The Supreme Court of South Carolina

In the Matter of Dean D. Porter, Respondent.

ORDER

By opinion dated today, respondent is definitely suspended from the practice of law for ninety (90) days. See In the Matter of Porter, Op. No. 26131 (S.C. Sup. Ct. filed April 3, 2006) (Shearouse Adv. Sh. No. 13 at 24). The Court hereby appoints an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that W. Andrew Gowder, Jr., Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Gowder shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Gowder may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

IT IS SO ORDERED.

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

Columbia, South Carolina
April 3, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 13

April 3, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Julia Ellis Brown, Respondent.

Opinion No. 26129
Submitted February 7, 2006 – Filed March 27, 2006

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Paulette Edwards, of Columbia, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the imposition of a confidential admonition, public reprimand, or a definite suspension not to exceed two years. We accept the Agreement and impose a two year suspension from the practice of law. The facts, as set forth in the Agreement, are as follows.

FACTS

For a period beginning in December 2002 and ending in April 2004, while employed by the South Carolina Centers for Equal Justice (SCCEJ), respondent used her office and home computers to access or attempt to access the email accounts of more than forty employees of SCCEJ and at least one member of the SCCEJ Board. Respondent accessed the email accounts using passwords either not voluntarily provided to her or not provided to her for the purpose for which she used them. Respondent was not authorized to access these email accounts either by SCCEJ or by the individual users of the accounts.

Respondent accessed these email accounts nearly every day from December 2002 until April 2004. The purpose of respondent's unauthorized access of her coworkers' email accounts was to monitor management activity and anti-union sentiment during a unionizing effort that respondent initiated and supported. In particular, respondent was looking for information related to the budget, to management meeting reports, and to anti-union activities.

Respondent read, downloaded, and disseminated some of the information contained in the email messages accessed during this time period. Respondent's reading, downloading, and disseminating of this information was not authorized by SCCEJ, the users whose email accounts she accessed, or the original parties to the email messages.

Respondent deleted some of the email messages accessed during this time period. Some of the messages she deleted had not yet been read by the recipients. Respondent was able to discern from viewing the messages which ones had and had not been read. The messages respondent chose to delete contained anti-union information or sentiment. Respondent's deletion of these email messages was not authorized by SCCEJ, the users whose email accounts she accessed, or the original parties to the email messages.

On or about March 29, 2004, respondent used her home computer to access the email account of the managing attorney in another office. She did not have authority from either SCCEJ or the managing attorney to access the account. Through that unauthorized access, respondent obtained a copy of an email message to the interim executive director of SCCEJ from outside counsel representing SCCEJ in connection with the union campaign.

Respondent disseminated this email message to individuals working to unionize SCCEJ. Respondent did not tell these individuals how she obtained the email message. At the insistence of those individuals, respondent forwarded the email message to all of the SCCEJ employees who could vote in the union election. At the time she accessed the email message and at the time she disseminated it, respondent knew that the original sender was outside counsel representing SCCEJ in the union matter.

LAW

Respondent admits that her misconduct constitutes grounds for discipline under Rule 413, RLDE, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law). In addition, respondent admits she has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 8.4(a) (lawyer shall not violate the Rules of Professional Conduct); Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to administration of justice).[1]

[1] Respondent's misconduct occurred before the effective date of the Amendments to the Rules of Professional Conduct. See

CONCLUSION

We accept the Agreement for Discipline by Consent and impose a two year definite suspension from the practice of law. suspension. Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30, RLDE, Rule 413, SCACR.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur. WALLER, J., not participating.

Court Order dated June 20, 2005. The Rules cited in this opinion are those which were in effect at the time of respondent's misconduct

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Dean D. Porter, Respondent.

Opinion No. 26131
Submitted February 6, 2006 – Filed April 3, 2006

DEFINITE SUSPENSION

Henry B. Richardson, Jr., Disciplinary Counsel, and Charles N. Pearman, Assistant Disciplinary Counsel, both of Columbia, for the Office of Disciplinary Counsel.

Justin O'Toole Lucey, Mount Pleasant, for respondent.

PER CURIAM: In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to a definite suspension of ninety (90) days. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a ninety (90) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent served as a title insurance agent for a title insurance company. During a routine audit, the title insurance

company determined there were unpaid premiums due from respondent for the title insurance company's share of premiums for title insurance issued by respondent.[1]

The amount claimed due from respondent by the title insurance company after the audit was approximately $12,000. The title insurance company requested payment of that amount from respondent, but respondent advised the title insurance company he did not have adequate funds to make payment at that time, but would do so in the future on a periodic basis under a plan agreed to by the title insurance company and respondent. Respondent represents that, unbeknownst to him, the premiums had been placed in his firm's operating account and then disbursed by his now deceased non-lawyer assistant.

Approximately one year later, the title insurance company conducted another audit of respondent's operations. As a result, the title insurance company determined there was an additional sum of approximately $12,524 due from respondent for premiums which had been collected but for which policies had not been issued. These un-issued policies were in connection with real estate closings which, in some cases, had taken place several months prior to the second audit.

After the second audit, the title insurance company terminated its agency agreement with respondent and took possession of its title insurance policies and files related to policies where commitments/binders had been issued and closings conducted, but final policies had not been issued by respondent.[2] The title insurance

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[1] Under the terms of the agency agreement between respondent and the title insurance company, respondent typically received sixty percent of the premiums and the title insurance company received forty percent of the premiums.

[2] During this period of time, respondent's non-lawyer assistant who handled his title insurance work and was the principal point of contact between respondent's firm and the title insurance

company did the work necessary to complete the closings and issued final policies for those files in accordance with the commitments/binders previously issued by respondent as its agent.

After it became dissatisfied with respondent's progress in paying the past-due premiums, the title insurance company reported the foregoing to ODC.[3] ODC then made inquiries and determined that the amounts collected by respondent for title insurance premiums had been deposited into respondent's escrow account and then transferred into his operating account. Thereafter, portions of these funds were expended out of the operating account for the cost of operation of respondent's firm, for respondent's benefit, or for other purposes than intended.

Respondent now recognizes that, in addition to being contrary to the provision of Rule 1.15, Rule 407, SCACR, his handling of the insurance premiums was contrary to the provisions of the agency agreement between respondent and the title insurance company. The agency agreement provided that funds collected for title insurance premiums would be maintained by respondent in an account separate from respondent's own funds or those of his law firm.

Respondent represents, however, that the title insurance company was aware of his method in handling the insurance premiums and did not object. To the best of ODC's knowledge, this was, in fact,

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company died in an accident and another non-lawyer assistant left respondent's employ. The loss of these two employees caused the title insurance company to become concerned about whether respondent had sufficient staff, especially in view of the backlog of non-issued final policies created after the loss of the two employees. According to the Agreement, the title insurance company terminated its agency agreement with respondent primarily because of the staffing shortage at respondent's firm.

[3] The title insurance company's report to ODC occurred quite some time after it conducted the two audits.

true. Moreover, the agency agreement did not specifically address how often or under what circumstances the title insurance company's portion of premiums would be transmitted by respondent to the title company. Nevertheless, respondent recognizes the funds should have been maintained in a separate account. Should he ever collect premiums for title insurance companies in the future, respondent agrees to place insurance premiums in a separate account. Respondent admits he did not personally reconcile his escrow account in strict compliance with the provisions of Rule 417, SCACR.

By way of mitigation and not as a defense, respondent represents the following: that he had a very capable, experienced paralegal who worked extensively on loan closings and related title insurance matters and who was his principal point of contact with the title insurance company; that the arrangement for the handling of title insurance policies and title insurance premiums was handled by the paralegal; that the title insurance company had previously audited respondent's firm, escrow account, and the title insurance operations, was aware of the paralegal's role, and was apparently satisfied with respondent's performance as an agent until past due premiums came to light; that even after the title insurance company determined there were amounts due for policies previously issued, it continued its agency agreement with respondent for quite some time thereafter until it became dissatisfied with respondent's progress in repaying the premiums it felt it was due; that the paralegal died as a result of injuries sustained in an automobile accident and another key non-lawyer employee left respondent's firm, causing respondent to fall behind in completion of closings (which included failing to issue final title insurance policies and transmitting premiums to the title insurance company). According to respondent, immediately prior to the final audit, an employee of the title insurance company advised respondent that his books and records were in excellent shape.[4]

[4] ODC disagrees with the opinion of the title insurance company employee and respondent now recognizes that, in regard to title insurance premiums, there were irregularities in his recordkeeping

Respondent now recognizes that he should have more closely supervised his non-lawyer staff, especially in connection with the handling of premiums collected for title insurance policies; that the premiums should have been maintained in his escrow account or in some other account separate from his operating account and should not have been expended except for their intended purpose; that respondent should have strictly complied with the recordkeeping and money handling requirements of Rule 417, SCACR; that he should have maintained better records as to what amounts were due the title insurance company including, but not limited to respective policy numbers, file numbers, and premium amounts due for each policy; that he should have been more prompt in making payment to the title insurance company of its share of premiums collected; that he should have reduced his intake of new real estate files until he was able to catch up on the backlog of completed closings and issuance of title insurance policies after the loss of his two key non-lawyer employees; that, due to the foregoing, respondent was not as diligent as he should have been in handling real estate matters for his clients which, in turn, caused the quality of services provided those clients not to have been as competent as they should have been.

To date, in spite of considerable expenditures of time and effort, ODC has been unable to reconcile to its satisfaction the exact amounts due the title insurance company and must, instead, rely on the agreement between the title insurance company and respondent as to the amounts due. Complicating ODC's investigation is the fact that the title insurance company applied premiums for subsequent policies issued by respondent to past due premiums. As a result, the title insurance company's records show as paid amounts it later claimed were unpaid and show as unpaid amounts that cancelled checks from respondent demonstrate have been paid.

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and money handling procedures notwithstanding the apparent lack of disapproval by the title insurance company.

Respondent represents he no longer handles real estate closings and, at this time, does not plan to do so in the future. However, should he become involved with real estate closings in the future, respondent warrants he will maintain funds for title insurance either in his escrow account or in an account separate from his own money, keep detailed records as to what funds are due for each policy, and promptly remit the premiums to the insuring title insurance company, together with information specifying which portions of the amount submitted should be applied to each policy issued. The Court specifically adopts these restrictions. Accordingly, if respondent handles real estate closings in the future, he shall comply with each of the restrictions set forth in the Agreement.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.1 (lawyer shall provide competent representation to his client); Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.15 (lawyer shall hold property of third persons in his possession in connection with a representation separate from the lawyer's own property); Rule 5.3 (partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that a non-lawyer assistant's conduct is compatible with the professional obligations of the lawyer); Rule 8.4(a) (lawyer shall not violate Rules of Professional Conduct); and Rule 8.4(e) (lawyer shall not engage in conduct that is prejudicial to the administration of justice). In addition, respondent admits his misconduct constitutes a violation of Rule 7, RLDE, of Rule 413, SCACR, specifically Rule 7(a)(1) (lawyer shall not violate Rules of Professional Conduct) and Rule 7(a)(5) (lawyer shall not engage in conduct tending to bring the legal profession into disrepute or conduct demonstrating an unfitness to practice law). Finally, respondent admits that his misconduct constitutes a violation of the financial recordkeeping provisions of Rule 417, SCACR.

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for ninety (90) days. Within fifteen days of the date of the suspension, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR.

Respondent shall pay all title premiums due the title insurance company as a result of the misconduct reported herein and shall demonstrate to the satisfaction of ODC, the Commission on Lawyer Conduct, and the Court that he has paid all title premiums due the title insurance company before he shall be permitted to resume the practice of law in this state.

DEFINITE SUSPENSION.

TOAL, C.J., MOORE and PLEICONES, JJ., concur. WALLER, J., not participating.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina State Ports Authority, Petitioner,

v.

Jasper County, Respondent.

ORIGINAL JURISDICTION

Opinion No. 26132
Heard September 20, 2005 – Filed April 3, 2006

C. Mitchell Brown and Kevin A. Hall, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Petitioner.

A. Camden Lewis, Keith M. Babcock and Brady T. Thomas, all of Lewis, Babcock & Hawkins, of Columbia; and Marvin C. Jones, of Bogoslow Jones Stephens & Duffie, PA, of Walterboro, for Respondent.

JUSTICE BURNETT: This case was filed in the original jurisdiction of the Court, pursuant to Rule 229(a), SCACR. The South Carolina State Ports Authority (SCSPA) seeks a declaratory judgment determining whether it has the exclusive authority to develop a port or terminal on the Savannah River. The SCSPA further seeks determination of whether it has a superior right over Jasper County (County) to condemn land on the Savannah River for port or terminal development, and thus a superior right to port or terminal development. The SCSPA does not have the

exclusive authority to develop a port or terminal on the Savannah River. Further, County has the power and authority, which is consistent with the Constitution and general law of this State, to develop a county-owned public marine terminal. However, we find the SCSPA's eminent domain power is superior to County's power.

FACTUAL BACKGROUND

After several years of rejecting the idea of building a public marine terminal in County, the SCSPA informed County in early 2004 of its interest in 1,776 acres of land located along the Savannah River (Proposed Site) and that it intended to conduct studies and evaluations of the land as a necessary precursor to condemning the land for the purpose of a port.[1] In October 2004, Jasper County Council (Council) voted to establish its own ports authority as part of a plan to acquire the Proposed Site.

On January 7, 2005, Council adopted Resolution #05-01, which authorized County to enter into development and management agreements with South Atlantic International Terminal, LLC (SAIT), a private company. Under Resolution #05-01, County would own the land and the public marine terminal.[2] SAIT would assist County in developing and managing County's terminal, and SAIT would serve as Port Developer/Manager for County. On the same day, County had a first reading of County Ordinance #05-02 which allowed County to enter into a loan agreement with SAIT for preliminary financing of a public marine terminal. Also on January 7, 2005, County offered to purchase the Proposed Site from the landowner, Georgia

[1] County disputes this fact and asserts that the SCSPA did not contact or inform County of the SCSPA's intent to condemn the Proposed Site prior to this case.

[2] The parties disagree over whether County has proposed to build a marine terminal or a port on the Savannah River. Whether County intends to develop a port or a marine terminal and the potential difference in the meaning of those terms is not determinative of the issues in this case.

Department of Transportation (GDOT). County notified GDOT that it would commence condemnation proceedings if negotiations to purchase the land failed, and on January 19, 2005, County filed a Notice of Condemnation against GDOT.[3]

On January 18, 2005, the SCSPA's board of directors unanimously approved a resolution to undertake efforts to acquire the Proposed Site, including commencing a condemnation action. The board also approved the step of commencing this lawsuit. On the same day, the SCSPA requested permission, as required by S.C. Code Ann. § 28-2-70 (1991), from GDOT to enter the Proposed Site in anticipation of condemning the land. The SCSPA commenced this action in the Court's original jurisdiction on January 19, 2005, seeking declaratory judgments and injunctive relief.

ISSUES

I. Does the SCSPA's Enabling Act preempt County from developing a county-owned public marine terminal on the Savannah River?

II. If County is not preempted, does County have the power and authority to create a county-owned public marine terminal?

[3] County previously attempted to condemn the same land for construction of a terminal. Georgia Dept. of Transp. v. Jasper County, 355 S.C. 631, 586 S.E.2d 853 (2003). We found that condemnation to be unlawful. We held that "County's proposed marine terminal does not meet our restrictive definition of public use. The private lessor, SAIT, will finance, design, develop, manage, and operate the marine terminal. The terminal itself will be a gated facility with no general right of public access." *Id.* at 639, 586 S.E.2d at 857. In holding the condemnation unlawful for lack of a public purpose, we noted that the lease arrangement in which County planned to lease the land to SAIT for ninety-nine years defeated the validity of the condemnation. *Id.*

III. If County has the power and authority to create a county-owned public marine terminal, is that power consistent with the Constitution or the general law of the State?

LAW/ANALYSIS

Determining whether a local ordinance is valid is essentially a two-step process. Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). The first step is to ascertain whether the county had the power to enact the ordinance. If the state has preempted a particular area of legislation, then the ordinance is invalid. If no such power existed, the ordinance is invalid and the inquiry ends. However, if the county had the power to enact the ordinance, then the Court ascertains whether the ordinance is inconsistent with the Constitution or general law of this state. *Id.* See also Hospitality Ass'n of South Carolina, Inc. v. County of Charleston, 320 S.C. 219, 224, 464 S.E.2d 113, 117 (1995).

I. Preemption

The SCSPA argues the General Assembly has preempted the field of developing and constructing harbors and seaports, including terminals, on the Savannah River, through its Enabling Act, S.C. Code Ann. §§ 54-3-110 through -1050 (1992 & Supp. 2004). We disagree.

To preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way. Town of Hilton Head Island v. Fine Liquors, Ltd., 302 S.C. 550, 552, 397 S.E.2d 662, 663 (1990).[4] We have not expressly followed the same

[4] See also Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) (no preemption where ordinance affected the hours of operation of beer and wine retailers when Department of Revenue had authority to regulate operation of retailers of beer, ale, porter and/or wine); Barnhill v. City of North Myrtle Beach, 333 S.C. 482, 511 S.E.2d 361 (1999) (finding preemption of regulating watercraft on navigable waters where statute required local laws to be identical to statute); Wrenn Bail Bond Service, Inc.

preemption analysis in deciding whether a state law preempts a local law as we have applied in deciding whether a federal law preempts a state law or regulation. Compare Fine Liquors, Ltd., 302 S.C. at 552-53, 397 S.E.2d at 663 with State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 186, 525 S.E.2d 872, 877 (2000) (federal law may preempt a state law as follows: (1) Congress may explicitly define the extent to which it intends to preempt state law, (2) Congress may indicate an intent to occupy an entire field of regulation, or (3) federal law may preempt state law to the extent the state law actually conflicts with the federal law, such that compliance with both is impossible or the state law hinders the accomplishment of the federal law's purpose); accord Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984). We find it appropriate to address the SCSPA's preemption arguments using the three categories previously recognized when discussing federal law preemption, any of which is a method by which the General Assembly's intent may be made manifest.[5]

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v. City of Hanahan, 335 S.C. 26, 28, 515 S.E.2d 521, 522 (1999) (finding preemption of the field of professional licensing for bail bondsmen through a statute providing, "[no] license may be issued to a professional bondsman or runner except as provided in this chapter"); Hospitality Ass'n of South Carolina, Inc., 320 S.C. at 228 n.9, 464 S.E.2d at 119 n.9 (no preemption of field of local sales taxation because of absence of legislative intent); AmVets Post 100 v. Richland County Council, 280 S.C. 317, 313 S.E.2d 293 (1984) (no preemption of the regulation of bingo but rather that the statute contemplated further regulation by counties and municipalities).

[5] Other courts have recognized the three federal law preemption categories when considering whether a state law preempts a local law. See Phantom of Clearwater, Inc. v. Pinellas County, 894 So.2d 1011 (Fla. Dist. Ct. App. 2005); Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998); Worton Creek Marina, LLC v. Claggett, 850 A.2d 1169 (Md. Ct. App. 2004); State ex rel. City of Alma v. Furnas County Farms, 667 N.W.2d 512 (Neb. 2003).

The following provisions of the SCSPA's Enabling Act are at issue:

> Through the [SCSPA], the State may engage in promoting, developing, constructing, equipping, maintaining, and operating the harbors or seaports within the State. S.C. Code Ann. § 54-3-110.

> The [SCSPA] is created as an instrumentality of the State for the accomplishment of the following general purposes:. . .(8) To promote, develop, construct, equip, maintain and operate a harbor or harbors within this State on the Savannah River, and in furtherance thereof have all of the powers, purposes and authority given by law to the [SCSPA] in reference to the harbors and seaports of Charleston, Georgetown and Port Royal [see § 54-3-410]; and (9) In general to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State and to the increase of water-borne commerce, foreign and domestic, through such harbors and seaports. *Id.* § 54-3-130.

> [F]or the acquiring of property necessary for the development of a harbor or harbors within this State on the Savannah River, the [SCSPA] may purchase them by negotiation or may condemn them. The power of eminent domain shall apply not only to all property of private persons or corporations but also as to property already devoted to public use. *Id.* § 54-3-150.

A. Express Preemption

Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area. See *e.g.* Wrenn Bail Bond Service, Inc., 335 S.C. at 28, 515 S.E.2d at 522. See also Michigan Canners & Freezers Ass'n., 467 U.S. at 469; 56 Am.Jur.2d *Municipal Corporations* §392 (2000); 5 *McQuillin Municipal Corporations* §15.18 (rev. 3d ed 2004). The General Assembly has not expressly

preempted the field of developing harbors, ports, and terminals on the Savannah River.

B. Implied Field Preemption

Under implied preemption, an ordinance is preempted when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity. See Denene, Inc., 352 S.C. at 213, 574 S.E.2d at 199 ("[i]t would have been unnecessary for the legislature to refer to municipalities' authority to regulate the hours of operation of retail sales of beer and wine if the General Assembly intended to occupy the entire field"); McAbee v. Southern Ry. Co., 166 S.C. 166, 166, 164 S.E. 444, 445 (1932) ("the question [of] whether a conflict exists [between a statute and an ordinance] depends upon whether the state has occupied the whole field of prohibitory legislation with respect to the subject. If such is the case it is held that a conflict exists."). See also Michigan Canners & Freezers Ass'n, 467 U.S. at 469; 56 Am.Jur.2d *Municipal Corporations* §§ 329, 392; 5 *McQuillin Municipal Corporations* § 15.18.

The SCSPA contends that the specific provisions in S.C. Code Ann. §§ 54-3-130 and -150 manifest a legislative intent to occupy the field. The SCSPA, relying on Barnhill, 333 S.C. at 486-87, 511 S.E.2d at 363-64, asserts that the statutory purpose of acquiring property and developing ports within the State on the Savannah River makes manifest a legislative intent that no other enactment may touch upon that subject. In Barnhill, the applicable statute provided that "the provisions of this chapter. . . shall govern the operating [sic], equipment, numbering and all other matters relating thereto whenever any vessel shall be operated on the waters of this State. . . ." *Id.* at 487 n.2, 511 S.E.2d at 363 n.2 (citing S.C. Code Ann. § 50-21-30) (emphasis in original). The SCSPA's reliance on Barnhill is misplaced. The applicable statute in that case manifested a clear legislative intent that state law—not local law—regulate watercraft on navigable waters. Unlike the statutory provisions in Barnhill, the SCSPA's Enabling Act does not manifest a clear legislative intent that state law control all aspects of port and terminal development.

In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. TNS Mills, Inc. v. South Carolina Dept. of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998). A statute should not be construed by concentrating on an isolated phrase. Laurens County School Districts 55 and 56 v. Cox, 308 S.C. 171, 417 S.E.2d 560 (1992).

In construing S.C. Code Ann. §§ 54-3-110, -130 and -150 in their entirety, we discern no language prohibiting entities other than the SCSPA from developing a terminal on the Savannah River; nor is there a manifest intent that the SCSPA be the only developer of ports and terminals on the Savannah River. Section 54-3-150 enables the SCSPA to condemn property for port development but does not manifest an intent that other public entities are prohibited from condemning property for port or terminal development. The consistent use of the permissive "may" in describing the SCSPA's powers and the absence of language referring to other enactments touching upon the subject indicate that the General Assembly did not intend to occupy the field.

Several other factors demonstrate the General Assembly did not intend to occupy the field of port or terminal development. For example, S.C. Code Ann. § 54-3-410 gives the SCSPA the authority to supervise terminals in Charleston. Under § 54-3-130(8), the SCSPA has this same general supervision over any port or terminal on the Savannah River.[6] This general supervisory authority is a manifestation that the General Assembly contemplated the development of terminals by other entities.

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[6] Section 54-3-410 provides:

> The [SCSPA] shall have general supervision on the port of Charleston of all wharves, warehouses and terminal facilities of all transmitting and transporting corporations and of all wharves, warehouses and terminal facilities of persons engaged in business of public warehousemen or wharfingers . . . .

Moreover, S.C. Code Ann. §§ 54-5-10 through -110 (1992) allows cities with a population in excess of 50,000 and which are located on a navigable stream to develop port and terminal utilities.[7] Also, municipalities, including counties, are authorized to construct terminals pursuant to S.C. Code Ann. §§ 6-21-5 through -570 (2004). These provisions further reveal the absence of a legislative intent to place exclusive authority to develop a port or terminal in the SCSPA.

The presence of non-SCSPA-owned terminals in the state further indicates the field is not occupied.[8] If the General Assembly had manifested an intent to preempt the field, then the SCSPA would be the *sole* developer of

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[7] The SCSPA admits that S.C. Code Ann. § 54-5-10 provides a statutory exception but argues that we should apply the statutory construction maxim *expressio unius est exclusion alterius* or "to express one thing implies the exclusion of the other, or the alternative." Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002). In our opinion, the maxim does not apply because it would revive Dillon's Rule, which has been overruled by Home Rule. See Williams v. Town of Hilton Head Island, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993) (recognizing that Dillon's Rule had been abolished when Home Rule was enacted); Hospitality Ass'n of South Carolina, 320 S.C. at 225 n.4, 464 S.E.2d at 117 n.4 (prior to Home Rule, under S.C. Const., art. VIII, § 17, courts strictly and narrowly construed any grant of local government power under Dillon's Rule).

[8] Non-SCSPA owned terminals have existed since the SCSPA's creation. See History of the South Carolina Ports Authority 88, 101, 128, 134 (R.L. Bryan Co., 1991). Other private terminals in South Carolina include terminals owned by Nucor Steel, BP Amoco, MeadWestvaco, Chem-Marine, Shell, Exxon-Mobil, Allied, Salmon Dredging, Chevron-Texaco, Amerada Hess, Kinder Morgan, and the United States Navy. In the Port of Charleston, the SCSPA operates five public terminals and oversees, pursuant to S.C. Code Ann. § 54-3-410, nine other private terminals and seven bulk commodity terminals.

ports and terminals, and other entities, private and public alike, would be prohibited from such facilities.

The SCSPA argues that its grant of jurisdiction to oversee harbors within the state is a manifestation of a legislative intent to preempt the field. See S.C. Code Ann. § 54-3-120 ("The jurisdiction of the Authority in any of said harbors or seaports within the State shall extend over the waters and shores of such harbors or seaports…."). This argument is unpersuasive because the statutory provision does not deal with port or terminal development within the State, but rather specifies the extent of the SCSPA's authority.

The SCSPA also argues that the field of port and terminal development is occupied because the management of South Carolina's ports requires statewide uniformity of purpose and application. In our opinion, the SCSPA's supervisory power set forth in S.C. Code Ann. § 54-3-410 indicates that uniformity is not required, but that the SCSPA has general supervisory powers over owners of terminals, including any terminal owned by County. In Bugsy's, Inc., we noted that "while the General Assembly has enacted a comprehensive scheme regulating many aspects of video poker machines, the scheme does not manifest an intent to prohibit any other enactment from touching on video poker machines." 340 S.C. at 94, 530 S.E.2d at 893. Similarly, we find the SCSPA's Enabling Act to be a comprehensive scheme regulating many aspects of port and terminal development, ownership, and maintenance in this state, but the scheme does not evidence an intent to prohibit other entities, public or private, from developing a marine terminal on the Savannah River.

C. Implied Conflict Preemption

Conflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible. See Peoples Program for Endangered Species v. Sexton, 323 S.C. 526, 530, 476 S.E.2d 477, 480 (1996) ("To determine whether the ordinance has been preempted by Federal or State law, we must determine whether there is a conflict

between the ordinance and the statutes and whether the ordinance creates any obstacle to the fulfillment of Federal or State objectives."); 192 Coin-Operated Video Game Machines, 338 S.C. at 186, 525 S.E.2d at 877 (describing federal law conflict preemption); 56 Am.Jur.2d *Municipal Corporations* § 392 ("[i]mplied conflict preemption occurs when an ordinance prohibits an act permitted by a statute, or permits an act prohibited by a statute"); 5 *McQuillin Municipal Corporations* §15.18.

The SCSPA contends that County's efforts to condemn the Proposed Site and develop a terminal on the site are in direct conflict with the specific provisions in the SCSPA's Enabling Act and serve to complicate and burden the SCSPA in accomplishing one of its express purposes. Specifically, the SCSPA argues that County's efforts conflict with S.C. Code Ann. §§ 54-3-130(8), -140(4),[9] and -150. In our opinion, the General Assembly has not preempted the field. The statutory provisions do not manifest an intent that other public entities are prohibited from developing ports and terminals or from exercising their eminent domain powers for such development. Compliance with both is possible and County's efforts do not conflict with the SCSPA's Enabling Act.[10]

II. County's Power and Authority

The SCSPA contends that County does not have the power and

[9] S.C. Code Ann. § 54-3-140 provides in pertinent part:

In order to enable it to carry out the purposes of this chapter, the [SCSPA]:…(4) May acquire, construct, maintain, equip and operate wharves, docks, ships, piers, quays, elevators, compresses, refrigeration storage plants, warehouses and other structures and any and all facilities needful for the convenient use of the same in the aid of commerce….

[10] Further, if County develops a terminal on the Savannah River, this terminal would be under the SCSPA's general supervision pursuant to S.C. Code Ann. §§ 54-3-130, -410.

authority to develop and operate a terminal on the Savannah River. We disagree.

> County's Resolution provides:
>
> > [T]here is hereby established a public marine terminal for and of Jasper County on the Terminal Property to be named the South Atlantic International Terminal. . .[T]here is hereby appointed. . .South Atlantic International Terminal, LLC as Port Developer/Manager to provide assistance to the County in the form of turnkey development and management services. . . .

County's Ordinance provides: "To adopt a Loan Agreement between the County and South Atlantic International Terminal, LLC and to authorize the borrowing of money as provided therein." The Resolution and Ordinance both find that:

> > a public marine terminal will serve the best interests of the citizens of Jasper County to (i) provide transportation facilities, (ii) remedy a shortage of marine cargo loading, unloading, and transshipment capacity in Jasper County, the State of South Carolina and the Lowcountry region, (iii) foster development of commerce in Jasper County, (iv) meet Jasper County's unrealized potential as a regional transportation nexus, and (v) reduce local unemployment.

Article VIII of the South Carolina Constitution "mandates 'home rule' for local governments" and requires "all laws concerning local government [to] be liberally construed in their favor." S.C. Const. art. VIII, § 17; see also Quality Towing Inc. v. City of Myrtle Beach, 340 S.C. 29, 37, 530 S.E.2d 369, 373 (2000). County contends that under S.C. Code Ann. § 4-9-25 (Supp. 2004),[11] its Resolution, Ordinance, and proposed terminal are

[11] Section 4-9-25 provides:

valid because the terminal will promote the general welfare of the county and enhance the county's economy. Section 4-9-25, especially when read in conjunction with Article VIII's mandatory liberal construction, authorizes County to pass a resolution and enact an ordinance promoting the general welfare of County's residents by building and maintaining a public marine terminal on the Savannah River. See Hospitality Ass'n of South Carolina, 320 S.C. at 219, 464 S.E.2d at 113, (§ 5-7-30, analogous to § 4-9-25, authorized the Town of Hilton Head to enact an ordinance promoting the health, safety, and welfare of its residents by raising funds to improve, maintain, and nourish the Town's beaches).

III. Validity of Ordinance

The SCSPA argues that County's Resolution and Ordinance are inconsistent with the Constitution and general law of this state. We disagree, but find the SCSPA's eminent domain power is superior to County's power.

Where an ordinance is not preempted by state law, the ordinance is valid if there is no conflict with State law. Bugsy's Inc., 340 S.C. at 95, 530 S.E.2d at 894. A conflict between a state statute and a county ordinance exists when "both contain either express or implied conditions which are inconsistent with each other. . . . If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand." Fine Liquors, 302 S.C. at 553, 397 S.E.2d at 664.

First, the SCSPA contends that County's Resolution and

> All counties of the State . . . have authority to enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of these powers. . . respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties. . . .The powers of a county must be liberally construed in favor of the county and the specific mention of particular powers may not be construed as limiting in any manner the general powers of counties.

Ordinance conflict with Article VIII, § 14 of the South Carolina Constitution. Section 14 prohibits local governments from "set[ting] aside…the structure and the administration of any governmental service or function, responsibility for which rests with the State government or which requires statewide uniformity." County's Ordinance and Resolution do not "set aside" the structure or administration of developing ports or terminals because as previously explained, that function does not rest exclusively with the state government and does not require statewide uniformity. *Cf.* Town of Hilton Head Island v. Coalition of Expressway Opponents, 307 S.C. 449, 456, 415 S.E.2d 801, 805 (1992) (an ordinance is defective under Article VIII, § 14 because it attempted to limit the authority granted to the Department of Highways by state law).

Second, the SCSPA argues that County's Resolution and Ordinance are inconsistent with the S.C. Code Ann. §§ 54-3-110 through -140. We conclude the statutory provisions and the ordinance are consistent because the provisions are silent on the issue of whether public entities may develop a terminal on the Savannah River. We discern no conflict between these provisions and County's Resolution and Ordinance.

Third, the SCSPA argues that County's Resolution and Ordinance are inconsistent with the general law of the state because the SCSPA claims to have a superior eminent domain power with regard to developing a port or terminal and thus a superior development power. The SCSPA argues that § 54-3-150 gives it a "super" power of condemnation, so that even if County had the power to condemn the Proposed Site and develop a terminal, the SCSPA would have an overriding authority to condemn the previously condemned land and hence has a superior right to develop a port or terminal. We conclude the statutory provision and the ordinance are consistent because the provision is silent on the issue of whether the SCSPA can prevent other entities from port or terminal development.

Yet, we address the issue of priority of eminent domain rights between the SCSPA and County because there are ripening seeds of a controversy. See Sunset Cay v. City of Folly Beach, 357 S.C. 414, 593 S.E.2d 462 (2004). Eminent domain is an attribute of sovereignty. Because

condemnation by a state agency is on behalf of the State, a state agency's power of eminent domain is superior to that of a political subdivision. Riley v. S.C. Hwy. Dept., 238 S.C. 19, 118 S.E.2d 809 (1961). We conclude the SCSPA's right of condemnation regarding the Proposed Site is superior to County's condemnation right.

CONCLUSION

We conclude County is not preempted from the field of port and terminal development on the Savannah River because the General Assembly has not manifested an intent that no other enactment touch upon the subject. Further, County has the power and authority to create a county-owned public marine terminal on the Savannah River, and this power is consistent with the Constitution and general law of the State. However, the SCSPA's right of condemnation is superior to County's right. Finally, we find it unnecessary to address the SCSPA's request for injunctive relief. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issues is dispositive).

TOAL, C.J., MOORE, and WALLER, JJ., concur. Acting Justice John C. Few concurring in part and dissenting in part in a separate opinion.

ACTING JUSTICE FEW: I agree that Jasper County has the power to construct a marine shipping terminal on the Savannah River. I also agree that under normal circumstances this action would not conflict with State law, and therefore would not be preempted. Under the specific facts of this case, however, I believe that the County's ordinance is in conflict with the Ports Authority's enabling legislation in two important respects. First, the ordinance interferes with and hinders specific action being taken by the Ports Authority to acquire the Proposed Site. Second, it creates problems of interstate relations with the State of Georgia, the current owner of the Proposed Site. In these two ways, the County ordinance creates significant obstacles to the ability of the Ports Authority to fulfill the objectives set forth in the Ports Authority's enabling legislation, and it hinders the accomplishment of the purpose of that legislation. Therefore, the County ordinance is preempted. See State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 186, 525 S.E.2d 872, 877 (2000). To this extent, I respectfully dissent. I would grant an injunction prohibiting the implementation of Jasper County's ordinance so long as the Ports Authority is actively pursuing efforts to condemn the Proposed Site and build a marine terminal there.

The County ordinance interferes with and hinders the Ports Authority's efforts to acquire the Proposed Site. The Ports Authority has unanimously adopted a resolution to undertake efforts to acquire, and if necessary condemn, the Proposed Site. Pursuant to that resolution, the Ports Authority has exercised its responsibility to have the property appraised as required in South Carolina Code § 28-2-70, and it has initiated this lawsuit. Jasper County has also initiated efforts to condemn the Proposed Site, and has actually filed a condemnation action. When two governmental entities attempt to condemn the same property, there is an obvious conflict between those efforts. As the majority makes clear, the Ports Authority's condemnation power is superior to that of Jasper County. Therefore, the simple fact that Jasper County is trying to condemn the same property interferes with and hinders the efforts of the Ports Authority to acquire it.

In addition, there are specific ways in which Jasper County's condemnation efforts conflict with the efforts of the Ports Authority. For example, the Ports Authority has attempted to exercise its condemnation power by first initiating negotiations with the State of Georgia to purchase the Proposed Site. The Ports Authority has said it wants to file a condemnation action only if the negotiations fail. The existence of Jasper County's condemnation proceeding has very real potential to make these negotiation efforts impractical, if not impossible. In the face of this competing action by Jasper County, the Ports Authority will have to change its approach, and initiate its own condemnation action as a first resort, instead of as a last resort. Therefore, the County ordinance authorizing the Jasper County condemnation is interfering with the Ports Authority's ability to accomplish its goal in the manner it chooses. This interference is a significant obstacle to the fulfillment of the objectives of Ports Authority's enabling act.

The County's ordinance also poses potential problems of interstate relations because the ordinance seeks to condemn property owned by the State of Georgia. The issue regarding these problems is not whether there really is a potential problem. Rather, the issue is whether the Ports Authority, as the arm of State government with irrefutable authority to handle interstate relations regarding the harbor and lower end of the River,[1] reasonably believes there is a potential problem. It is not for this Court, and it is certainly not for Jasper County, to say that the Ports Authority is incorrect in its assessment as to what the issues and potential problems are in this State's relations with Georgia on the subject of a port on the Savannah River. Interstate relations are, at least in this instance, an executive branch issue. In any instance, interstate relations should be handled on the State level; Counties should play no role in affecting relations between the States. The Ports Authority's determination that Jasper County's ordinance interferes with interstate relations regarding the Savannah River requires a finding that the ordinance is an obstacle to accomplishing the purposes and objectives of the Ports Authority's enabling act.

[1] See footnote 3.

The first potential problem of interstate relations pointed out by the Ports Authority is that an ongoing dispute between two governmental entities in South Carolina as to which has the power to condemn the property puts both of them at a negotiating disadvantage with the State of Georgia.

Next, the Ports Authority points out that Jasper County has already failed in one effort to condemn this same property, and the record in this case reveals several potential problems with the current condemnation. In particular, the question arises from the record in this case as to whether the proposed condemnation is for public use, given the manner in which the County proposes to construct and operate the terminal. The existence of a competing condemnation proceeding with such significant potential defects has the potential to be a major distraction to the Ports Authority's efforts to acquire the property, and an advantage to the State of Georgia.

Even more importantly, the Ports Authority points out that the ongoing litigation between the County and Georgia is a significant obstacle to the efforts of South Carolina to negotiate a compact with the State of Georgia on all issues regarding the Savannah River, from its headwaters in the Northwestern corner of our State, to the coast, including, but certainly not limited to, the development and operation of a port. The Ports Authority has publicly stated that it wants to try to negotiate a resolution of these issues with Georgia, rather than to litigate them.

Finally, the existence of the Jasper County condemnation, and the danger of further litigation, give rise to the possibility that the State could be brought into a lawsuit in the federal courts of Georgia.

Turning to the applicable law, the federal courts, and this Court, have recognized three separate ways in which federal law preempts state or local law. Michigan Canners and Freezers Ass'n v. Agricultural Marketing & Bargaining, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed.2d 399 (1984); State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 186, 525 S.E.2d 872, 877 (2000). The majority has adopted this approach to determining whether State law preempts local law. Under the third of these preemption categories, sometimes referred to as "implied conflict

preemption," local law is preempted "when the [local] law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of [State law].'" Michigan Canners & Freezers, 467 U.S. at 469, 104 S.Ct. at 2523 (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)). As stated by this Court, under this third category, local law is preempted ". . . to the extent . . . the [local] law hinders the accomplishment of the [State] law's purpose." 192 Coin-Operated Video Game Machines, 338 S.C. at 186, 525 S.E.2d at 877.

Two of the purposes of the Ports Authority's enabling act are to allow the Ports Authority to purchase or condemn land for the construction and operation of port and shipping facilities,[2] and to manage interstate relations with Georgia regarding a port on the Savannah River.[3] Jasper County's condemnation ordinance hinders the accomplishment of these purposes by interfering with the actions of the Ports Authority as described above. The ordinance is therefore preempted.

The next question is whether or not it is appropriate for this Court to use its injunctive power. I believe that it is.

The majority makes clear that the Ports Authority's condemnation power is superior to that of Jasper County. It should follow that the Ports Authority can exercise that power in the manner it chooses. Once a

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[2] South Carolina Code §§ 54-3-130(2); 54-3-140(2); and 54-3-150.

[3] While the purpose to "manage interstate relations" is not explicitly stated in the enabling act, it is clearly implied. With regard to ports, the State acts through the Ports Authority. *See generally* South Carolina Code § 54-3-110. In some sections specifically, such as in section 54-3-130(8), and generally in others, the Ports Authority is given the responsibility of developing port facilities on the Savannah River. The introductory paragraph to section 54-3-130, which sets forth the "purposes," states that the specifically listed "purposes" are "intended to broaden and not to restrict any other powers . . . ." Therefore, if the State is going to develop port facilities on that River, the Ports Authority is the entity that must manage relations with Georgia, to the extent that is necessary.

governmental entity decides to exercise its lawful authority to do anything, it is within the discretion of that governmental entity to decide how it wants to accomplish the task. The Ports Authority could choose to initiate its own condemnation action, and by doing so, stop the pending action by Jasper County. However, the Ports Authority has stated it does not choose to immediately initiate a condemnation proceeding, but rather prefers to exercise its condemnation power by first attempting to negotiate a solution with Georgia.

This course of action has numerous obvious advantages over immediate litigation, including the possibility of avoiding litigation altogether. In addition, it is consistent with sound public policy, and is contemplated by statutory provisions regarding condemnation. See, e.g., South Carolina Code § 28-2-70.

As explained above, however, the existence of the action by Jasper County interferes with the Ports Authority's ability to pursue its statutory authority to negotiate before filing a lawsuit. Therefore, I believe it is not enough merely to declare the superiority of the Ports Authority's condemnation authority. Going no farther than this would require the Ports Authority to take a course of action it does not deem to be advisable, immediate litigation, in order to exercise its condemnation power. Rather, the only way the Ports Authority can exercise the superior power the majority of this Court recognizes it has, in the manner the Ports Authority should be allowed to choose, is for this Court to stop Jasper County's condemnation action by issuing an injunction.

The Supreme Court of South Carolina

In the Matter of Alex J. Newton, Respondent.

ORDER

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

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

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

any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

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

Columbia, South Carolina

March 22, 2006

The Supreme Court of South Carolina

In the Matter of Jack L. Schoer, Respondent.

ORDER

The Office of Disciplinary Counsel petitions the Court to place respondent on interim suspension pursuant to Rule 17(b) and (c), RLDE, of Rule 413, SCACR. The petition is granted. Respondent is hereby suspended from the practice of law in this State until further order of the Court.

IT IS SO ORDERED.

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

Columbia, South Carolina

March 22, 2006

The Supreme Court of South Carolina

In the Matter of Harriett E. Wilmeth, Respondent.

ORDER

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

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

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

office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

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

Columbia, South Carolina
March 22, 2006

The Supreme Court of South Carolina

In the Matter of Barry T. Wimberly, Petitioner.

ORDER

On December 1, 2003, petitioner was suspended from the practice of law for twelve (12) months. In the Matter of Wimberly, 356 S.C. 436, 590 S.E.2d 335 (2003). Petitioner has filed a Petition for Reinstatement pursuant to Rule 33, RLDE, Rule 413, SCACR.

Petitioner's Petition for Reinstatement is hereby granted.

IT IS SO ORDERED.

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

Columbia, South Carolina

March 27, 2006

The Supreme Court of South Carolina

In the Matter of Kevin M. Cunningham, Respondent.

ORDER

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

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

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

office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

IT IS SO ORDERED.

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

Columbia, South Carolina
March 29, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Willie James, Petitioner

v.

State of South Carolina, Respondent

Appeal From Florence County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 4099
Submitted January 30, 2006 – Filed March 27, 2006

REVERSED AND REMANDED

Assistant Appellate Defender Eleanor Duffy Cleary, Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott and Assistant Attorney General Sabrina Todd, Office

of Attorney General, all of Columbia, for Respondent.

GOOLSBY, J.: This is a PCR case. The petitioner Willie James contends his counsel was ineffective for not objecting to the State's failure to provide written notice to him of its intention to seek a sentence of life imprisonment without parole as required by S.C. Code Ann. § 17-25-45(H) (2003). The trial court dismissed James' petition. We reverse and remand for resentencing.

An indictment charged James with armed robbery. Because he had a prior armed robbery conviction, the State sought to have him sentenced to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45(A)(1) (2003). South Carolina Code section 17-25-45(H) provides the following regarding notice:

> Where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten days before trial.[1]

The trial court found defense counsel received the required written notice but James did not; however, the trial court also found James had actual notice of the State's intention to seek a sentence of life imprisonment without parole.

Our recent case of State v. Johnson[2] controls the result here. In Johnson, a majority of this court held insufficient the notice required by

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[1] S.C. Code Ann. § 17-25-45(H) (2003).

[2] 347 S.C. 67, 552 S.E.2d 339 (Ct. App. 2001), cert. denied (S.C. March 6, 2002).

section 17-25-45(H) where the State served written notice upon the defendant but not upon his counsel, notwithstanding both the defendant and his lawyer had actual notice of the State's intention to seek a sentence of life imprisonment without parole. The court observed:

> By its words in the recidivist statute, the General Assembly has mandated that the solicitor "must" notify the defendant and the defendant's counsel in writing if the solicitor intends to seek a life sentence without the possibility of parole. For this Court to dismiss the clear and unambiguous language of the statute and merely require the defendant's counsel to have actual notice of the solicitor's intent to seek life without parole would have the effect of amending the statute. In our view, actual notice under section 17-25-45(H) is insufficient unless and until the General Assembly decides otherwise and amends the statute itself.[3]

As noted in footnote two, supra, the supreme court declined to review the decision. It did so, notwithstanding one judge dissented.[4]

We discern no meaningful distinction between the Johnson case and the one here. The statute in question requires both a defendant and defendant's counsel to receive written notice of the State's intention. In Johnson, the solicitor notified the defendant in writing but not the defendant's counsel; here, the solicitor notified the defendant's counsel in writing but not the defendant. To paraphrase the majority's words in Johnson, for this court to dismiss the clear and unambiguous language of the statute and merely require the defendant to have actual notice of the solicitor's intent to seek life

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[3] 347 S.C. at 70, 552 S.E.2d at 340.

[4] See Rule 226(b)(2), SCACR (listing a dissent in the decision of the Court of Appeals as a factor in determining whether to grant certiorari).

imprisonment without parole would have the effect of amending the statute. The statute is the same today as it was when this court decided Johnson.

Regarding the State's argument that written notice to defense counsel sufficed to provide written notice to the defendant because defense counsel served as the defendant's agent, we can only say not in this case – not where the statute, as this court held in Johnson, in clear and unambiguous language requires both a defendant and his counsel to be served with written notice. If a defendant's actual notice is insufficient to satisfy the requirements of section 17-25-45(H), then his imputed knowledge certainly is.

To establish a claim of ineffective assistance of counsel, a PCR applicant must prove trial counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability the result would have been different but for counsel's error.[5] James made such a showing here when he proved counsel did not raise the issue of the State's failure to serve the defendant with written notice, even though the statute, as this court later held, plainly required a defendant to be so served, and as a result James was sentenced to life imprisonment without the possibility of parole in violation of the statute. This failure obviously prejudiced him. Moreover, that this court decided Johnson after the trial court sentenced James is of little moment in view of the "clear and unambiguous language"[6] of section 17-25-45(H).

REVERSED AND REMANDED.

HUFF and KITTREDGE, JJ., concur.

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[5] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[6] 347 S.C. at 70, 552 S.E.2d at 340.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Douglas J. Menne, as Trustee of the First Supplemental Trust Agreement created by Douglas J. Menne dated 11/22/96 (as amended), Appellant,

v.

Keowee Key Property Owners' Association, Inc., Respondent.

Appeal From Oconee County
Ellis B. Drew, Jr., Master-In-Equity

Opinion No. 4100
Heard March 7, 2006 – Filed April 3, 2006

AFFIRMED

Andrea Hawkins, of Spartanburg, and Christopher M. Kelly, of Greenville, for Appellant.

James B. Richardson, Jr., of Columbia, and Samuel F. Albergotti, of Anderson, for Respondent.

GOOLSBY, J.: Douglas Menne brought this declaratory judgment action against the Keowee Key Property Owners' Association, Inc. seeking a determination regarding the validity of a restrictive covenant that prevents him from building an individual boat dock on his lakefront property. The master in equity ruled the covenant was valid and enforceable. Menne appeals. We affirm.

FACTS

Keowee Key is a gated residential community on Lake Keowee. The community is divided into units, with each unit further divided into multiple lots. Keowee Key, a large area comprised of over 2,200 lots, covers approximately 1,600 acres. Each unit contains its own distinct set of restrictive covenants that apply only to the lots within that unit.

In 1985, Menne's mother purchased from the Lake Keowee Development Corporation Lot 24, a lakefront tract within Unit 20 of Keowee Key. Unit 20 abuts the largest cove at Lake Keowee, informally called the Leisure Trail Cove (the "Cove").

Menne's mother purchased the property subject to a restrictive covenant that the developer recorded in Oconee County on April 19, 1985. The covenant prohibits construction of individual boat docks in Unit 20 and provides in relevant part as follows:

> No docks or other structures of a permanent or temporary nature shall be placed in or upon the waters or the shoreline of Lake Keowee by any individuals, partnership or corporation other than Lake Keowee Development Corporation, its successors or assigns.

The developer created the Leisure Trail, a walking path along the edge of the Cove at Lake Keowee, for the enjoyment of all Unit 20 property owners, including the owners of interior lots. The developer believed the

natural aesthetics of the Leisure Trail would be better preserved by a few community boat docks, or "cluster docks," rather than numerous individual boat docks. The covenant maintains this appearance by preventing the construction of individual boat docks. In lieu of individual docks, however, Unit 20 property owners can lease boat slips from a nearby community boat dock, the Gazebo Dock.

At the time Menne's mother purchased Lot 24 in 1985, the Cove contained community docks in two locations, one consisting of 58 slips (the "Main Dock") and another consisting of the 18-slip Gazebo Dock, for a total of 76 slips. At one end of the Cove is Unit 21, which, like Unit 20, borders the Cove. At the other end of the Cove formerly stood the Yacht Club. It housed a restaurant and meeting area. The Leisure Trail started near the Yacht Club, traversed Unit 20, and ended within Unit 21.[1] From the time she bought the property, Menne's mother rented a boat slip at the Gazebo Dock.

In 2000, Menne took over ownership of Lot 24 from his mother subject to the covenant.[2] Menne admittedly knew when he acquired the property that the covenant prohibited Lot 24 from having an individual dock. He had accompanied his mother when she purchased the property in 1985. Menne also knew the covenant applied only to Unit 20 and did not apply to the other units in the Cove.

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[1] Unit 21, which was undeveloped in 1985, has restrictive covenants that are similar, but not identical, to the Unit 20 restriction. Unit 21 borders and shares the Leisure Trail with Unit 20.

[2] Menne's mother originally held title individually and later transferred title to the property to her revocable trust. Menne holds title as trustee for his revocable trust.

In 2001, Menne contacted the Keowee Key Property Owners' Association[3] and requested permission to build an individual boat dock on Lot 24 so he could house his three watercraft on the lake. Menne explained that, although he continued to lease one boat slip at the Gazebo Dock (as his mother had done), he wished to dock more boats at Lake Keowee because, in addition to his pontoon boat, he now owned a ski boat and jet ski used by his children. Menne complained about having to remove his watercraft from the lake on a daily basis. He said it cut into the amount of "water time" that he had on the lake. He viewed the Unit 20 restriction as "neither fair, logical or legal."

The Association rejected Menne's request based on the restrictive covenant in Unit 20. The Association noted no private docks existed in the restricted area and it was in the process of constructing additional community boat slips.[4]

Menne subsequently enlisted the help of an Ohio attorney to negotiate with the Association about building an individual dock on Lot 24. Menne met with the Association's general manager, David Coe, but the Association maintained its position that the Unit 20 covenant prevented Menne from constructing an individual boat dock on Lot 24.

Menne thereafter filed this declaratory judgment action seeking a determination that the Unit-20 covenant could no longer be enforced because of a change of conditions in the area. The master in equity reviewed the pleadings, stipulations, testimony, and exhibits, and walked the Leisure Trail with the consent of all parties, and concluded no radical change of conditions had occurred that would support an invalidation of the Unit 20 restrictive covenant regarding the construction of private docks. The master noted the Leisure Trail had retained its aesthetic appeal despite the addition of a few

[3] The Association is the successor to Realtec, Inc., the parent corporation of the Lake Keowee Development Corporation, which had originally deeded Lot 24 to Menne's mother.

[4] Menne now leases two community boat slips from the Association, both of which are located at the Gazebo Dock near Menne's lot.

community docks in the Cove. Finally, the master ordered Menne to pay attorney fees and costs of $56,273.25 to the Association.

LAW/ANALYSIS

I. Change of Conditions

Menne contends the master erred in failing to invalidate the restrictive covenant based on a change of conditions.

Under South Carolina law, a party may bring a declaratory judgment action to invalidate a restrictive covenant based on a change of conditions.[5] The party bringing the action bears the burden of proof by the preponderance of the evidence.[6]

In an action for a declaratory judgment, "affirmative relief may be granted against a restrictive covenant where there is such a change in the character of the neighborhood as to render the enforcement of the covenant valueless to the covenantee and oppressive and unreasonable as to the covenantor."[7] A party seeking to annul a restrictive covenant must show the change of conditions represented so radical a change that the original purpose of the restrictive covenant can no longer be realized.[8] Even if, however, a

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[5] Flinkingshelt v. Johnson, 258 S.C. 77, 187 S.E.2d 233 (1972); Dunlap v. Beaty, 239 S.C. 196, 122 S.E.2d 9 (1961); Martin v. Cantrell, 225 S.C. 140, 81 S.E.2d 37 (1954).

[6] Martin, 225 S.C. at 144, 81 S.E.2d at 38-39.

[7] Dunlap, 239 S.C. at 210, 122 S.E.2d at 15.

change of conditions has occurred and inflicts a hardship upon the servient estate, equity will enforce a restrictive covenant if it "remain[s] of substantial value."[9]

Since Menne's mother purchased Lot 24 in 1985, the Cove has changed. When she purchased Lot 24, the Cove contained 76 community boat slips—18 slips at the Gazebo Deck and 58 slips at the Main Dock. In 1992, the Association built a 24-slip cluster dock off the Leisure Trail, increasing the total number of boat slips to 100. Like the Gazebo Dock, this cluster dock accommodates property owners who could not build individual docks on the lake because they purchased property along the Leisure Trail. This particular cluster dock was built for Unit 21 property owners. In 1996, the Association added 12 slips to the Main Dock, increasing the total number of slips in the Cove to 112. In 2001, the Association built a 20-slip cluster dock off the Leisure Trail called the Tall Ships Dock. These additional slips, combined with the 2-slip Fordco Dock that had been in the Cove for an indeterminate number of years, brought the total number of slips near the Leisure Trail in the Cove to 134 overall.

The Association also has plans for future development. It has submitted an application to Duke Energy Corp. to build another cluster dock comprised of 14 slips next to the Main Dock at the beginning of the Leisure Trail.

The Yacht Club was razed and replaced with a town house development called Sunrise Pointe between 2001 and 2003. The developer of Sunrise Pointe built an 8-slip cluster dock and has already submitted a proposal to increase the dock to 12 slips. Sunrise Pointe is not located on the Leisure Trail and is not governed by the Association, but it is within the

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[8] Inabinet v. Booe, 262 S.C. 81, 202 S.E.2d 643 (1974); Pitts v. Brown, 215 S.C. 122, 54 S.E.2d 538 (1949); Shipyard Property Owners' Ass'n v. Mangiaracina, 307 S.C. 299, 414 S.E.2d 795 (Ct. App. 1992).

[9] Circle Square Co. v. Atlantis Dev. Co., 267 S.C. 618, 630, 230 S.E.2d 704, 709 (1976).

Cove. The old 2-slip Fordco Dock near the Sunrise Pointe property is slated to be removed, however.

The purpose of the Unit 20 covenant is to preserve the aesthetics of the Leisure Trail that runs along the Cove and crosses Unit 20. The developer believed prohibiting individual docks along the Unit 20 shoreline would best preserve the Leisure Trail. By building community docks, the Leisure Trail would remain open along the Unit 20 shoreline and Unit 20 property owners would still have access to the lake. To this end, the original purpose of the Unit 20 covenant can and continues to be realized.

As of this date, the Leisure Trail enjoys an open shoreline within Unit 20. No individual boat docks have been added to the Unit 20 shoreline and there have been no violations of the covenant since it was recorded. Although community docks have been built elsewhere in the Cove, no community docks have been added to the Unit 20 shoreline since Menne's mother purchased Lot 24. Consequently, there has been little change to the aesthetics of the Leisure Trail within Unit 20, let alone a radical change warranting the invalidation of the Unit 20 covenant at issue here.

Moreover, the Association's enforcement of the Unit 20 covenant is not oppressive to Menne. Because Menne currently leases two boat slips from the Association at the Gazebo Dock, two of his three watercraft are already housed on the lake. Thus, even if there was a radical change of conditions within Unit 20, we do not believe the fact that Menne cannot house additional boats or other watercraft on the lake places such an exorbitant burden on him that the Unit 20 covenant should be invalidated.

II. Evidence of Changes Outside the Restricted Area

Menne argues the master erred in failing to consider evidence of changed circumstances outside the restricted area.

To invalidate restrictive covenants based on a change of conditions, the changed conditions must occur within the restricted area, i.e., within the area

where the covenants apply.[10] In Flinkingshelt v. Johnson,[11] our supreme court explained the relevant area must end somewhere and different conditions naturally will exist outside the restricted zone:

> It is obvious that any restricted area, whether it be residential or industrial, must have a demarcation line; it must end somewhere. Where the restricted area ends, other unrestricted development will or may foreseeably occur. To hold that commercial development in an unrestricted area adjoining a restricted area would allow the lifting of the residential restrictions as to property adjoining or in the vicinity of the unrestricted area, would be to expose all restrictions to eventual invalidation. It would remove the sanctity of long standing, long respected contractual agreements and place them at the whim of parties not privy to the agreements.[12]

Here, Unit 20 is considered the restricted area because the covenant at issue applies only to the lots within Unit 20 and prohibits those lot owners from building individual boat docks on their property. The alleged change of conditions in the other units of the Cove is irrelevant to the determination of whether the Unit 20 covenant should be invalidated because of changed conditions.

III. Alleged Ambiguity of the Restrictive Covenant

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[10] Flinkingshelt, 258 S.C. at 87, 187 S.E.2d at 238; see also Inabinet, 262 S.C. at 83-84, 202 S.E.2d at 644-45; Martin, 225 S.C. at 147-48, 81 S.E.2d at 40-41.

[11] 258 S.C. 77, 187 S.E.2d 233.

[12] Id. at 87, 187 S.E.2d at 238.

Menne asserts the master erred in concluding the language of the restrictive covenant is clear and unambiguous.

"[W]here the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning."[13]

The Unit 20 restrictive covenant provides as follows:

> No docks or other structures of a permanent or temporary nature shall be placed in or upon the waters or the shoreline of Lake Keowee by any individuals, partnership or corporation other than Lake Keowee Development Corporation, its successors or assigns.

The Association is the successor of the Lake Keowee Development Corporation. Thus, the Association can build docks on Lake Keowee, while individual Unit 20 property owners, such as Menne, cannot. We conclude the language is clear and unambiguous.

IV. Weight of the Testimony

Menne next contends the master erred in giving the testimony of his witness, real estate appraiser Luke Fields, less weight than the testimony of the Association's witness, local realtor Dan Suddeth, regarding the value of Menne's lakefront property with and without a dock.

"The credibility of testimony is a matter for the finder of fact to judge."[14] "Because the appellate court lacks the opportunity for direct

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[13] Mangiaracina, 307 S.C. at 308, 414 S.E.2d at 801; see also Harvey v. Marsh Hawk Plantation, 310 S.C. 355, 356, 426 S.E.2d 792, 793 (1993) ("An unambiguous covenant will be enforced according to its obvious meaning.").

observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."[15] Nothing in the record persuades us to overturn the master's view of the evidence.

Moreover, we find no error in the master's determination that, even if Menne's lot would be worth more with an individual dock, this would not justify the invalidation of the restrictive covenant where there is no radical change in the restricted area and the covenant still retains substantial value to the residential community.

V. Complaints by Other Residents

Menne argues the master erred in excluding evidence of other residents' complaints about the addition of more community docks within the Cove.

The admission or exclusion of evidence is within the sound discretion of the trial court, whose ruling will not be reversed on appeal absent an abuse of discretion.[16] "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support."[17] "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice . . . ."[18]

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[14] South Carolina Dep't of Soc. Servs. v. Forrester, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984).

[15] Id.

[16] Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005).

[17] Id. at 26, 609 S.E.2d at 509.

[18] Id.

Menne offered several letters from Unit 21 property owners who objected to the addition of boat slips to the Unit 21 community dock, a dock that lies outside the restricted area. Menne argued the letters showed the Association had notice of changed conditions due to continued expansion within the Cove. The master excluded the letters as hearsay and irrelevant. We find no abuse of discretion in this instance. The only pertinent evidence of changed conditions is of those changes occurring within the restricted area, i.e., Unit 20.

VI. Motion to Amend the Pleadings

Menne asserts the master erred in denying his motion to amend his pleadings to include causes of action for misrepresentation and estoppel.

The master denied Menne's motion under Rule 15(b), SCRCP to amend his pleadings to conform to the evidence, finding the evidence had not established either cause of action. Menne argued the Association had represented Keowee Key as being a complete community that was already developed. He further argued the covenant prohibited the addition of any docks, even by the Association. Menne's interpretation of the covenant is clearly not supported by the evidence. Moreover, because Menne admitted the Association never told him that additional community docks would not be built within Unit 20 or elsewhere in the Cove, there is no evidence establishing either misrepresentation or equitable estoppel.[19]

VII. Attorney Fees

Menne lastly argues the master erred in ordering him to pay $56,273.25 in attorney fees and costs to the Association.

[19] See Harvey v. Strickland, 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002) ("A motion to amend is addressed to the sound discretion of the trial court, and the party opposing the motion has the burden of establishing prejudice.").

As a general rule, a party may not recover attorney fees absent a contract or statute.[20] "When there is a contract, the award of attorney[] fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown."[21]

"There are six factors to consider in determining an award of attorney[] fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained."[22] An award of attorney fees will be affirmed on appeal if there is sufficient evidentiary support in the record for each factor.[23]

In this case, the "Amended and Restated Declaration of Protective Covenants of Keowee Key"[24] authorize the Association to recover attorney fees in the event it is successful in the defense of the provisions of the Declaration.[25] The master thoroughly examined the factors that determine an award of attorney fees and concluded the evidence supported an award of

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[20] Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993).

[21] Id.

[22] Id. at 494, 427 S.E.2d at 660.

[23] Id. at 494, 427 S.E.2d at 661.

[24] The Declaration provides: "Declarant and each person to whose benefit this Declaration inures may proceed at law or in equity to maintain any action for the enforcement or defense of any provisions of this Declaration, and if such party is successful, shall be entitled to recover reasonable expenses, including attorney[] fees."

[25] See, e.g., Seabrook Island Property Owners' Ass'n v. Berger, 365 S.C. 234, 239, 616 S.E.2d 431, 434 (Ct. App. 2005) ("Restrictive covenants are contractual in nature.").

$56,273.25 to the Association. The record fully supports the master's findings.

AFFIRMED.

HUFF and STILWELL, JJ., concur.