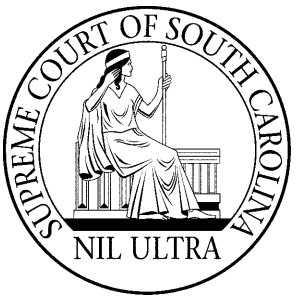

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
September 6, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas E. Skinner, Employee, Respondent,

v.

Westinghouse Electric Corporation, Employer, and Viacom, Carrier, Defendants,

Of Whom Westinghouse Electric Corporation is, Appellant.

Appeal From Richland County
Walter H. Sanders, Jr., Special Referee

Opinion No. 27037
Heard May 25, 2011 – Filed September 6, 2011

REVERSED

R. Daniel Addison, Hedrick Gardner Kincheloe & Garofalo, L.L.P., of Columbia, Shay Dvoretzky and

Craig I. Chosiad, of Jones Day, of Washington, D.C.
for Appellant.

Jeffrey T. Eddy, of Charleston, for Respondent.

JUSTICE HEARN: Thomas Skinner received an award of benefits from the Workers' Compensation Commission for his asbestosis under the scheduled loss provisions of Section 42-9-30 of the South Carolina Code (1976 & Supp. 2009). Westinghouse Electric Corporation, Skinner's former employer, appeals that decision, arguing Skinner cannot recover for a scheduled loss and must proceed under the "general disability" statutes found in Sections 42-9-10 and 42-9-20 of the South Carolina Code (1976 & Supp. 2009). We agree and reverse.

FACTUAL/PROCEDURAL BACKGROUND

Skinner began working for Westinghouse in 1968 and spent nearly fifteen years performing several different jobs in its Hampton, South Carolina plant. During the course of his employment, Skinner was regularly exposed to and breathed in asbestos dust contained in the insulation products produced at the plant as well as other toxic chemicals. In addition to his work with Westinghouse, Skinner joined the South Carolina Army National Guard as a reservist in 1969, attending one drill weekend a month and two drill weeks in the summer each year. Furthermore, he worked in the "property book" section of the National Guard, keeping accounting records of government-owned property.

In 1983, Skinner left Westinghouse on his own accord, not because of any condition, medical or otherwise, and began working full-time with the National Guard. His salary with the National Guard was over $44,000 per year, which was more than he was making at Westinghouse. He held that position until 1990, when he became a unit administrator for the Bamberg

unit. As of 2005, he was still working full-time with the National Guard as an administrator for the Hampton unit.[1]

Skinner began having noticeable breathing problems while he was employed at Westinghouse. His breathing problems became more pronounced in the early 1990s, when he was working full-time with the National Guard. At that time, an army doctor diagnosed him with chronic obstructive pulmonary disease (COPD). Skinner continued to have breathing problems, and a pulmonary function test performed in 1998 showed a worsening of his lung function. Dr. Cary E. Fechter, a board-certified pulmonary and critical care medicine specialist, evaluated Skinner in 2003 and diagnosed him with asbestosis, occupational bronchitis, severe sleep apnea, and sinusitis. Additionally, medical records for the hospital where Skinner received his general medical care stated he had COPD and asbestosis in both lungs.

Skinner filed a claim against Westinghouse with the South Carolina Workers' Compensation Commission in 2004, alleging he suffered an accidental injury to his lungs and whole body in 2003, caused by chronic inhalation of asbestos fibers, chemical fumes, and other injurious airborne contaminants. Skinner claimed this injury led to partial general disability and partial specific disability. Although Skinner was the only witness to testify at the hearing, the parties submitted the depositions of several doctors, including Dr. Fechter who claimed Skinner had a combined impairment of 64% of the whole person.

The Commissioner found Skinner suffered from an occupational disease and an injury by accident, was partially disabled, and was able to recover under section 42-9-30. Accordingly, the Commissioner awarded Skinner a lump sum amount of $119,159.66. Westinghouse appealed this decision to the Appellate Panel of the Commission, which affirmed the Commissioner's order. Westinghouse then appealed to the circuit court,

[1]Under the National Guard's rules, Skinner would reach his mandatory retirement age in September 2006. We assume that he retired as planned at that time.

which dismissed the appeal for lack of subject matter jurisdiction. This Court reversed that decision and remanded the appeal back to the circuit court. *See Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 97, 668 S.E.2d 795, 798 (2008). The circuit court referred the matter to a special referee, who held a hearing and summarily affirmed the Commission's findings. This appeal followed.

ISSUES PRESENTED

Westinghouse raises two issues on appeal:

I. Does Section 42-11-60 of the South Carolina Code (1985) bar a claimant with pulmonary disease from recovering workers' compensation disability benefits if he cannot show lost wages?

II. Does Section 42-11-70 of the South Carolina Code (1985) bar a claimant with pulmonary disease from recovering benefits if he is not disabled within two years of the exposure to the substance that caused the disease?

LAW/ANALYSIS

Westinghouse's arguments on appeal concern the impact of section 42-11-60 on Skinner's right to recover for his pulmonary disease. In particular, it argues Skinner can only recover for total or partial disability under sections 42-9-10 and 42-9-20, respectively. Westinghouse therefore contends the Commissioner erred in finding Skinner's injuries to be compensable as a scheduled loss under section 42-9-30. Our review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. *See* S.C. Code Ann. § 1-23-380(5)(d) (Supp. 2010); *Rodriguez v. Romero*, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005). We agree with Westinghouse.

Section 42-11-10(D) of the South Carolina Code (1985) generally allows for compensation to be paid to an employee with an occupational

disease who suffers from a disability under sections 42-9-10, 42-9-20, or 42-9-30. Section 42-11-10(B)(5) of the South Carolina Code (Supp. 2010) exempts from the definition of occupational disease "any disease of the cardiac, pulmonary, or circulatory system." However, this subsection also contains an exception to this exception applicable to Skinner's claim: if the pulmonary disease results from "the *natural entrance into the body* through the skin or *natural orifices thereof of foreign organic or inorganic matter* under *circumstances peculiar to the employment* and the processes utilized therein," then it is an occupational disease. *Id.* (emphasis added). In Skinner's case, his asbestosis was caused by the inhalation of asbestos dust. It is undisputed that asbestos dust was prevalent in his work conditions at Westinghouse due to the particular products it manufactured, and thus, it was peculiar to his employment. Therefore, Skinner's asbestosis is an occupational disease under the statute.

However, "[n]o compensation shall be payable for any pulmonary disease arising out of the inhalation of organic or inorganic dust or fumes unless the claimant suffers disability as described in § 42-9-10 or § 42-9-20 and shall not be compensable under § 42-9-30." *Id.* § 42-11-60 (1985). Because section 42-11-60 is the specific statute governing compensability for pulmonary disease, it controls over the more general language of 42-11-10(D). *See Langley v. Pierce*, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993) (citing *Lloyd v. Lloyd*, 295 S.C. 55, 57-58, 367 S.E.2d 153, 155 (1988)) ("Generally, specific laws prevail over general laws and later legislation takes precedence over earlier legislation."). It is uncontested that COPD and asbestosis are pulmonary diseases. Therefore, in order for Skinner to be compensated, he must proceed under sections 42-9-10 or 42-9-20, not section 42-9-30.

Sections 42-9-10 and 42-9-20 are commonly known as the "general disability statutes," with section 42-9-10 governing total disability and section 42-9-20 governing partial disability. Both parties concede that Skinner's claim falls under the partial disability statute. Under section 42-9-20, lost wages must be shown in order to receive compensation. S.C. Code Ann. § 42-9-20 (1985) (stating that an employee with partial disability

receives "a weekly compensation equal to sixty-six and two-thirds percent of the *difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter*, but not more than the average weekly wage in this State for the preceding fiscal year") (emphasis added). "It is well-settled that an award under the general disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing." *Fields v. Owens Corning Fiberglas*, 301 S.C. 554, 555, 393 S.E.2d 172, 173 (1990) (citing *Roper v. Kimbrell's of Greenville, Inc.*, 231 S.C. 453, 461, 99 S.E.2d 52, 56-57 (1957)).

Without question, Skinner has established that he suffers from an occupational disease. However, because his asbestosis is a pulmonary disease, it is not compensable under section 42-9-30, and is only compensable under section 42-9-20, which requires a showing of lost wages. Skinner's workers compensation claim fails because he cannot establish any lost wages occasioned by his asbestosis. In fact, the only evidence of Skinner's wages established that he was making more money with the National Guard than he did when he was employed by Westinghouse. Because he is unable to prove lost wages, we find that Skinner cannot recover under section 42-9-20, and as a result, does not have a compensable occupational disease.

CONCLUSION

We reverse the special referee's affirmance of Skinner's award based upon the clear language of section 42-11-60. In that section, the General Assembly specified that recovery for a pulmonary disease such as Skinner's hinges upon a showing of lost wages under section 42-9-10 and 42-9-20. Because our resolution of this issue is dispositive of the appeal, it is not necessary for us to address the remaining issues raised by the parties. *See Futch v. McAlister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (determining that once an appellate court has addressed an issue that is dispositive to the case, it is unnecessary to address any remaining issues).

REVERSED.

PLEICONES, ACTING CHIEF JUSTICE, BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ann F. McClurg and Ann F. McClurg, as Personal Representative of the Estate of Stephen Andrew McClurg, Respondent,

v.

Harrell Wayne Deaton and New Prime, Inc., Petitioners.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 27038
Heard January 5, 2011 – Filed September 6, 2011

AFFIRMED

C. Mitchell Brown, William C. Wood, Jr., A. Mattison Bogan, and Michael J. Anzelmo, all of Nelson Mullins Riley & Scarborough, of Columbia, and C. Stuart Mauney, Phillip E. Reeves, and Jennifer D. Eubanks, all of Gallivan, White & Boyd, of Greenville, and Samuel

W. Outten and Sandi R. Wilson, both of Womble Carlyle Sandridge & Ride, of Greenville, for Petitioners.

Cynthia Barrier Patterson, of Columbia, and Donald R. Moorhead, of Greenville, for Respondent.

Duke R. Highfield, Brandt R. Horton, and Benjamin A. Traywick, all of Young Clement Rivers, of Charleston, for Amicus Curiae American Law Firm Association. Frank L. Eppes, of Eppes & Plumblee, of Greenville, for Amicus Curiae South Carolina Association for Justice. Robert D. Moseley, Jr., Kurt M. Rozelsky, and Matthew M. Staab, all of Smith Moore Leatherood, of Greenville, for Amicus Curiae SC Trucking Association and American Trucking et al.. William B. Darwin, Jr. and Nathaniel P. Mark, both of Holcombe Bomar, of Spartanburg, for Amicus Curiae SC Defense Trial Attorney's Association.

JUSTICE PLEICONES: We granted certiorari to review a decision of the Court of Appeals which upheld the circuit court's denial of both petitioners' Rule 60(b), SCRCP, motions. McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008). We affirm.

The Court of Appeals rested its affirmance on issue preservation grounds, that is, the failure of the petitioners to argue to the circuit court that they had a meritorious defense.[1] A meritorious defense is necessary in order

[1] "Preserving issues for appellate review is a fundamental component of appellate practice." Toal, Vafai, Muckenfuss Appellate Procedure in South Carolina (1999) 65. Issue preservation requires that the question presented to the appellate court "must first have been fairly and properly raised in the lower court and passed upon by that court." Id. The dissent would alter these well-settled precepts in favor of burdening trial courts with discerning the

issues a party should raise, and perusing the record for evidence to support those issues.

Here, the dissent would find the issue of a meritorious defense raised by New Prime when, in two sentences in the portion of its pretrial memorandum titled "Background," which preceeds the section titled "Argument," it states:

> Neither Zurich nor New Prime heard about the suit that was filed against Deaton until October 7, 2005, after the default judgment for $800,000 was entered (see Affidavit of Gail Meyer at ¶ 13-14). Plaintiff's counsel had previously demanded $170,000 to settle the matter.

The dissent also finds Deaton raised a meritorious defense when, in its "Supplemental Memorandum in Support of Amended Motion to Set Aside Default Judgment," he footnoted his text sentence "Therefore, the Plaintiffs' loss of a windfall Default Judgment simply should not be a factor in the Court's decision" with the following:

> It is appropriate to characterize the Default Judgment as a windfall for Plaintiffs given the fact that their Counsel made a settlement demand of $170,000 from Zurich on April 26, 2004, little over a year before the Default Judgment of over four times that amount was entered. See Exhibit A ¶ 16.

To say that these three sentences "fairly and properly raised" the issue of a meritorious defense to the circuit court, albeit without use of "magic words" strains credulity, as does the suggestion that Thompson v. Hammond, 299 S.C. 116, 382 S.E.2d 900 (1989) stands for the proposition that a party need not argue "the existence of a meritorious defense within a Rule 60(b) motion."

for a judgment to be set aside under Rule 60(b). See Mitchell Supp. Co., Inc. v. Gaffney, 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988). The Court of Appeals did not decide, nor do we, whether a meritorious defense as to damages alone and not as to liability is an adequate basis for the grant of Rule 60 relief. Moreover, we do not decide whether a party demonstrating a meritorious defense to the damages awarded in the default proceeding would be entitled to have the entire judgment set aside or merely the damages award.

Since the issue of a meritorious defense was neither raised to nor ruled upon by the circuit court,[2] the decision of the Court of Appeals is

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Moreover, it is well-settled that the moving party in a Rule 60(b) motion has the burden of presenting **evidence** entitling him to relief. BB&T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (2006) (emphasis supplied). Memorandum in support of a motion is not evidence. Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 701 S.E.2d 742 (2010) (Hearn, J., dissenting). Even if we were to find that the issue of a meritorious defense were suggested by the memoranda, neither petitioner could be said to have presented evidence of such a defense as it is beyond cavil that a settlement offer is not evidence. Rule 408, SCRE; Fesmire v. Digh, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009).

Finally, if we were to construe the trial judge's statement that "there has been no showing of a meritorious defense" as a ruling rather than an observation, compare Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951) (mere observations by trial judge do not enlarge grounds upon which motion is made), the fact remains that he would have been correct. Rule 408, SCRE; Fesmire, *supra*.

[2] Although both petitioners filed motions for reconsideration in the trial court, neither challenged the finding of the circuit court that there was no showing of a meritorious defense. Moreover, petitioner New Prime did not challenge the finding of no meritorious defense in its appellant's brief. Petitioner Deaton, in his appellant's brief, referenced a discrepancy between the documented medical expenses and the damages award only in support of his

argument that there was a defect in respondent's pleading warranting a setting aside of the default judgment. The settlement offer was not mentioned. The "substantial discrepancy between the settlement offer and the amount awarded upon default" relied upon by the dissent as the basis for a meritorious defense appears for the first time in petitioners' appellate reply briefs. It is axiomatic that an issue cannot be raised for the first time in a reply brief. Chet Adams Co. v. Jones F. Pedersen Co., 307 S.C. 33, 413 S.E.2d 827 (1992).

None of the cases cited by the dissent support the dissent's proposition that a party is not required to argue to the trial or appellate court that it has a meritorious defense in order to obtain Rule 60(b) relief. In EM-CO Metal Prods., Inc. v. Great Atlantic & Pacific Tea Co., 280 S.C. 107, 311 S.E.2d 83 (Ct. App. 1984), the Court of Appeals affirmed an order relieving respondent from a default judgment under the statutory predecessor to Rule 60(b), citing both deference to judicial discretion and the "liberal spirit" of the statute, a spirit which did not survive the adoption of the SCRCP. Sundown Operating Co., Inc. v. Intedge Industries, Inc., 385 S.C. 601, 681 S.E.2d 885 (2009) (standard for relief under Rule 60(b) rigorous). Moreover, in EM-CO, the appealed order stated respondent had a meritorious defense but did not support this conclusion of law by factual findings. Appellant argued this omission required reversal. The Court of Appeals, in affirming this conclusion, noted there was evidence in the record to support it in an attorney's letter. In EM-CO, the court looked for evidence to affirm a finding by the trial court, while here the dissent is searching for evidence to reverse. Moreover, the dissent finds this evidence in mere factual recitations which reflect a settlement offer made long before discovery was complete or a complaint had been filed.

The dissent's reliance on Mictronics, Inc. v. S.C. Dep't of Rev., 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001) and William v. Watkins, 389 S.C. 319, 681 S.E.2d 914 (Ct. App. 2009) is similarly misplaced. In Mictronics, the Court of Appeals affirmed a circuit court order granting relief from an administrative law judge's (ALJ's) order dismissing a contested case for procedural reasons, using its authority to affirm an appeal for any reason

AFFIRMED.

BEATTY, KITTREDGE, JJ., and Acting Justice John H. Waller, concur. TOAL, C.J., dissenting in a separate opinion.

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appearing in the record. See Rule 220(b), SCACR. The court found the circuit court had applied the incorrect standard in reversing the ALJ's order, and proceeded to review the case under the correct standard. The court, applying this new standard, found evidence of a meritorious defense in the respondent's prehearing statement, that is, the document it had filed with the ALJ in support of the merits of its claim that it was entitled to a tax exemption. This decision does not stand for the proposition that an appellate court must search the record for evidence of a meritorious defense in order to reverse an appealed order, but rather that when affirming for any reason, the court may rely on arguments actually raised by the party below. In William v. Watkins, the Court of Appeals found the meritorious defense in the party's pleading.

Here, the dissent does not rely on any argument made to the lower tribunal but instead searches the record for evidence to support an argument raised for the first time in a petition for rehearing after the Court of Appeals had affirmed the appeal. It is axiomatic that an issue cannot be raised for the first time on rehearing. E.g., Nelson v. QHG of South Carolina, Inc., 362 S.C. 421, 608 S.E.2d 855 (2005).

The dissent goes beyond plain error, and would require appellate courts to search the record in an effort to reverse. This we should not do. E.g., Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).

CHIEF JUSTICE TOAL: I respectfully dissent. This case presents an unusual fact scenario where New Prime, Inc. and Deaton (collectively, Petitioners) challenge a default judgment—obtained, in my opinion, by Respondents' trickery and deception—by contesting damages, rather than contesting liability. The majority concludes the issue of whether the default judgment should be set aside is unpreserved for appellate review because a meritorious defense was neither raised to, nor ruled upon by the circuit court. I believe both Petitioners raised a meritorious defense in their original pleadings before the circuit court by noting the substantial discrepancy between the damages awarded upon default and the medical expenses incurred or the settlement offer advanced by the plaintiffs. The circuit court ruled on that issue, finding Petitioners did not make a meritorious defense. It is a question of first impression in this state whether a meritorious defense to a default judgment may relate to damages or whether it may only involve a defense to liability. That question was squarely before the court of appeals when the circuit court found Petitioners failed to raise a meritorious defense. As such, it should be weighed on this Court's scales.

Because the majority neglected to include an explanation of the facts in its affirmance, I include a recitation here. In this case, Petitioners appeal the decision of the court of appeals upholding the circuit court's denial of each of Petitioners' Rule 60(b), SCRCP, motions.

On August 5, 2002, Deaton was driving a truck for his employer, New Prime, when Deaton was involved in an accident with Respondent Ann McClurg. Zurich North American (Insurer) insured New Prime under a commercial trucker's general liability policy with a $2 million per accident deductible.

Insurer learned of the accident on August 6, 2002, and began an investigation. In September 2002, Insurer received a letter of representation from the lawyer (Lawyer) representing both Ann McClurg and her then-living husband Stephen McClurg. In October 2002, Deaton left New Prime's employment.

Insurer and Lawyer remained in contact, discussing injuries, medical treatments, and settlement negotiations. In April 2004, Insurer received a settlement package from Lawyer demanding $170,000 to settle all claims. On June 28, 2004, Lawyer sent Insurer a letter referencing "McClurg v. New Prime and Deaton," and stating that if Insurer did not respond by next week regarding the settlement offer, he would "file suit and serve the Defendant and send [Insurer] a courtesy copy of the pleadings." In October 2004, Lawyer sent Insurer another letter enclosing a draft complaint naming only Respondent Ann McClurg as plaintiff and only New Prime as defendant, alleging that New Prime was vicariously liable for Deaton's negligence, and New Prime was liable for the negligent hiring, retention, and training of Deaton. Later that month, Insurer contacted Lawyer who agreed to delay filing the suit. For the next eight months, until June 2005, Insurer and Lawyer exchanged settlement offers, but the parties could not reach an agreement. At no time during these exchanges did Lawyer indicate he intended to pursue an action solely against Deaton. In May 2005, Lawyer sent Insurer a new medical report, without mentioning that in April 2005 he had filed suit on behalf of both McClurgs against Deaton only.

Lawyer attempted to serve Deaton in April 2005 through the South Carolina Department of Motor Vehicles (SCDMV) pursuant to South Carolina Code section 15-9-350. That attempt at service was returned and marked as "insufficient address." Lawyer then hired a private investigator, who found an alternate address for Deaton in Texas, and in June 2005, the SCDMV sent the complaint to Deaton by certified mail. The return receipt was ostensibly signed by Deaton on June 27, 2005. Deaton denies ever receiving the Summons and Complaint. Deaton did not answer or otherwise appear, and the circuit court filed an order of default on August 1, 2005. Deaton failed to respond to notice of the damages hearing, and in September 2005, the court entered judgments totaling $800,000 against Deaton; $750,000 for Ann McClurg and $50,000 for Stephen McClurg.

On October 5, 2005, after the expiration of the statute of limitations, Insurer contacted Lawyer's office to check on the status of the settlement negotiations, but Lawyer's staff would not give Insurer any information. On

October 7, 2005, Insurer received a copy of the Deaton default judgment from Lawyer. In the letter accompanying the copy of the default judgment, Lawyer requested payment from Insurer to satisfy the judgment against Deaton. This is the first notice Insurer and New Prime had of the suit brought against Deaton. On that same day, Deaton made a motion to set aside the default judgment under Rule 60(b)(1) and (b)(3), SCRCP. New Prime subsequently motioned to intervene and moved to set aside the default judgment under this rule, as well. The circuit court granted New Prime's motion to intervene, but denied both Deaton's and New Prime's Rule 60(b) motions. The circuit court subsequently denied the parties' motions for reconsideration under Rule 59(e), SCRCP.

On appeal, the court of appeals affirmed in a 2-1 decision, with then-Chief Judge Hearn dissenting. *McClurg v. Deaton*, 380 S.C. 563, 580, 671 S.E.2d 87, 96 (Ct. App. 2008). The denial of relief for Petitioners rested entirely on the determination that Petitioners failed to raise a meritorious defense when motioning to set aside the default judgment. *Id.* at 573, 671 S.E.2d at 93. On the merits, the court of appeals held that, as an intervening party to the action, New Prime was entitled to relief under Rule 60(b), SCRCP, if it satisfied one of the Rule's requirements.[3] *Id.* at 573, 671 S.E.2d at 92–93. The court of appeals then found that, at a minimum, the required element of surprise existed. *Id.* at 573, 671 S.E.2d at 92. The court opined

[3] Rule 60(b), SCRCP, provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise or excusable neglect;
>
> . . .
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party
>
> . . . .

that Lawyer's actions would most likely satisfy the misrepresentation and misconduct element of Rule 60(b)(3), SCRCP, as well. *Id.* at 573, 671 S.E.2d at 92–93. However, the court declined to offer relief to Petitioners, determining that any meritorious defense that may have existed in the record was not raised to or ruled upon by the trial court. *Id.* Then-Chief Judge Hearn dissented with respect to that conclusion, stating she believed Petitioners raised a meritorious defense in the course of the pleadings. *Id.* at 580, 671 S.E.2d at 96. In short, I would adopt Judge Hearn's dissent.

Petitioners' request for rehearing en banc was denied by a vote of 5 in favor, and 4 opposed.[4] This Court granted both Deaton's and New Prime's petitions for writs of certiorari.

Our standard of review in this case is deferential. The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.* at 551, 633 S.E.2d at 503.

Deaton and New Prime briefed their issues separately to the Court, and present a variety of issues. Because the question of whether Petitioners raised a meritorious defense is dispositive, I address it first. Both the court of appeals and the majority of this Court determined a meritorious defense was neither raised to, nor ruled upon by the circuit court. In so finding, both courts disposed of this case on preservation grounds. I disagree with such a disposal.

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[4] "It shall require the affirmative vote of six (6) members of the Court of Appeals to hear or rehear an appeal or other proceeding en banc." Rule 219, SCACR.

Our courts require a party seeking to set aside a default judgment also raise a meritorious defense. *See Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988) (noting the South Carolina Code section that was the precursor to the South Carolina Rules of Civil Procedure required a showing of a meritorious defense, and holding the passage of the Rules do not change that requirement). It is in the interest of judicial efficiency that our courts require a meritorious defense. To borrow a statement from Chief Judge Sanders writing for the court of appeals: "[w]hatever doesn't make a difference doesn't matter" in the law. *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987). As the meritorious defense requirement derives from the policy that courts do not engage in acts of futility:

> A meritorious defense need not be perfect[,] nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.

Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989) (*quoting Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978)). Therefore, to demonstrate a meritorious defense, our courts have not required that parties specifically tag their argument as a "meritorious defense" in a Rule 60(b) motion.[5] Notably, in this case, the Court need not look beyond the

[5] In asserting the contrary position, the majority notes the rigorous standard of Rule 60(b), SCRCP, citing *Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009). *Richardson* stands for the proposition that the standard for finding mistake, inadvertence, surprise or excusable neglect under Rule 60(b)(1) or fraud and misrepresentation under 60(b)(3) is more rigorous than the standard required to set aside an entry of default judgment under Rule 55(c). *Id.* Rule 60(b) requires a party make a particularized showing of the elements under subsections 1 or 3, as opposed to Rule 55(c), where a party may prevail with a showing of good cause. *Id. Richardson* does not assert

pleadings to find the meritorious defense raised by Petitioners.

In *EM-CO Metal Products, Inc. v. Great Atlantic & Pacific Tea Co.*, the appellant argued respondents did not make a prima facie showing of a meritorious defense. 280 S.C. 107, 115, 311 S.E.2d 83, 88 (Ct. App. 1984). Although the circuit court order did not set forth the facts upon which it found a meritorious defense, the court of appeals affirmed the finding of a meritorious defense based on evidence found in the record. Specifically, the court of appeals found evidence of a meritorious defense in the plaintiff's complaint and in a letter introduced by the plaintiff at a hearing. 280 S.C. 107, 115, 311 S.E.2d 83, 88 (Ct. App. 1984). Although the letter purported to set forth the plaintiff's position, the court found it nevertheless demonstrated that both defendants in that case possessed a meritorious defense. *Id.* Importantly, the documents relied upon by the court of appeals were supplied by the plaintiff, not the party seeking to have the judgment set aside. The majority states that in *EM-CO*, the court was merely asserting its Rule 220(b), SCACR, authority to affirm a ruling on any ground found in the record. Perhaps, but on several occasions, our courts have *reversed* the denial of a Rule 60(b) motion by finding the existence of a meritorious defense in the record. In *Thompson*, this Court reversed the denial of a Rule 60(b) motion, finding testimony made at the motion hearing revealed the existence of a real controversy, and therefore, the petitioners in that case presented a meritorious defense. *Thompson*, 299 S.C. at 120, 382 S.E.2d at 903 (1989). In *Williams v. Watkins, Jr.*, the court of appeals reversed the circuit court's denial of a Rule 60(b) motion by gleaning a meritorious defense from the record. 384 S.C. 319, 326–27, 681 S.E.2d 914, 917–18 (Ct.

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that a defendant's Rule 60(b) motion must include the words "meritorious defense" to demonstrate that adjudication on the merits might lead to a different result. Additionally, the "liberal spirit" of Rule 60(b) did not see its demise with the adoption of the South Carolina Rules of Civil Procedure (SCRCP), as the majority contends. As stated in *Thompson v. Hammond*, 299 S.C. at 122, 382 S.E.2d at 904 (J. Chandler dissenting), and supported in numerous cases decided after the adoption of the SCRCP (discussed herein), "Rule 60(b)(1) is virtually identical to S.C. Code Ann. § 15-27-130 (1976), which was repealed in 1985 with enactment of the Rules of Civil Procedure."

App. 2009). In reversing, the court stated, "[w]ith respect to the meritorious defense factor, the record contains evidence Watkins made a prima facie showing of a meritorious defense to Williams' claims." *Id.* The majority distinguishes *Williams* on the ground that the court found a meritorious defense in a pleading. As I have noted, both Petitioners presented a meritorious defense in the memoranda supporting their Rule 60(b) motions. I do not understand the majority's distinction.

In yet another case, the court of appeals found a meritorious defense in a party's prehearing statement. *Mictronics, Inc. v. S.C. Dep't Rev.*, 345 S.C 506, 511, 548 S.E.2d 23, 226 (Ct. App. 2001). In so finding, the court reiterated that the standard for finding a party raised a meritorious defense is a low one. *Id.* ("To establish a meritorious defense, a party is not required to show an absolute defense."). Further research would likely reveal a multitude of similar cases. In my view, the key inquiry is merely whether the materials submitted to the trial court reflect, in any way, that a contest on the merits might render different results than the result reached by the default judgment.

In this case, the majority of the court of appeals, and this Court's majority, rests on the conclusion that the moving party must expressly indicate to the court that a Rule 60(b) argument is being made for the purpose of providing a meritorious defense. The court of appeals recognized New Prime's argument on appeal that its defense related to the discrepancy in damages awarded versus the amount offered by Lawyer during settlement negotiations. *McClurg*, 380 S.C. at 575, 671 S.E.2d at 94. In reviewing the record, the court noted an allegation in an affidavit by the Insurer's employee that Lawyer offered a far lesser amount during settlement negotiations. *Id.* at 575–76, 617 S.E.2d at 94. The court found that statement was not made for the purpose of raising a meritorious defense. *Id.* at 576, 617 S.E.2d at 94. The court did not reach the question of whether this evidence could constitute a meritorious defense, but stated, "even assuming for the sake of argument that this bare assertion regarding settlement negotiations is evidence of a defense to the amount of damages, the argument is not preserved for our review as it was neither raised to nor ruled upon by the trial court." *Id.* In

my view, Petitioners each raised a meritorious defense to damages directly within the memoranda supporting their motions to set aside the default judgment, and supported that claim in an affidavit of a claims specialist with the Insurer. New Prime's memorandum states: "Neither Zurich nor New Prime heard about the suit that was filed against Deaton until . . . after the default judgment for $800,000 was entered. Plaintiff's counsel had previously demanded $170,000 to settle the matter." Likewise, Deaton's memorandum characterizes the judgment as a "windfall," stating "their Counsel made a settlement demand of $170,000 from Zurich on April 26, 2004, little over a year before the Default Judgment of over four times that amount was entered." To support the claim that the damages on default far exceeded what would have otherwise been awarded with a decision on the merits, Deaton provides the affidavit of a claims specialist with the Insurer that stated Ann McClurg incurred medical expenses of approximately $21,000, and Respondents made a settlement offer of $170,000.[6]

In addition to its contention that a meritorious defense was not raised to the circuit court, the majority argues that neither Petitioner challenged the circuit judge's finding that there was no showing of a meritorious defense in their motions for reconsideration. Because I believe Petitioners raised a meritorious defense in their original pleadings and that the circuit judge ruled on that issue, our preservation rules do not require they contest that finding in a motion for reconsideration. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (a party is only required to file a motion to

[6] The majority argues that because a settlement offer is not admissible evidence of damages under Rule 408, SCRE, these statements cannot fairly be construed as meritorious defenses. I reiterate that the purpose of requiring a meritorious defense when petitioning a court to set aside a default judgment is simple—to prevent courts from engaging in acts of futility by re-opening litigation where there is no real controversy. I do not consider the settlement offer referenced by Petitioners to represent evidence of what the damages ought to be. However, I believe that the evidence meets the low bar set for a meritorious defense in that it merely demonstrates the existence of a real controversy and the probability that a decision on the merits might render a different result.

reconsider when an issue has been raised but not ruled upon by the court). Nevertheless, Deaton did raise the meritorious defense of the discrepancy in damages as a third ground in his motion for reconsideration. (*see* App. at 184–85, "Because of the defect in pleading and disparity between the award and medical expenses, the default judgment should be set aside;" *see also* App. 542–43.) This being clear, the majority is apparently expounding the view that a party must use the magic words, "meritorious defense," when arguing that a court may have reached a different result had it heard a case on the merits. As elaborated, our courts have never before required such explicit language.

The majority finally attempts to prove the issue unpreserved by concluding Petitioners did not challenge the circuit court's finding of no meritorious defense in its appeal to the court of appeals. To the contrary, Deaton appealed the circuit court's meritorious defense ruling in his third issue before the court of appeals. There, Deaton again argued that because the McClurgs' complaint did not include a request for damages from future loss of in-kind services, it was error for the trial court to award Ann McClurg $600,000 in damages on that ground. That argument represents a meritorious defense as it "raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989).

The question of whether a meritorious defense can relate to damages or if it can relate only to the existence of liability is one of first impression in this state. It was clear in both Deaton's and New Prime's motions to set aside default judgment that, if given the opportunity to defend the lawsuit properly, the outcome may very well have been different based on the actual damages incurred. Therefore, I believe that when the circuit judge found "there has been no showing that a meritorious defense exists in this case," he reached this conclusion on the belief that Petitioners were required to raise a defense to liability. Petitioners argued to the court of appeals, and to this Court, that its meritorious defense related to the discrepancy in damages awarded. Because I agree with Petitioners that a meritorious defense can relate not only

to the liability of the defendant, but also to the amount of damages awarded, I believe it was error for the court of appeals to find the issue was not raised to or ruled upon by the circuit court, and I dissent from the majority's similar disposition of this case.

In support of my position, I note other courts have recognized that an allegation relating to the amount of damages satisfies the meritorious defense requirement. *See, e.g.*, *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir. 1988) (discussing the meritorious defense raised: "[a]lthough these statements address the amount, rather than the propriety, of Augusta's claim, we believe that taken together they are a sufficient proffer of a meritorious defense"); *Wayneright's Vacations, LLC v. Pan American Airways Corp.*, 130 F.Supp.2d 712, 719 (D. Md. 2001) (discussing *Augusta Fiberglass* and concluding, "[t]he company has raised a viable dispute about the amount it owes Pan Am"); *Esteppe v. Patapsco & Back Rivers Railroad*, 2001 U.S. Dist. LEXIS 7112, 2001 WL 604186 (D. Md. 2001) (appellant raised a meritorious defense "by contradicting the amount claimed by plaintiff"). There are many instances, and this case is an example, where a defendant does not contest liability, but contests the extent of damages owed. Restricting the scope of a meritorious defense to liability alone incentivizes a party who may otherwise concede liability to deny any wrongdoing. I do not believe our courts wish to encourage that practice. At oral argument before this Court, there was concern that allowing a meritorious defense to damages might impede the finality of judgments, in that any discrepancy between actual damages and awarded damages could be a basis for setting aside a default judgment. I note that a meritorious defense to the amount of damages awarded must first be accompanied by a showing that the action filed meets the requirements of Rule 60(b)(1)–(5), SCRCP.

After surmounting the meritorious defense hurdle, I side with the court of appeals' view that by virtue of allowing New Prime to intervene, it was entitled to an order setting aside the judgment if New Prime could meet the requirements of Rule 60(b)(1) or (b)(3). *McClurg*, 380 S.C. at 571, 671 S.E.2d at 92. Our holding in *Edwards v. Ferguson*, is instructive on this

point. 254 S.C. 278, 175 S.E.2d 224 (1970). In that case, Ferguson and his insurance company moved to set aside a default judgment on the ground that it was taken by mistake, inadvertence, surprise, or excusable neglect. *Id.* The plaintiff in that case attempted to settle with the insurance company. *Id.* When settlement did not develop, the plaintiff served a summons and complaint to the home of Ferguson. *Id.* Ferguson did not answer or inform his insurance company of the complaint, and the circuit court entered default judgment for the plaintiff. *Id.* This Court found the insurance company "stands in the shoes of [its insured] so far as liability is concerned." *Id.* at 282, 175 S.E.2d at 226.

I agree with the court of appeals that the trial court erred in finding the elements of Rules 60(b)(1) and (b)(3) could not apply to New Prime since New Prime was not the party served. The burden of this judgment ultimately will fall on New Prime's shoulders and, therefore, I believe the court of appeals properly found New Prime could stand in Deaton's shoes when arguing the existence of surprise, misrepresentation, or misconduct under Rule 60(b)(1) and (b)(3), SCRCP.

On the facts in the record, I believe New Prime undoubtedly met both the surprise element of Rule 60(b)(1) and the misconduct element of Rule 60(b)(3) when moving to have the default judgment set aside. At oral argument before this Court, Lawyer admitted he was trying to fly under the radar in serving Deaton because of the prolonged, and seemingly unsuccessful, settlement negotiations with Insurer. Although prolonging settlement negotiations in hopes of surpassing the statute of limitations is a disdainful practice some insurance companies keep, this in no way justifies the type of "gotcha" game played by McClurgs' counsel in this case.

In sum, I would find Petitioners met their burden to set aside the default judgment by demonstrating the existence of surprise and misconduct. Further, in my opinion, Petitioners' supporting memoranda and affidavits to the Rule 60(b) motions provided the court a basis for concluding that a contest on the merits might result in a different outcome by illustrating the discrepancy between the amount of damages awarded and the actual damages

suffered or the settlement offer advanced by Respondents. It was an error of law for the circuit judge to determine that because Petitioners did not deny liability, Petitioners did not raise a meritorious defense. I believe it was error for the court of appeals to conclude Petitioners did not raise a meritorious defense, and accordingly, I part ways with the majority in its affirmance of the court of appeals on that ground.

The Supreme Court of South Carolina

In the Matter of Daniel A. Beck, Respondent.

ORDER

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

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

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

respondent's clients. Mr. Keith may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

s/ Costa M. Pleicones J.
FOR THE COURT

Columbia, South Carolina

September 2, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles E. Gordon and Barbara Gordon, as Personal Representatives of the Estate of Clara Gordon Burch, Appellants,

v.

Jacqueline F. Busbee, individually and as Personal Representative of the Estate of George E. Burch; Dennis E. Burch; and Laurie E. Burch, Respondents.

In the Matter of:

The Estate of Clara Gordon Burch

Appeal From Aiken County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 4880
Heard March 8, 2011 – Filed August 31, 2011

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Adele J. Pope, of Columbia, and Thomas H. Pope, of Newberry, for Appellants.

B. Michael Brackett, of Columbia, for Respondent Jacqueline F. Busbee, as Personal Representative of the Estate of George E. Burch; Warren C. Powell, Jr. and William D. Britt, Jr., of Columbia, for Respondent Jacqueline F. Busbee, individually; and Carlos W. Gibbons, Jr., of Columbia, for Respondents, Dennis E. Burch and Laurie E. Burch.

KONDUROS, J.: Charles and Barbara Gordon appeal the circuit court's denial of their motions for directed verdict and the grant of directed verdict to the defendants on various causes of action. They further appeal various matters related to jury instructions as well as the circuit court's refusal to grant equitable relief. We affirm in part and reverse in part.

FACTS

Clara Gordon Burch and her fourth husband, George E. Burch, were married in 1984. Clara was 75 at the time of their marriage and George was almost 70. Clara had no children, while George had two, Dennis E. Burch and Laurie E. Burch. Clara's will, executed in 1985, left a life estate in her home to George, but ceded her remaining assets to her Gordon family members, including her nephew Charles, and other nieces and nephews. In October 1994, Clara entered a nursing home and was experiencing "cognitive defects." She had amassed a sizable estate composed primarily of bonds, certificates of deposit, and other funds received incident to her previous marriages. In February of 1995, Clara executed a power of attorney (POA) in George's favor. The POA did not contain a gifting provision. George's attorney, Jacqueline Busbee, prepared the POA, although she did not meet or confer with Clara before doing so. Thereafter, George removed funds in CDs

or accounts owned by Clara or from their joint account totaling approximately $400,000. Clara passed away in April of 2000, and, per the provisions in her will, George was named personal representative (PR) of her estate. Busbee began advising George in his capacity as PR. George died on January 18, 2003, and, per the provisions of his will, Busbee was named PR of his estate. Charles was appointed successor PR of Clara's estate on February 27, 2003. Charles filed this lawsuit in April 2005.[1]

At trial before the circuit court, Charles's wife, Barbara, and George's daughter, Laurie, testified George mentioned an arrangement between Clara and him to handle their estate finances. Laurie also testified George gave her a loan in the amount of $170,000 that was to be considered an advance against her inheritance if it was not repaid at the time of his death.

The Gordons presented expert accounting evidence through Agnes Asman, a certified public accountant. She testified she had examined all the records available to her and created a chart that represented transfers made from Clara's funds into accounts or CDs held solely in George's name or in their joint account that had been used to pay for Clara's nursing home care. In her estimation, George had misappropriated approximately $450,000 exclusive of interest. On cross-examination, Asman conceded the examination she had conducted was not a forensic accounting that would demonstrate the source of the funds into the accounts and specifically trace the funds to their final destination. She further admitted she had not examined the signature cards for the various accounts but had relied on the Internal Revenue Service form 1099s to determine who had ownership of various accounts and assets. In at least one instance when Asman's chart showed ownership of an account by Clara, George was also a signator on the account. Additionally, Asman testified she had not considered George's contribution to the parties' joint bank account when determining that he had withdrawn money that belonged to Clara.

[1] The matter was dismissed on a procedural ground but remanded for trial on appeal. Gordon v. Busbee, 367 S.C. 116, 623 S.E.2d 857 (Ct. App. 2005).

With respect to Busbee, the Gordons alleged she had operated as George's attorney in his capacity as PR and as attorney for Clara's estate. They claimed Busbee failed to check the status of Clara's estate at the time of her death by failing to inventory Clara's safety deposit box and by neglecting to obtain Clara's last bank statements prior to the death. They also argued Busbee's filing of the inventory of assets in Clara's and George's estates was inaccurate and/or fraudulent. They contended Dennis and Laurie knew of George's transfer of funds from Clara's accounts and estate and received the benefit of those transfers either directly or as his devisees.

At the close of the Gordons' case, the circuit court granted Dennis Burch's directed verdict motion as to all claims against him. With respect to Laurie, the court granted a directed verdict in her favor as to all claims with the caveat that she may be called upon to repay the loans from George to his estate. The circuit court granted a directed verdict in favor of Busbee on all claims against her individually with the exception of the causes of action for legal malpractice and breach of fiduciary duty. It also allowed the conversion claim against her as PR of the estate to remain but only insofar as she was the representative of George's estate in the action, not based on her actions in converting any assets.

At the close of all evidence, the Gordons moved for directed verdict against George's estate, arguing the money transferred by George should be returned to Clara's estate because he had transferred the funds without Clara's permission. That motion was denied, apparently based on the argument that George and Clara had made an oral contractual arrangement for the execution of these transfers.

After closing arguments, court was dismissed for the day. The following morning, the Gordons submitted additional jury charge requests relating to the proportional ownership of joint bank accounts with right of survivorship and other matters. The circuit court refused the charges, determining the request was untimely pursuant to Rule 51, SCRCP. After the jury was charged, the Gordons took exception to the charge on conversion. They argued the circuit court had placed the burden of persuasion on the

plaintiff when the burden should have been shifted to the defendant to prove the transfers were valid in the absence of authorization to make them. The circuit court stood by its original charge.

The jury found in favor of Busbee and George's estate on the remaining causes of action. The Gordons then sought equitable relief from the circuit court seeking (1) the removal of Busbee as PR of George's estate; (2) a declaration that the bank accounts and loan to Laurie were receivable assets of Clara's estate; (3) the appointment of a special administrator to account to Clara's estate; and (4) the imposition of a constructive trust on all liquid assets of George's estate to the extent of the transfers with interest. The circuit court denied this motion and all post-trial motions. This appeal followed.

LAW/ANALYSIS

I. Denial of Directed Verdict (George's Estate)

The Gordons contend the circuit court erred in failing to direct a verdict in their favor concerning the transfers George made after Clara's undisputed incompetence in the summer of 1995. We agree in part.

In reviewing the denial of a directed verdict motion, this court employs the same standard as the trial court: we view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Welch v. Epstein, 342 S.C. 279, 299-300, 536 S.E.2d 408, 418 (Ct. App. 2000).

At the close of evidence, the Gordons moved for a directed verdict "as to all transfers of the assets of Clara Burch by George Burch from and after June 30 of [1995]." On appeal, George's estate argues this motion was not sufficiently specific as required by Rule 50(a), SCRCP, which states "[a] motion for a directed verdict shall state the specific grounds therefor." We disagree.

The Gordons relied upon Fender v. Fender, 285 S.C. 260, 329 S.E.2d 430 (1985), in making their motion. In Fender, the attorney in fact for the decedent transferred to himself 37.4 acres of land, a car, and the proceeds of two bank accounts prior to the decedent's death. Id. at 262, 329 S.E.2d at 431. The POA did not contain a gift-giving provision and the South Carolina Supreme Court adopted a bright-line rule in this area. Id. "[I]n order to avoid fraud and abuse, we adopt a rule barring a gift by an attorney in fact to himself or a third party absent clear intent to the contrary evidenced in writing." Id. (emphasis added). Fender's mandate is designed to protect the vulnerable from improper conduct by those in whom they place the greatest trust. Accordingly, the Gordons' directed verdict motion to disallow the transfers under Fender was sufficiently specific to operate as a directed verdict motion for breach of fiduciary duty.

In this case, no one disputes Clara's POA did not contain a gift-giving provision and the record contains no written evidence of her authorization for George to make the transfers he did. The circuit court based its decision on the existence of evidence, however slight, showing an arrangement between Clara and George to allow him to make transfers to avoid estate taxes. However, under Fender, the existence of such an oral agreement is insufficient to authorize the transfers. Any transactions involving George's taking funds that were undisputedly Clara's and transferring them into a fund solely owned by him would fit within the construct of Fender. Therefore, the circuit court erred in failing to grant the Gordons' directed verdict motion as to those transactions.

The transactions made during April 2000 and listed in the record as Plaintiff's Exhibit 6, with the exception of the $70,000 withdrawal made from George and Clara's joint account, fall within this category. With respect to these transactions all evidence indicates George took funds belonging solely to Clara and opened CDs for those amounts exclusively in his name. Even if these transfers were made in furtherance of some oral agreement between George and Clara, they are exactly the types of transactions prohibited by

Fender as a matter of law.[2] Our supreme court has drawn a very bright line in such situations so as to avoid the defrauding of vulnerable adults by fiduciaries.

Because the evidence relating to each transaction in this case is not identical, the transactions should be considered individually. Some of the transactions involve facts that arguably bring them outside the clear scope of Fender. For example, one transaction at issue involved George closing a CD and depositing the funds into the joint account that was used to pay for Clara's care while in the nursing home. Another transaction involved the removal of $70,000 from the joint account and conversion into a $50,000 CD for George and a $20,000 deposit into his own bank account.[3] Yet another transaction involved the removal of funds from a joint account, although it is disputed when the account was made joint, after Clara's death. In each of these instances, George at least arguably had an initial claim to the funds as proceeds in a joint account or he put Clara's funds into a joint account that paid for her care, an act that would arguably be for her benefit. With respect to some of the transactions, how the funds were expended is unclear. In those cases, determining whether George had breached a fiduciary duty was within the jury's province.

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[2] When asked a hypothetical at trial, Steve Johnson, a defense expert, opined if the transfers were made pursuant to a contract between Clara and George, George could have made the transfers under the POA's authority to execute and carry out contracts on Clara's behalf. However, the purpose of the contractual power is to benefit Clara. Here, even if the arrangement was her desire, the transfers benefited George, not her, and such an interpretation would effectively eliminate the prohibition expressly stated in Fender.

[3] We recognize Asman testified the funds contributed to the joint account were primarily Clara's and that would render the joint account funds her property until the time of her death as discussed in Section IIIA. However, the cross-examination of Asman revealed enough uncertainty in her testimony to make the question of ownership of the joint account funds a jury issue.

In sum, Fender mandated a grant of directed verdict on transactions in which the evidenced demonstrated Clara's solely-owned assets were transferred by George for his sole benefit. Therefore, the following funds taken from Clara's estate pursuant to the transactions listed on Plaintiff's Exhibit 6 should be returned to Plaintiffs: (1) $79,495.11 and $4,778.46 withdrawn from two of Clara's accounts at Security Federal on April 13, 2000; (2) $20,026.41 received upon the closing of one of Clara's accounts at Security Federal on April 17, 2000; (3) $39,552.98, $6,235.99, and $9,904.21 withdrawn from three of Clara's accounts at Community Bank[4] on April 17, 2000. We remand this matter to the circuit court for a determination of the interest that will be due to the Plaintiffs on these sums. The issue of the propriety of the remaining transactions was properly submitted to the jury because they involved questions of disputed fact.

II. Grant of Directed Verdict

A. Aiding and Abetting a Breach of Fiduciary Duty (Busbee – Individually and as PR)

The Gordons contend Busbee knew or should have known of George's activities and she was therefore guilty of aiding and abetting his conduct. We disagree.

When deciding a motion for a directed verdict, the trial court "must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." Anderson v. The August Chronicle, 355 S.C. 461, 470, 585 S.E.2d 506, 511 (Ct. App. 2003). If the evidence presented yields only one inference such that the trial court may decide the issue as a matter of law, the decision to grant the motion is proper. Id.

"The elements for a cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages."

[4] According to the record Community Bank is now Capital Bank.

Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (2008). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." Future Group, II v. NationsBank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996).

The Gordons presented no evidence Busbee had actual knowledge of the transfers George made prior to his making them or at the time he made them. Furthermore, to establish this cause of action, a "knowing participation in the breach" is required. See Vortex, 378 S.C. at 205, 662 S.E.2d at 449 (discussing evidence of the defendant's actual knowledge as sufficient to overcome directed verdict); Future Group, II, 324 S.C. at 100-101, 478 S.E.2d at 50 (affirming the grant of directed verdict when there was no evidence of defendant's actual knowledge). Consequently, Busbee's constructive knowledge was not sufficient to survive a directed verdict motion.

The one instance of actual knowledge alleged by the Gordons in their brief relates to a Wachovia CD transferred from Clara's name to George's between the time of their deaths. With respect to this CD, it is a factual issue as to whether the CD was connected to an individual retirement account (IRA). If it was connected, the surviving spouse would be the beneficiary of the CD upon the decedent's death. Therefore, Busbee did not have actual knowledge of an improper transfer by George, and the circuit court did not err in directing a verdict in Busbee's favor individually and as PR on this cause of action.

B. Fraud/Fraud Benefit under Section 62-1-106 (Busbee – Individually and as PR; Dennis and Laurie Burch)

The Gordons contend the circuit court erred in granting a directed verdict in Busbee's favor, individually and as PR, and in favor of Dennis and Laurie Burch as to this cause of action. We disagree.

Section 62-1-106 of the South Carolina Code (2009) provides:

> Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

Here, the circuit court determined no evidence was presented that Dennis had committed any sort of fraud in connection with this matter and he had yet to receive any of the funds transferred from Clara's estate to George's estate. Therefore, he had not committed fraud or benefited from any other party's fraud. We agree with the circuit court. Evidence showed the only participation Dennis had was evaluating the contents of George's safety deposit box after his death, and a bank employee testified the examination was conducted properly.

With respect to Laurie, the record contains no evidence that she herself committed fraud. Although she received a benefit from George's conduct in the form of the loan from her father, the circuit court indicated those funds might be owed to Clara's estate pending the resolution by the jury of the remaining claims against George's estate. Therefore, we find the circuit court did not err in granting directed verdict on this claim.

As to Busbee, individually and as PR, she did not benefit from the alleged fraud. Therefore, the only question is whether she perpetrated fraud

by filing the inventory of assets of George's estate that listed the transfers as part of his estate. The record contains no evidence Busbee knew any representations she made in those filings were false at the time they were made. Consequently, the circuit court did not err in granting a directed verdict in Busbee's favor.

C. Conversion (Busbee – Individually and as PR)

The Gordons argue Busbee continued George's conversion of Clara's assets by including them in George's estate's inventory of assets. We disagree.

"Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights." Bank of New York v. Sumter Cnty., 387 S.C. 147, 158, 691 S.E.2d 473, 479 (2010). "Conversion may arise by some illegal use or misuse, or by illegal detention of another's personal property." Regions Bank v. Schmauch, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003).

Nothing in the record demonstrates Busbee assumed the control of any funds without authorization. At the time she became PR, the assets were in accounts held by George and she properly exercised control over them as the PR of his estate. The individual claim of conversion fails because she exercised no control over the assets in her individual capacity. Therefore, we affirm the circuit court's grant of directed verdict.

D. Civil Conspiracy (Busbee – Individually and as PR; Dennis and Laurie Burch)

The Gordons maintain the circuit court erred in granting a directed verdict in favor of Busbee, individually and as PR, and Dennis and Laurie Burch with respect to their civil conspiracy claim. We disagree.

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage." Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). "The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to a common design." Cricket Cove Ventures, LLC v. Gilliand, 390 S.C. 312, 324, 701 S.E.2d 39, 46 (Ct. App. 2010).

The record contains no evidence, only speculation, that any of the parties conspired with each other for the purpose of harming Clara or her estate. Furthermore, civil conspiracy requires that the plaintiff claim special damages. In this case, the Gordons' amended complaint fails to allege any special damages incurred as a result of any conspiracy. They allege the same damages as they do under the other causes of action. This is insufficient to establish special damages. See Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) ("If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed."). Accordingly, we conclude the circuit did not err in granting a directed verdict.

III. Jury Charges

A. Joint Bank Accounts

The Gordons argue the circuit court erred in failing to give the following jury charge: "Funds placed in a joint account with right of survivorship remain property of the contributing party until that party's death, unless there is clear and convincing evidence of a different intent." We disagree.

The principal embodied in this charge emanates from the case of Vaughn v. Bernhardt, 345 S.C. 196, 547 S.E.2d 869 (2001). In Vaughn, the decedent opened several joint bank accounts with her nephew, and the decedent was the sole contributor to those accounts. Id. at 197, 547 S.E.2d at 869. The nephew withdrew the funds a week prior to the decedent's death and deposited the monies in an account titled solely in his name. Id. The court determined the statute governing such accounts was unambiguous and required a holding that funds withdrawn from such an account prior to a decedent's death were no longer presumed to belong to the survivor but became assets of the decedent's estate. Id. at 199, 547 S.E.2d at 870. A survivor would have to establish entitlement to the funds by "other evidence of intent" without the presumption of right of survivorship. Id. at 200, 547 S.E.2d at 871.

The circuit court disallowed the jury charge on the procedural grounds in Rule 51, SCRCP, which states:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

This charge was requested after closing arguments, but before the circuit court charged the jury. While Rule 51 makes clear that it is preferable to have all requested charges submitted prior to closing arguments, it is not

an absolute rule. In Dalon v. Golden Lanes, Inc., 320 S.C. 534, 466 S.E.2d 368 (Ct. App. 1996), this court discussed the discretion vested in the trial court with respect to the allowance of "late" instructions. "[T]he trial court's discretion to refuse a charge because it is not timely requested should be sparingly and cautiously exercised." Id. at 541, 466 S.E.2d at 372. "While Rule 51 contains permissive language with respect to the timing of the filing of a request to charge, [it] does not specifically bar a request to charge that is made after the jury is charged . . . ." Id.

Of the transactions remaining at issue, some could be impacted by the failure to give the requested instruction. For example, a check for $70,000 was drawn on Clara and George's joint account in the week prior to her death. George subsequently opened a $50,000 CD in his own name and deposited $20,000 in his own account. These facts fit squarely within the situation presented in Vaughn. Furthermore, the defense was not prejudiced by the fact that the instruction was requested after closing arguments. The defense strategy as to George's estate was that he and Clara had an arrangement and he would have been entitled to these joint account funds upon Clara's death. That argument was made to the jury.

However, to warrant a new trial, the failure to give the requested instruction must have been prejudicial. See Dalon, 320 S.C. at 540, 466 S.E.2d at 372 ("In order to warrant reversal for failure to give a requested charge, the refusal must be both erroneous and prejudicial."). In this case, the proportion of contribution to the joint accounts was a disputed factual point. Furthermore, the jury's verdict makes clear that it adopted the version of events presented by George's estate. Evidence of the financial "arrangement" between George and Clara is at least some other evidence of her intent that he have the monies in the joint account. The jury clearly believed the defense in the case, because it did not find against the estate as to any transfer or cause of action. Therefore, we conclude the failure to give the requested instruction was not prejudicial to the Gordons and did not constitute reversible error. See Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 484, 18 S.E.2d 331, 335 (1942) (holding the giving of erroneous charge was harmless error when it could not have affected the action of the jury).

B. Conversion

The Gordons contend the trial court's instruction regarding the burden of persuasion in a conversion claim was confusing and prejudicial warranting a mistrial. We disagree.

At the beginning of his jury charge, the circuit court instructed the jury as follows:

> There is one exception to [the general rule that plaintiff bears the burden of proof], and that is because of the confidential relationship between Mr. Burch and his wife. The estate of Mr. Burch has the burden to prove that all transfers to himself under the power of attorney and all transfers, assets form the name of Clara Burch or her estate are valid. He has to prove that by the preponderance or greater weight of the evidence. He also has the burden or preponderance of greater weight of the evidence to show that all transfers by Mr. Burch to himself or to any third party from Clara's funds are valid by the greater weight or preponderance of the evidence. So, it shifts to him on that issue, but everything else the plaintiff is – has their burden except for the transfers, and that is on Mr. Burch and his estate.

Later, when addressing the specific causes of action, the circuit court instructed:

> In order to prove conversion, the plaintiff must (1) prove by the preponderance or greater weight of the evidence first that the plaintiff owned or had a right to possess a certain piece of personal property.

> In other words, they must prove either title to or a right to possess the personal property. That would include, money, bank accounts at the time of conversion. Ordinarily, an immediate right to possession at the time of conversion is all that is required in the way of title or possession to enable the plaintiff to maintain his action.
>
> Next, the plaintiff must (2) show by the preponderance or greater weight of the evidence that the defendant gained control and possession of the property or prevented the plaintiff from using the property. The wrongful detention of another person's property may give rise to an action for conversion, and, finally, the plaintiff must show (3) by the preponderance or greater weight of the evidence that the defendant did this without the plaintiff's permission. If the plaintiff expressly or impliedly agreed to or approved the defendant's taking, use, retention, or disposition of the property, the plaintiff cannot recover for conversion of the property. . . .
>
> If you find that a conversion did take place, you should return a verdict for the plaintiff for the value of the property taken with interest. Of course, the plaintiff has to prove all of that by the greater weight or preponderance of the evidence.

The Gordons objected to the charge arguing it was inconsistent and could be construed by the jury as not requiring George's estate to prove the validity of the transfers in question. The circuit court declined to make any changes or additions to its original charge

While the jury charge on conversion may have been somewhat confusing, it does not constitute prejudicial error. No South Carolina case

discusses the burden-shifting scheme in a conversion claim against a power of attorney or PR. However, in Howard v. Nasser, 364 S.C. 279, 613 S.E.2d 64 (Ct. App. 2005), this court discussed the burden shifting scheme as between will or deed contestants and fiduciaries.

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.

Id. at 288, 613 S.E.2d at 68 (quoting Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. f (2003)).

The court went on to interpret the Restatement as it pertains to cases in South Carolina.

> We interpret the foregoing to mean that if the contestants of a duly executed will provide evidence that a confidential/fiduciary relationship existed sufficient to raise the presumption, the proponents of the will must offer evidence in rebuttal. We emphasize that although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will.

Id. at 288, 613 S.E.2d at 68-69.

While Howard is not directly on point, it illustrates the unusual nature of the burden-shifting scheme in cases involving decedents and their fiduciaries. While the fiduciary may have the burden to offer some evidence to establish a lack of undue influence, or in this case the validity of the transfers, the ultimate burden of proof remains with the complaining party unless the fiduciary offers no evidence to rebut the relevant presumption. In this case, the circuit court's instruction indicated the ultimate burden of proof was on the Gordons and also indicated that George's estate, as his representative, was required to offer a valid explanation for the transfers he made. These statements appear to accurately represent the burden-shifting scheme that should be employed. Therefore, the instruction was not erroneous and did not constitute reversible error.

IV. Equitable Relief

Finally, the Gordons argue the trial court erred in failing to grant the equitable relief requested. We disagree.

"A constructive trust results 'when circumstances under which property was acquired make it inequitable that it be retained by the one holding legal title. These circumstances include fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution.'" Macaulay v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002) (citation omitted).

> In general, a constructive trust may be imposed when a party obtains a benefit "which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty."

Straight v. Goss, 383 S.C. 180, 210, 678 S.E.2d 443, 459 (Ct. App. 2009) (citation omitted).

In this case, evidence was presented that George was an attentive and loving husband to Clara and at least some evidence showed that the two of them had arranged a plan for him to transfer funds for his benefit. Furthermore, a large portion of the transfers did not occur until the end of Clara's life was near and she would no longer need them for her own benefit. Furthermore, under the statutory law of the state, George was entitled at least to his elective share of Clara's estate. Based on the record as a whole, the circuit court did not err in declining to create a constructive trust in favor of Clara's estate.

The Gordons also sought an accounting, requested the removal of Busbee as PR of George's estate, and raised the Statute of Elizabeth. However, they fail to advance any argument as to why the circuit court's ruling as to these specific equitable matters was error. Therefore, we deem these issues abandoned. See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (holding that an issue is abandoned if the appellant's brief treats it in a conclusory manner).

CONCLUSION

We find the circuit court erred in denying the Gordons' directed verdict motion as to the transfers listed on Plaintiff's Exhibit 6 excluding the first-listed transaction in which George withdrew monies from his and Clara's joint account. We remand this matter to the circuit court for a determination of the interest due Plaintiffs on these sums. However, we find the circuit court did not err in granting a directed verdict in Busbee's and Dennis and Laurie Burch's favor as to the claims for aiding and abetting a breach of fiduciary duty, fraud, conversion, and civil conspiracy. As to the jury charges, we conclude the failure to give the requested instruction on joint bank accounts did not constitute prejudicial error and the failure to modify

the instruction on the conversion claim was not erroneous. Finally, we affirm the circuit court's decision not to impose a constructive trust on the disputed funds in favor of Clara's estate, and we conclude the remainder of the Gordons' equitable claims have been abandoned on appeal. Consequently, the ruling of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FEW, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elise Kelly Barrow, Respondent,

v.

Sam Carson Barrow, Appellant.

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

Opinion No. 4881
Heard April 6, 2011 – Filed August 31, 2011

AFFIRMED IN PART AS MODIFIED AND REVERSED IN PART

Anne Frances Bleecker, of Charleston, for Appellant.

Joseph M. Ramseur, Jr., of Greenville, for Respondent.

KONDUROS, J.: Sam Barrow (Husband) appeals the family court's apportionment of marital income tax debt to him, the award to Elise Barrow (Wife) of a $30,000 special equity in the marital home, and other issues relating to equitable distribution. We affirm in part as modified and reverse in part.

FACTS

Husband and Wife were married in April 2002 and divorced in June 2007. No children were born of the marriage. During the marriage, Husband was employed as a salesperson for an orthopedic supply company and earned approximately $93,000 per year. Wife was employed as a sales representative for a uniform supply company, CINTAS, and earned approximately $73,000 annually. Husband and Wife shared a marital home purchased in part with a $40,000 down payment provided by Wife's parents.

Wife admitted to "economic misconduct" during the marriage including chronic overspending and opening credit cards without Husband's knowledge. Husband admitted to failing to file state and federal income tax returns during the marriage. The total tax liability incurred by the parties during the marriage was $260,832. Wife paid taxes on her income using a married filing separately return and paid a total of $92,328 in income taxes. At the time of the final hearing, Husband had contributed nothing to the payment of the original tax debt incurred during the marriage, and his failure to do so resulted in substantial late fees and penalties being assessed.[1]

The family court granted Wife a divorce on the grounds of one year's continuous separation. The family court divided the equity in the marital home and the marital portion of Wife's 401(k) equally. The family court determined Husband was solely responsible for the outstanding tax debt and awarded Wife a $30,000 special equity in the marital home based on the down payment provided by her parents. The family court declined to award attorney's fees to either party.

Husband filed a Rule 59(e), SCRCP, motion claiming the court failed to consider the parties' vehicles in determining the equitable distribution, the outstanding tax liens in calculating the marital home's equity, and the advances Wife took from her marital portion of her 401(k). The family court

[1] At the time of the final hearing, the outstanding tax liability including penalties and late fees was $323,506.72.

denied Husband's motion to alter or amend the judgment stating, "[t]he Court has carefully reviewed the Court's file along with the Order, and finds that the Order accurately reflects the findings of the Court made following the hearing on May 5-6, 2009, with respect to the matters addressed in [Husband's] Motion." This appeal followed.

LAW/ANALYSIS

The appellate court reviews decisions of the family court de novo. Lewis v. Lewis, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011). The appellate court generally defers to the factual findings of the family court regarding credibility because the family court is in a better position to observe the witness and his or her demeanor. Id. The party contesting the family court's decision bears the burden of demonstrating the family court's factual findings are not supported by the preponderance of the evidence. Id.

I. Wife's Economic Misconduct

Husband argues the family court erred in not considering Wife's economic misconduct in equitably apportioning the marital estate. We disagree.

Section 20-3-620(B) of the South Carolina Code (Supp. 2010) lists fifteen factors for the court to consider in equitably apportioning a marital estate.[2] Fault or marital misconduct affecting the parties' economic circumstances or contributing to the marital breakup is one factor to consider. § 20-3-620(B)(2). The statute grants the family court discretion to decide what weight to assign various factors. Id. While this court may make its own

[2] The factors are duration of the marriage and ages of the parties, marital misconduct, the value of marital property, income of the parties, health of the parties, need for additional training to reach income potential, nonmarital property, retirement accounts, alimony, desirability of awarding marital home to either party, tax consequences, support obligations to other parties, debts of the parties, child custody, and other considerations the court deems appropriate. § 20-3-620(B).

findings of fact on appeal, we recognize "the presence of discretion in the family court in valuing marital property and in effecting a division of marital property that is equitable under the circumstances." Lewis, 392 S.C. at 391, 709 S.E.2d at 655.

The record shows Wife had a habit of overspending and writing checks before ensuring her company reimbursement checks had been deposited. Testimony also indicated she took a cash advance against one of Husband's credit cards without his permission and took out at least one credit card in Husband's name without his permission. Nevertheless, Husband testified he had the ability to pay his taxes but elected not to do so. Wife testified the breakup of the marriage was caused by Husband's refusal to file his income taxes. The poor money management and financial decisions by both parties affected their economic circumstances, and Husband did not testify that Wife's overspending caused the breakup of the marriage. The parties were similarly situated with respect to other factors such as age, income, health, work experience, and nonmarital property. Therefore, we do not believe the family court erred in not placing greater weight on Wife's economic misconduct in making its equitable distribution.

II. Apportionment of Tax Liability

Husband argues the family court erred in placing the responsibility for outstanding income tax debt solely on him. We agree.[3]

"Marital property" is defined as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation . . . ." S.C. Code Ann. § 20-3-630 (Supp. 2010). "For purposes of equitable distribution,

[3] In his appellate brief, Husband took the position that Wife should bear a proportional share of the outstanding tax liability as well as the penalties assessed because of the failure to pay. At oral argument, Husband conceded Wife should not be responsible for penalties arising from the past-due income tax debt. Therefore, we limit our discussion to the equitable apportionment of the original tax debt.

'marital debt' is debt incurred for the joint benefit of the parties regardless of whether the parties are legally jointly liable for the debt or whether one party is legally individually liable." Hardy v. Hardy, 311 S.C. 433, 436-37, 429 S.E.2d 811, 813 (Ct. App. 1993). Marital debt, like marital property, must be specifically identified and apportioned in equitable distribution. Smith v. Smith, 327 S.C. 448, 457, 486 S.E.2d 516, 520 (Ct. App. 1997). In equitably dividing the marital estate, the family court must consider "liens and any other encumbrances upon the marital property, which themselves must be equitably divided, or upon the separate property of either of the parties, and any other existing debts incurred by the parties or either of them during the course of the marriage." § 20-3-620(B)(13).

After recognizing Wife had filed separate income tax returns during the marriage, the family court concluded "[W]ife has paid her proportional share for marital taxes." (emphasis added). Therefore, it appears the family court determined the income taxes incurred by the parties during the marriage were marital debt. This determination is in accordance with other South Carolina and other states' jurisprudence. See Ellerbe v. Ellerbe, 323 S.C. 283, 294, 473 S.E.2d 881, 887 (Ct. App. 1996) (finding Husband's income tax liability incurred in the year before the parties' separated was a marital debt); Phillips v. Phillips, 290 S.C. 455, 458, 351 S.E.2d 178, 180 (Ct. App. 1986) (finding Wife was entitled to equitable portion of income tax refund because the refund was merely a return of income which was marital property); see also Meints v. Meints, 608 N.W.2d 564, 569 (Neb. 2000) ("Income tax liability incurred during the marriage is one of the accepted costs of producing marital income, and thus, we hold that income tax liability should generally be treated as a marital debt.").

Although we agree with the family court's determination that the tax on Husband's income was a marital debt, we disagree with the decision to apportion that debt entirely to Husband considering the testimony adduced at trial regarding the parties' incomes and spending. The record shows Wife's income tax payments amounted to approximately 35% of the total marital tax liability. However, the record demonstrates Wife was benefiting from at least 50% of the marital income.

According to Wife's testimony, her check was deposited into a joint account and Husband's check was deposited into a sole account in his name that predated the marriage. From his account, Husband paid the mortgage and his car payment plus he wrote Wife a check each month for some general expenses because he did not like the tedious task of actually writing and mailing checks. According to Wife, she frequently had to badger Husband for the check and some months he did not give her the funds. However, Husband claims he gave Wife money "pretty much whenever" she asked for it. Although Wife's direct testimony on that question is not included in the record, the manner in which the question is posed to Husband indicates Wife agreed with this statement.[4] Additionally, there was testimony that Husband usually paid the bill for occasions when the couple went out socially.

The record also shows, and Wife does not dispute, that she received payments from Husband totaling $145,450 during the marriage. Whether these monies were for the monthly general expenses, Wife's sole benefit, or a combination of the two is unclear. However, assuming only half of the $145,450 should be treated as inuring to Wife's benefit, that brings the parties' division of marital income much closer to a 50/50 ratio. Husband also testified Wife had spent a cash buffer he had put in their joint account of $5,000 to $10,000 and had taken an advance on a Sears credit card for $5,000.

Because the record contains considerable evidence Wife benefited from at least 50% of the total marital income, the family court erred in attributing a

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[4] Husband was asked:

> Q. You heard your wife's testimony?
> A. Absolutely, yes.
> Q. And you heard her testify that you never refused to give her money?
> A. That's correct.

No objection was raised to the characterization of Wife's testimony.

lesser amount of the marital tax liability to Wife. To effect a 50/50 allocation of the original tax debt incurred during the marriage, we attribute to Wife another 14.6% of the original tax liability, $260,832, which amounts to $38,081. Adding this amount to the 35.4% Wife already paid through her income tax withholdings and payments effects a nearly 50/50 split of the original tax liability incurred during the marriage. The remainder of the original tax liability incurred during the marriage remains the marital debt of Husband, and Husband is solely responsible for any penalties or liens resulting from his failure to file state and federal income taxes.

III. Special Equity in Marital Home

Husband argues the family court erred in determining the $40,000 down payment toward the marital home provided by Wife's parents was a loan and by awarding Wife a $30,000 special equity in the home on that basis. We agree.

"Loans from close family members must be closely scrutinized for legitimacy." Jenkins v. Jenkins, 345 S.C. 88, 104, 545 S.E.2d 531, 539 (Ct. App. 2001). In Jenkins, Wife and Mother testified Mother loaned Wife and Wife's husband money for home renovations. Id. at 103-04, 545 S.E.3d at 539. "Neither Wife nor [M]other, however, introduced into evidence a promissory note or cancelled check as proof that the payment was a loan. In fact, [Mother] acknowledged Husband and Wife never signed any kind of note or I.O.U. because [she] never asked them to do so." Id. at 104, 545 S.E.2d at 539. This court, in reversing the family court, determined the evidence established at most a "moral obligation" to repay Mother. Id. at 104, 545 S.E.2d at 540.

In this case, neither party disputes that Wife's parents provided her with $40,000 to put toward the down payment of the marital home. Wife's mother described this transaction as a loan, and Wife and her mother testified that Wife had been paying her mother back sporadically although neither knew

the exact amount of any payments.[5] Wife's mother estimated about $30,000 was still outstanding on the loan. Neither Wife nor her mother could produce any documentary evidence of indebtedness or repayment or the outstanding balance. This evidence was insufficient to establish the advance of the funds from Wife's mother was a loan.[6]

Furthermore, the family court erred in removing the down payment funds as a special equity to Wife prior to equitable distribution. The issue of "special equity" in marital property was addressed recently by the South Carolina Supreme Court in Dawkins v. Dawkins, 386 S.C. 169, 687 S.E.2d 52 (2010), abrogated on other grounds by Lewis v. Lewis, 392 S.C. 381, 709 S.E.2d 650 (2011). In Dawkins, the basis for special equity in the marital home was the fact that the home had been inherited from Husband's mother, but the rationale is equally applicable with respect to a gift of funds for a down payment. Id. at 173, 687 S.E.2d at 54. The court in Dawkins determined any special equity Husband had in the marital home was not to be apportioned separately but was to be considered as a factor in equitable distribution. Id. at 173-74, 687 S.E.2d at 54.

> We approve of the approach announced in Toler, [v. Toler, 292 S.C. 374, 356 S.E.2d 429 (Ct. App. 1987)] decided after adoption of the equitable apportionment statute, as the sole method in accounting for a spouse's special equity in marital property and hold that "the correct way to treat [an] inheritance is as a contribution by [the inheriting party] to the acquisition of marital property [and that] [t]his contribution should be taken into account in determining the percentage of the marital estate to

[5] Wife's mother testified she obtained the $40,000 through a home equity line of credit. Wife indicated that some months she paid the interest on the line of credit as payment toward the loan to her and Husband.

[6] Wife listed this as a debt on her financial declaration and claimed she had made payments to her mother. In Jenkins, Wife did not list the debt and no testimony was presented regarding any repayment.

> which [the inheriting party] is equitably entitled upon distribution."

Id. (all alterations except first in original) (quoting Toler, 293 S.C. at 380 n.1, 356 S.E.2d at 432 n.1).

Here, as in Dawkins, Wife does not argue the home is not marital property to be equitably apportioned between Husband and Wife. Furthermore, Wife has not appealed the family court's finding that the $30,000 is part of the marital estate, so that point is the law of the case.[7] Consequently, following the formula set forth in Dawkins, we order the $30,000 awarded as a special equity to Wife be included in the marital home's equity and divided 50/50 between the parties. This results in a $15,000 reduction in overall equitable apportionment to Wife and a $15,000 increase in equitable apportionment to Husband.

IV. Wife's 401(k), Stock Options, Automobiles, and Cash Advances

Next, Husband contends the family court erred in failing to address certain pieces of property in its order and in failing to consider post-separation withdrawals Wife made from her 401(k) account when making its equitable distribution award. We disagree.

After the parties separated, Wife withdrew monies from her 401(k) account with CINTAS. Part of what she withdrew was nonmarital property as it was money she contributed prior to the marriage and subsequent to the filing of marital litigation. The marital portion of Wife's 401(k), as of the date of filing, was $45,155. The family court divided this amount equally between Husband and Wife in the equitable distribution. Husband claims the family court failed to consider withdrawals Wife made prior to the final

[7] The South Carolina Code indicates a gift to a person from someone other than his or her spouse is nonmarital property. See § 20-3-630(A)(1) (stating "property acquired by either party by inheritance, devise, bequest, or gift from a party other than the spouse" is nonmarital). The burden is then on the party seeking to establish the asset is marital in nature.

hearing. However, if the family court had not considered the withdrawals, the value of the 401(k) for equitable division would have been $10,599, the amount remaining in the account after Wife's advances. Therefore, the family court properly valued the 401(k) for equitable distribution.

Husband also argues the family court erred in not considering Wife's CINTAS stock options among the marital assets for equitable division. However, this issue was not addressed in the family court's order, and Husband did not raise it in his Rule 59(e), SCRCP, motion.[8] Therefore, it is not preserved for our review. See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (stating to be preserved for appellate review, issue must have been raised to and rule upon by the trial court).

Husband argues the family court abused its discretion by not considering the parties' automobiles in the equitable distribution award. Wife testified she paid the $16,000 outstanding on her Mercedes with her marital share of the 401(k). Because the family court did not specifically address Wife's car or Husband's Suburban in its order, the result is the parties are responsible for their own vehicle. While the family court is instructed to "set forth the specific findings of fact and conclusions of law to support [its] decision," the failure to do so does not require a remand. Rule 26(a), SCRFC. "[W]hen an order from the family court is issued in violation of Rule 26(a), SCRFC, the appellate court 'may remand the matter to the trial court or, where the record is sufficient, make its own findings of fact in accordance with the preponderance of the evidence.'" Griffith v. Griffith, 332 S.C. 630, 646-47, 506 S.E.2d 526, 535 (Ct. App. 1998) (quoting Holcombe v. Hardee, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991)).

The record contains no finding regarding Husband's 2003 motorcycle or the $3,000 advanced to Wife by Husband during the pendency of the

[8] Language used in the family court's order denying Husband's 59(e) motion suggests the family court may have ruled from the bench on issues not addressed in its order. However, that portion of the transcript is not included in the record on appeal.

divorce. However, assuming the family court would have split equally the equity in the motorcycle, valued by Husband at $7,444.77, Wife would have gained $3,722.38 to her side of the equitable division. By not equitably dividing the motorcycle, the family court, in effect, repaid the $3,000 advance to Husband by allowing him to keep the asset.

Based on the record before us and in our view of the preponderance of the evidence, the result of the family court's action, or inaction, was appropriate in the general scheme of equitable division. By the parties keeping their respective car or motorcycle, the family court has made an in-kind distribution, which is favored, and permitted the parties to become disentangled from each other financially with respect to those items. See Craig v. Craig, 358 S.C. 548, 557-58, 595 S.E.2d 837, 842 (Ct. App. 2004) ("The court, however, should first attempt an 'in-kind' distribution of the marital assets."). Therefore, we affirm the family court's distribution of these assets.

V. Marital Home Equity – Tax Liens and Mortgage Payments

Husband claims the family court erred in not subtracting the outstanding tax liens on the home in determining the amount of equity in the marital home. We disagree.

The tax liens are a direct result of Husband's failure to pay income taxes. As previously discussed, Husband conceded at oral argument that penalties resulting from his failure to pay income taxes are properly assigned to him. It would penalize Wife to include the liens in determining the equity amount. Therefore, we affirm the family court's decision not to consider the tax liens in determining the equity in the marital home.

Additionally, we affirm the family court's decision not to credit Husband with his ongoing mortgage payments since Wife vacated the marital home. Husband and Wife were living separate and apart and paying approximately $1,600 per month in mortgage payments and rent respectively.

These were the parties' living expenses post-separation and do not entitle Husband to any special credit.

VI. Attorney's Fees

Husband argues the family court erred in not holding Wife responsible for his attorney's fees. We disagree.

The award of attorney's fees in a domestic action rests within the sound discretion of the family court. Stevenson v. Stevenson, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1988). In deciding whether to award attorney's fees and costs, the family court should consider "(1) the party's ability to pay his/her own attorney's fee; (2) beneficial results obtained by the attorney; (3) the parties' respective financial conditions; [and] (4) effect of the attorney's fee on each party's standard of living." E.D.M. v. T.A.M., 307 S.C. 471, 476-77, 415 S.E.2d 812, 816 (1992). In determining a reasonable attorney's fee the family court should consider "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; [and] (6) customary legal fees for similar services." Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

As discussed previously, the parties were similarly situated economically during the marriage and have the same means for earning income as before. Furthermore, even if we modify the original tax liability and special equity determination, Husband did not obtain greatly beneficial results beyond those of Wife. The assets and debts are split 50/50 and Husband is still responsible for the tax penalties, a major point of contention in the original equitable distribution and appeal. Therefore, we discern no error in the family court's decision not to award Husband attorney's fees.

CONCLUSION

We affirm the family court's equitable distribution award with the following modifications: Wife and Husband shall bear the original tax

liability incurred during their marriage in a 50/50 ratio. Because Wife has already paid approximately 35.4% of the marital taxes, the remaining debt assessed to Wife is 14.6% of the total tax liability incurred by both parties during the marriage–$38,081. We find the $40,000 advance from Wife's parents for the down payment on the marital home was not a loan, and the $30,000 special equity awarded to Wife is to be included in the equity calculation of the marital home and divided equally between Husband and Wife. We affirm the result of the family court's order with respect to the personal property of the parties, and we affirm the family court's denial of attorney's fees to Husband.

AFFIRMED IN PART AS MODIFIED AND REVERSED IN PART.

FEW, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Palmetto Company, Respondent,

v.

Sean McMahon, Appellant.

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

Opinion No. 4882
Submitted March 8, 2011 – Filed August 31, 2011

REVERSED

Thomas A. Belenchia, Travis D. Hilka, and John C. Strickland, of Spartanburg, for Appellant.

Joseph K. Maddox, Jr., of Spartanburg, for Respondent.

KONDUROS, J.: Sean McMahon appeals the circuit court's affirming the magistrate's court's ruling that the ten-year statute of limitations found in

section 15-3-350 of the South Carolina Code (2005) applies to the collection of rent due under a commercial lease. We reverse.[1]

FACTS/PROCEDURAL HISTORY[2]

On April 13, 1997, McMahon and Palmetto Company entered into a written agreement in which McMahon leased real property from Palmetto Company. The lease was from May 1, 1997, to April 30, 1998, and had an automatic renewal provision for successive twelve-month periods unless either party terminated with three months' notice. In 2000, McMahon began making sporadic payments.

On April 22, 2008, Palmetto Company filed an application and affidavit for collection of rent by distraint in the magistrate's court. The magistrate's court heard oral arguments on the proper statute of limitations.[3] McMahon argued the statute of limitations was three years under section 15-3-530(1) of the South Carolina Code (2005), action upon a contract. Palmetto Company argued it was ten years under section 15-3-350 of the South Carolina Code (2005), cause of action founded upon a title to real property or to rents out of the same. The magistrate's court found the ten-year statute of limitations applies when a party seeks to recover rents owed under a lease agreement. McMahon appealed to the circuit court, which affirmed the magistrate's court's ruling. This appeal followed.

STANDARD OF REVIEW

"Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

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

[2] The parties' statements of facts and statements of the case in their briefs are identical.

[3] The parties agreed that McMahon owed $101,600 under the three-year statute of limitations and $196,650 under the ten-year statute of limitations.

LAW/ANALYSIS

McMahon argues the circuit court erred in affirming the magistrate's court's ruling that the ten-year statute of limitations from section 15-3-350 applies rather than the three-year statute of limitations from section 15-3-530. McMahon contends the language in the statute is clear and unambiguous that the three-year limitation applies to contracts and a commercial lease agreement is a contract. He further maintains section 15-3-350 does not apply because it is only for an action founded upon title to real property and actions for rent based upon title to real property. We agree.

"A lease agreement is a contract . . . ." Middleton v. Eubank, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (Ct. App. 2010). Section 15-3-530(1) of the South Carolina Code (2005) provides the statute of limitations for an action upon a contract is three years, and that article of the code is entitled "Actions Other Than for Recovery of Real Property." See also Anonymous Taxpayer v. S.C. Dep't of Revenue, 377 S.C. 425, 438, 661 S.E.2d 73, 80 (2008) ("The statute of limitations for actions pursuant to [a] contract . . . is three years.").

Section 15-3-350 of the South Carolina Code (2005), entitled "Action founded on title or for rents or services," provides:

> No cause of action or defense to an action founded upon a title to real property or to rents or services out of the same shall be effectual unless it appear that the person prosecuting the action or making the defense or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of the premises in question within ten years before the committing of the act in respect to which such action is prosecuted or defense made.

That section is found in the article entitled "Actions for Recovery of Real Property."

When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the court has no right to impose another meaning. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Id. The best evidence of legislative intent is the text of the statute. Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 844 (2002). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). "Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). An appellate court will reject the interpretation of a statute that would lead to an absurd result the legislature could not have intended. Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Def., 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008). When "the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself." Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001). In some cases, legislative history may be probative in determining the legislature's intent. Eagle Container Co. v. Cnty. of Newberry, 366 S.C. 611, 630, 622 S.E.2d 733, 743 (Ct. App. 2005), rev'd on other grounds, 379 S.C. 564, 666 S.E.2d 892 (2008).

The circuit court erred in affirming the magistrate's court's ruling that the ten-year statute of limitations applies. Although Palmetto Company titled its action as one for distraint, its claim for rent arose out of the lease, not its title to real property. Because a lease is a contract, the three-year statute of limitations applies. Accordingly, the circuit court is

REVERSED.

FEW, C.J., and THOMAS, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hala K. Nestberg, Respondent/Appellant,

v.

Paul V. Nestberg and Eastview Development, Inc., Appellants/Respondents.

Appeal From Greenville County
Letitia H. Verdin, Family Court Judge

Opinion No. 4883
Submitted June 1, 2011 – Filed August 31, 2011

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jessica Ann Salvini, of Greenville, for Appellants/Respondents.

Kenneth C. Porter, of Greenville, for Respondent/Appellant.

FEW, C.J.: This cross-appeal presents two primary issues: (1) whether property purchased before the marriage should have been included in the marital estate for purposes of equitable division, and (2) whether alleged marital economic misconduct should have affected the division of the marital

estate. We affirm the family court's decision to include the property in the marital estate, but reverse the ruling that economic misconduct affected its valuation. We remand for a new trial as to the valuation of one asset of the marital estate.[1]

I. Facts and Procedural History

Paul and Hala Nestberg married on September 28, 1996. A little over a month before they married, Paul bought a fourteen-acre piece of land, which was titled only in his name. He purchased the property with borrowed funds secured by two mortgages, one to the seller and one to his stepmother. Hala went with him to look at the property but did not attend the closing. Paul and Hala intended to live together in the home on the property after they married, and did so for their entire marriage.

In January 2001, Paul lost his job. For the next six months he was able to use his severance benefits to make the mortgage payments on the property. Paul never secured other employment. Hala took a second job, and for the remainder of the marriage, the couple used her salary to pay the mortgages.

About the time his severance package ran out, Paul said he "began looking into developing" the property. He divided the property into fifteen parcels, one for their marital home and fourteen to sell as lots in a new residential subdivision. In January 2002, Paul formed Eastview Development Company and transferred the fourteen lots to Eastview. The property was slow to sell, and by 2006 Paul had sold only three lots.

In 2006, Paul met another couple and formed the Danielson Company with them to continue developing the subdivision. On December 11, 2006, Paul filed for divorce on the ground of Hala's alleged physical cruelty. However, in March 2007 Paul agreed to dismiss the complaint, and they attempted to reconcile their marriage. Two months later Hala moved out, and on May 11, 2007, she filed a complaint for an order of separate maintenance and support, equitable division of marital assets, attorney's fees, and a restraining order preventing the parties from disposing of any assets. Paul

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

answered and requested a divorce on the ground of living separate and apart without cohabitation for a period of one year. On August 1, 2008, the family court granted the divorce.

Between the December 2006 and May 2007 filings, Paul sold the six remaining subdivision lots. Hala contends Paul sold them at prices below fair market value to intentionally devalue Eastview in contemplation of marital litigation. Paul contends he needed to sell them to avoid bankruptcy.

On July 6, 2009, the family court issued its order addressing equitable division and attorney's fees. The court found the property and home were marital property and, therefore, Eastview was also marital property. The court concluded five lots sold between December 2006 and May 2007 "were sold far below fair market value . . . in contemplation of marital litigation." The court adjusted the equitable division based on the finding of marital economic misconduct.[2] Finally, the court granted Hala's request for attorney's fees and costs because it found she prevailed on the main issue in this case, the valuation of Eastview.

Paul appeals arguing three issues: (1) Eastview and the home should be nonmarital property, (2) alternatively, if the property is found to be marital, the court erred in finding he committed marital economic misconduct and in considering that misconduct in equitable distribution, and (3) the court erred in awarding Hala attorney's fees. Hala also appeals arguing three issues: (1) the court should have given Eastview a higher value, (2) the court should have given the Danielson Company a higher value, and (3) a $20,000 promissory note accompanying the sale of the house should not have been classified as a marital debt.

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[2] Marital economic misconduct is a factor the family court must consider in making an equitable apportionment. S.C. Code Ann. § 20-3-620(B)(2) (Supp. 2010) ("In making apportionment, the court must give weight in such proportion as it finds appropriate to all of the following factors: . . . (2) marital misconduct or fault of either or both parties, . . . if the misconduct affects or has affected the economic circumstances of the parties . . . ." (emphases added)).

We review the family court's decision de novo. Lewis v. Lewis, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). While we have the authority to make our own findings of fact, we commonly defer to the family court's factual findings of credibility because it is in a superior position to assess the demeanor of witnesses. 392 S.C. at 390-91, 709 S.E.2d at 654-55. It is the appellant's burden to demonstrate the preponderance of the evidence is against the family court's factual findings. 392 S.C. at 391, 709 S.E.2d at 655.

II. Paul's Appeal

a. Home and Eastview as Marital Property

Section 20-3-630(A)(2) & (3) of the South Carolina Code (Supp. 2010) excludes from the term "marital property" any "property acquired by either party before the marriage" and "property acquired by either party in exchange for property described in items (1) and (2) of this section." Based on this statute, Paul and Hala's home and the property transferred to Eastview are nonmarital property because Paul bought them "before the marriage." § 20-3-630(A)(2). However, the family court found the property had been transmuted into marital property.

Nonmarital property "may be transmuted . . . if it is used by the parties . . . in some manner so as to evidence an intent by the parties to make it marital property."[3] Murray v. Murray, 312 S.C. 154, 157, 439 S.E.2d 312, 314 (Ct. App. 1993). "Transmutation is a matter of intent to be gleaned from the facts of each case." Smallwood v. Smallwood, 392 S.C. 574, 579, 709 S.E.2d 543, 545 (Ct. App. 2011); Murray, 312 S.C. at 157, 439 S.E.2d at 315. "The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarded the property as the common property of the marriage." Smallwood, 392 S.C. at

[3] Our courts recognize other ways in which nonmarital property can be transmuted into marital property. See Jenkins v. Jenkins, 345 S.C. 88, 98, 545 S.E.2d 531, 537 (Ct. App. 2001) (stating nonmarital property may be transmuted if "it becomes so commingled with marital property as to be untraceable; [or if] it is jointly titled").

579, 709 S.E.2d at 545-46. Such evidence "'may include . . . using the property exclusively for marital purposes, . . . using marital funds to build equity in the property, or exchanging the property for marital property.'" 392 S.C. at 579, 709 S.E.2d at 546 (quoting Johnson v. Johnson, 296 S.C. 289, 295, 372 S.E.2d 107, 111 (Ct. App. 1988)).

The facts of this case demonstrate that Paul and Hala regarded the property as common property of the marriage. In addition to the fact that they lived in the home for the duration of their marriage, Hala's primary role in paying the mortgages for five years after Paul lost his job tips the scale in favor of transmutation. Her salary from both jobs was placed into a joint checking account until Paul's December 2006 divorce filing. The joint checking account contained marital funds that were used to build equity in the property by paying the mortgages. Paul agreed he relied on Hala's income and credit cards to develop the land he transferred to Eastview and that, "to a degree," Hala "had been carrying the majority of the income for five years." Hala testified that after she quit contributing to the joint checking account, Paul could not make the mortgage payments. Finally, Paul conceded that even after he got business capital from his business partners in the Danielson Company, he still needed Hala's income to pay for his personal expenses, including the mortgages on the property.

Because the property was transmuted into marital property, it remained marital after Paul transferred it to Eastview Development Company. Therefore, we agree with the family court that Eastview and the home are marital property. See S.C. Code Ann. § 20-3-630(A)(3) (Supp. 2010).

b. Valuation of Eastview

Both parties dispute the proper valuation of Eastview. As we explain below, we reverse the family court's valuation of Eastview and remand for a new trial on this issue.

For purposes of equitable division, marital property should be valued as of the date the marital litigation was filed. Gardner v. Gardner, 368 S.C. 134, 136, 628 S.E.2d 37, 38 (2006). When there are two filing dates, the court must use the date of the filing of the litigation which lead to the equitable

division. See Hickum v. Hickum, 320 S.C. 97, 100, 463 S.E.2d 321, 323 (Ct. App. 1995) (holding the "litigation required 'to trigger the statute must be the same litigation which brings about the equitable division.' . . . 'It is not enough that the parties in the past engaged in some litigation if that litigation did not serve as the vehicle for equitable division'" (quoting Shannon v. Shannon, 301 S.C. 107, 112, 390 S.E.2d 380, 383 (Ct. App. 1990))). Because the May 2007 action filed by Hala is the litigation which brought about the equitable division in this case, May 11, 2007, is the correct date of valuation for the Nestbergs' marital property.

In making its decision as to the value of Eastview, the family court considered the fact that Paul sold five lots between December 2006 and May 2007 for less than market value. In light of this consideration, the family court changed the date of valuation for Eastview from May 11, 2007, to the date Paul filed his action in December 2006. We hold this was error. We find Paul did not engage in marital economic misconduct by selling the lots below market value, and thus the valuation of Eastview may not be adjusted to account for those sales.[4]

In ordering an equitable apportionment of marital property, the family court must consider any marital misconduct that "affects or has affected the economic circumstances of the parties." S.C. Code Ann. § 20-3-620(B)(2) (Supp. 2010). This court discussed the use of marital economic misconduct in equitable division in Panhorst v. Panhorst, 301 S.C. 100, 390 S.E.2d 376 (Ct. App. 1990). In Panhorst, the husband regularly gave his mother cash gifts totaling between $25,000 and $30,000 throughout the parties' twenty-year marriage. 301 S.C. at 104, 390 S.E.2d at 378-79. Because the wife did not know about the gifts, she claimed "the family court should have treated

[4] We also note the family court should not change the date of valuation in order to account for the effect of the marital economic misconduct. The filing date of the litigation which brought about the equitable division is always the correct valuation date. Using that date, the family court adjusts what property is included in the marital estate, how much each party receives in the division of the estate, or both, to account for the effect the marital economic misconduct had on the value of the estate. S.C. Code Ann. § 20-3-620(B)(2)-(3) (Supp. 2010).

them as part of the marital estate subject to equitable division." 301 S.C. at 104, 390 S.E.2d at 379. This court disagreed for two reasons. First, we concluded the property was not subject to equitable division because "at the time the action was filed, it no longer belonged to either of the Panhorsts as the statute requires." 301 S.C. at 104-05, 390 S.E.2d at 379. Second, we found no evidence that the husband gave the money to his mother in contemplation of marital litigation. 301 S.C. at 105-06, 390 S.E.2d at 379. Because we found no evidence of fraudulent intent or purposeful reduction of the marital estate in contemplation of marital litigation, this court refused to include the gifts as part of the marital estate for equitable division. Id.

In McDavid v. McDavid, 333 S.C. 490, 492-93, 511 S.E.2d 365, 366-67 (1999), the supreme court addressed the question of whether money the husband used in support of his failing business without his wife's knowledge should be deducted from his equitable distribution. Similar to the argument Hala makes in this case, the wife argued her husband's actions constituted "marital misconduct" that "affected the economic circumstances of the parties," and therefore should be considered in making an equitable apportionment. 333 S.C. at 493, 511 S.E.2d at 367. The supreme court disagreed and held "poor business decisions, in and of themselves, do not warrant a finding of marital 'misconduct,' and that there must be some evidence of willful misconduct, bad faith, intention to dissipate marital assets, or the like, before a court may alter the equitable distribution award for such misconduct." 333 S.C. at 496, 511 S.E.2d at 368. Because the court found "no such evidence," it did not deduct from the husband's equitable distribution. Id.

Finally, in Deidun v. Deidun, 362 S.C. 47, 59, 606 S.E.2d 489, 496 (Ct. App. 2004), this court upheld a finding of marital economic misconduct and took it into account in making the equitable division. The wife hid from her husband the accumulation of over $450,500 in credit card debt, increase in lines of credit by $13,218, and withdrawal of almost $27,000 from an IRA. 362 S.C. at 58-59, 606 S.E.2d at 495. This court distinguished the facts from McDavid, stating:

> Although there is nothing in the record to indicate that Wife acted with any bad faith in her spending

> habits, we believe McDavid is more applicable to cases involving business expenditures. Wife's depletion of marital funds and increase of the marital debt in the present case were not to support a failing business. Accordingly, we find McDavid inapplicable in the present case and the family court's consideration of Wife's failure to appropriately manage the family finances was not error.

362 S.C. at 60, 606 S.E.2d at 49. Because the wife's "spending amounted to . . . economic misconduct," this court affirmed the family court's decision to consider it in granting the husband a higher percentage of the marital assets. 362 S.C. at 55, 61-62, 606 S.E.2d at 493, 497.

Here, the facts involve challenged business expenditures. Therefore, the family court must find the allegedly at fault party engaged in "willful misconduct, bad faith, intention[al] . . . dissipat[ion of] marital assets, or the like" before it may alter the equitable distribution of marital property based on economic misconduct. McDavid, 333 S.C. at 496, 511 S.E.2d at 368.

The family court made no such finding in this case. The only factual finding made by the family court is that "these sales were made in contemplation of marital litigation." This finding will not support the family court's decision to alter the equitable distribution.

We find the preponderance of the evidence does not support any of the findings required to alter the equitable distribution of marital property based on economic misconduct. While most of the lots sold after the December 2006 filing were sold below market value, we find Paul's decision to do so was reasonable under the circumstances. Paul explained his decision as follows:

> Well, I was covered up with debt, under financial stress, had no income myself. Hala quit contributing any income whatever as of January of that year. So, during that time, I was having to depend on whatever money I could generate from my work or from sales

> of the lot or whatever. Someone came along and offered me money for those lots. I looked at it as an opportunity to pay debt, and that's exactly what I did.

Similarly, one of Paul's economic experts testified Paul's actions in selling the lots for low prices "makes a lot of sense when you look at the financial health of Paul Nestberg individually. He owed over $150,000 in credit cards. He didn't maintain the debts and the lots without going into bankruptcy. It made it very possible to sell those lots." Later in his testimony, the expert said "there would be reason to suspect that the company . . . without selling the lots could not stay in business." We agree with the expert that selling the lots below market value made good sense under the circumstances. Because we find Paul did not engage in willful misconduct or bad faith, did not intend to dissipate marital assets, and did not purposefully reduce the value of Eastview in contemplation of marital litigation, we reverse the family court's decision to alter the valuation of Eastview.

On remand, the family court must determine the value of Eastview as of May 11, 2007, and apportion it without any consideration of marital economic misconduct.

c. Hala's Attorney's Fees

The family court awarded attorney's fees to Hala because it found she prevailed on the main issue in the case and Paul was in a better position to pay. Because we reverse the family court's valuation of Eastview, on remand, the family court must reconsider whether to award attorney's fees and, if so, how much. See Sexton v. Sexton, 310 S.C. 501, 503-04, 427 S.E.2d 665, 666 (1993) (reversing and remanding attorney's fees issue for reconsideration when the substantive results achieved by trial counsel were reversed on appeal); Pruitt v. Pruitt, 389 S.C. 250, 274, 697 S.E.2d 702, 715 (Ct. App. 2010) (remanding for reconsideration of attorney's fees where the court also remanded for a determination of whether wife had equity interest in home).

III. Hala's Appeal

We decline to address Hala's two remaining issues—the value of Danielson Company and a $20,000 promissory note accompanying the sale of the house included as marital debt—because we find they are not preserved for our review. Although the two issues were mentioned briefly at the hearing on the motions to reconsider, Hala did not object to the judge's ruling as to either issue. At the end of the hearing, the judge did a "recap to make sure [she] got the crux of everybody's argument." However, the judge did not mention the value of Danielson or the note. The order addressing the motions to reconsider lists each party's arguments, but does not mention the value of Danielson or the note as marital debt. Therefore, the issues are unpreserved. Nicholson v. Nicholson, 378 S.C. 523, 537, 663 S.E.2d 74, 81-82 (Ct. App. 2008) (stating an issue must have been raised to and ruled upon by the trial judge to be preserved on appeal, and if the trial court does not rule on an issue and the appellant does not raise it in a Rule 59(e) motion, it is unpreserved).

IV. Conclusion

We affirm the finding that the home and Eastview are marital property. We reverse the family court's valuation of Eastview, and remand for a new trial as to that issue and the issue of attorney's fees.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

PIEPER and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dana Winters and Daniella Winters, Appellants/Respondents,

v.

Joyce Fiddie, C.W. Burbage, Barbara Daniels, and Prudential Carolina Real Estate, Respondents/Appellants.

Appeal From Berkeley County
Roger M. Young, Circuit Court Judge

Opinion No. 4884
Heard November 3, 2010 – Filed August 31, 2011

AFFRIMED IN PART and REVERSED IN PART

Daniel E. Martin, of Charleston, for Appellant-Respondents.

Michael A. Scardato, of Charleston, and Michael Christopher Scarafile, of N. Charleston, for Respondent-Appellants.

WILLIAMS, J.: On appeal from the trial court, Dana and Daniella Winters (individually "Mr. Winters/Mrs. Winters," collectively "Buyers") contend the trial court erred on several grounds when it granted Joyce Fiddie, C.W. Burbage, (collectively "Sellers") and Barbara Daniels' ("Daniels") motion for a new trial absolute. On cross-appeal, Sellers and Daniels claim the trial court committed reversible error when it (1) applied the Residential Property Condition Disclosure Act[1] ("the Act") to a non-residential transaction; (2) failed to grant Sellers' motion for a directed verdict; and (3) allowed Buyers to introduce a consent order issued by another state agency from a separate proceeding in violation of the South Carolina Rules of Evidence.

FACTUAL/PROCEDURAL BACKGROUND

The underlying negligence action stems from the purchase of a piece of real estate located at 2105 South Live Oak Drive in Moncks Corner, South Carolina ("the Property"). At the time of the sale, the Property consisted of several small storage sheds, an unoccupied house, and a commercial block building. Sellers inherited the Property from their deceased mother in 1999. Sellers rented the house on the Property for several years before enlisting the services of Daniels, a real estate agent for Prudential Carolina, in an effort to sell it. When Daniels listed the Property, the house had been vacant for approximately one and a half years.

Daniels initially listed the Property for sale in March 2001 for $180,000. Due to little interest in the Property, Sellers relisted the Property on several occasions between March 2001 and October 2004. Sellers eventually sold the Property for $110,000 in November 2004 to Buyers.

Prior to Buyers closing on the Property, three prospective purchasers attempted to buy the Property from Sellers. The first buyer, Laura Shambrook, noticed some type of growth on the walls in the house. After a lab report dated September 4, 2004, confirmed the presence of mold, Ms.

[1] See S.C. Code Ann. §§ 27-50-10 to -110 (2007).

Shambrook attempted to purchase the Property for approximately $80,000. Ms. Shambrook showed the mold disclosure report to Daniels and Sellers in hopes they would lower their asking price; however, Sellers were unwilling to accept her offer, and the contract fell through.

Shortly thereafter, a second prospective buyer, Anna Oster, contacted Daniels about the Property. Daniels testified she disclosed the presence of mold to Ms. Oster when she showed her the house and surrounding property, but Ms. Oster stated otherwise at trial. On September 14, 2004, Ms. Oster's real estate agent submitted an offer on a "Residential Agreement to Buy and Sell" form to purchase the Property for $125,000. During negotiations, Ms. Oster's agent also requested a residential disclosure form. Daniels never produced a residential disclosure form, but four days after receiving Ms. Oster's offer, Daniels faxed a copy of the mold report to Ms. Oster's agent. Daniels claimed the deal fell apart because the Sellers would not agree to the terms of Ms. Oster's offer; Ms. Oster, however, stated that once Daniels disclosed the presence of mold in the house, the negotiations ended.

During the same month, a third prospective purchaser, Edward Spence, attempted to purchase the Property for $110,000. On September 23, 2004, the parties entered into a "General Use And Lots/Acreage" contract. The contract contained no "as is" language and was contingent only upon Mr. Spence obtaining financing. A mold disclosure and waiver form was also attached to the contract, which Mr. Spence and Daniels signed on September 27, 2004. The parties never closed on the contract due to Mr. Spence's failure to obtain financing.

Following Mr. Spence's inability to obtain financing, Daniels told Mr. Winters about the Property because she knew Mr. Winters was looking for some commercial property. Buyers and Daniels had a pre-existing relationship at the time Buyers bought the Property because Daniels had recently sold Buyers their primary residence. Daniels showed Mr. Winters the Property, at which time Mr. Winters noticed what he called "dirty water" on the walls of several rooms in the house. However, Mr. Winters stated Daniels never mentioned the presence of mold in the house.

Buyers and Sellers subsequently entered into a "General Use And Lots/Acreage" contract for the purchase of the property for $110,000. Daniels prepared the contract and included language to convey the property "as is." Mr. Winters agreed the "as is" language was present when he signed the contract but claimed Daniels added the language, "[b]uyer acknowledges the presence of mold in the house," after he signed the contract, and he was unaware of this language until the underlying suit was commenced. Daniels countered Mr. Winters' testimony at trial and stated she told Mr. Winters about the mold, but it was immaterial to him because he was going to tear down the house as soon as they closed on the Property. Mr. Winters testified no disclosures were made about the presence of mold at the closing. He stated he was unaware of its existence in the house until Ms. Oster, one of the prior prospective buyers, walked onto the Property one day and disclosed it to him while he was repairing the house.

Buyers filed suit against Sellers and Daniels for failure to disclose the presence of toxic mold in the house and for failure to provide Buyers with written reports in Sellers and Daniels' possession confirming the existence of toxic mold. Buyers additionally asserted Daniels breached certain sections in Title 40 based on her statutory duties to Buyer as a real estate broker. Buyers requested actual damages as well as $1.5 million in punitive damages. The case was tried before a jury on August 12 and 13, 2008.

Over Daniels' objection at trial, Buyers introduced a consent agreement between the South Carolina Labor, Licensing, and Regulations board and Daniels, which sanctioned Daniels for failing to disclose to Buyers "reports indicating the presence of structural defects and toxic mold . . . [until] . . . approximately one month after purchase." Daniels confirmed she did not provide Buyers with a copy of the mold disclosure report but stated she told Buyers about the presence of mold. Further, Daniels testified she attempted numerous times after she was sanctioned to contact Buyers in an effort to remediate the problem, but Buyers never returned her phone calls.

At the close of Buyers' case, Sellers made a motion for a directed verdict on several grounds, which the trial court denied. Sellers renewed their directed verdict motion after the close of evidence, which the court denied. The trial court then charged the jury on the law but neglected to charge the appropriate burden of proof for punitive damages. Neither party objected to the jury charges. The jury returned a verdict in favor of Buyers for $50,000 in actual damages and $75,000 in punitive damages.

Sellers timely filed a motion for JNOV, New Trial Absolute, or, in the alternative, New Trial Nisi Remittitur. Sellers raised numerous grounds for granting a new trial, including the trial court's failure to charge the jury that the award of punitive damages requires clear and convincing proof. After a hearing on the motion, the trial court granted Sellers' motion for a new trial, finding it had the authority to grant a new trial absolute pursuant to Rule 59(d), SCRCP, despite Sellers' failure to timely object to the jury charge. Buyers' motion to reconsider was denied. Buyers appealed and Sellers cross-appealed.

I. Buyers' Appeal

Buyers contend the trial court erred in granting Sellers a new trial absolute because Sellers failed to timely object to the trial court's flawed jury instruction. In response, Sellers claim their failure to timely object to the jury charge did not prevent the trial court from being able to grant a new trial pursuant to Rule 59, SCRCP.[2] We agree with Buyers.

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[2] Sellers raised several other grounds in their motion for a new trial, including juror misconduct, improperly admitted evidence, the Thirteenth Juror Doctrine, and the failure of the punitive damages award to meet the constitutional requirements of Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). On appeal, Sellers contend Buyers did not appeal these additional sustaining grounds, which renders them law of the case. However, the trial court never specifically ruled on Sellers' alternative grounds in its order; thus, law of the case is inapplicable, and Sellers' alternate grounds for a new trial are not properly before this court. See Wilder Corp. v. Wilke, 330

The grant or denial of a new trial motion rests within the trial court's discretion, and its decision will not be disturbed on appeal unless the court's findings are wholly unsupported by the evidence or its conclusions are controlled by error of law. Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996).

A trial court's authority to grant a new trial is rooted in Rule 59, SCRCP. Rule 59(a) permits a trial court to grant a new trial "to all or any of the parties and on all or part of the issues [] in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State . . . ." More specifically, Rule 59(d), SCRCP, states,

> Not later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

Rule 51, SCRCP, which pertains to jury instructions, states, "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."

Rule 59 does not expressly address whether a trial court's ability to grant a new trial for "any reason" is limited to only grounds that were raised

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S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

at trial. Moreover, while Rule 51 specifies that a jury instruction must be objected to, and case law affirms that a failure to timely object will preclude appellate review,[3] neither Rule 51 nor Rule 59 explicitly address whether a flawed jury instruction must be objected to for the trial court, either sua sponte or by a party's motion, to grant a new trial on that ground.

South Carolina jurisprudence indicates that a moving party must raise the objectionable issue at the appropriate time during trial; thus, unobjected to trial error cannot be advanced as grounds for a new trial. See State v. Dicapua, 383 S.C. 394, 398-99, 680 S.E.2d 292, 294 (2009) (finding a trial court cannot sua sponte grant a new trial on a ground not raised by a party and reversing the trial court's grant of a new trial based on the admission of an unobjected to videotape); S. Railway Co. v. Coltex, Inc., 285 S.C. 213, 216, 329 S.E.2d 736, 737-38 (1985) (finding party waived its right to claim an omitted jury charge was error by not objecting to its omission at the trial level and reversing the trial court's grant of a new trial on that ground); Collins Cadillac, Inc. v. Bigelow-Sanford, Inc., 276 S.C. 465, 468, 279 S.E.2d 611, 612 (1981) (holding a party's failure to raise issue in directed verdict motion precluded assertion of issue in support of motion for new trial); Brown v. Singletary, 226 S.C. 482, 484, 85 S.E.2d 738, 738 (1955) (finding a party's failure to object to prejudicial remarks by the trial court during ruling on directed verdict motion prevented trial court from granting the party's motion for a new trial based on its prejudicial remarks); Munn v. Asseff, 226 S.C. 54, 58, 83 S.E.2d 642, 643-44 (1954) (holding failure to object or otherwise challenge a jury charge precluded issues from being raised in new trial motion to trial court or on appeal).

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[3] See Belue v. City of Greenville, 226 S.C. 192, 202-03, 84 S.E.2d 631, 636 (1954) (holding that the supreme court will not consider on appeal a contention regarding the trial court's jury instructions that was not raised at trial); Wilhoit v. WCSC, Inc., 293 S.C. 34, 41, 358 S.E.2d 397, 401 (Ct. App. 1987) (citing to Rule 51, SCRCP, and finding trial court's failure to charge that the standard of proof for punitive damages is by clear and convincing evidence was not properly preserved because appellant did not object to the trial court's error).

In the civil context, the Supreme Court has addressed a trial court's ability to order a new trial based upon inadequate jury instructions that were not specifically objected to at the trial level nor raised in the party's new trial motion in Southern Railway Company v. Coltex, Inc., 285 S.C. 213, 329 S.E.2d 736 (1985).[4] In that case, Southern Railway brought an action against Coltex to recover money due for shipment and storage of Coltex's trailers. Id. at 214, 329 S.E.2d at 736. The trial court charged the jury that Southern Railway had a lien on the trailers in its possession, but this lien was waivable by the parties' agreement. Id., 329 S.E.2d at 736-37. Southern Railway objected to the trial court's charge that the lien was waivable, but the trial court overruled the objection, and the jury found for Coltex. Id., 329 S.E.2d at 737. Southern Railway then moved for a new trial based on the court's erroneous jury charge. Id. The trial court granted Southern Railway a new trial, not on the charge Southern Railway objected to, but on the court's failure to clarify in its jury charge what Coltex had to do to retain the benefit of the waived lien. Id. at 215, 329 S.E.2d at 737.

On appeal, the Supreme Court held that Southern Railway should have requested an additional charge regarding Coltex's duties to claim the benefit of the waived lien. Id. at 215-16, 329 S.E.2d at 737. In holding the trial court erred in granting Southern Railway a new trial, the Supreme Court stated, "Southern waived the right to claim the omitted charge was error by not objecting to its omission at the trial level. Therefore, the omitted charge was not properly before the trial court, the Court of Appeals, or this Court." Id. at 216, 329 S.E.2d at 737-38 (emphasis added).

In the instant case, the trial court failed to instruct the jury in regard to punitive damages that the burden of proof was by clear and convincing

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[4] The Supreme Court recently reaffirmed the holding from Southern Railway in State v. Dicapua, 383 S.C. 394, 398-99, 680 S.E.2d 292, 294 (2009), asking "[M]ay a trial court in a criminal case sua sponte order a new trial on a ground not raised by a party? We answered this question 'no' in the context of a civil proceeding in Southern Railway . . . ."

evidence. Neither party objected to this omission after the jury retired or before the jury returned the verdict. The first time Sellers argued the trial court erred in failing to charge the appropriate burden of proof was in Sellers' motion for a new trial. At the hearing on Sellers' new trial motion, the trial court stated, "[M]y standard jury charge on punitive damages specifically addresses that the standard of proof is clear and convincing. . . . I don't know how it didn't get in there." Both parties acknowledged the trial court permitted them to review the jury charges before the court read them, and while Sellers conceded they did not object, they also stated the clear and convincing language was included in the court's standard jury charge when they reviewed it.

In granting Sellers' new trial motion outside the ten-day window, the trial court cited to Rule 59(d) and stated, "Here, while it is true that the Defendants' objection to the jury charges is not preserved because of their failure to object prior to the jury retiring, my authority to grant a new trial absolute is based on my own ability to do so and does not hinge on the Defendants' motion . . . in the instant case, the Defendants should not suffer because of my administrative oversight . . . ."

Despite the trial court's good faith effort to correct its error by granting Sellers' motion, we are constrained by precedent to conclude the trial court erred in granting a new trial absolute. Based on the supreme court's holding in Southern Railway, we find Sellers' failure to object to the omitted portion of the jury instruction precluded the trial court from granting a new trial on that ground. Accordingly, we reverse the trial court's grant of a new trial absolute.

II. Sellers' Cross-Appeal

On cross-appeal, Sellers and Daniels claim the trial court committed reversible error when it (1) applied the Act to a non-residential transaction; (2) failed to grant Sellers' motion for a directed verdict; and (3) allowed Buyers to introduce a consent order issued by another state agency from a separate proceeding in violation of the South Carolina Rules of Evidence.

1) Residential Property Condition Disclosure Act

Sellers first claim the trial court erred in applying the Act to the sale of the Property because the abandoned house was not a "dwelling unit" within the meaning of the Act. We disagree.

The Act applies to transfers of residential real property consisting of at least one but not more than four dwelling units. S.C. Code Ann. § 27-50-20 (2007). Under the Act, the owner of the real property must furnish a written disclosure statement to a buyer disclosing certain characteristics and conditions of the property, including, among other things, the presence of toxic material and other environmental contamination. S.C. Code Ann. § 27-50-40 (2007). Failure to provide a buyer with an accurate disclosure statement may subject the owner and his or her real estate agent to civil liability. S.C. Code Ann. § 27-50-65 (2007).

While the Act does not define a "dwelling unit," Sellers argue the definition of a dwelling unit from the Residential Landlord Tenant Act ("RLTA"), which is located in the same title, should apply in this case. Under the RLTA, a dwelling unit is "a structure or the part of a structure that is used as a home, residence, or sleeping place by one person who maintains a household or by two or more persons who maintain a common household and includes landlord-owned mobile homes." S.C. Code Ann. § 27-40-210(3) (2007). We find it is not unreasonable to resort to the definition of a dwelling unit from the RLTA because both chapters are located in Title 27. See S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) ("In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.").

Regardless, even if we do not utilize the definition of dwelling unit as set forth in the RLTA, our conclusion is the same. When confronted with an undefined statutory term, this court must interpret it in accordance with its usual and customary meaning. Branch v. City of Myrtle Beach, 340 S.C.

405, 409-10, 532 S.E.2d 289, 292 (2000). According to Black's Law Dictionary, a "dwelling-house" is "the house or other structure in which a person lives; a residence or abode." Black's Law Dictionary (9th ed. 2009). We find this definition is in accord with the term "dwelling unit" as defined in section 27-40-210.

Throughout trial, the parties disputed the intended use of the house and consequently if the Act should apply to the sale of the Property. Sellers testified it had been rented in prior years as a residence, but the house was vacant two years before the Property's sale. Sellers stated Buyers intended to tear down the house and erect a steel building in its place; whereas, Mr. Winters claimed he wanted to renovate the house. Both parties conceded the house was in disrepair and needed substantive repairs before it was suitable to be rented. Moreover, multiple contracts were submitted on the Property, some on residential forms and others on lot and acreage forms.

The conflicting nature of the evidence supports the trial court's finding that the nature of the property and the intended use for the house was a disputed issue to be resolved by the factfinder. If the jury determined the house was a dwelling unit, it was then within the jury's province to determine whether Sellers breached a duty to Buyers. See Burnett v. Family Kingdom, Inc., 387 S.C. 183, 189, 691 S.E.2d 170, 173 (Ct. App. 2010) (finding the question of negligence is a mixed question of law and fact, so that if the law recognizes a particular duty, the jury then determines whether a breach of the duty that resulted in damages occurred). Accordingly, we conclude whether the house was a "dwelling unit" within the meaning of the Act was properly submitted to the jury. See Ward v. Zelinski, 260 S.C. 229, 234, 195 S.E.2d 385, 388 (1973) (finding when evidence is contradictory and more than one reasonable inference is possible, it is the trial court's duty to submit the disputed issues of fact to the jury).

2) Directed Verdict

Sellers next argue the trial court erred in denying their motion for a directed verdict on the following grounds: (1) Buyers only alleged negligence

against Sellers but their relationship with Sellers sounded solely in contract; (2) Buyers failed to present any evidence that Burbage had any knowledge of mold in the house or that Fiddie knowingly violated any statutory provisions; and (3) Buyers failed to offer any evidence to support an award of actual damages. We disagree.

"In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." Steinke v. S.C. Dep't of Labor, Licensing & Reg., 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The trial court must deny a directed verdict motion when the evidence yields more than one inference or its inference is in doubt. Id.

A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability. Carolina Home Builders, Inc. v. Armstrong Furnace Co., 259 S.C. 346, 358, 191 S.E.2d 774, 779 (1972). When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Harvey v. Strickland, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002). In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002).

This court will reverse only when there is no evidence to support the trial court's ruling or when the ruling is controlled by an error of law. Clark v. S.C. Dep't of Public Safety, 362 S.C. 377, 382-83, 608 S.E.2d 573, 576 (2005).

(1) Sellers' Duty to Buyers

Sellers first contend any duty they had to Buyers was created solely by contract, and because Buyers only alleged negligence against Sellers, the trial court should have granted a directed verdict in Sellers' favor. We disagree.

The evidence presented at trial created more than one reasonable inference on the issue of liability. See Carolina Home Builders, 259 S.C. at 358, 191 S.E.2d at 779 (holding a directed verdict may be granted only when the evidence raises no issue for the jury as to liability). Buyers argued Sellers had both a statutory and common law duty to disclose material information pertaining to the sale of the Property. Buyers presented evidence that the purchase of the Property was a residential transaction subject to the statutory requirements set forth in the Act. While the dissent contends Buyers failed to sue Sellers under section 27-50-65[5] of the Act, and their failure to do so precludes them from recovering damages they would have otherwise been entitled to, we construe Buyers' complaint as alleging a cause of action under section 27-50-65. See Whale Beach Corp. v. Fed. Land Bank of Columbia, 275 S.C. 218, 219, 268 S.E.2d 583, 584 (1980) ("In determining whether a cause of action is stated, we are required to construe the complaint liberally in favor of the pleader."). Specifically, Buyers alleged Sellers "fail[ed] to disclose the existence of toxic mold located within the dwelling [and] fail[ed] to provide [Buyers] with written reports within [Sellers and Daniel's] possession, which confirmed the existence of toxic mold . . . ." Additionally, Buyers alleged Sellers "attempt[ed] to falsify documentation to disguise their failure to disclose evidence of toxic mold [and] fail[ed] to eliminate dangerous condition (sic) upon said property that [Sellers and Daniels] knew or should have known existed." Although Buyers may not have specifically cited to the Act, we construe their complaint as sufficiently alleging a cause

[5] Section 27-50-65 permits recovery of actual damages, court costs, and attorney's fees against a seller who knowingly fails to disclose "any material information on the disclosure statement that he knows to be false, incomplete, or mislead . . . ."

of action under the Act. Moreover, the parties argued over whether the Act applied throughout trial, and Sellers' only objection to the directed verdict motion was on Buyers' failure to allege a breach of contract action not failure to sue under the Act.

Furthermore, even if the jury determined Sellers breached no duty to Buyers under the Act, there was conflicting evidence as to whether the presence of mold was a patent or latent defect as well as whether Buyers exercised reasonable diligence in discovering the mold. Accordingly, the trial court properly denied Sellers' motion for a directed verdict.

(2) Knowledge of Mold

Next, Sellers argue the trial court erred in denying their directed verdict motion because Buyers presented no evidence that Burbage had any knowledge of the presence of mold and that Fiddie knowingly failed to disclose the presence of mold. We disagree.

As to Burbage, there was evidence from which the jury could infer Burbage had either actual or constructive knowledge of the presence of mold. First, Burbage assigned a power of attorney to Fiddie, who signed the contract of sale, which Sellers claim expressly disclosed the presence of mold. Moreover, Burbage signed a previous contract with a prospective purchaser, which included a mold disclosure and waiver form. Given the deferential standard of review with regard to motions for directed verdict, we find Buyers presented sufficient evidence to create a jury question as to Burbage's constructive or actual knowledge regarding the presence of mold in the house. As to Fiddie, she testified she was aware of the presence of mold in the house. Because Fiddie admitted she knew about the mold, the trial court did not err in denying Sellers' motion for directed verdict on this ground.

(3) Evidence of Damages

Sellers argue the trial court erred in denying their directed verdict motion based on Buyers' failure to produce any evidence to support an award of actual damages. We disagree.

In order for damages to be recoverable, the evidence should be sufficient to "enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). "While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." Id. The evidence, however, should be such that a court or jury can reasonably determine an appropriate amount. Gray v. S. Facilities, Inc., 256 S.C. 558, 570, 183 S.E.2d 438, 444 (1971). Moreover, bald allegations are insufficient to establish a claim for diminution in value, and the evidence must not be speculative as to the amount of the alleged diminution. See Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 117, 410 S.E.2d 537, 546 (1991).

At trial, testimony was presented that the Property was initially appraised at $125,000 but was currently valued at $75,000 based on a county tax assessment. Mrs. Winters stated the $75,000 valuation did not take into account the presence of mold in the house. Mr. Winters stated they were continuing to pay a $900 monthly mortgage on the Property, which was partially offset by renting the other building on the Property for $600 per month. Mr. Winters claimed he would have rented the house for between $750 and $800 per month if not for the mold, which rendered the house uninhabitable.

The jury apparently awarded Buyers $50,000 in actual damages based on the difference between the bank's pre-purchase appraisal of the Property at $125,000 and the county's subsequent tax assessment of the Property at $75,000. The tax assessment is not necessarily conclusive on the Property's depreciated value, particularly when Mrs. Winters stated the assessment did

not account for the presence of mold in the house. However, Mrs. Winters testified the Property was worth $75,000 and supported her conclusion based on the tax assessment and their loss of projected rental income. As the co-owner of the Property, her testimony is sufficient to support the jury's verdict.[6] See Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 560, 671 S.E.2d 79, 86 (Ct. App. 2008) ("As a general principle, a landowner who is familiar with her property and its value, is allowed to give her estimate as to the value of the land and damage thereto, even though she is not an expert.") (internal citation omitted).

[6] The dissent states other motions were pending before the trial court when the court granted Sellers' new trial motion, and because this court has now reversed the trial court's grant of a new trial, the trial court must review the punitive damages award for compliance with due process. We first note the trial court never conducted nor did Sellers object at the close of trial to the lack of a post-verdict judicial review of the punitive damages award as required by Mitchell v. Fortis Insurance Company, 385 S.C. 570, 588-89, 686 S.E.2d 176, 185-86 (2009). While we find Sellers' alternative requests for a new trial nisi remittitur and JNOV based on lack of evidence and the excessiveness of the punitive damages award would have sufficiently preserved the punitive damages issue for appeal to this court, they failed to raise this issue on appeal. In their post-trial motion, Sellers explicitly objected to the trial court's failure to grant a directed verdict due to the lack of evidence to support an award of actual damages as well as an award of punitive damages but only raised this issue in the context of actual damages on appeal. We agree with the dissent's conclusion that requiring a prevailing party to request a ruling on alternative grounds from the trial court when the court has ruled in its favor would be "inefficient and pointless." However, this does not obviate the need for Sellers to raise any issue it has with the award of punitive damages (because it was an adverse ruling) to this court on cross-appeal. Accordingly, we find it improper for either this court or the trial court to review the punitive damages award.

3) Admission of Consent Agreement

Last, Sellers contend the trial court erred in admitting a consent order issued by South Carolina Labor, Licensing, and Regulations board ("LLR") in violation of Rules 403 and 404, SCRE.[7] We disagree.

The admission of evidence is within the trial court's discretion, and its decision will not be reversed absent an abuse of discretion. Whaley v. CSX Transp., Inc., 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005).

Daniels signed a consent agreement with LLR, which stated, "[Daniels] admits that she failed to disclose to purchasers of said property reports indicating the presence of structural defects and toxic mold at said property. [Daniels] presented toxic mold disclosure statements to purchasers approximately one month after purchase." Daniels also agreed in the order to remediate and repair the mold conditions within thirty days of signing the agreement. The trial court ruled in limine the order could only be admitted for impeachment purposes. During Daniels' testimony, the trial court ruled the order was also relevant on the issue of punitive damages. The order was then admitted into evidence over Sellers' objection.

Pursuant to Rule 403, SCRE, 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." Rule 403, SCRE.

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[7] While Sellers also reference Rule 408, SCRE, in their brief on appeal, this argument was not made to the trial court and is not preserved for our review. See Wilder, 330 S.C. at 76, 497 S.E.2d at 733 (an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review).

We conclude the order was admissible under Rule 403, SCRE, because it was evidence of whether Daniels knowingly failed to disclose the mold report to Buyers. Because Buyers alleged they would not have bought the property if they had this information, Daniels' disclosure or lack thereof was relevant to Buyers' theory of negligence. While a third party may have instituted the LLR complaint against Daniels, the provision relating to the disclosure of the mold reports clearly pertained to Buyers. Moreover, Mrs. Winters' testimony reaffirmed the order's finding that Daniels asked Mrs. Winters to sign the mold disclosure waiver form one month after closing on the Property. While the LLR order was prejudicial to Daniels in that it established Daniels' wrongdoing towards Buyers, we find its probative value outweighed its prejudicial impact.

We also disagree with Sellers' contention that the order was inadmissible under Rule 404, SCRE.

Under Rule 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

"The law in civil cases, as well as in criminal cases, permits proof of acts other than the one charged which are so related in character, time and place of commission as to . . . tend to show the existence of [] a common plan or system." Citizens Bank of Darlington, 202 S.C. 244, 262-63, 24 S.E.2d 369, 376 (1943) (internal citations omitted). In the case of the common scheme or plan exception to the general rule barring admission of prior bad act evidence, a close degree of similarity between the prior bad act and the present case is necessary. Judy v. Judy, 384 S.C. 634, 642, 682 S.E.2d 836, 840 (Ct. App. 2009). Prior bad act evidence is admissible where the evidence is of such a close similarity to the charged offense that the previous act enhances the probative value of the evidence so as to outweigh the prejudicial effect. Id.

We find the facts giving rise to LLR's order and those in the instant case were extremely similar, so that the order's probative value outweighed its prejudicial effect. In both instances, Daniels was accused of failing to disclose the mold report to Buyers. Both the order and the case against Sellers involved the same property and the same transaction. Although the order also sanctioned Daniels for her failure to have contract changes initialed with Ms. Oster, who was not a party to this suit, Sellers did not try to introduce the order for that purpose at trial. Moreover, Daniels stated that particular finding was in error because that provision did not apply to Buyers' contract, which Sellers did not contest. Despite that slight factual distinction, we do not believe the differences constitute such a meaningful distinction that the trial court's admission of the prior LLR order into evidence constituted an abuse of discretion. See Judy, 384 S.C. at 643, 682 S.E.2d at 840-41 (finding trial court properly admitted prior judgment under Rule 404(b) based on common scheme or plan when the dispute involved same property and allegations but differed in that defendant was involved with one party in first dispute and another party in second dispute).

CONCLUSION

For the foregoing reasons, the trial court's decision to grant a new trial absolute is **REVERSED.** Sellers' cross-appeal issues are **AFFIRMED,** and the jury's verdict is **REINSTATED** in accordance with this opinion**.**

AFFIRMED IN PART and REVERSED IN PART.

SHORT, J., concurs.

FEW, C.J.: concurring in part and dissenting in part: I concur in the majority opinion except in two respects. First, I would reverse the trial court's decision not to direct a verdict in favor of Sellers. Second, I would remand the case to the circuit court to conduct a post-trial review of punitive damages and to consider other pending post-trial motions.

Buyers alleged only one theory of recovery: negligence. Because Sellers owed no duty of due care to Buyers, Sellers' motion for a directed verdict should have been granted. Buyers did not allege an action against Sellers under the Residential Property Condition Disclosure Act.[8] Had they done so, and had they proven the requisite conduct on the part of Sellers under section 27-50-65 of the South Carolina Code (2007), they would have been entitled to recover damages. They chose, however, to sue in negligence, and thus they are foreclosed from recovery.

Historically, a seller of real estate could not be liable to a buyer in negligence. See Rutledge v. Dodenhoff, 254 S.C. 407, 412, 175 S.E.2d 792, 794 (1970) ("The doctrine of caveat emptor . . . has, in the absence of fraud and misrepresentation long governed the obligations of the parties in the sale of real estate in this State."). Under this rule of law, a seller could be liable for making a fraudulent statement about the property but could not be liable for negligent failure to disclose a latent defect. Our courts have gradually moved away from this doctrine in specific situations. See, e.g., Rogers v. Scyphers, 251 S.C. 128, 134, 161 S.E.2d 81, 84 (1968) (imposing a duty of due care upon builder-vendor of new homes); Rutledge, 254 S.C. at 414, 175 S.E.2d at 795 (recognizing a right of recovery for breach of warranty for the sale of a new house by a builder-vendor); Lane v. Trenholm Bldg. Co., 267 S.C. 497, 500, 229 S.E.2d 728, 729 (1976) (holding an implied warranty of fitness for its intended use arises from the sale of a new building). However, no decision of our appellate courts imposes a duty of due care upon a seller of residential property who is not in the business of building or selling homes. While the Residential Property Condition Disclosure Act imposes a duty on a seller of residential property to disclose to buyers environmental conditions such as the existence of mold, this duty is not in negligence. In order to recover damages for the breach of this statutory duty of disclosure, a plaintiff

[8] The majority interprets the complaint to allege an action under the Act. Our disagreement over the interpretation of the complaint is not significant, however, because the only claim presented to the jury was a claim for negligence. While the trial judge explained various sections of the Act to the jury, he did so only in the context of Buyers' claim for negligence.

must prove more than negligence on the part of the seller. Such a plaintiff must prove the seller knew of the mold and knowingly failed to disclose it. See S.C. Code Ann. § 27-50-65 (2007) ("An owner who knowingly violates or fails to perform any duty prescribed by any provision of this article or who discloses any material information on the disclosure statement that he knows to be false, incomplete, or misleading is liable for actual damages proximately caused to the purchaser and court costs." (emphasis added)); S.C. Code Ann. § 27-50-40(C) (2007) ("The rights of the parties to a real estate contract in connection with conditions of the property of which the owner has no actual or constructive knowledge are not affected by this article.").

In my opinion, this case should be remanded to the trial court. When the circuit court granted the motion for a new trial based on the court's failure to charge the proper standard of proof for punitive damages, there were other motions pending, and the circuit court never ruled on them. Now that this court has reversed the order granting a new trial, those motions must be resolved. Exactly which rulings remain to be made should be determined by the circuit court, but they certainly include the court's duty to review the punitive damages award for compliance with due process. See Mitchell v. Fortis Ins. Co., 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009) (holding an appellate court must conduct a de novo review of a trial court's determination of the constitutionality of a punitive damages award); James v. Horace Mann Ins. Co., 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006) (requiring courts to determine whether an award of punitive damages is consistent with due process).

The majority argues that Sellers should have cross-appealed this issue. I disagree because the trial court made no ruling on which to file such an appeal. When the trial court granted Sellers' motion for a new trial, Sellers became the prevailing party. The trial court did not rule against Sellers on any post-trial motion. The only possible additional action the trial court could have taken to benefit Sellers was to rule on some alternative ground raised in their post-trial motions. However, Sellers were not obligated to request the trial court rule on alternative grounds when the court had already

ruled in Sellers' favor. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review."). Therefore, because Sellers were not aggrieved by any of the trial court's rulings, they could not cross-appeal. See Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal.").

Further, this is not an issue Sellers could have raised as an alternative sustaining ground. The trial judge's ruling granted a new trial as to all issues, including actual and punitive damages. It is not possible to "sustain" that ruling by asking this court to review the punitive damages amount for its consistency with due process. See I'On, 338 S.C. at 417, 526 S.E.2d at 722 (stating an additional sustaining ground is when "the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court" (emphasis added)). Even if we were to rule in Sellers' favor on the constitutionality of the award, our ruling would simply reduce the amount of the punitive damages award, leaving part of the punitive damages award and the entire actual damages award intact. Even if we did grant a new trial, we would do so only as to punitive damages. Therefore, Sellers could not have raised the issue as an alternative sustaining ground. Moreover, there is no precedent for an appellate court to rule on the constitutionality of a punitive damages award except on review of such a ruling by the trial court. While our courts have never expressly disapproved such a procedure, current law contemplates that the appellate courts review the trial court's ruling. See Mitchell, 385 S.C. at 583, 686 S.E.2d at 183.