reasonably have drawn from learning appellant's confession followed closely after a deceptive polygraph was that the confession was truthful and the answers given to the polygraph exam were untruthful." *Id.* That would have served "to bolster [the appellant's] confession rather than persuade the jury to believe the alleged coercion." *Id.*

After suggesting in *Wright* that polygraph evidence could potentially be admissible in trial, if sufficient safeguards were in place to limit the possible prejudice to the defendant, our supreme court further explained in *Council*, 335 S.C. at 23-24, 515 S.E.2d at 519-20, that "the results of polygraph examinations are ***generally*** not admissible because the reliability of the tests is questionable," but that "in light of the adoption of the SCRE, admissibility of [polygraph evidence] should be analyzed under Rules 702 and 403, SCRE and the *Jones* factors." Upon review of these cases, we find Samuel's statement that polygraph evidence is *per se* inadmissible is incorrect. The trial court could have conducted an analysis pursuant to *Council* to determine what evidence, if any, regarding the polygraph examination was admissible in the present case.

Because the trial court based its decision to suppress Statement 1 on the erroneous belief that polygraph evidence was *per se* inadmissible, we reverse and remand this issue to the trial court in accordance with this decision.

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[4] This case was decided before our supreme court's decision in *State v. Council*, 335 S.C. 1, 23-24, 515 S.E.2d 508, 519-20 (1999), which clarified further that polygraph evidence was not *per se* inadmissible, and outlined the analysis required when determining whether polygraph evidence can be admitted into trial.

SAMUEL'S CROSS-APPEAL

Did the trial court err in determining Samuel's statements were voluntarily given when a law enforcement officer administered pre-custodial *Miranda* rights but failed to re-advise Samuel of her *Miranda* rights after being taken into custody?

STANDARD OF REVIEW

"The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence." *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007) (citing *State v. Washington*, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988); *State v. Smith*, 268 S.C. 349, 353-54, 234 S.E.2d 19, 21 (1977)). "The jury must determine whether the statement was freely and voluntarily given beyond a reasonable doubt." *Id.* (citing *Washington*, 296 S.C. at 55-56, 370 S.E.2d at 612). "On appeal, the conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so erroneous as to show an abuse of discretion." *Id.* (citing *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996)). "When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 378-79, 652 S.E.2d at 448 (citing *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001)).

LAW/ANALYSIS

Samuel argues that a law enforcement officer's pre-custodial advisement of her *Miranda* rights was not sufficient for the subsequent custodial interrogation, and law enforcement should have re-advised her of them when she was taken into custody. She maintains that because *Miranda* rights are only applicable during custodial interrogation, the failure to administer them again once she was in custody renders her statements inadmissible. We disagree.

South Carolina has not directly addressed the issue of whether a pre-custodial *Miranda* waiver is *per se* ineffective when applied to confessions made after custody was established. However, several other states have addressed this issue, and all but one determined that instead of a bright-line approach to the issue, it is more appropriate to apply a totality-of-the-circumstances assessment. *See Upton v. State*, 36 S.W.3d 740, 743 (Ark. 2001) ("'When the police are conducting a good

faith [pre-custodial] investigation at police headquarters, they may have difficulty in determining the precise moment when questioning turns into custodial interrogation and Miranda warnings are required. Although the uncertain line between questioning and custodial interrogation does not excuse late warnings, it does provide a justification for the validity of good faith early warnings[,] which are sufficiently proximate to formal custody to alert the person being questioned to the importance of these constitutional rights.'" (quoting *State v. Burge*, 487 A.2d 532, 543 (Conn. 1985))); *State v. Dispoto*, 913 A.2d 791, 800-01 (N.J. 2007) (stating that instead of finding that pre-custodial *Miranda* waivers are *per se* ineffective, a totality-of-the-circumstances approach "is preferable in that it encourages warnings when police question a suspect and allows law enforcement officials to pursue their investigations, subject to later review by a neutral court"); *State v. Grady*, 766 N.W.2d 729, 734-36 (Wis. 2009) (finding that "a sound interpretation of *Miranda* and sound public policy require the application of the [totality-of-the-circumstances test rather than a bright-line rule"); *but see State v. Bradshaw*, 457 S.E.2d 456, 466-67 (W.Va. 1995) (finding a defendant cannot anticipatorily invoke his Miranda rights, because the "window of opportunity" for the assertion of *Miranda* rights comes into existence only when that right is available during a custodial interrogation; however, to avoid a significant burden on the defendant, when police have given *Miranda* rights outside the context of custodial interrogation, those warnings must be repeated once custodial interrogation begins).

The majority view is convincing, and we find pre-custodial *Miranda* warnings and waivers may be sufficiently effective during a subsequent custodial interrogation without the need for re-advisement, but a totality-of-the-circumstances assessment should be applied to each case. In the present case, evidence in the record supports the trial court's finding that Samuel's statements were voluntary and admissible at trial.[5] For the forgoing reasons, we affirm the trial court.

[5] Samuel conceded to the trial court that staleness was not an issue under these facts, and the sole argument on appeal is that pre-custodial *Miranda* rights and waivers are not effective once custody is subsequently established. We also note Samuel was asked whether she had been given her rights, to which she responded affirmatively and indicated she was willing to continue with the interview.

CONCLUSION

In conclusion, we reverse the trial court's exclusion of Statement 1 based upon its inaccurate assessment that polygraph evidence is *per se* inadmissible. Additionally, we affirm the trial court's ruling that Samuel's statements to law enforcement were voluntary and admissible pursuant to *Jackson v. Denno*. Finally, we remand this case in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

John Bendarian Bonner, Appellant.

Appellate Case No. 2009-146206

Appeal From Cherokee County
J. Derham Cole, Circuit Court Judge

Published Opinion No. 5048
Heard September 11, 2012 – Filed November 14, 2012

VACATED AND REMANDED

Chief Deputy Appellate Defender Wanda H. Carter and Acting Appellate Defender Tristan M. Shaffer, both of Columbia, for Appellant.

Attorney General Alan Wilson, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General William M. Blitch, Jr., all of Columbia, for Respondent.

GEATHERS, J.: John Bendarian Bonner appeals his sentence of life imprisonment without the possibility of parole for a non-homicide offense he committed as a juvenile, arguing the sentence violates the Eighth and Fourteenth

Amendments of the United States Constitution. We vacate Bonner's sentence and remand for resentencing.

FACTS

On April 2, 2008, Dipali Darji was the victim of a home-invasion robbery. The police later arrested Bonner and seven other individuals for committing the burglary. At the time of the offense, Bonner was seventeen years old.[1]

Bonner was indicted on charges of burglary in the first degree, grand larceny, burglary in the second degree, kidnapping, armed robbery, and assault and battery of a high and aggravated nature (ABHAN). On November 17, 2009, the jury returned a verdict of guilty on all charges. Before sentencing, the trial judge asked to hear from Bonner's defense counsel. Counsel asked the court to take into consideration Bonner's "relative age and youth." However, counsel mistakenly stated Bonner was nineteen years old.[2]

The trial court sentenced Bonner to life in prison without parole (LWOP) for the burglary in the first degree charge.[3] Bonner's counsel did not object to the sentence, nor did he raise any issue concerning the sentence in a post-trial motion. Bonner appeals his sentence of LWOP for burglary in the first degree.[4]

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[1] It is undisputed that Bonner was seventeen years old at the time of the offense. The sentencing sheet indicates Bonner was born on January 24, 1991.

[2] At the time of trial, Bonner was eighteen years old.

[3] A charge of burglary in the first degree carries a sentence between fifteen years to life imprisonment. S.C. Code Ann. § 16-11-311(B) (2003). Bonner was sentenced as follows: LWOP for burglary in the first degree; five years for grand larceny; fifteen years for burglary in the second degree; thirty years for kidnapping; thirty years for armed robbery; and ten years for ABHAN. All the sentences were imposed concurrently to each other, with the exception of the sentence for ABHAN.

[4] Bonner does not challenge his conviction or sentence for any other charge.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous." *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted).

It is well settled that issues not raised and ruled on in the trial court will not be considered on appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003); *State v. Passmore*, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005). Thus, "a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review." *State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999). Nevertheless, an exception to the general rule of issue preservation exists authorizing the appellate court to consider an unpreserved issue in the interest of judicial economy under appropriate circumstances. *See State v. Vick*, 384 S.C. 189, 203, 682 S.E.2d 275, 282 (Ct. App. 2009) (vacating a kidnapping sentence in the interest of judicial economy, even though the issue was not preserved for review); *see also Jeter v. S.C. Dep't of Transp.*, 369 S.C. 433, 441 n.6, 633 S.E.2d 143, 147 n.6 (2006) (holding the appellate court would address an issue in the interest of judicial economy despite any preservation problems).

LAW/ANALYSIS

Bonner argues his sentence of LWOP for burglary in the first degree should be vacated. He contends the Eighth and Fourteenth Amendments of the U.S. Constitution, as interpreted in *Graham v. Florida*, __ U.S. __, 130 S. Ct. 2011 (2010), forbid the imposition of a LWOP sentence for a non-homicide crime committed by a juvenile. We agree.

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)). In *Graham*, the United States Supreme Court held that the Eighth Amendment's cruel and unusual punishment clause "prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." 130 S. Ct. at 2034. The Court explained: "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What

the State must do, however, is give [these offenders] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 130 S. Ct. at 2030.

Here, it is undisputed that Bonner was seventeen years old at the time of the offense. The State concedes in its brief that it was error for the trial court to sentence Bonner to LWOP for burglary in the first degree. However, the State contends the sentencing issue is not preserved for appellate review because Bonner never objected to the sentence imposed for burglary in the first degree, nor did he raise any issue with the sentence in a post-trial motion. The State further argues the most appropriate avenue for addressing Bonner's claim is a post-conviction relief (PCR) proceeding.

Bonner acknowledges the sentencing issue is not preserved for appellate review.[5] However, he asserts that the court should address the sentencing issue in the interest of judicial economy. We agree.

In *State v. Johnston*, the South Carolina Supreme Court established the appellate court's authority in "exceptional circumstances" to consider an improper sentence even though the sentencing issue was not properly preserved. 333 S.C. 459, 464, 510 S.E.2d 423, 425. The *Johnston* court identified two exceptional circumstances warranting consideration of an appellant's improper sentence for the first time on appeal. *Id.* at 463-64, 510 S.E.2d at 425; *see also*, Jean Hoefer Toal, Shahin Vafai, Robert A. Muckenfuss, *Appellate Practice in South Carolina* 61 (2nd ed. 2002). First, there is an exceptional circumstance when "the State has conceded in its briefs and oral argument that the trial court committed error by imposing an excessive sentence." *Id.* at 463, 510 S.E.2d at 425. Second, an exceptional circumstance exists when there is a "real threat that Defendant will remain incarcerated beyond the legal sentence due to the additional time it will take to

[5] The general rule of issue preservation provides that if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal. *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Even in the context of juvenile criminal matters, South Carolina courts have applied the general error preservation rule. *See In re Antonio H.*, 324 S.C. 120, 122, 477 S.E.2d 713, 714 (1996); *In re Jamal G.*, 396 S.C. 158, 163-64, 720 S.E.2d 62, 64-65 (Ct. App. 2011); *In re Walter M.*, 386 S.C. 387, 392-93, 688 S.E.2d 133, 136 (Ct. App. 2009).

pursue [PCR]." *Id.* at 464, 510 S.E.2d at 425. Based on these exceptional circumstances, the *Johnston* court reached the merits of the appellant's case and remanded the case for resentencing. *Id.*

This court addressed a similar situation in *State v. Vick*, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009). There, the defendant appealed a thirty-year sentence for kidnapping in a case in which he was also convicted of murdering the victim. *Id.* at 201, 682 S.E.2d at 281. The State conceded Vick's sentence for kidnapping was improper pursuant to section 16-3-910 of the South Carolina Code (2003), which provides that one convicted of murder should not also be sentenced for kidnapping. *Id*. The State nevertheless argued the sentencing issue was not properly preserved for appellate review and that PCR was the appropriate avenue of relief. *Id.* However, the court considered the sentencing issue, irrespective of the preservation rule, because it was in the interest of judicial economy. *Id.* at 203, 682 S.E.2d at 282. Accordingly, the court vacated Vick's kidnapping sentence. *Id.*

In its opinion, the *Vick* court recognized, "our courts have at times considered an issue in the interest of judicial economy." *Id.* at 202, 682 S.E.2d at 282. The court cited *Jeter v. South Carolina Department of Transportation*, 369 S.C. at 441 n.6, 633 S.E.2d at 147 n.6, which addressed an issue in the interest of judicial economy "[r]egardless of any preservation problems[.]" *Vick*, 384 S.C. at 203, 682 S.E.2d at 282. Additionally, the *Vick* court referenced *Southern Bell Telephone & Telegraph Co. v. Hamm*, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991), which considered a matter in the interest of judicial economy when the issue would be raised to the court at some future time and both parties had fully briefed the issue. *Vick*, 384 S.C. at 202, 682 S.E.2d at 282.

Moreover, the *Vick* court emphasized the State's concession that the kidnapping sentence was erroneously imposed as a controlling factor in its decision to address the issue in the interest of judicial economy. *Id*. at 203, 682 S.E.2d at 282. Specifically, the court noted that the State's concession presented an "exceptional circumstance" pursuant to the standard established in *State v. Johnston*. *Id.* Even though the court recognized Vick's case presented only one exceptional circumstance because there was no threat Vick would be incarcerated beyond the legal sentence, it nevertheless referenced that exceptional circumstance as the determinative factor in its decision to address the sentencing issue in the interest of judicial economy. *Id.* at 202-03, 682 S.E.2d at 282.

Applying this court's precedent in *Vick*, we find vacating Bonner's LWOP sentence is appropriate. Both parties have fully briefed the issue and acknowledge that Bonner could raise the sentencing issue to the court at some future time by filing an application for PCR. Furthermore, this case presents an exceptional circumstance because the State concedes in its brief that the trial court committed error by imposing an improper sentence. *See Johnston*, 333 S.C. at 463, 510 S.E.2d at 425; *Vick*, 384 S.C. at 203, 682 S.E.2d at 282.

For the foregoing reasons, we vacate Bonner's sentence of LWOP for burglary in the first degree and remand the matter to the circuit court for resentencing.

VACATED AND REMANDED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Paine Gayle Properties, LLC, Appellant,

v.

CSX Transportation, Inc., Respondent.

Appellate Case No. 2010-178026

Appeal from McCormick County
Clifton Newman, Circuit Court Judge

Opinion No. 5049
Heard September 12, 2012 – Filed November 14, 2012

AFFIRMED

G.P. Callison, Jr., of Callison Dorn Law Firm, of Greenwood, for Appellant.

Elizabeth A. McLeod, of Fulcher Hagler, LLP, of Augusta, Georgia, for Respondent.

GEATHERS, J.: Appellant Paine Gayle Properties, LLC (Landowner) brought this action against Respondent CSX Transportation, Inc. (Railroad), seeking an order establishing an easement across a right-of-way held by Railroad. Landowner and Railroad filed cross-motions for summary judgment, and the circuit court granted summary judgment to Railroad. Landowner seeks review of this order. We affirm.

FACTS/PROCEDURAL HISTORY

On May 31, 1995, Richard R. Gayle, a member of Landowner, purchased from Wayne King a fifteen-acre tract of land in McCormick County adjacent to the Savannah River (the Property).[1] On the same date, Gayle conveyed a one-half interest in the Property to Travers W. Paine, III, Landowner's other member. On January 1, 2003, Paine and Gayle individually conveyed the Property to Landowner.

The Property is bounded on the north and east by a two-hundred-foot right-of-way held by Railroad, which extends south to the river bank. Pollard Lumber Company (Pollard) owns the land to the immediate north and east of Railroad's right-of-way. The record is unclear as to who owns fee simple title to the land underlying Railroad's right-of-way,[2] although it is clear from the legal descriptions of their respective properties that neither Landowner nor Pollard owns title to the underlying land.

The Property can be accessed by watercraft via the Savannah River. However, the only motor vehicle access for the Property is a gravel roadway that runs beneath Railroad's trestle (the access road). Pollard granted an easement to Landowner across the southwesterly part of its land, which runs adjacent to Railroad's right-of-way, for the purpose of constructing an improved right-of-way for ingress and egress; the access road running beneath the trestle picks up where the easement granted by Pollard terminates.

Railroad uses the access road whenever repair work on the trestle is necessary. The distance from the bottom of the trestle to the underlying access road is twelve feet, two inches at the highest point. The width of the useable part of the access road is eleven feet, two inches, at its widest point.

Since purchasing the Property, Paine and Gayle have used the access road to visit the Property, to harvest timber from the Property, and to build a cabin on the Property. In 2001, Paine paid South Carolina Electric & Gas Company (SCE&G) $5,147 to obtain a utility easement from Railroad for the purpose of running electrical lines through Railroad's right-of-way to the cabin on the Property. This

[1] To be exact, the Property measures 15.16 acres.
[2] The extent of Railroad's rights as to the underlying land is discussed in the analysis section of this opinion.

amount included $2,872 to be paid to Railroad for the easement and $2,275 for SCE&G to install the service lines under Railroad's tracks.

Landowner also obtained permission from Railroad's security officer, Steve Purvis, to build a gate across the access road to keep out trespassers. Purvis acknowledged that the gate helped Railroad guard against potential liability for trespasser injuries. Landowner and Railroad possessed keys to the locks on the gate.

In 2004, Paine and Gayle appeared before the McCormick County Planning Commission (the Commission) to present Landowner's plans for a small subdivision on the Property. In his deposition, Paine testified that Landowner had paid its engineers approximately $35,000 for the plans and drawings. The Commission indicated that Landowner would have to obtain a written easement from Railroad to cross its right-of-way in order to run a water line into the subdivision. Landowner's efforts to speak with a Railroad employee with authority to grant the easement were unsuccessful. Subsequently, Landowner filed the present action, seeking an order recognizing its alleged right to cross Railroad's right-of-way to access the Property.[3]

In its amended complaint, Landowner asserted the following causes of action: "Easement by Grant," "Easement by Implication," "Easement by Prescription," "Easement by Necessity," "Adverse Possession," "Equitable Estoppel," "Laches," and "General Law of Easements." Landowner and Railroad filed cross-motions for summary judgment, and the circuit court granted summary judgment to Railroad, while denying Landowner's summary judgment motion.

In its order granting summary judgment to Railroad, the circuit court recognized that the ownership of the strip of land underlying Railroad's right-of-way was unclear. The circuit court, however, concluded that Landowner did not own the fee underlying Railroad's right-of-way.[4] The circuit court further indicated that due to Landowner's failure to establish at least one essential element of each of its causes of action, Railroad was entitled to judgment as a matter of law. This appeal followed.

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[3] Landowner filed this action because it could not locate a person with authority to grant a written easement. Paine admitted: "We are here because . . . we can't get the attention of the railroad to discuss an easement." Paine also admitted: "We don't know who to talk to."

[4] Landowner has not appealed this conclusion.

ISSUES ON APPEAL

1. Did the circuit court err in granting summary judgment to Railroad on the issue of easement by equitable estoppel?

2. Did the circuit court err in granting summary judgment to Railroad on the prescriptive easement claim?

3. Did the circuit court err in granting summary judgment to Railroad on the issue of laches?

4. Did the circuit court err in granting summary judgment to Railroad on the issue of easement by necessity?

STANDARD OF REVIEW

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted 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." "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

An adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial. *Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Nonetheless, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

I. Railroad Rights-of-Way

To foster a complete understanding of the parties' respective rights, we begin our analysis of the issues in this case by explaining the nature of railroad rights-of-way. Ultimately, however, the precise nature of the estate held by Railroad in the strip of land underlying its right-of-way does not affect our analysis of Landowner's easement claims.

"The term 'right-of-way,' as used in deeds, has dual meanings: it is sometimes used to describe the right belonging to a party allowing passage over any tract and is also used to describe that strip of land that railroad companies take upon which to construct their road-bed." 65 Am. Jur. 2d *Railroads* § 31 (2012). Likewise, the term can have two purposes: (1) to qualify or limit the interest granted in a deed to the right to pass over a tract of land, i.e., an easement; or (2) to describe the strip of land being conveyed to a railroad for the purpose of building a railway. *Id.* A railroad can acquire real property for railway operations only pursuant to a statute, and "when so authorized, a railroad may acquire an interest in real property by eminent domain, by purchase, or by voluntary grant." *Id.* at § 33.

A railroad right-of-way allows a railroad company "the free and perfect use of the surface of the land as far as is necessary for all its purposes, and **the right to use as much above and below its surface as may be needed**." *Id.* at § 66 (emphasis added). A railroad right-of-way has been described as "an easement with the substantiality of a fee and the attributes of a fee, perpetuity, and exclusive use and possession . . . ." *Id.* at § 62.

Here, the statute chartering Railroad's predecessor in interest, the Greenwood and Augusta Railroad Company, states that the Company "shall have the same presumptive right and title, and to the same extent, to lands through which their railroad may be built, **in absence of any agreement with the proprietor . . . of such lands**, which is possessed or enjoyed by any other railroad, in [South Carolina and Georgia], as to the lands through which their railroad may have been, or may be, constructed, in absence of any contract with the owners thereof." Act No. 170, § 7, 1872 S.C. Acts 216, 219 (emphasis added). The "presumptive right and title" possessed by other railroads in South Carolina and Georgia when the Greenwood and Augusta Railroad Company was chartered is set forth in section 7 of 1868 Act No. 42, which provides that upon payment of compensation to the landowner, a right-of-way over the subject land,

> or the use of said lands for the purposes for which the same were required, shall vest in the person or corporation who shall hold the charter of such highway, so long as the same shall be used for such highway, and no longer; **but the fee in such lands subject to such special uses shall remain in the owner thereof, and nothing herein contained shall be construed to confer upon such person or corporation any right in, or power over, the lands so condemned, other than such as may be within the particular purpose for which such lands were condemned**.

Act No. 42, § 7, 1868 S.C. Acts 88, 90 (emphasis added). In other words, in the absence of an agreement by the owner to grant to the Greenwood and Augusta Railroad Company a fee simple estate in the land underlying its right-of-way, the company held merely a right-of-way easement. As recognized by the circuit court, the parties presented inconclusive evidence concerning the estate granted to the Greenwood and Augusta Railroad Company. The circuit court, however, concluded that Landowner did not own the fee underlying the railroad right-of-way, and Landowner has not appealed this conclusion. Therefore, this conclusion is the law of the case. *See Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.").

In any event, no person may interfere with a railroad's use of its right-of-way for railroad purposes, and the railroad may prohibit even the owner of the underlying fee from interfering with such a use. *See Faulkenberry v. Norfolk S. Ry. Co.*, 349 S.C. 318, 325, 563 S.E.2d 644, 648 (2002) (noting that although the owner of the fee underlying a railroad right-of-way may cross the railroad tracks, he may not do anything that would unreasonably interfere with the railroad's use of its easement); *Miller v. Seaboard Air Line Ry.*, 94 S.C. 105, 108, 77 S.E. 748, 749 (1913) (holding that the owner of the fee underlying a railroad's right-of-way had the right "to cross the railroad on his own land wherever he saw fit to do so," as long as he did not interfere with the right of the railroad to use its right-of-way for railroad purposes).[5]

[5] *See also Atlanta & Charlotte Air-Line Ry. Co. v. Limestone-Globe Land Co.*, 109 S.C. 444, 451, 96 S.E. 188, 190 (1918) ("[T]he owner of the fee in a railroad right

"Railroad purposes" include any purpose that "furthers the business of the railroad." *Eldridge v. City of Greenwood*, 300 S.C. 369, 374, 388 S.E.2d 247, 250 (Ct. App. 1989) (citing *Sparrow v. Dixie Leaf Tobacco Co.*, 61 S.E.2d 700 (N.C. 1950). "The use . . . must be reasonably necessary for or convenient to the operation of the railroad." *Sparrow*, 61 S.E.2d at 703. Further, a railroad cannot dispose of its right-of-way or use it in a way that will destroy or impair its ability to serve the public. *Eldridge*, 300 S.C. at 375, 388 S.E.2d at 250 (citation and quotation marks omitted); *see also Cayce Land Co. v. Guignard*, 135 S.C. 446, 550, 134 S.E. 1, 34 (1926) (holding that a railroad exceeded its authority as to its right-of-way by allowing a non-connecting spur track of a second railroad to pass under the first railroad's tracks).

The railroad's use of its right-of-way may include the area underneath a trestle, which sits above the land on which the right-of-way is located. *See N.Y., New Haven & Hartford R.R. Co. v. Armstrong*, 102 A. 791, 796 (Conn. 1918) (holding that an adjoining landowner had no right to run oil pipes through a railroad's right-of-way directly underneath its trestle, which was located above the surface of the land on which the railroad held its right-of-way); *id.* at 795 (holding that whatever space was reasonably required for the purposes of support and security of a piling for a platform on the southeasterly side of the railroad's tracks "must be presumed to have been included as a part of the occupation of the trestle"); *id.* ("No narrow rule should be adopted in passing upon the [railroad's] acceptance of a public grant, where the welfare of the public is involved.").

II. Easement by Equitable Estoppel

Landowner asserts the circuit court erred in granting summary judgment to Railroad on the issue of easement by equitable estoppel. We disagree.

To establish a claim for easement by equitable estoppel, the party claiming estoppel must show the following elements as to the party sought to be estopped:

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of way has the right to use so much thereof as is not in the actual use and occupancy of the railroad company, provided the use be not inconsistent with the claim of right of way for the railroad purposes."); 65 Am. Jur. 2d *Railroads* § 62 (2012) ("A railroad company has the exclusive use of the surface of the land on which its right-of-way is located."); *id.* at § 63 ("The owner of the servient estate may use the land in a manner and for any purpose **that does not interfere with the full and free use of the railroad easement**.") (emphasis added).

(1) conduct that amounts to a false representation or concealment of material facts, or, at least, that is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those that the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. *Boyd v. Bellsouth Tel. & Tel. Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006). These elements may be satisfied by the silence of the party to be estopped when that party has actual knowledge of the other party's prejudicial change in position. *See O'Cain v. O'Cain*, 322 S.C. 551, 557-59, 473 S.E.2d 460, 464-65 (Ct. App. 1996) (holding that a landowner was equitably estopped from denying the use of a driveway on his property by an adjoining landowner when the first landowner remained silent during the second landowner's construction of the driveway and improvements to land to which the driveway led). As to the party claiming estoppel, the following elements must be shown: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance on the conduct of the party sought to be estopped; and (3) a prejudicial change in position. *Id.*

Here, when questioned about McCormick County's requirement for Landowner to obtain a written easement from Railroad, Paine stated the following: "Yes. And, in the meantime, we are out [of $30,000] or [$40,000] in engineering costs waiting to hear from [Railroad], who we cannot contact." Landowner argues: "By failing to communicate, the railroad has necessitated needless expense, delay, and frustration on our part." Landowner also argues Railroad misled it by "laying low and not saying anything—having any objection to our subdivision development until we ask for something and then no one will respond. We spent approximately $35,000.00 in engineering drawings and planning . . . ." Landowner states that Railroad also misled it by sharing a gate with Landowner and by granting the utility easement through its right-of-way:

> [Railroad] sat by, allowed [Landowner] to spend large sums of money, had no objection to the construction of a cabin and electricity being provided to the cabin underneath its tracks, and then when [Landowner] requested legal acknowledgement of its access rights—[Railroad] objected and acted in an entirely inconsistent manner.

Landowner asserts that its prejudicial change in position was "cutting timber, constructing a cabin, having power run, building a septic tank and on and on."

However, Gayle admitted that Railroad never did anything or communicated anything to cause him to act in a way that would be detrimental to himself or to Landowner. Further, Gayle admitted that Railroad never made any false representations to him, and Paine admitted that Railroad did not induce him to do anything with regard to the Property. As to Landowner's expenses in building the cabin and installing a gate across the access road, even if Railroad had been on notice of Landowner's construction of the cabin, Paine and Gayle have continued to use the cabin for their personal enjoyment. Railroad has never denied *permission*, i.e., a mere license,[6] to Paine and Gayle to cross the right-of-way for these purposes. The record shows that Railroad had not taken any action adverse to Landowner's use of the road before Landowner filed this action.

Even after this action was filed, Railroad continued to allow Paine and Gayle to cross the right-of-way for their personal enjoyment of the Property through late March 2009. In his deposition, Gayle testified that just a few days before the deposition, which occurred on April 1, 2009, he was still able to cross the right-of-way. Further, Landowner indicated at oral argument that Railroad had not interfered with Landowner's current use of the right-of-way thus far. Because Paine and Gayle may still use the cabin for their personal enjoyment, incurring expenses to build the cabin, supply utilities to it, and install a gate did not amount to a prejudicial change in Landowner's position.

As to any expenses incurred for subdivision plans, nothing in the record shows that, prior to Landowner's filing of this action, Railroad was aware of either (1) Landowner's future plans to use the access road as a residential subdivision entrance, or (2) Landowner's agreement to pay an engineering firm $30,000 to $40,000 for development plans and sketches.[7] Although Paine's affidavit states that Railroad "specifically agreed" to SCE&G's utility easement for the cabin "and

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[6] *See Main v. Thomason*, 342 S.C. 79, 92 n.5, 535 S.E.2d 918, 924 n.5 (2000), *overruled on other grounds, Byrd v. City of Hartsville*, 365 S.C. 650, 659, 620 S.E.2d 76, 81 (2005) (defining a license as "a personal, revocable, and unassignable privilege, conferred either by writing or parole, to do one or more acts on land without possessing any interest therein") (quoting *Briarcliffe Acres v. Briarcliffe Realty Co.*, 262 S.C. 599, 615, 206 S.E.2d 886, 894-95 (1974)).

[7] Landowner cites the communications between its engineers and Railroad regarding permission to build a driveway under the trestle, which took place prior to Gayle's purchase of the Property. However, the documentation of these communications does not indicate any plans to develop a subdivision on the Property.

future development[,]" when pressed to attest to Railroad's awareness of Landowner's subdivision plans, Paine could not do so:

> Q. But you can't say they knew you were going to build a subdivision, can you?
>
> A. Well, you might say we - - we relied on what we knew.

Further, Railroad's awareness of Landowner's building of the cabin and running electricity to it does not equate to an awareness of plans for a subdivision. Paine testified that Railroad's agreement to allow SCE&G to run electrical lines through its right-of-way to the Property "was on the presumption and the assumption that 12 residential lots would be built." However, he later admitted that he did not know what SCE&G communicated to Railroad when it obtained the utility easement. Nothing in the documents SCE&G submitted to Railroad for this purpose indicates that the electrical lines were to serve a residential subdivision with multiple homes. Likewise, nothing in the record indicates that a representative of Landowner communicated directly with Railroad regarding the utility easement. Paine admitted that Railroad had no knowledge that Landowner was accumulating engineering expenses while "waiting to hear" from Railroad.

Moreover, giving permission to one or two owners of the Property to cross the right-of-way hardly translates into consent for the access road to be used as a subdivision entrance. First, Railroad finds it necessary from time to time to block the access road so that its employees may perform repair work on the trestle, and Railroad asserts that Landowner's proposed development activities would interfere with this work. Second, Railroad argues the proposed development activities threaten the safety of its operations due to the limited clearance preventing safe passage of large vehicles, such as moving vans, cement trucks, and fire trucks.

Based on the foregoing circumstances, mere silence on the part of Railroad does not satisfy the elements required for equitable estoppel. *See Boyd*, 369 S.C. at 422, 633 S.E.2d at 142 (requiring (1) misleading conduct; (2) the misleading party's intent that the other party rely on the conduct; and (3) the misleading party's knowledge of the real facts); *cf. O'Cain*, 322 S.C. at 558, 473 S.E.2d at 464 (stating that the party to be estopped took action to deny an adjacent landowner's family access over a driveway only after he thought they were going to require removal of his hogs from their land). Therefore, the circuit court properly granted summary judgment to Railroad on Landowner's easement by estoppel claim.

III. Prescriptive Easement

Landowner maintains that the circuit court erred in granting summary judgment to Railroad on Landowner's prescriptive easement claim. Landowner assigns error to the circuit court's failure to consider the use of Railroad's right-of-way by Landowner's predecessors in title. We agree that the circuit court's analysis did not address the use of the right-of-way by previous owners of the Property. However, Landowner failed to present evidence creating a genuine factual issue as to whether the use of the right-of-way was "adverse" or under a "claim of right," as explained below, for the requisite twenty years. Therefore, we affirm summary judgment in favor of Railroad on this claim. *See* Rule 220(c), SCACR (stating that the appellate court may affirm an order on any ground appearing in the Record on Appeal).

A. Legal Elements

To establish an easement by prescription, a party must show the following: (1) the continued and uninterrupted use or enjoyment of a right for a full period of twenty years; (2) the identity of the thing enjoyed; and (3) that the use or enjoyment was adverse or under a claim of right. *Jones v. Daley*, 363 S.C. 310, 316, 609 S.E.2d 597, 599-600 (Ct. App. 2005). Additionally, a party claiming a prescriptive easement under a claim of right must show a substantial belief that he had the right to use the property based on the totality of circumstances surrounding his use. *Matthews v. Dennis*, 365 S.C. 245, 250, 616 S.E.2d 437, 440 (Ct. App. 2005). This "claim of right" is "**without recognition of the rights of the owner of the servient estate**." *Id.* n.10 (quoting 25 Am. Jur. 2d *Easements & Licenses* § 57 (2004)) (emphasis added).

> **[U]se by express or implied permission or license**, no matter how long continued, **cannot ripen into an easement by prescription**, since user as of right, as distinguished from permissive user, is lacking, if permissive in its inception, such permissive character will continue of the same nature, and no adverse user can arise, until there is a **distinct and positive assertion of a right hostile to the owner, and brought home to him**.

Williamson v. Abbott, 107 S.C. 397, 400-01, 93 S.E. 15, 16 (1917) (emphases added); *see also Atl. Coast Line R.R. Co. v. Epperson*, 85 S.C. 134, 140, 67 S.E.

235, 236 (1910) (holding that to establish a hostile use for purposes of adverse possession, there must be notice to the railroad of the adverse use, other than that arising from the mere erection of a substantial enclosure).

> **The asking and obtaining of permission**, whether from the tenant or owner of the servient estate, **stamps the character of the use as not having been adverse, or under claim of right**, and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription.

Williamson, 107 S.C. at 400-01, 93 S.E. at 16 (emphasis added).

B. Application to Landowner's Use

1. Twenty Years' Use

Landowner filed the present action on February 29, 2008. Therefore, to satisfy the first element of a prescriptive easement, Landowner must show continued and uninterrupted use of Railroad's right-of-way dating back to March 1, 1988. Landowner correctly argues that a party may "tack" the period of use of prior owners in order to satisfy the twenty-year element of the prescriptive easement theory.[8] However, the use by the previous owners must also satisfy all of the elements of a prescriptive easement. 25 Am. Jur. 2d *Easements & Licenses* § 63 (2004 & Supp. 2012); *see also Babb v. Harrison*, 220 S.C. 20, 23, 66 S.E.2d 457, 458 (1951) (holding that the claimant carries the burden of proving that the use of the disputed area was adverse for the full period of twenty years in order to establish an easement by prescription). Our examination of the evidence in the present case yields no genuine factual issue as to whether the use of the right-of-way was "adverse" or "under a claim of right" for the requisite twenty years.

[8] *See* 25 Am. Jur. 2d *Easements & Licenses* § 63 (2004 & Supp. 2012) ("The owner of a dominant estate generally need not show continued use by himself or herself for the entire prescriptive period, in order to establish an easement, but may tack the use[s] by his or her predecessors in title, where such successive owners are privies in estate and their possessions constitute one continuous possession.").

2. Permissive versus Adverse Use

Gayle's testimony, as well as Paine's testimony, indicated that after Landowner acquired the Property, Paine and Gayle had developed a good relationship with Railroad's security officer, Steve Purvis. Gayle admitted that Railroad, through Purvis, had given Landowner tacit permission to cross the right-of-way. On one occasion, Gayle had asked Purvis if "it would be better to access over the [railroad] track." Gayle testified that Purvis told him it would be "much more dangerous" for Gayle and Paine to access the Property by crossing over the track. Further, on behalf of Landowner, Gayle asked for, and received, Railroad's permission to install the gate on the access road. This permissive character of Landowner's use of the right-of-way is confirmed by Paine's affidavit. Although the conclusion of this affidavit states "we have requested legal acknowledgement of the existence of the right to access our property," the overall tenor of the affidavit is that Landowner's use was with Railroad's permission and in recognition of Railroad's rights. Therefore, the affidavit does not show that the use was adverse or under a claim of right. *See Matthews*, 365 S.C. at 250 n.10, 616 S.E.2d at 440 n.10 (characterizing a claim of right as "without recognition of the rights of the owner of the servient estate") (quoting 25 Am. Jur. 2d *Easements & Licenses* § 57 (2004)); *Atl. Coast Line R.R. Co. v. Searson*, 137 S.C. 468, 489, 135 S.E. 567, 573 (1926) ("The right of way of a railroad, having been acquired for a public purpose, cannot be lost by a prescriptive use or adverse possession, unless by the erection of a permanent structure, accompanied by notice to the railroad company of an intention to claim adversely to its right." (quoting *Atlanta & Charlotte Air-Line Ry. Co. v. Limestone-Globe Land Co.*, 109 S.C. 444, 96 S.E. 188 (1918))).

Moreover, at oral argument, Landowner indicated that Gayle's reason for seeking permission to install the gate on the access road was to avoid interfering with Railroad's access. Landowner's implicit acknowledgement of Railroad's rights is inconsistent with a claim of right, which is "without recognition of the rights of the owner of the servient estate." *Matthews*, 365 S.C. at 250 n.10, 616 S.E.2d at 440 n.10 (quoting 25 Am. Jur. 2d *Easements & Licenses* § 57 (2004)). Notably, Landowner arranged for Railroad and SCE&G to possess keys to the locks on the gate. The gate was actually beneficial to Railroad as it limited access to the trestle by trespassers.

In sum, Railroad gave permission to Landowner to use its right-of-way, and there is no probative evidence showing that after Railroad granted this permission, Landowner made any distinct and positive assertion of a right hostile to Railroad and "brought home" to Railroad. *See Williamson*, 107 S.C. at 400-01, 93 S.E. at 16

(holding that the permissive character of the use will continue of the same nature "until there is a distinct and positive assertion of a right hostile to the owner and brought home to him"); *id.* ("The asking and obtaining of permission . . . stamps the character of the use as not having been adverse, or under claim of right, and therefore as lacking that essential element which was necessary for it to ripen into a right by prescription.").

Even if Landowner's use could be characterized as adverse or under a claim of right, there is no probative evidence showing such an intent on the part of all previous owners of the Property dating back to March 1, 1988. Specifically, Landowner relies in part on the affidavit of Dr. Alexander Murphey, Jr., an owner of Furey Development, Inc., Wayne King's immediate predecessor in title. Dr. Murphey's affidavit indicates that his use of the right-of-way was without Railroad's permission and "with the understanding that [Railroad] refused to grant a right of way over and under its property."[9] However, an intent to claim adversely cannot be inferred from this statement because it does not show an intention to dispossess Railroad. *Cf. Brasington v. Williams*, 143 S.C. 223, 264, 141 S.E. 375, 388 (1927) ("Adverse possession is hostile . . . and hostile possession . . . **with intention to dispossess the owner**." (citation omitted) (emphasis added)). Likewise, Dr. Murphey's affidavit does not show a "claim of right" to use the right-of-way because it shows that Dr. Murphey recognized the rights of Railroad. *See Matthews*, 365 S.C. at 250 n.10, 616 S.E.2d at 440 n.10 (characterizing a claim of right as without recognition of the rights of the owner of the servient estate) (quoting 25 Am. Jur. 2d *Easements & Licenses* § 57 (2004)). Similarly, the inclusion of the access road in the development plans drawn by Dr. Murphey's engineers does not show a claim or right or an intent to claim adversely.

Because there is no genuine factual issue as to whether the use of the right-of-way was "adverse" or "under a claim of right" for the requisite twenty years, summary judgment on Landowner's prescriptive easement claim was proper.

IV. Laches

Landowner asserts that the trial court erred in granting summary judgment to Railroad on the issue of laches. We disagree.

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[9] Incidentally, Furey's other owner, C.E. Carter, stated in his affidavit that he never accessed the Property by driving a motor vehicle on the access road under the trestle; rather, he accessed the Property by foot and "walked the [P]roperty on only a few occasions."

"Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009), *aff'd*, 393 S.C. 160, 712 S.E.2d 408 (2011) (citation omitted). In other words, laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988).

Here, assuming Landowner's assertion of laches is procedurally appropriate,[10] the record does not show any actions by Railroad that were inconsistent with its current position that Landowner has no legal right to cross the right-of-way. There is no evidence that Railroad was aware of Landowner's plans for a subdivision. Therefore, Railroad's *permission* for Landowner to use the access road in the manner it had been used could not have been construed as permission to use it as a subdivision entrance. Accordingly, any "delay" on the part of Railroad cannot be characterized as unreasonable. *Judy*, 383 S.C. at 7, 677 S.E.2d at 217 (characterizing laches as an unreasonable delay in asserting one's rights, causing his adversary to detrimentally change his position). Further, there is no indication that Railroad has revoked permission for Paine or Gayle to cross the right-of-way for their personal enjoyment of the Property and its prior improvements. Therefore, Landowner's expenses related to those improvements do not constitute a detrimental change in position. *Id.*

Based on the foregoing, the circuit court properly granted summary judgment to Railroad on the doctrine of laches.

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[10] In *Byars v. Cherokee Cnty.*, 237 S.C. 548, 557-59, 118 S.E.2d 324, 329-330 (1961), the **plaintiff** in a quiet title action successfully asserted the doctrine of laches and estoppel against Cherokee County; the supreme court affirmed the special referee's conclusion that Cherokee County was barred by laches and equitable estoppel to repudiate its sale of the plaintiff's property and the reconveyance of the land to the plaintiff. Notably, however, the supreme court's opinion still characterized laches as a **defense**. *Id.* at 559, 118 S.E.2d at 330. Therefore, even if a plaintiff may successfully assert laches against a defendant, it must be in response to some assertion by the defendant.

V. Easement by Necessity

Finally, Landowner contends that the circuit court erred in granting summary judgment to Railroad on the easement by necessity claim because access to the Property by the Savannah River is inadequate as a matter of law. However, the necessity for this type of easement must have existed at the time Railroad's predecessor in interest first obtained the right-of-way.

The elements of a claim for easement by necessity are: (1) unity of title, (2) severance of title, and (3) necessity. *Boyd v. Bellsouth Tel. & Tel. Co.*, 369 S.C. 410, 418-19, 633 S.E.2d 136, 140-41 (2006). "To establish unity of title, the owner of the dominant estate must show that his land and that of the owner of the servient estate once belonged to the same person." *Kennedy v. Bedenbaugh*, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002). Severance of title means that title to a larger tract was "severed" by conveyance of a part to the plaintiff's predecessor in title and of a part to the defendant's predecessor in title; "they both claim, from a common source, different parts of the integral tract, which necessarily assumes a severance." *Brasington*, 143 S.C. at 246, 141 S.E. at 382 ; *see also Turnbull v. Rivers*, 14 S.C.L. 131, 139 (Ct. App. 1825) ("The necessity by which a person derives a right of way, is when one person sells to another lands inclosed on all sides by other lands. Here[,] the law imposes an obligation on the seller to allow the purchaser a right of way over his adjacent land.").

In cases involving the conveyance of a railroad right-of-way over the larger tract, as either an easement or a fee simple estate, the severance occurs at the time of the conveyance. *See Miller*, 94 S.C. at 109-10, 77 S.E. at 749-50 (Woods, J. concurring) (stating that when a railroad acquires a right-of-way, dividing one tract of land into two parts, the law "will hold that the intention was that the owner of the land would of necessity have the right of crossing, if a crossing could be made so as not to interfere materially" with the railroad's use of its right-of-way); *cf. Schwarz & Schwarz, LLC v. Caldwell County R.R. Co.*, 677 S.E.2d 546, 548 (N.C. App. 2009) (holding that a corporate landowner, who claimed an easement by necessity to cross over a railroad right-of-way easement separating the landowner's property from a public road, had not established that the necessity for the crossing arose out of its predecessor's conveyance of the right-of-way in 1902); *id.* at 548-49 (highlighting evidence showing that until the 1940s, when a railroad crossing

was constructed during the property's development, the property was a meadow "possibly used as a berry patch").[11]

"The necessity required for easement by necessity must be actual, real, and reasonable as distinguished from convenient, but need not be absolute and irresistible." *Boyd*, 369 S.C. at 420, 633 S.E.2d at 141. "South Carolina requires only 'reasonable necessity' to imply an easement: while the owner of the servient estate must prove more than convenience, he need not show the [easement] is absolutely necessary." *Graham v. Causey*, 284 S.C. 339, 341, 326 S.E.2d 412, 414 (Ct. App. 1985), *disapproved of on other grounds by Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987) (citations omitted). "The necessity element of easement by necessity **must exist at the time of the severance** and the party claiming the right to an easement **must not create the necessity when it would not otherwise exist**." *Boyd*, 369 S.C. at 420, 633 S.E.2d at 141 (citations omitted) (emphasis added). This is so because it is the severance that creates the necessity for an easement and, thus, allows the law to impute to a landowner a right to cross an adjacent parcel. *See Turnbull*, 14 S.C.L. at 139 ("The necessity by which a person derives a right of way, is when one person sells to another lands inclosed on all sides by other lands. Here[,] the law imposes an obligation on the seller to allow the purchaser a right of way over his adjacent land.").

Further, "reasonable access to a road over navigable water will prevent the implication of a way of necessity, even though a way by land may be more convenient." 25 Am. Jur. 2d *Easements & Licenses* § 38 (2004), *cited with approval in Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 97 n.4, 659 S.E.2d 151, 157 n.4 (2008); *but see Graham*, 284 S.C. 339, 342, 326 S.E.2d 412, 414 (Ct. App. 1985), *disapproved of on other grounds by Jowers*

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[11] *See also Town of Bedford v. Cerasuolo*, 818 N.E.2d 561, 567 (Mass. App. 2004) (holding that a landowner's need to establish a way to access the southern parcel of his tract arose upon his conveyance of a strip of land to a railroad in 1873, which had the effect of dividing his tract and leaving the tract's southern parcel landlocked)*; State v. Beeson*, 232 S.W.3d 265, 273-74 (Tex. App. 2007) (noting that landowners, who sought an easement by necessity to cross a railroad right-of-way, did not have any evidence of the manner in which their predecessors in interest used a tract of land at the time that the right-of-way, which severed the tract, came into existence in 1893); *id.* at 274 (stating that the landowners merely relied on the general allegation that their predecessors would have needed to cross the right-of-way to access the northern strip of their property that was cut off from the remainder of their tract by the right-of-way).

v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987) (holding that because the plaintiff's land was bordered by a lake and property belonging to others, the requirement that the necessity "must have existed at the time of the grant" was satisfied because "ever since [the plaintiff's] tract was severed [in the 1960s,] an easement . . . has been necessary" (citations omitted)).

Here, Landowner argues that precluding an easement by necessity when the property at issue can be accessed by navigable waters is "an antiquated notion." In support of this argument, Landowner cites an opinion issued by the Supreme Court of Arkansas, *Attaway v. Davis*, 707 S.W.2d 302 (Ark. 1986).[12] In response to an argument that an easement by necessity should not be granted in light of the dominant estate's frontage on a navigable water course, the court stated that the necessity need only be reasonable, not absolute. *Id.* at 303. The court further stated, "Now that travel even for short distances is almost always by motor vehicle, it is not reasonable to require the appellee and those wishing to visit her to make the trip by boat." *Id.*

While Landowner's argument is appealing, it overlooks the critical aspect of timing. Although South Carolina requires only "reasonable necessity" to imply an easement,[13] the reasonable necessity must have existed **at the time of the severance**. *Boyd*, 369 S.C. at 420, 633 S.E.2d at 141. Here, the severance occurred in 1878 when Railroad's predecessor in interest obtained its right-of-way over a larger tract of land that included the 15.6 acres now owned by Landowner; the right-of-way severed the larger tract, leaving access to the 15.6 acres only by the Savannah River. *Cf. Graham*, 284 S.C. at 340, 326 S.E.2d at 413 (indicating that the severance creating the necessity occurred in the 1960s).

In 1878, it would not have been unreasonable or antiquated to require a landowner to access his property by water in the absence of evidence of adverse environmental conditions. *Cf. Brasington*, 143 S.C. at 250, 141 S.E. at 384 (recounting the plaintiff's testimony regarding the conditions of a river and its banks at the location of the plaintiff's property and the adverse effect of these conditions on the ability to access the property by the river). Landowner did not present any evidence of environmental conditions in 1878 that would prevent

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[12] Landowner also cites 25 Am. Jur. 2d *Easements & Licenses* § 38 (2004) for the proposition that there is a trend in the courts toward a more liberal interpretation of easements by necessity despite access by water.

[13] *See Graham*, 284 S.C. at 341, 326 S.E.2d at 414 (requiring only "reasonable necessity").

reasonable access to the Property by the Savannah River. Therefore, we are constrained to affirm the circuit court's grant of summary judgment to Railroad on Landowner's easement by necessity claim.

We take this opportunity to emphasize our previous conclusion that regardless of the interest a person has in a railroad right-of-way, whether it is the underlying fee, some type of an easement, or a mere license to cross the right-of-way, that person may not interfere with the railroad's use of its right-of-way for the purpose of furthering its business. *See Faulkenberry v. Norfolk S. Ry. Co.*, 349 S.C. 318, 325, 563 S.E.2d 644, 648 (2002) (noting that although the owner of the fee underlying a railroad right-of-way may cross the railroad tracks, he may not do anything that would unreasonably interfere with the railroad's use of its easement); *Miller v. Seaboard Air Line Ry.*, 94 S.C. 105, 77 S.E. 748, 749 (1913) (holding that the owner of the fee underlying a railroad's right-of-way had "the right to cross the railroad on his own land wherever he saw fit to do so, provided he did not interfere with the right of the railroad to use its right of way for railroad purposes"); *Eldridge v. City of Greenwood*, 300 S.C. 369, 374, 388 S.E.2d 247, 250 (Ct. App. 1989) (indicating that "railroad purposes" include any purpose that furthers the business of the railroad.).

CONCLUSION

Accordingly, the circuit court's order granting summary judgment to Railroad is

AFFIRMED.[14]

HUFF and THOMAS, JJ., concur.

[14] We decline to address Landowner's assignments of error as to the denial of its summary judgment motion. *See Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003) (quoting *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994)) (holding that the denial of summary judgment is not reviewable even in an appeal from final judgment).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Padgett S. Lewis, Respondent,

v.

Brian Randolph Lewis, Appellant.

Appellate Case No. 2010-173166

Appeal From Richland County
John M. Rucker, Family Court Judge

Opinion No. 5050
Heard September 11, 2012 – Filed November 14, 2012

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

Thomas M. Neal, III, of Law Offices of Thomas M. Neal, III, of Columbia, for Appellant.

Carrie A. Warner, of Warner, Payne & Black, of Columbia, for Respondent.

HUFF, J.: Brian Randolph Lewis (Husband) appeals the order of the family court, asserting the court erred in (1) awarding child support to Padgett S. Lewis (Wife) based upon an imputed monthly income to him of $2,900.00, (2) failing to award the parties joint custody of their minor child or, alternatively, failing to award Husband more than standard visitation, (3) finding Husband's therapy counselor was unaware of certain matters involving Husband, and (4) requiring each party to

pay his or her own attorney's fees. We affirm in part and reverse and remand in part.

FACTUAL/PROCEDURAL HISTORY

Husband and Wife were married on September 2, 2001, and have one child from the marriage (Son), who was born on April 27, 2004. The parties separated on October 29, 2006, following an incident between the two, wherein both alleged a physical assault by the other. Wife left the marital residence with Son at that time, and filed a complaint and motion for pendente lite relief on an expedited basis on October 31, 2006. Following a November hearing, the court issued a temporary order on December 14, 2006, granting Wife custody of Son and ordering Husband to pay $1,024 a month in child support, based upon the child support guidelines and submitted financial declarations. The court further ordered that, upon Husband providing a letter from his counselor, Dr. Samer Touma, Husband was entitled to visitation every other weekend from Friday until Sunday, two hours on Wednesdays during weeks he did not have overnight visitation, and for a three day period during the Christmas holidays that year. On March 7, 2008, the court subsequently modified Husband's visitation, extending the weekend visitation until Monday morning and providing for visitation during the Thanksgiving and Christmas holidays, as well as during spring break, Easter, and the summer months. On April 11, 2008, Husband filed a motion for pendente lite relief, alleging he became unemployed on April 2, 2008, and seeking a decrease in his child support payments. The family court issued an order on May 15, 2008, denying Husband's request, but allowing Husband to use his equity in the marital home as an advance against his share of equitable distribution for purposes of fulfilling his obligation. On September 24, 2008, Husband filed a motion, on an expedited basis, to require a psychological evaluation of the parties for use in determining the best interests of Son in regard to the custody issue. On October 17, 2008 the family court granted this motion, appointing a clinical psychologist, Dr. Marc Harari, to conduct the psychological evaluations.

The case was heard by the family court over a period of three days in November 2008, and February and March 2009. By order dated July 10, 2009, the family court issued a final decree of divorce in the matter, finding Wife entitled to a divorce on the ground of one year of continuous separation of the parties. The court denied Husband's request for joint custody, finding this case was not appropriate for same. The court granted Wife's request and denied Husband's for

primary custody, finding it in Son's best interest to remain with Wife. The court further granted Husband visitation every other weekend from Friday evening until Monday morning, Mondays following non-visitation weekends from 5:00 p.m. to 7:30 p.m., and ordered a split schedule between the parties for Thanksgiving, Christmas, spring break and Easter, to be followed on a yearly rotating basis between the parties. Husband also received four non-consecutive weeks of visitation during the summer. Additionally, the family court found Husband was unemployed at that time, but imputed an income to him of $2,900.00 a month, or $34,800.00 annually, and ordered Husband to pay $125.00 a week in child support based upon the child support guidelines. The family court further reserved the right to review Husband's child support obligation upon him securing employment. The court held the issue of attorney's fees and costs in abeyance, pending counsels' arguments on the matter and the court's review of settlement negotiations.

Husband filed a motion to reconsider, challenging the court's final decree in several aspects, including the family court's failure to grant him joint custody, or alternatively, increased visitation, failure to consider the full testimony of Dr. Touma based upon a finding Dr. Touma was unaware of certain matters, and imputation of a monthly income of $2,900.00 to him. Following a hearing on the matter, the family court partially granted Husband's motion, modifying certain aspects of its order not in issue on appeal, but declining to do so in the above matters. Thereafter, the family court considered written argument of both parties, and declined to award attorney fees to either, finding Husband and Wife were responsible for their respective attorney's fees.

ISSUES

1. Whether the family court erred in awarding child support based upon an imputed gross monthly income to Husband of $2,900.00 because there was insufficient evidence to support this amount.

2. Whether the family court erred in failing to award the parties joint custody of Son or, in the alternative, to award Husband additional visitation with Son.

3. Whether the family court erred in finding Dr. Samer Touma was unaware of certain issues regarding Husband, because the clear and uncontradicted testimony of Dr. Touma was that he was aware of the issues.

4. Whether the family court erred in requiring each party to pay his or her own attorney's fees, because the evidence shows Wife should be required to contribute to Husband's attorney's fees.

STANDARD OF REVIEW

In appeals from the family court, an appellate court reviews factual and legal issues de novo. *Simmons v. Simmons*, 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654-55 (2011). However, while this court has the authority to find facts in accordance with its own view of the preponderance of the evidence, "we recognize the superior position of the family court judge in making credibility determinations." *Id.* at 392, 709 S.E.2d at 655. Further, de novo review does not relieve an appellant of his burden to "demonstrate error in the family court's findings of fact." *Id.* "Consequently, the family court's factual findings will be affirmed unless appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court." *Id.* (alteration in original) (internal citation and quotation marks omitted).

LAW/ANALYSIS

A. Imputed Income

Husband first contends the family court erred and abused its discretion in awarding child support based upon an imputed gross monthly income of $2,900.00, because there was insufficient evidence to support the imputation of income and the corresponding child support award. We agree.

Our law is clear that, in determining child support or alimony obligations, the family court has the discretion to impute income to a party who is voluntarily unemployed or underemployed.

> If the obligor spouse has the ability to earn more income than he is in fact earning, the court may impute income according to what he could earn by using his or her best

> efforts to gain employment equal to his capabilities, and an award of [support] based on such imputation may be a proper exercise of discretion even if it exhausts the obligor spouse's actual income.

Dixon v. Dixon, 334 S.C. 222, 240, 512 S.E.2d 539, 548 (Ct. App. 1999) (internal citation and quotation marks omitted); *see also Patel v. Patel*, 359 S.C. 515, 532, 599 S.E.2d 114, 123 (2004*)* (*Patel II*); *Blackwell v. Fulcrum*, 375 S.C. 337, 347, 652 S.E.2d 427, 432 (Ct. App. 2007) (noting it is appropriate to impute income to a party who is voluntarily unemployed or underemployed when determining child support obligations). "Whether termed voluntary underemployment, imputation of income, or the failure to reach earning potential, the case law is clear that when a payor spouse seeks to reduce support obligations based on his diminished income, a court should consider the payor spouse's earning capacity." *Marchant v. Marchant*, 390 S.C. 1, 9, 699 S.E.2d 708, 712 (Ct. App. 2010) (quoting *Gartside v. Gartside*, 383 S.C. 35, 44, 677 S.E.2d 621, 626 (Ct. App. 2009)).

In *Sanderson v. Sanderson*, 391 S.C. 249, 253-54, 705 S.E.2d 65, 66-67 (Ct. App. 2010), this court addressed a similar situation wherein the family court had imputed an annual income of $64,000 to the husband after he lost his position earning $95,000, as a result of corporate downsizing. There, we noted the South Carolina Child Support Guidelines specifically provide that "[i]n order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earnings level of the parent based on that parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community." *Id.* at 256, 705 S.E.2d at 68; S.C. Code Ann. Regs. 114-4720(A)(5)(B) (Supp. 2011). We further acknowledged in *Sanderson*, while a bad faith motivation is not required for a finding of voluntary underemployment, "the motivation behind any purported reduction in income or earning capacity should be considered in determining whether a parent is voluntarily underemployed." *Id.* Additionally, "[w]hen actual income versus earning capacity is at issue, courts should closely examine a good-faith and reasonable explanation for the decreased income." *Id.* After noting there was no dispute that the husband lost his job through no fault of his own, this court then went on to review the evidence of record as related to the factors set forth in the guidelines and determined the family court abused its discretion in imputing an annual income of $64,000 to Husband, and that remand of the matter to the family

court was proper to calculate Husband's income based upon the evidence of record. *Id.* at 256-58, 705 S.E.2d at 68-69.

In regard to child support, the court's final order provides in pertinent part as follows:

> [Husband] is currently unemployed. Based upon his work history and income, this Court imputes a gross monthly income to [Husband] of $2,900.00, or $34,800.00 annually. [Wife] is currently employed and earns a gross monthly income of $6,669.00 per month. [Wife] pays $125.00 per month toward the child health and dental insurance through her employer and $518.00 per month in daycare expenses. Based upon the Child Support Guidelines, [Husband] shall pay [Wife] One Hundred Twenty-Five and No/100 Dollars ($125.00) per week in child support. . . . This court specifically reserves the right to review [Husband's] child support obligation upon his securing employment of which [Husband] shall notify [Wife] within 48 hours.

The family court made no finding whatsoever as to whether Husband was at fault in losing his job, whether he was voluntarily unemployed, or whether he put forth his best efforts to gain employment equal to his capabilities. More importantly, it failed to address the necessary factors delineated by the child support guidelines concerning recent work history, occupational qualifications, prevailing job opportunities and earning levels in the community. Additionally, there is nothing in the record to suggest how the family court arrived at the annual income figure of $34,800 to be imputed to Husband. Further, the family court specifically acknowledged at the hearing on Husband's motion for reconsideration that it did not remember why it arrived at that figure. The family court failed to address the factors required by the guidelines, and we simply cannot find evidence in the record before us to support the court's imputation figure of $34,800. Therefore, after de novo review, we remand the imputation of income to the family court

pursuant to *Sanderson* for reconsideration based upon the factors set forth in the Child Support Guidelines.[1]

B. Custody and Visitation

Husband next contends the family court erred in failing to award the parties joint custody over Son or, alternatively, failing to award him additional visitation with Son. He argues joint custody is generally awarded in exceptional circumstances, and such circumstances exist in this case. He maintains the actions of Wife show the only way he will have any meaningful time with Son is through a specific court order, as Wife would not permit visitation outside the court order. Husband contends, because he and Wife do not communicate well, joint custody would be healthiest, as it keeps the child from developing a negative perception of the non-custodial parent. In the alternative, Husband argues that should this court believe joint custody is not appropriate, he should be allowed more than the standard visitation awarded by the family court.

In making a custody determination, the child's welfare and best interest are the paramount and controlling considerations of the court. *Patel II*, 359 S.C. at 526, 599 S.E.2d at 119. As with determinations of child custody, the welfare and best interests of the child are the primary considerations in determining visitation. *Paparella v. Paparella*, 340 S.C. 186, 191, 531 S.E.2d 297, 300 (Ct. App. 2000). In determining the best interests of the child, the family court considers several factors "including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including GAL, expert witnesses, and the children); and the age, health, and sex of the children." *McComb v. Conard*, 394 S.C. 416, 422, 715 S.E.2d 662, 665 (Ct. App. 2011) (quoting *Patel v. Patel*, 347 S.C. 281, 285, 555 S.E.2d 386, 388 (2001) (*Patel I*)). "Although the legislature gives family court judges the authority to order joint or divided custody where the court finds it is in the best interests of the child, . . . joint or divided custody should only be awarded where there are exceptional circumstances." *Patel II*, 359 S.C. at 528, 599 S.E.2d at 121; S.C. Code Ann § 63-3-530(A)(42) (2010) (internal citation and quotation marks omitted). "Absent exceptional circumstances, the law regards joint custody as typically harmful to the

[1] Because we are remanding for reconsideration the issue of imputed income, upon establishing the imputed amount, the family court should also determine the matter of retroactivity.

children and not in their best interests." *Spreeuw v. Barker*, 385 S.C. 45, 61, 682 S.E.2d 843, 851 (Ct. App. 2009). In determining joint custody is usually considered harmful to and not conducive to the best interest and welfare of a child, our courts have explained the disfavor as follows:

> The courts generally endeavor to avoid dividing the custody of a child between contending parties, and are particularly reluctant to award the custody of a child in brief alternating periods between estranged and quarrelsome persons. Under the facts and circumstances of particular cases, it has been held improper to apportion the custody of a child between its parents, or between one of its parents and a third party, for ordinarily it is not conducive to the best interests and welfare of a child for it to be shifted and shuttled back and forth in alternate brief periods between contending parties, particularly during the school term. Furthermore, such an arrangement is likely to cause confusion, interfere with the proper training and discipline of the child, make the child the basis of many quarrels between its custodians, render its life unhappy and discontented, and prevent it from living a normal life.

Scott v. Scott, 354 S.C. 118, 125-26, 579 S.E.2d 620, 624 (2003) (quoting *Mixson v. Mixson*, 253 S.C. 436, 447, 171 S.E.2d 581, 586 (1969)). [2]

After review of the record de novo, we find Husband has not met his burden of convincing us the family court's determination regarding custody and visitation is against the preponderance of the evidence.

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[2] We note that in *Scott*, our supreme court concluded our legislative statute governing the family court's jurisdiction, which specifically grants the family court the exclusive jurisdiction "to order joint or divided custody where the court finds it is in the best interests of the child," currently codified in section 63-3-530(A)(42), does not change the law in this State that, generally, joint custody is disfavored. 354 S.C. at 125, 579 S.E.2d at 623-24.

As to joint custody, the record shows both Dr. Harari and Dr. Touma considered joint custody to be a more viable option when the parents can cooperate with each other. Specifically, Dr. Harari, who was qualified as an expert in counseling psychology, testified that based upon his evaluation of the parties, joint custody or shared custody would not be appropriate in this case because of the "immense disagreement between these parties." He noted, although both parents claimed they were trying to cooperate with the other, they had been through hours of unsuccessful mediation. Dr. Harari thus found "having them share in equal custody just doesn't seem realistic." He further concluded, within a reasonable degree of medical certainty, Wife presented in a more credible and realistic manner during the testing process. Further, although Dr. Harari acknowledged there was a potential for joint physical custody of Son due to the parties' geographic proximity, he was concerned with the communication problems between the parties. Dr. Harari clarified, however, he did not recommend joint legal custody, and though joint physical custody was potentially possible, the mistrust between the parties outweighed their geographic proximity. Finally, Dr. Harari expressed concern in regard to joint custody based upon Husband's response pattern on the administered psychological testing, which indicated there needed to be a higher degree of caution with Husband.[3] Dr. Touma, who was qualified as an expert in counseling and family therapy, testified that the more time a child spends with both parents, the more the child's adjustment issues are reduced and it is therefore beneficial to the child. However, Dr. Touma also qualified this opinion, stating "it's best if the parents can get along and cooperate and find a way to work together." He further noted, based on recent research, the ideal situation involving divorce is for two parents to split time with the child, but stated "the most important component is no hostility or controversy between the parents," and if the parents can cooperate and

[3] With regard to Husband, Dr. Harari found his response pattern on all four tests administered to show his "validity indices was considered socially desirable and overly favorable meaning it was not a realistic [portrayal] of his true functioning level," indicating he possibly presented only his most positive attributes. An alternative explanation was that Husband suffered from a personality disorder suggestive of someone with a high degree of narcissism, but Dr. Harari believed, based upon the data he received from Dr. Touma and other information, that it was more likely Husband responded over favorably and unrealistically. Dr. Harari noted in his report that Husband was reluctant to admit to common flaws that most individuals typically endorse, and determined Husband exhibited heightened levels of positive impression management defensiveness.

collaborate, equal time is good for the child. Dr. Touma also agreed that Dr. Harari was in a better position than him to offer a custody recommendation or opinion to the court.

As noted, our courts generally disfavor joint custody since, ordinarily, it is not conducive to the best interest and welfare of a child to be shuttled back and forth in alternate brief periods between parents. Further, our courts are particularly reluctant to award joint custody between estranged and quarrelsome parents. Here, not only has Husband failed to show exceptional circumstances warranting an award of joint custody, the evidence of record supports the conclusion that joint custody in this case would not be in the best interest of Son given the acrimonious relationship between Husband and Wife.

As to extended visitation, we find no error in the amount of visitation the family court awarded Husband for the same reasons as noted above. Our review of the preponderance of the evidence convinces us that, given the lack of cooperation and communication between the parties, allowing Husband more extensive visitation would not be in Son's best interest.

In *Paparella*, relied upon by Husband, this court agreed with the father's assertion that he should have been awarded expanded visitation. 340 S.C. at 191, 531 S.E.2d at 300. There, the family court awarded father visitation with the children every other weekend, beginning on Friday at 6 p.m. and ending on Sunday at 6 p.m. *Id.* The mother admitted during trial that the father should be awarded more visitation than this. *Id.* Further, the record showed that the father was involved in raising his children and in their day-to-day activities, and that while the parties were married, they worked as pharmacists at the same drugstore and were able to arrange their schedules so that one parent was home with the children while the other parent was at work, thus eliminating the need for the children to be in daycare. *Id.* Based on these circumstances, this court agreed that the father should be allowed more visitation with the children, and modified the visitation schedule to provide the father visitation every other weekend during the school year, beginning after school on Friday and ending when they returned to school Monday morning, as well as on the Thursday preceding the weekend when the father did not have visitation, from after school until they returned to school Friday morning, and on the Tuesday following the weekend when he did not have visitation, from after school until they returned to school Wednesday morning. *Id.* at 191-92, 531 S.E.2d at 300. We also determined the father's summer visitation should be

expanded to half of the children's summer vacation. *Id.* at 192, 531 S.E.2d at 300. In the case at hand, evidence of record shows Husband was not as involved in Son's life prior to the parties' separation.[4] Further, Husband's visitation was not as limited by the family court as was that of the father in *Paparella*. Finally, Wife did not agree during the trial that Husband should receive more visitation, as did the wife in *Paparella*.

Additionally, while Husband strenuously argues the importance of allowing joint custody or expanded visitation to insure the continued quality relationship between Husband and Son, we find no evidence in the record that Husband and Son's relationship is in jeopardy based upon the visitation awarded by the court. Further, as noted by the Guardian Ad Litem and the family court in the hearing on Husband's motion for reconsideration, Husband received fairly significant visitation from the court, with the court expanding his time somewhat from the previous temporary court order. Additionally, the court noted the testimony of the daycare provider concerning problems with Husband dropping child off at the appropriate time. Lastly, the court at this hearing noted that it had closely divided the summer by giving Husband four weeks of visitation. Accordingly, we find the preponderance of the evidence supports the family court's order concerning visitation.

In summary, the record before us does not reflect that the evidence is so clearly in Husband's favor to warrant a finding of an abuse of discretion by the family court, and Husband has failed to sustain his burden of convincing this court that the family court did not consider Son's welfare and best interest in its custody and visitation decision.

C. Finding Regarding Dr. Touma

Husband next argues the family court erred in finding Dr. Touma was unaware of certain issues regarding Husband, because the uncontradicted evidence was clear

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[4] Though Husband claimed the parties shared equally in caring for Son before the separation, Wife testified, as well as presented other witnesses, to the contrary. Given the problems with Husband's credibility, as noted below, we do not believe Husband has met his burden of convincing us by the preponderance of the evidence that he was involved with Son like the father was involved with raising his children in *Paparella*.

that Dr. Touma was aware of these matters. Specifically, Husband argues that Wife attempted to make an issue of allegations that Husband had, in the past, punched a hole in a wall and torn up photographs, and the family court made a finding that Dr. Touma was unaware of these incidents. He argues, in spite of the fact that the court was presented with Dr. Touma's testimony during the motion for reconsideration that he was aware of the incidents and Husband took responsibility for them, the court declined to modify its finding in this regard.

At the final hearing, Wife testified to numerous instances of hostile or aggressive behavior by Husband, including the following: routinely mistreating and threatening Wife's dog; instances of throwing objects such as phones, remote controls, alarms, and camcorders; beating on and damaging a locked bedroom door, causing Husband to break his wrist; and punching a hole in the wall. Additionally, Wife testified that, after she purchased a package of pictures of Son for around $200, Husband asked to see the pictures and then proceeded to rip them into pieces in front of her and Son. Wife also testified Husband threatened to divorce her, and told her he would "break [her] mentally, financially and physically." Finally, Wife submitted into evidence a note written to her by Husband during the marriage which stated, "I WISH YOU WOULD LEAVE!"

In response to Wife's allegation in her complaint that Husband beat the dog, Husband admitted in his answer that he did beat the dog, but "affirmatively assert[ed] that the dog required discipline." During his testimony, however, Husband denied that he beat the dog, claiming he only spanked the dog with Wife's permission, and asserted the admission in his answer was a "misstatement" by his attorney. Husband admitted he broke his wrist punching a hole in a bedroom door, and also admitted writing the note to Wife saying he wished she would leave. He further admitted tearing up the pictures of Son, stating he was disappointed and hurt because the parties had agreed on a less expensive package, and claimed he tore up the pictures "to prove a point." He likewise admitted putting his fist through a wall, explaining he was hurt and upset at things Wife had said to him during an incident with the dog. Yet, Husband repeatedly denied that he had a temper or that he was angry during the various incidents, and denied being abusive toward Wife. We find Husband's credibility is suspect.

During cross-examination, Dr. Touma testified Husband had indicated he did not anticipate the breakup with Wife, and it happened abruptly. When Wife's attorney asked, had Dr. Touma known Husband left Wife the note stating he wished she

would leave some one and a half years prior to the separation, whether Dr. Touma would have delved into that more, Dr. Touma stated that, had he known that, he would have asked Husband why he would have written that note. When asked if he saw any evidence of temper with Husband, Dr. Touma replied, "Not that I can talk about." Counsel then showed Dr. Touma the photographs of Son that Husband had torn and asked if he would have delved into those issues deeper had he known, and Dr. Touma responded, "Well, well, yeah, and I did delve into the issues of anger and frustration because he was angry initially regarding what took place and how these things transpired." Dr. Touma stated Husband talked to him about losing his temper, and Husband mentioned "about punching the hole at one time." When asked if he found Husband tended to blame everybody but himself for what happened during the marriage, Dr. Touma stated Husband did blame others, but he also "took responsibility for things such as . . . punching the wall . . . and all these things."

In its final order, under the section concerning the granting of a divorce, the family court made findings of fact regarding Husband's complaints with the dog, Dr. Touma's testimony, and Husband's dispute with the findings of Dr. Harari, before finding Wife was entitled to a divorce on the ground of one year of continuous separation. As to Dr. Touma, the court noted Dr. Touma testified he did not find Husband to have any anger problems, but had admitted he was unaware Husband punched holes in the wall, had torn up photographs of Son, or had written a note to Wife asking her to leave.

It is unclear from Dr. Touma's testimony whether he was actually made aware of the incident where Husband tore up the photographs of Son. It is clear, however, that Dr. Touma was made aware that Husband punched at least one hole in the wall and Husband "took responsibility for such things as . . . punching the wall." However, the court only made this finding in relation to the divorce between the parties, and there is no indication it considered this in regard to any of the other matters. Further, though the finding was inaccurate as concerned Dr. Touma's awareness that Husband punched a hole in the wall, the record supports its finding concerning the note left for Wife, and is ambiguous as to the torn photographs. Additionally, based upon the record before us, we do not believe this finding by the court is any more damaging to Husband than the other evidence presented. Accordingly, we find any error in the court's determination concerning Dr. Touma's knowledge of Husband's behavior to be harmless. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (noting our appellate courts

recognize an overriding rule which says: "whatever doesn't make any difference, doesn't matter.").

D. Attorney's Fees

Lastly, Husband contends the family court erred in requiring each party to pay his or her own attorney's fees, asserting the evidence supported a conclusion Wife should be required to contribute to Husband's fees. He argues the manner in which Wife chose to begin this action, requesting an expedited hearing, created an atmosphere of fear and mistrust which permeated the case, prejudiced Husband, and required the filing and hearing of numerous motions. Husband asserts Wife prolonged this case. He also contends he ultimately received greater than normal contact with Son, despite Wife's efforts to limit and restrict Husband's time with him. Further, Husband notes he lost his job during the pendency of the case, while Wife remained gainfully employed. Based upon the factors to be considered in determining whether any attorney's fees should be awarded, Husband argues he was entitled to an award of fees. Additionally, Husband argues that, if this court disagrees with his argument that he is entitled to attorney's fees under the case law, should it reverse the family court on any issue in this matter, the issue of attorney's fees and costs should be remanded.

The decision to award attorney's fees is within the family court's sound discretion, and although appellate review of such an award is de novo, the appellant still has the burden of showing error in the family court's findings of fact. *Chisholm v. Chisholm*, 396 S.C. 507, 510, 722 S.E.2d 222, 223-24 (2012). In deciding whether to award attorney's fees and costs, the court should consider the following factors: (1) the ability of the party to pay the fees; (2) beneficial results obtained; (3) the financial conditions of the parties; and (4) the effect a fee award will have on the party's standard of living. *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). Though we would generally be inclined to determine an award of attorney's fees in accordance with the factors outlined in *E.D.M. v. T.A.M.*, where "the case before us presents an added dimension of an uncooperative spouse who hampers a final resolution of the issues in dispute, we will not reward an adversary spouse for such conduct." *Blackwell*, 375 at 346, 652 S.E.2d at 431. Further, when parties fail to cooperate and their behavior prolongs the proceedings, this is a basis for holding the parties responsible for their own attorney's fees. *Lewin v.*

Lewin, 396 S.C. 349, 356, 721 S.E.2d 1, 4 (Ct. App. 2011). "An adversary spouse should not be rewarded for such conduct." *Anderson v. Tolbert*, 322 S.C. 543, 549, 473 S.E.2d 456, 459 (Ct. App. 1996).

Here, we note that at the time of trial, Husband had managed to pay a substantial portion of the attorney's fees he incurred with three separate attorneys. *See Patel II*, 359 S.C. at 533, 599 S.E.2d at 123 (finding Wife had not shown she was unable to pay her attorney's fees where Wife had paid a $35,000 portion of fees and expenses totaling more than $90,000). More importantly, our review of the record reflects that Husband was, if not primarily, at least equally to blame for the protracted litigation in this matter, and this failure to cooperate supports the family court's determination that each party should be responsible for his and her own attorney's fees. We find further support for this in the position taken by Husband during his motion for reconsideration, wherein his attorney stated, "I cannot imagine, when you apply the law to the financial circumstances of these parties, that there would be any other outcome other than they would each pay their own fees." Accordingly, we find no error in the denial of attorney's fees to Husband, even in light of our recommended remand on the issue concerning imputed income.

CONCLUSION

Based on the foregoing, we reverse and remand the matter of imputed income to Husband and affirm the remaining issues.

AFFIRMED IN PART and REVERSED AND REMANDED IN PART.

THOMAS and GEATHERS, JJ., concur.