The Supreme Court of South Carolina

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N O T I C E

In the Matter of John G. O'Day

Petitioner has filed a petition for reinstatement and that petition has been referred to the Committee on Character and Fitness pursuant to the provisions of Rule 33 of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules.

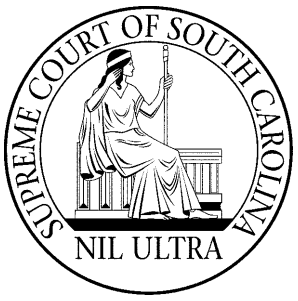
The Committee on Character and Fitness has now scheduled a hearing via video conference in this regard on November 25, 2020, beginning at 2:00 pm.

Any individual may appear before the Committee in support of, or in opposition to, the petition. If you wish to appear, you must submit your contact information (name, phone number and email address) to the address below in order to be included in the video conference.

Kirby D. Shealy, III, Chairman
Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

Columbia, South Carolina

October 14, 2020



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41
October 21, 2020
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Peter Miller, Mary Alice Miller, Mary Alice Miller, as Trustee of Mary Alice Miller Living Trust, Miller Group Properties, LLC, and C-Miller Properties, LLC, Plaintiffs,

Of whom C-Miller Properties, LLC, is the Appellant.

v.

Marilyn L. Dillon and JLJ, LLC, Respondents,

and

Marilyn L. Dillon, Third-Party Plaintiff, Respondent,

v.

PMC, LLC, Third-Party Defendant.

Appellate Case No. 2018-000084

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 5777
Submitted June 1, 2020 – Filed October 21, 2020

AFFIRMED

Beth B. Richardson and Jasmine Denise Smith, both of Robinson Gray Stepp & Laffitte, LLC, of Columbia, for Appellant.

Carmelo Barone Sammataro and Ian Douglas McVey, both of Turner Padget Graham & Laney, PA, of Columbia, for Respondents.

KONDUROS, J.: This appeal arises from a declaratory judgment action that resulted in a mediated settlement agreement between family members to resolve a dispute about the amount of debt on a loan. C-Miller Properties, LLC contends the master erred in denying its motion to enforce the settlement agreement. We affirm.

FACTS/PROCEDURAL HISTORY

Peter Miller and Mary Alice Miller (Parents) have three daughters, Cynthia Miller, Petrease Clarkson, and Marilyn Dillon. Cynthia Miller is the sole owner of both C-Miller Properties, LLC and CRM Agency, LLC. Petrease Clarkson is the sole owner of PMC, LLC. Marilyn Dillon and her husband, Joe Dillon, together own JLJ, LLC.

Parents originally owned real property in the Hollywood/Ravenel area of Charleston County. When Parents faced financial challenges in 2006, daughter Marilyn, a resident of Maryland, loaned $360,000 to Parents, memorialized in a promissory note dated June 1, 2006. The note indicated Marilyn was the lender, and the borrowers were "Peter Miller, Mary Alice Miller, Mary Alice Miller as Trustee of Mary Alice Miller Living Trust, and Miller Group Properties, LLC." The terms of the note mandated the principal and interest were due to Marilyn three years later, on May 31, 2009. The borrowers did not meet this obligation.

Over time the family members entered into additional agreements. The Record indicates, on February 5, 2008, Miller Group Properties and C-Miller Properties LLC, executed a mortgage securing the 2006 note with Marilyn as the mortgagee. In 2012, Mary Alice Miller executed, on behalf of Miller Group Properties, a modified promissory note in the amount of $434,059 and a modified mortgage agreement. A warranty deed was also executed in 2012 in which Miller Group Properties transferred its remaining fifty percent interest in the property as follows:

forty percent to JLJ, LLC—Marilyn and Joe Dillon's company—and ten percent to PMC, LLC—Petrease's company.

Ultimately, a dispute arose as to the amount of debt still owed to Marilyn. The family members disagreed whether certain conveyances of property were partial payments on the outstanding loan and disagreed as to the balance due on the loan. On June 15, 2015, Parents, Miller Group Properties, and C-Miller Properties (collectively, Plaintiffs) brought a declaratory judgment action against Marilyn and JLJ, LLC (collectively, Defendants), alleging certain conveyances Plaintiffs made were partial satisfactions of the loan and should be credited to Plaintiffs, and seeking a determination of the remaining balance by the court.

Defendants answered, counterclaimed and cross-claimed against Plaintiffs, and made a third-party complaint against Petrease, asserting the total debt owed to Marilyn, secured by note and mortgage, for principal, interest, and late fees was $543,958.05.

The parties then entered into mediation, which resulted in a consensual settlement. The settlement agreement and subsequent order consisted of eighteen detailed terms, beginning with the following mandate:

> Within one hundred and eighty (180) days of the date of the filing of this Consent Order described below, [Plaintiffs] must provide [Defendants] with one of the following:
>
> a. A ratified contract to sell the property . . . for Eight Hundred Fifty Thousand [dollars] ($850,000.00) or higher; or
>
> b. An unqualified loan commitment letter from a reputable lender licensed by the state or federal government for a loan on commercially reasonable terms in an amount sufficient to pay the debt [owed] [to Marilyn and JLJ] . . . .

The settlement agreement expressly stated that if Plaintiffs failed to provide one of these two options to Marilyn by the deadline, Plaintiffs would be in default.

"Failure to obtain a ratified contract or a loan commitment within one hundred eighty (180) days of the date of entry of this consent order shall be considered a default hereunder." Furthermore, the settlement agreement established Marilyn could record a deed to the property in lieu of foreclosure if Plaintiffs defaulted. "Said Deed in Lieu of Foreclosure will be held in trust by counsel for Defendants/Third-Party Plaintiff and will not be recorded unless Plaintiffs breach the terms hereof."

The agreement and subsequent order further detailed additional terms, including 1. specifying the ratified contract or loan commitment letter must be closed within 270 days from the date of the settlement agreement, 2. designating Reid Davis as the listing agent, 3. directing Plaintiffs to manage the property and to pay the expenses, property taxes, and insurance on the property until the sale or refinance closed, 4. and requiring Petrease, Marilyn, and JLJ, LLC to contribute specified funds to assist Plaintiffs in paying for the expenses, taxes, and insurance on the property.

All parties acknowledged Saturday, March 11, 2017, was the deadline to provide either the ratified contract or an unqualified loan commitment letter. On Wednesday, March 8, 2017, three days before the deadline, Cynthia sent a document entitled Real Estate Purchase Agreement to Marilyn offering to purchase the property for $850,000. However, Cynthia's signatures, as signatory for the proposed buyer, CRM Agency, LLC, and as one of the three sellers, C-Miller Properties, LLC, were the only signatures on the document. The signature lines for the two other sellers listed on the document, JLJ, LLC—Marilyn and Joe—and PMC, LLC—Petrease—were blank, as was a blank for "Seller's Spouse." The offer was not made with the involvement of the designated real estate agent and was contingent upon Cynthia obtaining financing "on or before June 2, 2017."

On Friday, March 10, 2017, via their counsel's correspondence, JLJ, LLC rejected Cynthia's offer, questioning Cynthia's financial ability to purchase the property, contending the property insurance had lapsed and the 2016 property taxes had not been paid, noting the settlement agreement required the use of Davis as the listing broker, and pointing out the offer did not include earnest money. The correspondence concluded: "That is simply unfair and a clear attempt to circumvent the terms and the intent of the Settlement Order."

The Record contains another signature page with Cynthia's signature as signatory authority for CRM Agency, LLC, as the buyer, and Cynthia, Petrease, and Parents, all signing as sellers on March 13, 2017. The signature lines for Marilyn, as one of the sellers, and Joe, as seller's spouse, were blank. Marilyn ultimately recorded the deed in lieu of foreclosure and then conveyed the property to another LLC.

On April 28, 2017, Plaintiffs filed a motion to enforce the settlement agreement, asking the master to require Marilyn and JLJ, LLC to "comply with the [settlement agreement] by executing the Real Estate Purchase Agreement . . . so that the Real Estate Purchase Agreement may proceed to closing." The master denied the motion, finding Cynthia's offer did not comply with the settlement agreement, Plaintiffs were not entitled to enforce the agreement because they did not perform their required obligations pursuant to the agreement, and enforcing the agreement would prejudice Defendants.

Plaintiffs thereafter moved to amend the order under Rule 52(b), SCRCP, and to alter or amend the judgment under Rule 59(e), SCRCP, asserting the master erred in its findings. A reconsideration hearing was held on December 18, 2017, and the master denied the motion. This appeal followed.[1]

STANDARD OF REVIEW

"Our scope of review for a case heard by a Master-in-Equity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury." *Tiger*, *Inc. v. Fisher Agro*, *Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). "Further, '[w]hen a suit involves both legal and equitable issues, each cause of action retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal.'" *Lollis v. Dutton*, 421 S.C. 467, 477, 807 S.E.2d 723, 728 (Ct. App. 2017) (quoting

[1] We refer to C-Miller Properties, LLC, the appellant, and to CRM Agency, LLC, the buyer in Cynthia's offer, as "Cynthia" herein, at times, for ease. We refer to Marilyn L. Dillon and JLJ, LLC, the respondents, as "Marilyn" herein, at times, for ease.

Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 180, 708 S.E.2d 787, 792 (Ct. App. 2011)).

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 621 (Ct. App. 2012) (quoting *Pee Dee Stores*, *Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009)). "An action to construe a contract is an action at law. In an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (citations omitted).

"This [c]ourt reviews all questions of law de novo." *Lollis*, 421 S.C. at 477, 807 S.E.2d at 728 (quoting *Fesmire v. Digh,* 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009)).

"An action for specific performance is one in equity." *Campbell v. Carr*, 361 S.C. 258, 262, 603 S.E.2d 625, 627 (Ct. App. 2004).

> "On appeal from an action in equity, [the appellate court] may find facts in accordance with its view of the preponderance of the evidence." *Walker v. Brooks*, 414 S.C. 343, 347, 778 S.E.2d 477, 479 (2015). "However, this broad scope of review does not require this court to disregard the findings at trial or ignore the fact that the [circuit court] was in a better position to assess the credibility of the witnesses." *Laughon v. O'Braitis*, 360 S.C. 520, 524-25, 602 S.E.2d 108, 110 (Ct. App. 2004). Further, "this broad scope does not relieve the appellant of [the] burden to show that the trial court erred in its findings." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012).

Lollis, at 477-78, 807 S.E.2d at 728.

LAW/ANALYSIS

I. Preservation

As an initial matter, Marilyn argues Cynthia makes arguments on appeal that are beyond the scope of the issues raised to the master, including asserting the master erred in considering affidavits admitted into evidence and in disfavoring undoing the filing of a deed in lieu of foreclosure.

> 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. Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector.

Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citation omitted).

"Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)).

"A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. A party may not argue one ground at trial and an alternate ground on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (citations omitted).

"An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009).

We find Cynthia's overarching issue on appeal, whether the master erred in denying her motion to enforce the settlement agreement, is preserved for appeal, and the majority of her arguments were raised to the master and addressed by the master. However, we find the record contains no evidence the master's use of the

affidavits were objected to at the hearing. Rather, Cynthia raised this argument for the first time in the motion for reconsideration. Because this is an argument not specifically made at the trial, to the extent it is used to support her argument the master erred, we find this particular issue is not preserved on appeal.

We also find several arguments Cynthia raises on appeal abandoned because they are arguments made without reference to jurisprudence. Namely, Cynthia fails to cite precedent for her argument the master erred in denying her motion because the closing could have occurred by the second deadline in the settlement agreement. Nor does Cynthia provide precedent for two of her three arguments contending the master erred in "balancing the equities in favor of Marilyn." While Cynthia contends in her brief the master considered certain facts and not others, she does not provide this court with legal authority on which she relies. To the extent unsubstantiated arguments are used, we find these arguments are abandoned on appeal. We turn to the merits of the appeal.

II. Enforcement of the Settlement Agreement

Cynthia contends the master erred in denying Plaintiffs' motion to enforce the settlement agreement, asserting three issues that sound in law. First, Cynthia contends the master erred in finding her offer was not a ratified contract because the only missing signature was that of Marilyn. Second, she contends the master erred in finding her offer failed to comply with the settlement agreement because it did not include earnest money. Finally, Cynthia argues the master erred in finding the offer violated the settlement agreement, asserting her offer could close by the second deadline set forth in the agreement. We disagree.

Cynthia provided a document to Marilyn before the deadline entitled Real Estate Purchase Agreement, establishing in the opening paragraph the agreement was between sellers, "C-Miller Properties[,] LLC, JLJ[,] LLC, [and] PMC[,]LLC," and [buyer], "CRM Agency[,] LLC." Signature lines for two of the three sellers were not executed and left blank in her offer. Cynthia expressly listed Petrease (PMC, LLC) and JLJ, LLC as owners; however, they did not sign the offer.

"The necessary elements of a contract are an offer, acceptance, and valuable consideration." *S. Glass & Plastics*, *Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012) (quoting *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003)).

Black's Law Dictionary defines "ratification" as:

> 1. Adoption or enactment, esp[ecially] where the act is the last in a series of necessary steps or consents. . . . 2. Confirmation and acceptance of a previous act, thereby making the act valid from the moment it was done . . . . 3. *Contracts.* A person's binding adoption of an act already completed but either not done in a way that originally produced a legal obligation or done by a third party having at the time no authority to act as the person's agent . . . .

Black's Law Dictionary (11th ed. 2019).

> "Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." Where the contract language is plain and capable of legal construction, that language alone determines the instrument's force and effect.

Stevens & Wilkinson of S. C., Inc. v. City of Columbia, 409 S.C. 568, 577, 762 S.E.2d 696, 700 (2014) (citation omitted) (quoting *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011)).

In *McGill v. Moore*, 381 S.C. 179, 672 S.E.2d 571 (2009), our supreme court provided guidance in a determination of whether an offer to purchase property constituted a contract. In that case the appellant asserted because eight of the nine owners signed the purchase agreement, the appellant had substantially complied with the agreement. *Id.* at 187, 672 S.E.2d at 575. Our supreme court stated:

> We hold that the master correctly found that the contracts contained a condition precedent that all owners sign the contract agreeing to sell their interests before any contract could be enforced. Reading all of the provisions as a whole, we find that the contract assumes that all owners would sell their interests in the property and that Appellant would subsequently be the sole owner of the property. . . .

. . . .

> Had Appellant intended to purchase the interests of an individual owner without regard to the other owners' interest, he could have easily drafted a contract to reflect this intent. In our view, to construe the contract according to Appellant's interpretation would not be faithful to the entire document and would not reflect the parties' intentions. Accordingly, we hold that the contract contained a condition precedent which was not satisfied.

Id. at 186, 672 S.E.2d at 574-75 (citation omitted).

The opinion further explains:

> If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises. In this case, before the closing could occur, the contract required all of the owners to sign the contract. This condition has not been met and has not been excused. Therefore, we hold that Appellant may not circumvent the contract[']s condition precedent by arguing substantial compliance.

Id. at 187-88, 672 S.E.2d at 575.

We affirm the decision of the master that Cynthia did not comply with the settlement agreement. The offer she made was not the required ratified contract, nor the loan commitment letter, by the deadline. We find Cynthia's representation to the master during the hearing noteworthy as it acknowledges a discrepancy between what she was required to provide under the agreement and what she did provide. Her counsel stated:

> Anticipating a little bit of what [counsel for Marilyn] is going to say, it took another day to get the signature of [Petrease] on the contract that [Cynthia] submitted. It

> was a Saturday. The deadline was a Saturday. I told her, ["w]e need to get another signature.["] It didn't come until Monday. I know he was going to make an issue of that. Your Honor, in substance they lived up to the term of the agreement. We simply want an opportunity to try to purchase the property. If it doesn't work then we're out of here and the Dillons have it, and that's the end of the case.

The offer made was not compliant with the mandate of the settlement agreement. The agreement required a ratified contract or a loan commitment letter, by a date certain, not an "opportunity to try to purchase."

As this court noted in *Galloway v. Regis Corp.*, memorializing the terms of a settlement agreement is important so the parties have clarity. 325 S.C. 541, 546, 481 S.E.2d 714, 716-17 (Ct. App. 1997) ("We hope our decision here underscores the importance of putting a settlement agreement on the record or immediately reducing the agreement to writing, and including in the writing all material terms and conditions of the agreement."). The parties here followed this directive and filed the consent settlement agreement as an order of the court. Neither the parties, the master, nor this court may now disregard that order and its terms. We find the master correctly found the offer Cynthia proposed did not comply with the settlement agreement and denied the motion.

We next address the argument Cynthia raises that the master erred in finding her offer to purchase did not comply with the settlement agreement in part because it failed to provide consideration in the form of earnest money. The master's ruling specifically stated: "The [c]ourt also finds the Real Estate Purchase Agreement is not supported by valuable consideration which is a necessary element of contract formation. . . . As a result, the Real Estate Purchase Agreement lacks consideration and does not comply with the terms of the Settlement Order."

While consideration is an element of contract formation, we do not find a requirement in the settlement agreement mandating earnest money must serve as that consideration. We note earnest money likely would have been a part of a ratified contract to purchase the property had the listing broker been used as required, but the settlement agreement did not address earnest money. Therefore, to the extent the master reasoned the failure to provide earnest money to Marilyn in

the offer factored into the ruling Cynthia failed to comply with the settlement agreement as a matter of law, we do not believe the language of the agreement supports that reasoning. However, because the master's finding Cynthia's failure to provide a ratified contract by the deadline supports denial of her motion, any error regarding the issue of earnest money is harmless. In the words of Chief Judge Alex Sanders, "whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

We further find unpersuasive Cynthia's argument she complied with the settlement agreement because she contends the closing on her offer to purchase could occur by the second deadline set forth in the settlement agreement. We note the settlement agreement established two deadlines for action, but the second date comes into play only if the first date is met. The agreement mandated Plaintiffs must provide a ratified contract to sell the property within 180 days from the date of the filing of the order. The order subsequently required: "[i]f Plaintiffs obtain a ratified contract," the sale "must be closed" within 270 days "of the entry of this consent order." We find the master did not err in denying Cynthia's motion to enforce the settlement agreement because Cynthia's offer was not a ratified contract or a loan commitment letter, provided within 180 days, regardless of her contention she could close on her offer by the second deadline.

Cynthia's offer failed to comply with the terms of the settlement agreement. We are cognizant of the fact another family may have chosen to negotiate further after receiving the offer, but the settlement agreement expressly validates Marilyn's decision to file the deed in lieu of foreclosure. Accordingly, we affirm the decision of the master.

III. Specific Performance

The appropriate review called for in this appeal is based in law. Because "settlement agreements are viewed as contracts," *Byrd*, 398 S.C. at 241, 727 S.E.2d at 621 (quoting *Pee Dee Stores, Inc., v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. Ap. 2009)), and because "[a]n action to construe a contract is an action at law," we affirm the decision of the master in finding the purchase offer did not comply with the requirements of the settlement agreement, and find evidence "reasonably supports the [master's] findings," *McGill*, 381 S.C. at 185, 672 S.E.2d at 574. However, we also find no error in the master's findings that sound in equity, to wit: Plaintiffs could not compel enforcement of the settlement agreement

because of Plaintiffs' own non-performance under the agreement, and enforcement of the settlement agreement would prejudice Defendants inequitably.

We recognize the motion made by Plaintiffs' seeking enforcement of the agreement could be considered, in essence, a motion to seek specific performance, requiring Marilyn to sell the property to Cynthia based upon the offer she made. In *Standard Federal Sav. & Loan Ass'n v. Mungo*, 306 S.C. 22, 410 S.E.2d 18 (Ct. App. 1991), this court affirmed the decision of the master to consider that a motion for a rule to show cause was in substance a petition to amend the judgment. This court found the rules of civil procedure work "to secure the just, speedy, and inexpensive determination of every action," and "[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." 306 S.C. at 25, 26, 410 S.E.2d at 20 (quoting Rule 7(b), SCRCP). This court found the master did not err in considering the motion for a rule to show cause as a motion to amend the judgment.

Cynthia argues on appeal the master erred in finding she was not entitled to specific performance because she satisfied all the elements for a specific performance award, and she contends the master erred in "balancing the equities" in favor of Marilyn. We disagree.

Our supreme court has established defined requirements a court must find to order a party to specifically perform a contract.

> In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract.

Ingram v. Kasey's Assocs., 340 S.C. 98, 106, 531 S.E.2d 287, 291 (2000).

"In order to compel specific performance, a court of equity must find . . . that the party who comes to compel performance has performed on his part, or has been and remains able and willing to perform his part of the contract." *Shirey v. Bishop*, Op. No. 5718 (S.C. Ct. App. refiled Sept. 16, 2020) (Shearouse Adv. Sh. No. 36 at

20, 24) (quoting *Gibson v. Hrysikos*, 293 S.C. 8, 13-14, 358 S.E.2d 173, 176 (Ct. App. 1987)). "Equity will not decree specific performance unless the contract is fair, just, and equitable." *Campbell v. Carr*, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004). "The discretion to grant or refuse specific performance is a judicial discretion to be exercised in accordance with special rules of equity and with regard to the facts and circumstances of each case." *Id.* (quoting *Guignard v. Atkins*, 282 S.C. 61, 64, 317 S.E.2d 137, 140 (Ct. App. 1984)).

Our jurisprudence also supports the discretion of the court to consider all the facts and circumstances before it. "The rule is well settled that the granting of specific performance is not a matter of absolute right, but rests in the sound or judicial discretion of the [c]ourt, guided by established principles, and exercised on a consideration of all the circumstances of each particular case." *Bishop v. Tolbert*, 249 S.C. 289, 298, 153 S.E.2d 912, 917 (1967). In *Bishop*, our supreme court included reasoning from an 1871 opinion of the court:

> Among the established principles by which the court is guided and governed in the exercise of the sound discretion is that laid down in the early case of *Cureton v. Gilmore*, 3 S.C. 46:
>
> > []* * * He, therefore, who demands the execution of an agreement, ought to show that there has been no default in him in performing all that was to be done on his part; for, if either he will not, or through his own negligence cannot perform the whole on his side, he has no title in equity to the performance of the other party, since such performance could not be mutual. And, upon this reasoning, it is that where a man has trifled or shown a backwardness in performing his part of the contract, equity will not decree a specific performance in his favor, * * *.[]

Bishop, 249 S.C. at 298, 153 S.E.2d at 917 (quoting *Cureton v. Gilmore*, 3 S.C. 46, 51 (1871)).

Cynthia did not perform her required obligations under the agreement, including using Davis as the listing broker and paying the expenses due on the property, to which her family members contributed. The Record indicates Cynthia managed the property for Parents and had access to needed information regarding the property's leases and tenants, an important element of the sale. However, the affidavits of Joe Dillon and Reid Davis indicate Cynthia did not act in a manner consistent with the requirement that Davis serve as listing agent. While Cynthia asserts she was not required to cooperate with Davis and did not prevent him from listing the property, he was not part of the offer she made. Rather, she made the offer as sole owner of her own company. Accordingly, we find no error in the master's ruling. As noted in *Ingram*, "[w]e rely on the equity maxim: 'He who seeks equity must do equity.'" 340 S.C. at 107, 531 S.E.2d at 291 (quoting *Norton v. Matthews*, 249 S.C. 71, 80, 152 S.E.2d 680, 684 (1967)).

Cynthia cites *Clardy v. Bodolosky*, 383 S.C. 418, 679 S.E.2d 527 (Ct. App. 2009), in support of her argument she sufficiently complied with the settlement agreement, as did the buyers in that case, and thus, she should be entitled to require Marilyn to specifically perform the agreement. We find the buyers' actions in *Clardy* distinguishable from the facts here. In *Clardy*, the seller argued on appeal the trial court erred in finding the buyers entitled to specific performance because the buyers wrote a check to the seller's attorney's trust account and not the seller, even though there was no plan to put the funds in escrow. *Id.* at 426, 679 S.E.2d at 531. This court, however, affirmed the specific performance award to the buyers. *Id.* at 428, 679 S.E.2d at 532. The court provided:

> We find the [buyers] satisfied the elements of the *Ingram* test: there is evidence of a valid agreement, the [buyers] performed their part of the contract with [seller's] consent, and the [buyers] remain able and willing to buy the real estate. Additionally, the [buyers] substantially performed their part of the contract and gave [seller] substantially all that he bargained for even if we assume the contract required the [buyers] write the earnest money check directly to [seller] rather than to [the attorney's] trust account. Furthermore, the express provisions of the contract do not make strict compliance essential; therefore, substantial compliance is sufficient.

Id. at 427, 679 S.E2d at 531. Here, Cynthia likens her offer to purchase to the performance of the buyers in *Clardy*. We disagree. The buyers in *Clardy* fully performed and met their obligations under the agreement, with the only variance being they addressed the payment check to counsel for the seller, instead of the seller. Cynthia provided neither document the settlement agreement expressly required by the deadline; she failed to perform other obligations she was specifically required to perform under the settlement agreement; and she in essence acted as the broker, contrary to the agreement. Accordingly, we agree with the decision of the master to deny Cynthia's motion.

Finally, Cynthia asserts the master erred in balancing the equities between Plaintiffs and Marilyn. We find two of Cynthia's arguments abandoned. "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." *Howard*, 384 S.C. at 217, 682 S.E.2d at 45. To the extent she preserved her argument the master erred in finding the equities favored Marilyn filing the deed in lieu of foreclosure, we find no error in the master's decision denying Cynthia's motion. The master's order included evidence of the inequity of the outstanding loan, and noted:

> [T]he loan which was the subject of this matter matured in May 1, 2013 . . . It originated in June of 2006. Therefore, [Marilyn] has been without payment of her funds since at least May 1, 2013[,] and, according to the arguments at the hearing, long before that time. [Marilyn] bargained for foreclosure of the property if no payment was made. She then agreed to accept a Deed-in-Lieu of Foreclosure after giving the Plaintiffs adequate time to sell the property to a third party under the Settlement Order. No sale materialized despite her efforts, and[] she is entitled to the remedy provided: the recordation of the Deed-in-Lieu and title to the Property.

Accordingly, we find no error in the master's ruling.

CONCLUSION

We find the master did not err in denying the motion to enforce the settlement agreement. Accordingly, the master's decision is

AFFIRMED.[2]

WILLIAMS and HILL, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Laurie Rogers, Appellant,

v.

George Rogers and the Navy Federal Credit Union,

Of Whom George Rogers is Respondent.

Appellate Case No. 2017-002091

Appeal From Horry County
Jan Bromell Holmes, Family Court Judge

Opinion No. 5778
Heard July 21, 2020 – Filed October 21, 2020

AFFIRMED IN PART AS MODIFIED, REVERSED IN PART, AND REMANDED

Nicole Nicolette Mace, The Law Offices of Curt Sanchez, P.A., of West Palm Beach, Florida, for Appellant.

Anita Floyd Lee, of Conway, for Respondent.

KONDUROS, J.: After a nineteen-year union, Laurie Rogers (Wife) filed for divorce from George Rogers (Husband). The family court granted the divorce on the grounds of one year's continuous separation, divided the marital estate 50/50, and awarded custody of the parties' four children to Wife. Wife appeals various

aspects of the equitable apportionment and the imposition of discovery sanctions against her. She contends the family court lacked jurisdiction because she was incompetent and the family court failed to appoint her a guardian ad litem (GAL). We affirm in part as modified, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

Husband and Wife separated on November 29, 2015, and Wife retained custody of their children. On February 11, 2016, Wife filed an action for divorce on the ground of adultery, wherein she also requested alimony, custody, and child support. Husband filed an answer and counterclaim, agreeing the parties should divorce but denying adultery.

A temporary hearing was initially scheduled for March 8, 2016, but was continued until April 24, 2016. However, on March 11, 2016, the parties entered into a consent order for discovery and on March 14, 2016, Ryan Stampfle was appointed as GAL for the benefit of the parties' children. Wife's attorney was relieved as counsel, and at the request of Wife's second lawyer, the hearing was rescheduled for June 9, 2016. At that time, the family court issued an order which provided, *inter alia,* that Husband would be responsible for child support in the amount of $1,286 per month and Wife would have possession of the parties' home and would be responsible for the monthly mortgage obligation incidental thereto. Additionally, the court ordered that Wife present herself for a psychological evaluation and that the children immediately begin counseling with their father to address alienation concerns. The court also ordered a review hearing within sixty days. The GAL was charged with the responsibility of scheduling Wife's psychological evaluation as well as the counseling. Subsequent to this hearing, Wife dismissed her second attorney.

On June 21, 2016, Husband filed a motion to compel discovery responses. At the review hearing on August 26, 2016, Wife had still not appeared for the psychological evaluation, and the children had yet to begin counseling. Husband also scheduled his motion to compel discovery simultaneous with the review hearing. At this August 26, 2016 hearing, the parties agreed the former marital residence would be immediately placed on the market for sale; the children would immediately begin counseling with Hal Heidt; Wife would immediately present herself for a psychological evaluation with Douglas Ritz; and Wife would respond to discovery within ten days.

Because of the lack of progress between the hearings on June 9 and August 26, the family court ordered another hearing to be scheduled in October 2016. Unfortunately, that hearing was continued until December 8, 2016, due to inclement weather. Prior to the commencement of the December 8, 2016 hearing, Wife's counsel presented a doctor's excuse on behalf of Wife. She advised the court Wife was unable to attend the hearing and sought a continuance. Husband's counsel then informed the court she had also scheduled a motion to compel for the second time, as well as a rule to show cause for this date, though Wife had evaded service of process of the rule (the hearing date for the motion was served directly on Wife's counsel). The family court denied Wife's request for a continuance, concluding instead that Wife did not need to be present for the review hearing. The court then requested a progress report, after which the family court noted Wife had not completed her psychological evaluation, had thwarted counseling efforts, had withdrawn large amounts of cash from the parties' bank account, and had transferred a large sum of money to a new location.

The court also determined Wife had severely damaged the parties' home by removing and selling light fixtures, cabinets from walls, a toilet, and a majority of furnishings from the home. As a result of this hearing, the court ordered custody be immediately transferred to Husband, Wife pay the outstanding utility bills, and Wife immediately vacate the property. In addition, Wife was ordered to respond to all discovery requests by January 3, 2017. On about February 23, 2017, Wife's third lawyer was relieved as counsel. Husband returned the children to Wife after only one day and did not pay child support from that time forward. However, Husband assumed the mortgage obligation from the time of the December hearing until the time the home was sold. Husband testified he only returned the children because Wife had alienated the children to such an extent that Husband had absolutely no control of them, and actually feared them based upon their fabrications to the police.[1]

[1] One of the children ran away and when picked up by police indicated she would rather go to foster care than live with her father. She kicked a police officer and eventually went to the Department of Juvenile Justice for a short time. Another child told police Husband had hit him and the other children supported this story although police discerned from the child's appearance the story was implausible.

Mediation was thereafter scheduled for March 3, 2017, but Wife did not attend, claiming she had not received notice. Husband requested a final hearing, which was scheduled for May 18, 2017. On the date of trial, Wife appeared with her fourth lawyer, who moved for a continuance, claiming Wife had not been properly notified of mediation or the final hearing. The court determined Wife had been properly notified of mediation and that she had elected not to appear. The court acknowledged notice of the final hearing had been served on the parties' daughter, so out of an abundance of caution, the trial was continued until July 10, 2017.

A hearing on Husband's motion to compel discovery and show cause was held on June 5, 2017. At the time of the June 5, 2017 hearing, Husband had received from Wife only copies of what *he* had presented at previous hearings. Accordingly, the court ruled that unless Wife complied with discovery requests by June 16, 2017, she would not be allowed to testify on the issues of alimony, child support, equitable apportionment, or attorney's fees, and she would not be allowed to offer any evidence regarding her income, alimony, or equitable apportionment. As of June 16, 2017, Wife had still not provided the requested bank statements; she had still not verified her income as had been requested; and she had still not produced full tax returns.

At the final hearing, the family court was notified Wife had moved marital funds into at least four separate accounts at the Navy Federal Credit Union (NFCU), said accounts all being in Wife's name, though each account also bore an additional name, one for each of the parties' four children. The NFCU accounts were opened with funds transferred from another account Husband discovered during the pendency of the action containing more than $200,000.

After Wife disclosed more specific information about the NFCU accounts, the court recessed the final hearing until the following morning, July 11, 2017. The family court ordered Wife to provide to Husband's counsel the names, account numbers, phone numbers, and any other pertinent information relative to these accounts. The family court further issued an order restraining Wife from transferring the funds, from dissipating the accounts, or from accessing these funds in any manner pending the issuance of a Final Order. Wife was also ordered to obtain a verified social security statement indicating how much she received from social security each month.

The following morning, Wife's counsel advised the court Wife had been hospitalized, and she requested a continuance. Husband then informed the court that after the previous day's hearing, Wife had driven to Charleston and attempted to withdraw the funds from the NFCU. However, NFCU had placed a temporary hold on the accounts, and Wife was denied access to the funds. After Wife returned from Charleston, she drove herself to the emergency room at Grand Strand Regional Medical Center.

Wife's request for a continuance was denied, and the court noted that even if Wife had been present, her ability to testify or present any evidence in regards to any of the contested issues would have been severely limited, based upon her refusal to comply with discovery after several orders to compel had been issued. This was based not only on the order following the June 5, 2016 hearing, but also the court's warning from the prior day of the final hearing wherein the court was still considering the severity of limitations it would place on Wife's testimony. The GAL was excused from attendance to locate Wife and after he returned to court, he noted Wife had been in the emergency room at Grand Strand Regional Medical Center and that when he saw her, she was in the process of being discharged. However, she had never actually been admitted to the hospital. The GAL noted that he was able to have a "lucid, normal conversation [with Wife] just like every other conversation I had with her."

At trial, Husband testified as to various issues including custody, child support, asset valuation, and equitable division. Husband presented a realtor, Glenn Hellofs, who testified as to the valuation of the marital home, the GAL who testified as to custody, and a friend of Husband who testified as to the parties having lived separate and apart for one year. Following trial, the family court issued an order granting a divorce on the grounds of one year's continuous separation, awarding Wife custody of the children, dividing the marital estate 50/50, denying alimony, and awarding child support in a lump sum in the form of an offset against Husband's equitable distribution interest. Thereafter, Wife filed a motion to alter or amend the final judgement. The court issued an order denying Wife's motion, though it did correct some clerical errors and reference additional evidence presented at trial to support its initial ruling. The amended Final Order was filed September 29, 2017. This appeal followed.

STANDARD OF REVIEW

> [W]hile retaining the authority to make our own findings of fact, we recognize the superior position of the family court judge in making credibility determinations. Moreover, consistent with our constitutional authority for *de novo* review, an appellant is not relieved of his burden to demonstrate error in the family court's findings of fact. Consequently, the family court's factual findings will be affirmed unless "appellant satisfies this court that the preponderance of the evidence is against the finding of the [family] court."

Lewis v. Lewis, 392 S.C. 381, 392, 709 S.E.2d 650, 655 (2011) (footnote omitted) (quoting *Finley v. Cartwright*, 55 S.C. 198, 202, 33 S.E. 359, 360-61 (1899)). "*Lewis* did not address the standard for reviewing a family court's evidentiary or procedural rulings, which we review using an abuse of discretion standard." *Stoney v. Stoney*, 422 S.C. 593, 594 n.2, 813 S.E.2d 486, 486 n.2 (2018) (per curiam).

LAW/ANALYSIS

I. Mental Incompetence, Discovery Sanction and Continuance

A. Mental Incompetence/Subject Matter Jurisdiction

On appeal, Wife argues the family court lacked subject matter jurisdiction over the parties' case because she was mentally incompetent and the family court did not appoint a GAL to represent her interests.[2] We disagree.

"Mental incompetency 'in its ordinary meaning imports mental deficiency so great as to render one unable to comprehend or transact the ordinary affairs of life.'" *Thompson v. Moore*, 227 S.C. 417, 422, 88 S.E.2d 354, 356 (1955) (quoting *Edge v. Dunean Mills*, 202 S.C. 189, 195, 24 S.E.2d 268, 271 (1943)). In *Zaragoza v.*

[2] "The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such order as it deems proper for the protection of the minor or incompetent person." Rule 17(c), SCRCP.

Zaragoza, 309 S.C. 149, 151-52, 420 S.E.2d 516, 517-18 (Ct. App. 1992), the family court considered the wife's argument that her husband was incompetent. The husband had suffered a brain injury while in the armed forces and was receiving disability. *Id*. at 150, 420 S.E.2d at 516. He had lapses in memory and required assistance in managing some of his affairs. *Id*. However, he lived and traveled independently with some minor assistance from his mother. *Id*. The family court determined it would not equate the husband's disability with incompetence, and this court affirmed. *Id*. at 152-53, 420 S.E.2d at 518.

In the present case, Wife demonstrated unwise and sometimes illogical behavior. However, her conduct was generally directed at prolonging and complicating the divorce proceedings and attempting to maintain marital assets for her own benefit. Although the family court ordered a psychological examination for Wife, that examination was based on the GAL's recommendation and was likely geared toward determining parental fitness more so than the larger question of competence. Additionally, it appears Wife eventually completed a partial psychological evaluation. However, information about that process is not included in the record. At trial, Husband was asked if he was aware of Wife's traumatic brain injury, to which he responded "that is what she says." The only evidence in the record regarding Wife's physical, mental, or emotional state was Husband's testimony that Wife had "issues" and goes to the Department of Veteran's Affairs for medications. Whatever Wife's issues, they do not appear to have rendered her unable to communicate with her attorneys, the family court, or the children's GAL or to understand the family court's instructions. In fact, Wife understood the nature of the proceedings so well that she surreptitiously manipulated the parties' assets, not to mention the children's attitudes toward Husband, in a clear attempt to gain an advantage whenever the family court issued an order that preserved the status quo. This included selling fixtures from the marital home, charging legal fees to credit cards in Husband's name, withdrawing and carefully hiding funds from the marital joint checking account, and secreting funds in the NFCU accounts.[3] Notably, in spite of her lack of cooperation in the divorce case, neither Wife, nor

[3] The record suggests Wife ably familiarized herself with the federal government's requirement that banks report withdrawals of $10,000 or more as she withdrew funds from disputed accounts, discussed later in this opinion, in increments of $9,999. *See* 31 U.S.C. § 5316(a) (2018); 31 C.F.R. § 1010.311 (2019).

her numerous counsels of record, put forward Wife's competence as an issue.[4] Based on all of the foregoing, we find the family court did not err in failing to appoint Wife a GAL.

B. Discovery Sanctions

Next, Wife contends the family court erred in imposing discovery sanctions that prevented her from offering evidence as to the issues of alimony, child support, and equitable division. We disagree.

"If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) (citing Rule 37(b)(2)(C), SCRCP)). "When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly." *Id*. "Therefore, the sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Id*. at 198, 511 S.E.2d at 719. "Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." *Id*. at 198-99, 511 S.E.2d at 719.

Numerous discovery violations were delineated in the family court's order and the record demonstrates Wife's noncompliance was willful. Wife was forewarned in an order from the June 5, 2017 hearing that this sanction would be issued if she continued refusing to produce discovery or comply with orders of the court by June 16, 2017. In spite of this order, the family court left open the question of the parameters of Wife's testimony at the conclusion of the first day of the final

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[4] Husband contends Wife's competency argument is unpreserved as it was not raised to the family court until Wife's motion for reconsideration. Wife denominates the issue as one of subject matter jurisdiction which would negate Husband's contention. We are not convinced Wife's position is correct as "[t]he family court has exclusive jurisdiction . . . to hear and determine actions for divorce a vinculo matrimonii . . . ." S.C. Code Ann. § 63-3-530(A)(2) (2010). Regardless, as seen from the discussion supra, we conclude the family court did not err as to this issue.

hearing and instructed Wife to bring her discovery information to court the following day. Wife did not avail herself of the family court's offer, but instead failed to attend the second day of the hearing.

In the absence of Wife's discovery, the family court conducted in-court inquiries in an attempt to verify Wife's disability benefits. Husband presented evidence of the values of other assets and testified as to his estimate of the value of other items. Husband presented a realtor who testified to the value of the marital home both before and after Wife's damage to the home. Unquestionably, Wife was prejudiced by the discovery sanctions. However, Wife was forewarned of the sanctions and continued to disregard the family court's instructions. Consequently, we are not persuaded the family court erred as to this issue.

C. Continuance

Next, Wife maintains the family court erred in denying her request for a continuance on the second day of the final hearing because she was at the hospital in the emergency room. We disagree.

Rule 40(i)(1) of the South Carolina Rules of Civil Procedure provides "[i]f good and sufficient cause for continuance is shown, the continuance may be granted by the court." The family court determined Wife's trip to the hospital was a ruse designed to delay the proceedings and as Wife would not be permitted to present evidence due to the discovery sanctions, the proceedings could continue in her absence. Wife was represented by counsel the second day of trial, and the family court sent the children's GAL to the hospital to attempt to ascertain Wife's status and wishes with regard to the custody of the children. The GAL indicated Wife was notably under stress but was capable of communicating clearly and logically with him. Based on all of the foregoing, we conclude the family court did not err refusing to grant Wife a continuance on the second day of trial.

II. Lump Sum Child Support Credit Against Equitable Distribution

Wife contends the family court erred in awarding her a lump sum for child support for the parties' four children. She also contends the court erred in executing that award through a setoff against Husband's equitable portion of the marital estate. We agree.

The family court awarded Wife child support in the amount of $64,640. This represented the total child support amount for each of the parties' four children for the duration of each child's minority. The amounts were based upon the child support guidelines as calculated by Husband. Husband also included an additional $10,000 "cost of living" in reaching the final lump sum. The family court determined this award would be unmodifiable and would be awarded as an offset against Wife's portion of the marital estate. These decisions were driven by Husband's wishes to avoid future litigation and entanglement with Wife.

The issue of lump sum child support has not been directly addressed in South Carolina. Other jurisdictions have different positions on the subject. In North Carolina, lump sum child support is specifically allowed pursuant to statute. *See* N.C. Gen. Stat. § 50-13.4(e) (West, Westlaw through S.L. 2020-74) ("Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of any interest therein, or a security interest in or possession of real property, as the court may order."). Georgia courts have concluded that although lump sum child support is not specifically allowed pursuant to statute, it is not precluded. In *Mullin v. Roy*, the court stated:

> Nothing in OCGA § 19-6-15 expressly precludes lump-sum child support awards. To the contrary, the statute as amended explicitly authorizes trial courts to exercise discretion in setting the manner and timing of payment. *See* OCGA § 19-6-15(c)(2)(B) (requiring trial courts to "[s]pecify . . . in what manner, how often, to whom, and until when the support shall be paid"). This language is certainly broad enough to encompass an order to pay a child support obligation all at once.

700 S.E.2d 370, 372 (Ga. 2010) (alteration and omission in original).

Conversely, Florida and Mississippi have specifically disallowed lump sum support. "Mississippi law is clear that 'that child support should *never* be awarded in lump sum.'" *McCall v. McCall*, 2019 WL 350628 at *3 (Miss. Ct. App. Jan. 29, 2019) (quoting *Pittman v. Pittman*, 909 So. 2d 148, 153 (Miss. Ct. App. 2005)). In analyzing the issue in Florida, the district court of appeals explained:

> First, we reverse the trial court's lump sum child support award to the former wife, because no statutory or precedential authority allows for such a lump sum child support award. If the Florida Legislature intended to permit a lump sum child support award, then perhaps the Legislature would have included such a provision within the child support provisions of section 61.30, Florida Statutes (2016), as it did within the alimony provisions of section 61.08(1), Florida Statutes (2016). . . . [I]nstead of a lump sum child support award, the trial court may consider sequestering the former husband's assets to provide security for the child support award.

Masnev v. Masnev, 253 So. 3d 638, 639 (Fla. Dist. Ct. App. 2018).

Like Florida, South Carolina makes no specific provision for lump sum child support awards although it does so for alimony. *See* S.C. Code Ann. § 20-3-130(B)(2) (2014) (explaining the nature and purpose of lump sum alimony). In *Mitchell v. Mitchell*, 283 S.C. 87, 92-93, 320 S.E.2d 706, 710 (1984), the court affirmed a $400 per month child support award. The wife was to retain, in an interest-bearing account, the husband's one-half of the proceeds from the sale of the marital home, with her having the right to withdraw monthly $400 in interest and principal to satisfy the husband's support payment. *Id*. at 89, 320 S.E.2d at 708. This arrangement still provided for periodic child support but sequestered the funds to provide security for the child.[5] Securing an award is permissible under certain circumstances. *See* S.C. Code Ann. § 20-3-160 (2014) ("In any action for divorce from the bonds of matrimony the court may at any stage of the cause, or from time to time after final judgment, make such orders touching the care, custody[,] and maintenance of the children of the marriage and what, if any, security shall be given for the same as from the circumstances of the parties and the nature of the case and the best spiritual as well as other interests of the children may be fit, equitable[,] and just.").

After considering the relevant law and the facts of this case, we conclude the family court's lump sum child support award must be reversed as there is no

[5] The wife did not appeal the manner in which the award was to be administered, just the monthly amount of the award.

statutory or precedential authority in South Carolina for a lump sum award. Although the court may create a trust or require other security to protect child support payments, such device is generally used to ensure the asset will not be dwindled away by the supporting parent. In this case, the lump sum was not placed in any secure asset for benefit of the children but was simply credited against Husband's equitable share at his request to diminish the possibility of future conflict with Wife. We agree with the family court that Wife's behavior warrants making certain arrangements to minimize her ability to file litigation simply for the sake of harassing Husband. However, the lump sum award is not an appropriate vehicle for accomplishing this goal. Furthermore, the child support award in this case was deemed unmodifiable. This is contrary to the instruction in section 20-3-160 providing the family court retains authority to modify orders touching the maintenance and security of children even after final judgment.

Although we are reluctant to remand a case in which the parties have obviously suffered such a fractured relationship, we must. Unwinding the matter of the lump sum child support and offset will be complex. On remand, the family court should effectuate a 50/50 division of the marital estate in keeping with the other modifications in this opinion and bearing in mind that any offset to Wife for child support is eliminated. Furthermore, the family court should calculate any unpaid child support Husband owes to Wife. Because the child support award was heretofore unmodifiable, the family court should take testimony and evidence from the parties as to any substantial or material change in circumstances that have occurred *since the final hearing*.[6] Normally, a party would be required to file and prove a change in circumstances; however, the complexity of setting support and correcting the offset from the award of equitable division may require a full evaluation of the parties' and their children's present circumstances. The family court should use this information to determine any accrued child support and the amount of Husband's support obligation going forward. Any accrued child support payments should be paid to Wife as the family court deems appropriate for Husband's circumstances.

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[6] We affirm the family court's original calculation of $1,070 as the amount of monthly child support as it was based on the information provided at trial and the child support guidelines. Changes may include the emancipation of any of the children or other substantial changes in Husband's or Wife's financial circumstances.

III. Equitable Distribution

A. Marital Residence

Next, Wife argues the family court erred in valuing the marital residence at its prelitigation value and in awarding Wife the home as part of the equitable division. We disagree.

The family court valued the martial residence at $265,000 based on the testimony of realtor Glenn Hellofs. This was his estimate of the value of the house prior to Wife's selling many of the fixtures in the home, damaging it, and otherwise failing to care for it.[7] After her misconduct, the precise date of which is uncertain, Hellofs valued the marital residence at $185,000. $110,000 was owed on the home's mortgage. The family court awarded Wife the devalued asset to hold Wife accountable for her destructive behavior. This distribution put Wife in the position of absorbing the entire cost of the devaluation in the home—$80,000. While this is a harsh penalty to Wife, we are not persuaded the family court erred in its decision.

In *Dixon v. Dixon*, the husband had intentionally devalued his business after the filing of litigation to the point of bankruptcy. 334 S.C. 222, 228-35, 512 S.E.2d 539, 542-44 (Ct. App. 1999) (per curiam). The family court awarded the husband the business in the parties' equitable division and assigned the business, C&R, its prelitigation value. *Id*. at 233-35, 512 S.E.2d at 545. In affirming this decision, the court of appeals explained:

> Had C & R been in existence at the time of the final hearing, it likely would have been awarded solely to the Husband, given his importance to the business and the Wife's minimal involvement in the day-to-day operations. Other marital assets would have been awarded to the Wife to bring the equitable division in line with the percentage allocation of the estate as determined by the family court. In this case, however, to

[7] The GAL's report suggest the damage to the home may not be as significant as described by Husband and Hellofs. However, the GAL acknowledges the parties' home would require some fairly substantial renovations to sell for what it is potentially worth.

> assess the entire value of C & R against the Husband's share of the marital estate will have severe consequences. The value we have assigned to C & R, although an accurate determination of its value at the time of the commencement of this action, is nonetheless an artificial value in one sense, given that C & R in fact no longer exists. Thus, every dollar of C & R's value that we assign to the Husband amounts to a dollar reduction in his realized share of the marital estate. Because C & R is the single largest asset in the marital estate, the Husband's share of the marital estate will be reduced dramatically.
>
> However, were we to assess any portion of C & R's value against the Wife's share of the marital estate, we would be reducing her realized share of the marital estate. Thus, to assess *any* portion of the C & R's value against the Wife would reward the Husband for his economic misconduct and punish the Wife, who was completely without responsibility for the demise of C & R. Accordingly, we conclude that the only equitable way to allocate the value of C & R is to assess its entire value against the Husband's share of the marital estate.

Id. at 233-34, 512 S.E.2d at 545.

We note, this case is distinguishable from *Dixon* in some respects. In this case, Wife alleged adultery although it was not proven. In *Dixon*, the husband, the party who devalued the asset, was found to have committed adultery. *Id*. at 226, 512 S.E.2d at 541. Additionally, the parties had no dependent children in the *Dixon* case. *Id*. at 225, 512 S.E.2d at 540. In this case, Wife was responsible for the care of the parties' four children.[8] Nevertheless, Wife's economic misconduct was the cause of the devaluation. This is a difficult issue, but overall we are not persuaded the family court erred in awarding Wife the marital home at its prelitigation value.

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[8] Husband never sought sole custody of the children but sought joint custody in the form of visitation. As the record demonstrates, a shared custody arrangement was derailed by Wife's efforts to alienate Husband and the children.

B. Credit Card Debt

Wife argues the family court erred in holding her solely responsible for the $14,843 credit card debt accumulated post-separation. We agree in part.

The equitable division statute[9]

> creates a rebuttable presumption that a debt of either spouse incurred prior to the beginning of marital litigation is a marital debt and must be factored in the totality of equitable apportionment. When the debt is incurred before marital litigation begins, the burden of proving a debt is nonmarital rests upon the party who makes such an assertion.

Wooten v. Wooten, 364 S.C. 532, 546-47, 615 S.E.2d 98, 105 (2005) (citations omitted).

Husband maintained Wife made the charges at issue without his knowledge. This appears to be the sole basis for the family court's decision according to the final amended order. However, this does not in and of itself mean the charges did not benefit the marriage as Wife was maintaining the home and providing all the support for the children during this time period. *See Thomas v. Thomas*, 346 S.C. 20, 27, 550 S.E.2d 580, 584 (Ct. App. 2001) ("Marital debt is debt incurred for the joint benefit of the parties regardless of whether the parties are legally jointly liable for the debt.") *aff'd as modified*, 353 S.C. 523, 579 S.E.2d 310 (2003). Charges made post-separation but prelitigation would be presumed marital unless Husband rebutted that presumption. Therefore, the family court erred in adopting Husband's position wholesale, without closer scrutiny.

Reviewing the credit card statements presented by Husband, we ascertain some charges were not in support of the marriage. Wife incurred charges totaling $5,350 for legal services presumably related to the parties' separation. These charges were obviously not in support of the marriage, household, or children. However, of the $14,843 at issue, $6,045.25 of the charges were incurred prior to the

[9] S.C. Code Ann. § 20-3-620 (2014).

commencement of marital litigation for more generalized expenses that supported the family and household. Therefore, that amount, $6,045.25, should be considered marital debt and apportioned equally between Husband and Wife. The remaining debt—$8,797.75, constituting legal fees and post-litigation charges—are nonmarital debt and should be charged against Wife's portion of the equitable division.

C. Marital Property Awarded to Husband—Joint Checking and Savings Accounts and Honda Odyssey Van

Wife maintains the family court erred in valuing and awarding certain assets to her as part of the equitable distribution. We agree in part.

> The ownership prong can potentially raise troublesome issues if the family court overlooks assets which should rightly be included in the marital estate, but which are non-existent on the date of filing due to a party's misconduct. Consequently, if a party attempts to unfairly extinguish ownership of marital property before the date of filing . . . , the family court must include that property in the marital estate. To do otherwise would "promote fraud, reward misconduct, and contravene legislative intent."

Shorb v. Shorb, 372 S.C. 623, 632, 643 S.E.2d 124, 129 (Ct. App. 2007) (citations omitted) (quoting *Bowman v. Bowman*, 357 S.C. 146, 155, 591 S.E.2d 654, 659 (Ct. App. 2004)).

Husband and Wife maintained a joint savings account and a joint checking account at Bank of America prior to their separation. As to those assets, Husband testified as follows:

> Q. Did you also have a joint savings account at Bank of America?
> A. Yes, ma'am.
> Q. And that reflects the amount of $49,674, also on November 30, 2015.
> A. Yes, ma'am.

Q. Is that correct?
A. Yes, ma'am.
Q. And did you make any withdrawals from that savings account?
A. Yes, ma'am, I took $20,500.
Q. Thereby leaving in the checking account $37,797, and $29,174; is that correct?
A. Yes, ma'am.
Q. And what happened the next day?

Husband testified Wife knew Husband was going to take funds from the savings account, so she attempted, albeit too late, to electronically withdraw *all* the funds from the savings account and checking account and thereby created an overdraft. However, when faced with the overdraft, Wife returned the $20,500 to the savings account. Keeping the funds she had remaining from both savings and checking, Wife opened a new account and then withdrew funds from that account in increments of $9,999 or less until the account was emptied by the date litigation was filed. According to Wife's testimony, she and the children lived off these funds and she had approximately $9,000 remaining at the time of trial. Wife testified Husband "took $20,700 of December 1, 2015. I called him because I went to pay the bills thinking this was a temporary separation. I said where did the $20,000 go? He said I took that for a nest egg for myself, the rest is yours and the kids'. It's yours."

Based on the testimony from both parties, the family court erred in valuing the joint savings account as of the date of separation instead of the date of filing. The parties had divided the account by agreement and taken individual ownership of their part prior to the filing of marital litigation. Wife did not unfairly attempt to extinguish ownership of the joint savings account so there is no basis for valuing the asset at a time other than the time litigation was commenced. *See Taylor-Cracraft v. Cracraft*, 417 S.C. 570, 581, 790 S.E.2d 423, 429 (Ct. App. 2016) ("Marital property subject to equitable distribution is presumptively valued at the date of the divorce filing."). At that time, the joint savings account had a value of zero.

With regard to the joint checking account, Husband's marital asset addendum also reflects the date of separation, not filing, for valuation. The record reflects Wife withdrew the entire amount of the checking account post-separation and prefiling

with no agreement from Husband. Then, she moved the funds into other accounts in amounts less than $10,000. Because she attempted to extinguish the account prefiling, the family court did not err in valuing the checking account at the time of the separation and awarding its value against Wife's share of the marital estate.

Finally, Wife also contends the family court erred in its valuing a Honda Odyssey Wife purchased approximately two months before the parties separated at $40,000. We disagree.

Husband testified Wife told him she paid $40,000 for the van. He listed the asset on his marital asset addendum with a $40,000 equity value. Although Wife could not offer any evidence about the van, she did not cross-examine Husband about his testimony. The only other evidence in the record relating to the van is Husband's Exhibit 2, a joint savings account statement, which indicates $20,000 was withdrawn on October 5, 2016. A hand-written notation indicates the withdrawal was made for "purchase of van by Wife." The dearth of evidence as to the *equity* in the van is regrettable. However, based on the record, we cannot say the family court's valuation is against the preponderance of the evidence.

IV. Alimony

Wife argues the family court erred in denying her request for alimony. We disagree.

"Generally, alimony should place the supported spouse, as nearly as is practical, in the same position he or she enjoyed during the marriage." *Allen v. Allen*, 347 S.C. 177, 184, 554 S.E.2d 421, 424 (Ct. App. 2001). "It is the duty of the family court to make an alimony award that is fit, equitable, and just if the claim is well founded." *Id*.

> Factors to be considered in making an alimony award include: (1) duration of the marriage; (2) physical and emotional health of the parties; (3) educational background of the parties; (4) employment history and earning potential of the parties; (5) standard of living established during the marriage; (6) current and reasonably anticipated earnings of the parties; (7) current and reasonably anticipated expenses of the

> parties; (8) marital and nonmarital properties of the parties; (9) custody of children; (10) marital misconduct or fault; (11) tax consequences; and (12) prior support obligations; as well as (13) other factors the court considers relevant.

Id. (citing S.C. Code Ann. § 20-3-130(C) (Supp. 2000)). "No one factor is dispositive." *Id*. at 184, 554 S.E.2d at 425.

"Generally, if on appeal there is inadequate evidentiary support for each of the factors, the appellate court should reverse and remand so the trial court may make specific findings of fact." *Griffith v. Griffith*, 332 S.C. 630, 646, 506 S.E.2d 526, 535 (Ct. App. 1998). "However, when 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.'" *Id*. at 646-47, 506 S.E.2d at 535 (quoting *Holcombe v. Hardee*, 304 S.C. 522, 524, 405 S.E.2d 821, 822 (1991)).

In this case, the family court did not address each of the factors specifically in declining to award alimony to Wife. The family court noted Wife received disability and social security benefits totaling $4,625 per month. Wife's emotional health, educational background, or earning potential do not impact the monthly amount of her income as her income is derived from sources independent of her current employability. Wife would have had more expenses than Husband based on the fact that she retained custody of the four children; however, she was prevented from admitting evidence as to precisely those expenses at trial because of her discovery violations.[10] Additionally, Wife will begin receiving monthly payments to contribute toward additional expenses she incurs on behalf of the children once the child support order is modified. Furthermore, the record reflects one reason Wife was solely responsible for the children was because she alienated them from Husband. The family court also emphasized that Wife possessed significant non-martial property—a $350,000 inheritance.

[10] Wife presented a financial declaration in June of 2016 that the family court may have considered, but if so, it is not referenced in the family court's order. In any event, the family court found Wife inherently uncredible.

Wife repeatedly failed to exercise her right to participate fully in her own case. Had she done so, she may have proven a case for alimony. We are not persuaded the family court's decision was against the preponderance of the evidence presented. Therefore, the family court's ruling on alimony is affirmed.

V. Attorney's Fees and Guardian Ad Litem Fees

Finally, Wife argues the family court erred in awarding Husband attorney's fees and in requiring her to pay the outstanding GAL fees. We agree in part.

"In determining whether an attorney's fee should be awarded, the following factors should be considered: (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; (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). The family court awarded Husband $20,000 of the $33,872.12 he accrued in attorney's fees based largely on Wife's misconduct during the course of the litigation. Misconduct or uncooperativeness can be a factor in awarding attorney's fees. *See Spreeuw v. Barker*, 385 S.C. 45, 73, 682 S.E.2d 843, 857 (Ct. App. 2009) ("Taking into account that [the f]ather's uncooperative conduct greatly increased the cost of litigation, we affirm the family court's award of $43,675 in attorney's fees to [the m]other."); *see also Donahue v. Donahue*, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989) (holding husband's lack of cooperation serves as an additional basis for the award of attorney's fees); *Anderson v. Tolbert*, 322 S.C. 543, 549-50, 473 S.E.2d 456, 459 (Ct. App. 1996) (per curiam) (noting an uncooperative party who does much to prolong and hamper a final resolution of the issues in a domestic case should not be rewarded for such conduct).

The court noted the incomes of both parties, found Husband obtained beneficial results in the litigation, and concluded Wife would be able to pay this amount without diminishing her standard of living based in part on her inheritance. The record demonstrates Wife made the litigation more difficult and expensive and although the record is not fully developed as to the financial conditions of both parties, we are not persuaded the family court erred in awarding Husband $20,000 in attorney's fees as the record demonstrates Wife has a large inheritance that places her in a stronger financial position. However, the beneficial results analysis

changes slightly in light of some of the modifications in this opinion. Therefore, we remand the award of attorney's fees for reconsideration based on this factor.

Additionally, the parties had accrued $11,705 in GAL fees in the case. At the time of trial, Husband had paid $4,625 of the fees. After reiterating the difficulty Wife created in the case, particularly Wife's trip to the emergency room the second day of trial, the family court ordered Wife to pay the outstanding $5,518.75. The family court did not address any factors outside Wife's misconduct in making this award. However, the record is sufficient to allow affirmance. *See Griffith*, 332 S.C. at 646-47, 506 S.E.2d at 535 ("[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.'" (quoting *Holcombe*, 304 S.C. at 524, 405 S.E.2d at 822)).

Here, it appears Wife would be able to pay a portion of the GAL fees without significantly compromising her standard of living based again on her inheritance and disability/social security income. The issues in the case were very contentious, and the record demonstrates much of the GAL's time and effort was expended due to Wife's lack of cooperation and efforts to thwart Husband's relationship with the children. Consequently, we affirm the family court's decision as to the payment of the GAL's fees. *See Klein v. Barrett*, 427 S.C. 74, 89, 828 S.E.2d 773, 781 (Ct. App. 2019) (affirming the family court's finding that the wife should bear the majority of the fees and costs because she was in a superior financial position and because a signification portion of the GAL fees were incurred based on the wife's conduct during the litigation).

CONCLUSION

To summarize, we find the family court had jurisdiction to determine this case and affirm the family court's decision to deny Wife's continuance and impose discovery sanctions. Additionally, we affirm the family court's denial of Wife's request for alimony and the division of GAL fees. Further, we affirm the family court's valuation of the marital home and the Honda Odyssey van and the award of both to Wife. We also affirm the valuation date of the parties' joint checking account and its award to Wife.

We reverse and remand the family court's award of an unmodifiable, lump sum child support payment issued as a setoff against Husband's share of the marital estate. We also reverse the family court's valuation of the parties' joint savings account as of the date of separation. We modify the family court's decision regarding the credit card debt as discussed herein. We remand the case to the family court to recalculate the amounts owing between the parties based on the changes in the value of certain assets and the reversal of the lump sum child support award. Additionally and finally, we remand the issue of attorney's fees for the family court to consider changes in the beneficial results obtained by Husband in light of this opinion.

AFFIRMED IN PART AS MODIFIED, REVERSED IN PART, AND REMANDED.

WILLIAMS and HILL, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cleo Sanders, Respondent,

v.

Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram, Santander Consumer USA Holdings, Inc., Isiah S. White, Danny Anderson, and Patrick Bachrodt, Jr., Defendants,

Of which Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White are the Appellants.

Appellate Case No. 2018-000171

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5779
Submitted September 1, 2020 – Filed October 21, 2020

AFFIRMED

John Thomas Lay, Jr., Jessica Ann Waller, and Alice Price Adams, all of Gallivan, White & Boyd, PA, of Columbia, for Appellants.

C. Steven Moskos, of C. Steven Moskos, PA, of Charleston, for Respondent.

THOMAS, J.: Cleo Sanders filed this action against Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram (Rick Hendrick Dodge), Santander Consumer USA Holdings, Inc. (Santander), Isiah S. White, Patrick Bachrodt, Jr., and Danny Anderson. Rick Hendrick Dodge and White (Appellants) appeal, arguing the circuit court erred in (1) denying their motion to compel arbitration, (2) granting Sanders' motion to compel discovery despite a lack of jurisdiction, and (3) finding they waived their right to seek arbitration by participating in discovery. We affirm.

FACTUAL BACKGROUND

Sanders visited Rick Hendrick Dodge in Charleston to purchase a vehicle. White, a salesman at Rick Hendrick Dodge, assisted Sanders with the sale. Sanders traded in his vehicle and purchased a 2012 Dodge Charger, allegedly at a price higher than Sanders previously saw advertised. Sanders alleges he notified Rick Hendrick Dodge that he was on short-term disability at the time of the purchase. According to Sanders, Rick Hendrick Dodge knowingly used his inflated income, including his disability payments, to obtain approval for a loan. Sanders signed a Retail Installment Sales Contract (RISC) that included an arbitration clause on its last page. Rick Hendrick Dodge assigned the RISC to Santander. Sanders' monthly payment was 37% of his pre-tax monthly income, he defaulted, and Santander repossessed the vehicle.

Sanders filed this action for conversion, Unfair Trade Practices Act violations, Regulation of Motor Vehicle Dealers Act violations, fraud, negligent misrepresentation, and negligence. Defendants answered, and Appellants moved to compel arbitration. After a hearing, the court denied the motion to compel arbitration by order filed January 10, 2018, finding the "right to compel arbitration was extinguished when [the RISC] was assigned to Santander." During a hearing on January 9, 2018, and in an order filed January 18, 2018, the court granted Sanders' oral motion to dismiss Santander from the case without prejudice. On February 6, 2018, Appellants filed a Notice of Appeal of the January 10, 2018 order with this court. While that appeal was pending, the circuit court filed an order on February 20, 2018, ordering Appellants to respond to discovery requests. Appellants also appeal the discovery order.

STANDARD OF REVIEW

"Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012).

LAW/ANALYSIS

A. Arbitration

Appellants argue the circuit court erred in finding their right to seek arbitration was extinguished when Rick Hendrick Dodge assigned the RISC to Santander, and the effect of the assignment on their right to arbitration should have been decided by an arbitrator. We disagree.

The circuit court found that although the RISC was governed by the Federal Arbitration Act (FAA), state law governed the issue of assignment as to the enforceability of the arbitration clause.[1] Applying South Carolina law, the court next found "once a contract is properly assigned[,] the assignor retains no interest in the right transferred." Finally, the court found "an assignor's right to compel arbitration is lost once it assigns a contract containing an arbitration clause."

Any rights of Appellants based on the arbitration clause, including the right to arbitrate and the right to have the issue of arbitrability decided by an arbitrator, arise from the RISC, which Rick Hendrick Dodge assigned to Santander. We find no error in the circuit court's finding that the assignment extinguished Appellants' rights under the RISC.

Three elements constitute an assignment: "(1) an assignor; (2) an assignee; and (3) transfer of control of the thing assigned from the assignor to the assignee." *Donahue v. Multimedia, Inc.*, 362 S.C. 331, 338, 608 S.E.2d 162, 165 (Ct. App.

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[1] Neither party has alleged that the transaction did not involve interstate commerce. *See Allied–Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995) (holding that all arbitration provisions dealing with transactions involving interstate commerce are subject to the FAA).

2005). "An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." *Moore v. Weinberg*, 373 S.C. 209, 219–20, 644 S.E.2d 740, 745 (Ct. App. 2007) (quoting Restatement (Second) of Contracts § 317(1) (1981)), *aff'd*, 383 S.C. 583, 681 S.E.2d 875 (2009). "The principle is well settled that a valid assignment operates to pass the whole right of the assignor, and that thereafter the assignee stands in the place of the assignor, possessing all rights or remedies available to the assignor." *duPont de-Bie v. Vredenburgh*, 490 F.2d 1057, 1061 (4th Cir. 1974). "[W]here a party assigns agreements that include an arbitration clause, the assignor's 'right to compel arbitration under those agreements is extinguished.'" *In re Wholesale Grocery Prods. Antitrust Litig.*, 97 F. Supp. 3d 1101, 1106 (D. Minn. 2015) (quoting *HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys., Inc.*, 590 F. Supp. 2d 677, 684–85 (D.N.J. 2008) (internal quotation omitted)), *aff'd*, 850 F.3d 344 (8th Cir. 2017), *amended* (May 1, 2017).

In *HT of Highlands Ranch*, the district court of New Jersey explained as follows the extinguishment of the right to arbitrate when the contract containing the arbitration clause is assigned:

> In light of the fact that, prior to the commencement of this action, [the defendant] assigned its rights and obligations under the franchising agreements . . . , the Court cannot, at this stage, conclude that "a valid agreement to arbitrate [presently] exists" . . . . "[W]hen an assignee assumes the liabilities of an assignor, it is bound by an arbitration clause in the underlying contract. Because "an assignment cannot alter a contract's bargained-for remedial measures," . . . a corollary to the principle that an assignee is bound by the arbitration clause in an assigned contract is that "an assignment ordinarily extinguishes the right [of the assignor] to compel arbitration."

590 F. Supp. 2d at 684 (second and fourth alterations in original) (internal citations omitted); *see Kennamer v. Ford Motor Credit Co.*, 153 So.3d 752, 762–63 (Ala. 2014) (explaining that because of a car dealership's assignment of a sales contract containing an arbitration clause to Ford Credit, Ford Credit could enforce the

arbitration clause, but the dealership could not). Because Rick Hendrick Dodge assigned the RISC to Santander, we find all alleged rights arising from the contract, including the right to have an arbitrator determine the arbitrability of the action and the right to arbitrate, were extinguished as to Appellants.

B. Discovery Order[2]

Appellants maintain the circuit court erred in compelling discovery, arguing the court lacked subject matter jurisdiction to enter the order compelling discovery after they had filed their Notice of Appeal. We disagree.

"It is well-settled that issues relating to subject matter jurisdiction may[ ]be raised at any time." *Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 168, 485 S.E.2d 371, 372 (1997). "Whether a court has subject matter jurisdiction is a question of law we review de novo." *Deborah Dereede Living Tr. dated Dec. 18, 2013 v. Karp*, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019). "[S]ubject matter jurisdiction refers to a court's constitutional or statutory power to adjudicate a case." *Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007). "Stated somewhat differently, 'subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong.'" *Id.* (quoting *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005)). "Circuit courts have jurisdiction over general tort cases . . . ." *Metts v. Mims*, 384 S.C. 491, 498, 682 S.E.2d 813, 817 (2009); *see also* S.C. Code Ann. § 39-5-140(a) (1985) (providing for an action to recover unfair trade practices damages in a "court"). We find the circuit court did not lack subject matter jurisdiction.

As to Appellants' remaining arguments regarding the discovery order, we decline to address them because discovery orders are interlocutory and not immediately appealable. *See Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008) ("[D]iscovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right.").

[2] We combine Appellants' second and third arguments.

CONCLUSION

Based on foregoing, the order on appeal is

AFFIRMED.[3]

HILL and HEWITT, JJ., concur.

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