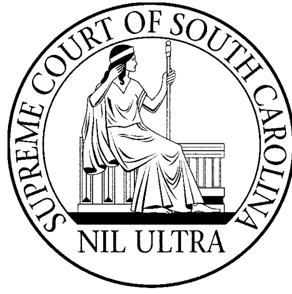

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

January 16, 2001

ADVANCE SHEET NO. 2

Daniel E. Shearouse, Clerk
Columbia, South Carolina

www.judicial.state.sc.us

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Facts

In 1996, respondent was retained to represent a client in a personal injury matter. A lawsuit was filed and the case went to trial in August 1998. The client's treating physician testified at respondent's request. The case was subsequently settled. On September 2, 1998, physician sent respondent an invoice for $750 for the court appearance. On September 14, 1998, respondent disbursed the settlement proceeds to the client but failed to pay physician's court appearance fee. Although physician contacted respondent on numerous occasions to secure payment, the court appearance fee was never paid.

In April 2000, physician's medical records supervisor filed a Complaint with the Commission on Lawyer Conduct. On April 25, 2000, Disciplinary Counsel notified respondent about the Complaint and requested a response. He did not reply. Disciplinary Counsel wrote respondent again on June 13, 2000, requesting a response to the Complaint. When respondent failed to respond, Disciplinary Counsel served him with a Notice of Full Investigation on August 1, 2000. Respondent failed to submit a response to the Notice of Full Investigation and was ultimately served with a subpoena pursuant to Rule 19(c)(4), RLDE, requiring him to appear on October 26, 2000, to respond to questions under oath concerning the Complaint. Respondent appeared but failed to provide the client file and trust account records to Disciplinary Counsel as required by the subpoena. Respondent finally submitted the documents after a second request.

Law

By his conduct, respondent has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (reasonable diligence and promptness in representing clients); Rule 1.15 (upon receiving funds in which a third person has an interest, a lawyer shall promptly notify the third person); Rule 4.4 (respect for the rights of third persons); Rule 8.1 (knowingly fail to respond to a lawful demand for information from a disciplinary authority); Rule 8.4(a) (violating the Rules of Professional Conduct); and Rule 8.4(e) (engaging in conduct that is

As the Duvall court noted, the term "'exposure' indicates a passive relationship between the worker and his work environment rather than an event or occurrence, or series of occurrences, which constitute injury under the Workers' Compensation Act." 621 N.E.2d at 1125. The claimant in that case was found by the Workers' Compensation Board to have carpal tunnel syndrome caused by repetitive trauma resulting from the ordinary conditions of her employment. On appeal, the court concluded that the claimant's carpal tunnel syndrome did not result from "exposure" to workplace conditions, but from hand and wrist mechanics associated with work on the production line. As the court succinctly stated, "[claimant's] carpal tunnel syndrome did not result from where she worked but from the work she did." Id. at 1126. Noting that compensation for injury in Indiana requires "injury by accident arising out of and in the course of the employment and does not include disease in any form except as it results from injury," Ind. Code § 22-3-6-1(e) (Supp. 1999), the court concluded claimant's carpal tunnel syndrome was properly treated as an injury by accident, rather than as an occupational disease.[3]

We see no reason why, if factually supported, carpal tunnel syndrome cannot be compensable as an injury by accident under our Act and existing case law. To be compensable under the Act, the injury must be an "injury by accident arising out of and in the course of the employment." S.C. Code Ann. § 42-1-160 (Supp. 1999). To determine whether an "injury by accident" has been established, the focus is on the injury itself, and not on some specific event. Creech, 320 S.C. at 563, 467 S.E.2d at 116. "'[A]ccident' means an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." Id. It is an event "not within one's foresight and expectation and may be due to purely accidental causes or to oversight and negligence,

[3] The Indiana view of injury is substantially similar to that of South Carolina. To be compensable as an injury under Indiana law, "a claimant is no longer required to prove that his injury arose from an accident as a specific, identifiable event; rather, an employee's injury is considered 'accidental' when it is the unexpected consequence of the usual exertion or routine performance of the particular employee's duties. Either an accidental cause or an unexpected result will support a claim." Duvall, 621 N.E.2d at 1126, (citing Evans v. Yankeetown Dock Corp., 491 N.E.2d 969 (Ind. 1986)). As stated in the body of this opinion, under South Carolina law proof of a causative event is not required. The unexpected result or industrial injury itself is considered the compensable accident. Stokes v. First Nat'l Bank, 306 S.C. 46, 410 S.E.2d 248 (1991).

carelessness, fatigue, or miscalculation of the effects of voluntary action." Linnen v. Beaufort County Sheriff's Dep't, 305 S.C. 341, 344, 408 S.E.2d 248, 250 (Ct. App. 1991). A slip, fall, or other fortuitous event or accident in the cause of the injury is not required. Creech, 320 S.C. at 563, 467 S.E.2d at 116. Proof of a "causative event" is not required to establish "injury by accident." Sigmon v. Dayco Corp., 316 S.C. 260, 449 S.E.2d 497 (Ct. App. 1994). The unexpected result or industrial injury is considered the compensable accident. Creech, 320 S.C. at 563, 467 S.E.2d at 116.

The employer contends that the result of the repetitive action in the workplace is not an "injury by accident" because it is not unexpected. However, there is no finding by the Commission that Pee knew she would develop carpal tunnel syndrome if she executed repetitive movements with her hands and wrists. There is no evidence that repetitive movements such as those made by Pee always result in carpal tunnel syndrome. Furthermore, the Commission concluded that the result was not expected, and that fact is supported by the record.

The employer has confused the symptoms with the injury. The testimony reveals that Pee's carpal tunnel syndrome was a condition produced by compression of the median nerve as it travels through the carpal tunnel at the wrist, resulting in symptoms of tingling, pain, and weakness. Dr. Healy, Pee's treating physician, testified that carpal tunnel syndrome results, as a rule, from repetitive stress as opposed to a single traumatic event.[4] In Pee's case, Dr. Healy opined her carpal tunnel syndrome was work related. Although Pee experienced her symptoms for some time during her repetitive work activity, there is no indication she expected or intended the resulting condition of median nerve compression. See Linnen, 305 S.C. at 344, 408 S.E.2d at 250 ("accident . . . may be due to oversight and negligence, carelessness, fatigue, or miscalculation of the effects of voluntary action") (emphasis added).

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[4] Carpal tunnel syndrome can also be caused by "a variety of factors, including age, gender, weight, acute trauma, rheumatoid arthritis, and other inflammatory diseases, pregnancy, diabetes, tumors, hormonal factors, and congenital defects." 14 A.L.R.5th 1, 16, n.3 (1993) (citing 8 Am. Jur. Proof of Facts 3d 1, Carpal Tunnel Syndrome § 6 (1990)).

Next, the employer asserts that Pee's carpal tunnel syndrome occurred gradually, having no "definiteness of time." To support the contention that an injury by accident must have a definitive time of occurrence, the employer asserts that no South Carolina case has found a claimant's condition to be compensable as an injury by accident without a definite time of occurrence. Furthermore, the employer argues that in cases involving the gradual onset of injury, such as Stokes v. First National Bank, 306 S.C. 46, 410 S.E.2d 248 (1991) (involving a stress-related nervous breakdown), and Grayson v. Gulf Oil Co., 292 S.C. 528, 357 S.E.2d 479 (Ct. App. 1987) (involving hypersensitivity to normal environmental factors from long term exposure to petroleum fumes), the forces at work resulted in one catastrophic event, which was the single, traumatically induced injury.

We reject this argument. An injury need only be unexpected to be considered an injury by accident. Creech, 320 S.C. at 559, 467 S.E.2d at 114. There is no requirement in the Act that it be distinct, as opposed to gradual. To impose such a requirement would refocus the inquiry on a discrete event, as opposed to the injury itself, in violation of Creech, 320 S.C. at 559, 467 S.E.2d at 114, and Sigmon, 316 S.C. at 260, 449 S.E.2d at 497. In Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992), our supreme court ruled that the two-year limitation period provided in section 42-15-40 begins to run from the date the claimant first discovers the compensable injury. It is this discrete event which provides the necessary certainty as to time.

For the foregoing reasons, we conclude the Commission did not err in treating Pee's carpal tunnel syndrome as an injury by accident. The substantial evidence in the record supports the Commission's decision, and the circuit court correctly affirmed the award.

AFFIRMED.

STILWELL, and SHULER, JJ., concur.

> accounting, [and] could have discovered any possible errors or discrepancies of the financial disclosures that she asserted to the Court she had at the time of entering into the final consent order and divorce decree.

Wife moved for reconsideration, arguing, inter alia, the Family Court erred in failing to require Husband to be responsible for his personal debts and the undisclosed accounts payable. In his return, Husband denied Wife was entitled to the relief she requested. He requested disbursement of his portion of the funds escrowed from the sale of real property that was required to be sold pursuant to the couple's settlement agreement. Husband did not otherwise seek reconsideration. The Family Court denied Wife's motion. As well, the court reversed its prior decision, sua sponte, which held Husband in contempt. The judge found Wife's action against Husband was based on "regrets" and "dissatisfaction for having entered into [the property settlement] agreement." The court further rescinded its earlier commandment requiring Husband to contribute $750.00 to Wife's attorneys' fees, and instead directed Wife to pay Husband $4113.92 for attorney's fees he accumulated in defense of the reconsideration motion. Husband was awarded the escrowed funds.

Wife again moved for reconsideration. That motion was denied, with the exception of a $170.00 downward adjustment in the award of attorney's fees to Husband. This appeal followed.

STANDARD OF REVIEW

On appeal from the Family Court, this Court has jurisdiction to find the facts in accordance with its view of the preponderance of the evidence. Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999). This tribunal, however, is not required to disregard the Family Court's findings. Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (Ct. App. 1999). Likewise, we are not obligated to ignore the fact the Family Court judge, who saw and heard the witnesses, was in a better position to evaluate their testimony. Smith v. Smith, 327 S.C. 448, 486 S.E.2d 516 (Ct. App. 1997); see also Dorchester County Dep't of Soc. Servs. v. Miller, 324 S.C. 445, 477 S.E.2d 476 (Ct. App.

1996) (because the appellate court lacks the opportunity for direct observation of witnesses, it should accord great deference to the Family Court's findings where matters of credibility are involved); Terwilliger v. Terwilliger, 298 S.C. 144, 378 S.E.2d 609 (Ct. App. 1989) (resolving questions regarding credibility and the weight given to testimony is a function of the Family Court judge who heard the testimony).

ISSUES

I. Did the Family Court err in sua sponte reversing its initial decision that Husband had willfully failed to surrender certain business assets?

II. Did the Family Court err in failing to find Husband liable for the personal expenses he incurred following the couple's separation and satisfied using Heins Plumbing funds?

III. Did the Family Court err in declining to interpret the couple's agreement as requiring Husband to be responsible for business debts he failed to disclose to Wife before the date of the final hearing?

IV. Did the Family Court err in awarding Husband attorney's fees?

LAW/ANALYSIS

I. Husband's Failure to Surrender Business Assets

Wife avers the Family Court erred in sua sponte reversing its initial order following the contempt action that Husband had willfully failed to surrender certain business assets. We agree.

It is well settled that ordinarily a party may not receive relief not contemplated in his pleadings. Loftis v. Loftis, 286 S.C. 12, 331 S.E.2d 372

(Ct. App. 1985).

> While it is true that pleadings in the family court must be liberally construed, this rule cannot be stretched so as to permit the judge to award relief not contemplated by the pleadings. Due process requires that a litigant be placed on notice of the issues which the court is to consider.

Bass v. Bass, 272 S.C. 177, 180, 249 S.E.2d 905, 906 (1978) (footnote omitted).

The Family Court found Husband in contempt because he did not relinquish $4,146.00 in business assets to Wife. Husband was mandated to pay Wife this amount. Husband did not make a request to alter or amend this decision. Moreover, neither Wife's subsequent Rule 59(e), SCRCP motion nor Husband's reply can be read to have brought this issue before the court for reconsideration.

While much has been written about the propriety of courts ruling on issues included in a Rule 59(e), SCRCP motion, but not raised at trial, a review of cases decided since the enactment of the South Carolina Rules of Civil Procedure reveals little comment on the permissibility of a trial court altering or amending an order on its own initiative. Because Rule 59(e), SCRCP is substantially the federal rule,[3] an examination of authorities addressing this dilemma, as it pertains to the federal courts, is appropriate. A leading treatise on federal practice elucidates:

> Rule 59(e) is silent on the power of a court to alter or amend a judgment on its **own initiative**, unlike Rule 59(d), which authorizes the court to grant a new trial on its **own initiative**. It is unclear whether or not a court has this authority. Arguably, a court should have the power to alter or amend a judgment on its own motion, as long as it acts no later than 10 days after the entry of the

[3] 25 S.C. Juris. Rules of Civil Procedure § 59.1 (1994)

> judgment. The authorization in Rule 59(d) (and Rule 60(a)) for the court to act on its **own initiative** has been held to be only a declaratory example of the general power of a court to act on its **own initiative** in many respects. However, when the court acts on its **own initiative**, the court must act within 10 days of the entry of judgment.

25 Moore's Federal Practice § 59.33 (Matthew Bender 3d ed. 2000) (emphasis added) (footnotes omitted).

In Burnam v. Amoco Container Company, 738 F.2d 1230 (11th Cir. 1984), an employee of Amoco filed a complaint against the company, alleging she was a victim of age discrimination. Amoco filed its answer and a motion to dismiss. The employee in turn filed a response to Amoco's motion. Soon thereafter, the federal district court issued an order dismissing the employee's complaint. No additional motions or other documents of any nature were filed by either party after the trial court's order. Nonetheless, 10 days later, the district court, on its own volition, entered another order, explaining that it had not received the employee's response to Amoco's motion to dismiss until after the initial order was entered. The court further stated: "[t]he court has now considered the plaintiff's arguments in opposition to the motion to dismiss and finds them to be without merit. The court's [initial] order … remains the order of this court. The instant order is issued as a clarification of the grounds set forth in the previous order." Id. at 1231. On appeal, the Eleventh Circuit was faced with the question of whether, pursuant to Rule 59(e), the trial court had the power to amend its initial judgment, sua sponte. The appellate tribunal responded:

> The Rules of Civil Procedure are unclear [regarding whether a district court may, sua sponte, consider the availability of Rule 59(e) relief]. For example, Rule 60(a) authorizes the court to correct clerical mistakes and other errors on its own initiative. Likewise, Rule 59(d) states that a court may grant a new trial on its own initiative. In contrast, Rule 59(e) is silent on the power of the

> court to order relief on its own initiative. Arguably, such silence implies that the court lacks such power. We decline to make such an inference …. Thus, so long as the court acts within ten days after the entry of judgment, the court has the power on its own motion to consider altering or amending a judgment ….

Id. at 1232.

The Burnam holding has been recognized and applied on numerous occasions. E.g., Continental Lab. Prods., Inc. v. Medax Int'l., Inc., 114 F. Supp. 2d 992 (S.D.Cal. 2000); Marshall v. Shalala, 5 F.3d 453 (10th Cir. 1993); Useden v. Acker, 947 F.2d 1563 (11th Cir. 1991).

In addition to Burnam, this Court finds Hidle v. Geneva County Board of Education, 792 F.2d 1098 (11th Cir. 1986), edifying. Hidle filed suit in federal district court, alleging the Geneva County Board of Education had established a pattern and practice of favoring males over females in its hiring for supervisory and administrative positions, which resulted in the school board denying employment to Hidle, a female. After trial, the court issued a written opinion that asseverated the school board had violated federal law by refusing to hire Hidle for an assistant principal's position because of her sex. Regarding damages, the court did not grant Hidle her request for back-pay; however, it did order the school district to offer Hidle the next vacant assistant principalship. Hidle timely filed a motion to alter and amend the judgment pursuant to Rule 59(e). She raised only the questions of back-pay and the court's failure to require her immediate instatement into the job she was originally denied. The school board filed no post-judgment motion requesting alteration or amendment. The district court subsequently denied Hidle's motion, set aside its order, and entered an amended judgment in favor of the school district. The time period between the initial judgment and the second order was seven months.

At issue on appeal was whether a party's motion to alter or amend a judgment pursuant to Rule 59(e) permits the trial court, sua sponte, to vacate a judgment in favor of the moving party so as to rule in favor of the non-moving

party:

> Strong policy considerations militate against what occurred here. The court … arguably erred in denying [back-pay], job instatement, and injunctive relief against future discrimination, as well as in assigning the burden of proof of mitigation. When plaintiff sought to present these matters as a basis for altering or amending the remedies afforded her, she lost her judgment to the defendant who had not asked any post-judgment relief. This inhibits the error-correcting function of a Rule 59(e) motion. If the district court is correct, a successful plaintiff given a less-than-complete remedy could not ask for correction without putting at risk the judgment in her favor though the party cast in judgment has raised no question of the validity of the judgment. A defendant successful on five claims cannot safely seek for correction concerning claim six.

. . . .

> The lapse of time is of real concern. This court has held, in Burnam v. Amoco … that where no motion has been filed by either party[,] a district court has a limited power to act sua sponte to alter or amend a judgment so long as done within ten days after the judgment is entered. If Burnam controls, the district court here exceeded its authority because of the … delay. Here a motion was made by plaintiff. Possibly the filing of a motion by a party opens up the judgment to a greater extent than the court itself can open it up without a motion. Nevertheless, the interest of the parties and society in the finality of judgments, and the legitimate expectation of the parties concerning the judgment to the extent it is not questioned by the parties, speak against pulling the rug from under the plaintiff [seven] months after she filed her motion to correct errors in the remedy granted her.

Id. at 1100.

A recent case decided by our Supreme Court, Leviner v. Sonoco Products Company, 339 S.C. 492, 530 S.E.2d 127 (2000), lends support to the proposition that a trial judge may alter or amend a judgment, sua sponte, but must do so within 10 days after the judgment was entered. Leviner was a workers' compensation case. In that dispute, the single commissioner found Leviner had reached maximum medical improvement and awarded him permanent disability. The full commission affirmed. Leviner appealed to the Circuit Court, which issued a form order, remanding the case to the single commissioner. Neither party filed a Rule 59(e), SCRCP motion within the 10-day period allowed by the rule. A month later, the Circuit Court entered a full written order purporting to vacate the commission's orders and finding Leviner totally disabled. Sonoco appealed. The Court of Appeals reversed the second order, holding the Circuit Court exceeded its appellate jurisdiction in finding Leviner totally disabled. The matter was remanded to the single commissioner for a de novo hearing, pursuant to the initial form order. Upon its review, the Supreme Court concluded the second order was void:

> [T]he trial judge's full written order filed … more than thirty days later, was patently untimely. Under Rule 59(e), SCRCP, trial judge has only ten days from entry of judgment to alter or amend an earlier order on his own initiative …. When no timely Rule 59 motion was made nor timely sua sponte order filed under Rule 59(e), the … form order "matured" into a final judgment. The [subsequent] order … was a nullity because the trial judge no longer had jurisdiction over the matter.

Id. at 494, 530 S.E.2d at 128.

The Leviner holding was founded in large part upon the Supreme Court's ruling in Doran v. Doran, 288 S.C. 477, 343 S.E.2d 618 (1986). Doran was a domestic relations case. In his petition for divorce, Husband sought equitable distribution of the marital assets. Wife listed a savings account on her financial

declaration. In his final order, the trial judge divided the parties' various real and personal property, but did not expressly mention the savings account. Neither party appealed the order. More than a month later, the judge, on his own volition, issued a supplemental order reserving jurisdiction to divide the savings account. After a hearing, the judge awarded 57% of the savings account to Husband. This case was heard before the promulgation of Rule 59(e), SCRCP; nevertheless, Chief Justice Ness, writing for a unanimous Court, declared a trial court's authority to alter or amend its decision, sua sponte, was time-limited:

> A trial judge loses jurisdiction to modify an order after the term at which it is issued .... Once the term ends, the order is no longer subject to any amendment or modification which involves the exercise of judgment or discretion on the merits of the action.[4]

Id. at 478, 343 S.E.2d 619 (citations omitted).

We rule a Family Court judge does not have the authority to alter or amend a judgment, sua sponte, once the judgment is more than 10-days-old. In the case sub judice, the order addressing Wife's contempt motion was filed January 29, 1999. On June 3, 1999, the Family Court entered its order in response to Wife's first reconsideration motion. The interim between these orders clearly exceeded the 10-day period permitted by Rule 59(e), SCRCP. Therefore, the Family Court's grant of relief to Husband from his obligation to Wife regarding the business assets is reversed.

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[4] In a footnote, the Court noted that under Rule 59(e), SCRCP, which was enacted in the time between the initial proceedings and the appeal, the trial judge would have had the authority to alter or amend the order, but only for a 10-day period after entry of the judgment.

The family court held a hearing on the exceptions and reaffirmed the prior order denying Basnight's motion to dismiss. Basnight filed an appeal, which was dismissed by our Supreme Court as an unappealable interlocutory order.

Following a hearing on the merits, the family court issued its final order concluding Basnight was the natural father of the minor child, and establishing his child support obligation at $474.09 per month. The court found the support obligation should be made retroactive to the date of the December 7, 1994 hearing, and thereby established Basnight's arrearage at $22,282.23, to be repaid at a rate of $25.00 per week. This appeal followed.

LAW/ANALYSIS

Personal Jurisdiction[2]

Basnight argues the family court should have dismissed the action for lack of personal jurisdiction. We disagree.

The party seeking to invoke personal jurisdiction against a nonresident defendant via a long-arm statute has the burden of establishing jurisdiction. White v. Stephens, 300 S.C. 241, 387 S.E.2d 260 (1990). The determination of whether a trial court may exercise personal jurisdiction over a nonresident defendant involves a two step analysis. Id. First, the defendant's conduct must meet the requirements of the applicable long-arm statute. Id. Second, the defendant must have sufficient contacts with South Carolina so that the constitutional standards of due process are not violated. Id.

Long-Arm Statute

We find Basnight's conduct met the requirements of the long-arm statute applied by the family court. The family court exercised personal jurisdiction over Basnight pursuant to South Carolina Code Annotated Section 20-7-953(A) (1985). Section 20-7-953(A) provides, in pertinent part:

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[2] Basnight's first, second, and seventh through tenth issues on appeal.

Sufficient Minimum Contacts

In analyzing the second step necessary to exercise personal jurisdiction over a nonresident defendant, we find Basnight had sufficient minimum contacts with South Carolina to meet the constitutional standards of due process. In determining whether a finding of minimum contacts comports with the due process requirements of traditional notions of fair play and substantial justice, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's act; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the state's interest in exercising jurisdiction. Clark v. Key, 304 S.C. 497, 405 S.E.2d 599 (1991).

The mother testified she met Basnight in late 1982 when he was stationed at the United States Army post in Columbia, South Carolina. Basnight and the mother engaged in sexual relations in early 1983 and again in March, 1984. We find Basnight's tour of duty in South Carolina and continuing relationship with the mother from at least late 1982 to early 1984 sufficient under the first and second factors.

In analyzing the third factor, the inconvenience to the parties, we recognize that Basnight is now stationed outside the state and defending a suit in South Carolina is inconvenient. However, we must weigh this against the final factor, South Carolina's interest in exercising personal jurisdiction over Basnight. We conclude South Carolina's interest in the support of a minor child residing within its borders is compelling. Accordingly, we find the state's interest in exercising personal jurisdiction over Basnight outweighs any hardship or inconvenience created by hailing Basnight into the courts of this state.

Res Judicata[3]

Basnight also argues the family court erred in failing to find that the North Carolina order of dismissal barred this action under the doctrine of res judicata.

[3] Basnight's third and fourth issues on appeal.

Rule 60(b), SCRCP[4]

Basnight next argues the family court erred in refusing to allow a record hearing on the merits of his Rule 60(b), SCRCP, motion for relief from judgment and/or in failing to issue a stay pending a hearing on the motion. DSS avers Basnight filed his Rule 60(b) motion, then requested, in chambers, the family court hold an emergency hearing. The court refused, and allegedly advised Basnight to file a written request for a hearing with the clerk of court. Basnight filed this appeal instead.

The issue Basnight relies on in support of his Rule 60(b) motion has not yet been presented to or ruled upon by the family court.[5] DSS admits the issue "may have been collateral" and does not object to the matter being raised post-trial. We find the issue is not ripe for review by this Court. See Baber v. Greenville County, 327 S.C. 31, 488 S.E.2d 314 (1997)(finding an issue not yet presented to the Tax Commission not ripe for appellate review).

Error Preservation[6]

In his brief, Basnight finally argues the family court erred in: (1) failing to dismiss this action because there exists no affidavit of proof of service of process on Basnight; and (2) failing to dismiss the action where no guardian ad litem was appointed for the child. Neither of these issues was raised to or ruled upon by the family court, and are therefore not properly before this court for review. McDavid v. McDavid, 333 S.C. 490, 511 S.E.2d 365 (1999)(holding an issue not raised to or ruled on by the family court should not be considered by the appellate court).

At oral argument, Basnight argued for the first time that the family court erred in failing to apply Rule 41(b) of the North Carolina Rules of Civil

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[4] Basnight's eleventh issue on appeal.

[5] Basnight argues the determination of his child support must take into account his obligation to his other children.

[6] Basnight's fifth and sixth issues on appeal.

Procedure. This issue is likewise not preserved for appellate review. See In the Interest of Bruce O., 311 S.C. 514, 429 S.E.2d 858 (Ct. App. 1993) (An appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief.).

For the foregoing reasons, the order on appeal is

AFFIRMED.

CURETON, GOOLSBY and CONNOR, JJ., concur.