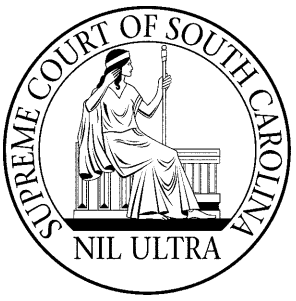

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 20

May 13, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Theodore Scott Geller, Respondent.

Opinion No. 26488
Submitted April 25, 2008 – Filed May 12, 2008

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Jr., Assistant Disciplinary Counsel, of Columbia, for the Office of Disciplinary Counsel.

Theodore Scott Geller, of Worcester, Massachusetts, pro se.

PER CURIAM: By way of the attached order of the Supreme Judicial Court for Suffolk County, Commonwealth of Massachusetts, respondent was disbarred from the practice of law in Massachusetts.

The Clerk of this Court sent a letter via certified mail to respondent notifying him that, pursuant to Rule 29(b), RLDE, Rule 413, SCACR, he had thirty (30) days in which to inform the Court of any claim he might have that disbarment in this state is not warranted and the reasons for any such claim. No response was received. The Office of Disciplinary Counsel filed a response stating it has no information that would indicate the imposition of identical discipline in this state is not warranted.

We find disbarment is the appropriate sanction to impose as reciprocal discipline in this matter. See In the Matter of Sipes, 367 S.C. 368, 626 S.E.2d 802 (2006); In the Matter of Wolf, 357 S.C. 399, 594 S.E.2d 157 (2004); In the Matter of Edwards, 323 S.C. 3, 448 S.E.2d 547 (1994). We also find a sufficient attempt has been made to serve notice on respondent, and find none of the factors in Rule 29(d), RLDE, Rule 413, SCACR, present in this matter. We therefore disbar respondent from the practice of law in this state, retroactive to December 20, 2007, the date respondent was disbarred from the practice of law in Massachusetts.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

TOAL, C.J., MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.	SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY NO: BD-2007-104

IN RE: THEODORE S. GELLER

AMENDED JUDGMENT OF DISBARMENT

This matter came before the Court, Cowin, J., on an Affidavit of Resignation submitted by Theodore S. Geller pursuant to S.J.C. Rule 4:01, .sec. 15(2) with the Recommendation and Vote of the Board of Bar Overseers filed by the Board on December 17, 2007. On December 20, 2007, this Court entered a Judgment of Disbarment accepting the lawyer's Affidavit of Resignation and disbarring the lawyer from the practice of law in the Commonwealth retroactive to November 15, 2007, the date of the lawyer's temporary suspension. Bar Counsel, on January 3, 2008, filed with the Court a letter requesting that the Court amend the December 20, 2007 Judgment of Disbarment, stating that the lawyer failed to comply with the temporary order of suspension.

The parties having waived hearing and assented to an entry of Judgment accepting the Affidavit of Resignation of the lawyer effective on December 20, 2007;

it is ORDERED and ADJUDGED that:

1. The Affidavit of Resignation be accepted and that THEODORE S. GELLER is hereby disbarred from the practice of law in the Commonwealth effective December 20, 2007, and the lawyer's name is forthwith stricken from the Roll of Attorneys.

It is FURTHER ORDERED that:

2. Within fourteen (14) days of the date of entry of this Judgment, the lawyer shall:

a) file a notice of withdrawal with every court, agency, or tribunal before which a matter is pending, together with a copy of the notices sent pursuant to paragraphs 2{c) and 2(d) of this Judgment, the client's or clients' place of residence, and the case caption and docket number of the client's or clients' proceedings;

b) resign all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other
fiduciary, attaching to ,the resignation a copy of the notices sent to the wards, heirs, or beneficiaries pursuant to paragraphs 2(c) and 2{d) of this Judgment, the place of residence of the wards, heirs, or beneficiaries, and the case caption and docket number of the proceedings, if any;

c) provide notice to all clients and to all wards, heirs, and beneficiaries that the lawyer has been disbarred; that he is disqualified from acting as a lawyer; and that, if not represented by co-counsel, the client, ward, heir, or beneficiary should act promptly to substitute another lawyer or fiduciary or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;

d) provide notice to counsel for all parties (or, in the absence of counsel, the parties) in pending matters that the lawyer has been disbarred and, as a consequence, is disqualified from acting as a lawyer;

e) make available to all clients being represented in pending matters any papers or other property to which they are entitled, calling attention to any urgency for obtaining the papers or other property;

f) refund any part of any fees paid in advance that have not been earned; and

g) close every IOLTA, client, trust or other fiduciary account and properly disburse or otherwise
transfer all client and fiduciary funds in his possession, custody or control.

All notices required by this paragraph shall be served by certified mail, return receipt requested, in a form approved by the Board.

3. Within twenty-one (21) days after the date of entry of this Judgment, the lawyer shall file with the Office of the Bar Counsel an affidavit certifying that the lawyer has fully complied with the provisions of this Judgment and with bar disciplinary .rules. Appended to the affidavit of compliance shall be:

a) a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries, attorneys, courts and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. Supplemental affidavits shall be filed covering subsequent return receipts and returned mail. Such names and addresses of clients shall remain confidential unless otherwise requested in writing by the lawyer or ordered by the court;

b) a schedule showing the location, title and account number of every bank account designated as an IOLTA, client, trust or other fiduciary account and of every account in which the lawyer holds or held as of the entry date of this Judgment any client, trust or fiduciary funds;

c) a schedule describing the lawyer's disposition of all client and fiduciary funds in the lawyer's possession, custody or control as of the entry date of this Judgment or thereafter;

d) such proof of the proper distribution of such funds and the closing of such accounts as has been requested by the bar counsel, including copies of checks and other instruments;

e) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

f) the residence or other street address where communications to the lawyer may thereafter be directed.

The lawyer shall retain copies of all notices sent and shall maintain complete records of the steps taken to comply with the notice requirements of S.J.C. Rule 4:01, Section 17.

4. Within .twenty-one (21) days after the entry date of this Judgment, the lawyer shall file with the Clerk of the Supreme Judicial Court for Suffolk County:

a) a copy of the affidavit of compliance required by paragraph 3 of this Judgment;

b) a list of. all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice; and

c) the residence or other street address where communications to the lawyer may thereafter be directed.

By the Court (Cowin, J.),
Assistant Clerk

Entered: January 8, 2008

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Leroy McGrier, Appellant.

Appeal From Abbeville County
Kenneth G. Goode, Circuit Court Judge

Opinion No. 26489
Heard February 21, 2008 – Filed May 12, 2008

REVERSED

Appellate Defender LaNelle C. DuRant, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, and Ernest Charles Grose, Jr., of Greenwood, for Appellant.

John Benjamin Aplin, of SC Department of Probation Parole and Pardon, of Columbia, for Respondent.

JUSTICE BEATTY: In this direct appeal, Leroy McGrier challenges the circuit court's order revoking six months for violating the conditions of the Community Supervision Program ("CSP").

McGrier contends the CSP statute, specifically section 24-21-560(D) of the South Carolina Code, is unconstitutional given a revocation from the CSP resulted in the imposition of a greater sentence than his original sentence without the benefit of the requisite constitutional protections. We reverse.

FACTUAL/PROCEDURAL HISTORY

On November 16, 1999, McGrier pleaded guilty to two counts of distribution of crack cocaine (third offense). The circuit court judge sentenced McGrier to three years imprisonment on each count. The sentences were to be served concurrently.

On May 4, 2002, after serving eighty-five percent of the original term of imprisonment,[1] McGrier was released pursuant to section 24-

[1] Section 24-13-150(A) of the South Carolina Code provides in pertinent part:

> (A) Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, a prisoner convicted of a "no parole offense" as defined in Section 24-13-100 and sentenced to the custody of the Department of Corrections, including a prisoner serving time in a local facility pursuant to a designated facility agreement authorized by Section 24-3-20, is not eligible for early release, discharge, or community supervision as provided in Section 24-21-560, until the prisoner has served at least eighty-five percent of the actual term of imprisonment imposed. This percentage must be calculated without the application of earned work credits, education credits, or good conduct credits, and is to be applied to the actual term of imprisonment imposed, not including any portion of the sentence which has been suspended.

21-560[2] of the South Carolina Code to the CSP of the South Carolina Department of Probation, Parole, and Pardon Services (the Department). The ending date of McGrier's participation in the CSP was set for May 3, 2004.

On February 23, 2004, McGrier appeared before Circuit Court Judge Wyatt T. Saunders for a revocation hearing. After finding McGrier willfully violated the terms of the CSP, Judge Saunders revoked the CSP and ordered that McGrier be remanded to the custody of the South Carolina Department of Corrections for a period of four months.[3] After serving this sentence, McGrier was again released to

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S.C. Code Ann. § 24-13-150(A) (2007) (emphasis added). Distribution of crack cocaine, third offense, has been designated as a "no parole offense." S.C. Code Ann. § 24-13-100 (2007).

[2] Section 24-21-560(A) provides in relevant part:

> (A) Notwithstanding any other provision of law, except in a case in which the death penalty or a term of life imprisonment is imposed, any sentence for a "no parole offense" as defined in Section 24-13-100 must include any term of incarceration and completion of a community supervision program operated by the Department of Probation, Parole, and Pardon Services. No prisoner who is serving a sentence for a "no parole offense" is eligible to participate in a community supervision program until he has served the minimum period of incarceration as set forth in Section 24-13-150.

S.C. Code Ann. § 24-21-560(A) (2007).

[3] Sections 24-21-560(C) and (D) of the South Carolina Code provide in relevant part:

> (C) If the department determines that a prisoner has violated a term of the community supervision program and

the community supervision should be revoked, a probation agent must initiate a proceeding in General Sessions Court. The proceeding must be initiated pursuant to a warrant or a citation issued by a probation agent setting forth the violations of the community supervision program. The court shall determine whether:

(1) the terms of the community supervision program are fair and reasonable;
(2) the prisoner has complied with the terms of the community supervision program;
(3) the prisoner should continue in the community supervision program under the current terms;
(4) the prisoner should continue in the community supervision program under other terms and conditions as the court considers appropriate;
(5) the prisoner has wilfully violated a term of the community supervision program.

If the court determines that a prisoner has wilfully violated a term or condition of the community supervision program, the court may impose any other terms or conditions considered appropriate and may continue the prisoner on community supervision, or the court may revoke the prisoner's community supervision and impose a sentence of up to one year for violation of the community supervision program. A prisoner who is incarcerated for revocation of the community supervision program is not eligible to earn any type of credits which would reduce the sentence for violation of the community supervision program.

(D) If a prisoner's community supervision is revoked by the court and the court imposes a period of incarceration for the revocation, the prisoner also must complete a community supervision program of up to two years as

CSP on June 23, 2004, and assigned a supervision ending date of June 22, 2006.

On April 11, 2005, McGrier appeared before Judge Saunders for a CSP revocation hearing. At the conclusion of the hearing, Judge Saunders found McGrier had willfully violated the conditions of the CSP. As a result, Judge Saunders revoked CSP, sentenced McGrier to six months imprisonment, and recommended that McGrier participate in the Alcohol Treatment Unit (ATU) while incarcerated. Upon completion of this sentence, McGrier was again released to the CSP on September 30, 2005. On April 3, 2006, McGrier appeared before Judge Saunders for a CSP violation hearing. Finding that McGrier willfully violated the terms of the CSP, Judge Saunders permitted McGrier's continued participation in the CSP but ordered that he be held in jail until he was accepted into an in-patient substance abuse treatment program.

> determined by the department pursuant to subsection (B) when he is released from incarceration.
>
> A prisoner who is sentenced for successive revocations of the community supervision program may be required to serve terms of incarceration for successive revocations, as provided in Section 24-21-560(C), and may be required to serve additional periods of community supervision for successive revocations, as provided in Section 24-21-560(D). The maximum aggregate amount of time the prisoner may be required to serve when sentenced for successive revocations may not exceed an amount of time equal to the length of incarceration imposed for the original "no parole offense". The original term of incarceration does not include any portion of a suspended sentence.

S.C. Code Ann. § 24-21-560(C), (D) (2007).

On October 30, 2006, McGrier appeared before Circuit Court Judge J. Cordell Maddox, Jr., for violating the terms of the CSP. After finding that McGrier willfully violated the terms and conditions of the CSP, Judge Maddox revoked McGrier's CSP and sentenced him to ninety days imprisonment. As part of the order, Judge Maddox specified that McGrier would not be awarded time-served credit, good-time credit, or work credit. McGrier appealed this order to the Court of Appeals.

On January 27, 2007, McGrier was released from the Department of Corrections to the CSP with a supervision ending date of January 26, 2009. On February 6, 2007, McGrier was served with an arrest warrant in which it was alleged that he violated the terms and conditions of the CSP by failing to: report since his release date of January 27, 2007; report to be placed on an electronic monitoring device; and follow the advice and instructions of his probation agent.

Based on these alleged violations, McGrier appeared before Circuit Court Judge Kenneth G. Goode on April 2, 2007, for a CSP revocation hearing. At the hearing, McGrier, who was represented by counsel, contended he should be released from the CSP because "his [original] sentence has been satisfied by the earlier revocation." In support of this argument, McGrier primarily relied on Justice Pleicones' dissent in State v. Mills, 360 S.C. 621, 602 S.E.2d 750 (2004), to challenge the constitutionality of section 24-21-560(D). Ultimately, Judge Goode rejected this argument and found that McGrier had willfully violated the terms and conditions of the CSP. As a result, Judge Goode revoked McGrier's CSP and sentenced him to a six-month term of imprisonment. McGrier appeals from this order.

DISCUSSION

McGrier asserts the circuit court judge erred in finding section 24-21-460(D) constitutional. Because a revocation under the CSP statute can result in a sentence that exceeds the original sentence, McGrier contends he is entitled to the protections afforded all criminal

defendants. Specifically, he claims his sentence was increased without the benefit of the right to be informed of the charges against him, the right to counsel, and the right to a jury trial. Given that the revocation procedure under the CSP statute does not provide for these rights, McGrier claims the statute is unconstitutional.

In support of this argument, McGrier primarily relies on Justice Pleicones' dissent in State v. Mills, 360 S.C. 621, 602 S.E.2d 750 (2004). In Mills, the defendant pleaded guilty to distribution of crack cocaine, second offense, and was sentenced to six months imprisonment. After serving five months and two days, he entered a CSP which was to continue for two years. After a circuit court judge found the defendant violated the terms of his CSP, the judge revoked the defendant's CSP and sentenced him to five months and seven days pursuant to section 24-21-560(D) of the South Carolina Code. Id. at 622, 602 S.E.2d at 751.

Mills appealed the circuit court's order, arguing that section 24-21-560(D) limited his sentence for revocation to the remaining time left on his original sentence for the substantive crime. Mills claimed that because he had served five months and two days, as well as three weeks on a prior revocation, his revocation sentence should not have exceeded five days. Essentially, Mills averred the circuit court misinterpreted section 24-21-560(D) to permit a revocation sentence that was "almost double" his original sentence. Id. at 623, 602 S.E.2d at 751. According to Mills, his sentence for revocation could only equal the amount of unserved time remaining on his original sentence.

A majority of this Court rejected Mills' assertion on the ground his claim was not supported by the plain reading of section 24-21-560(D). In reaching this conclusion, the Court stated:

> Subsection (C) of § 24-21-560 provides that "the court may revoke the prisoner's community supervision and impose a sentence of up to one year for a violation of the community supervision program." Subsection (D) then provides that for a *successive* revocation, the prisoner may

> be sentenced "as provided in [subsection] (C)" *i.e.*, for up to one year, with the limitation that the total time imposed "for successive revocations" *i.e.*, *all* revocations, cannot exceed the length of time of the prisoner's original sentence. Subsection (D) does not provide, as appellant contends, that the sentence for any successive revocation is limited to the amount of time remaining on the prisoner's original sentence, nor does this statute inevitably result in the "doubling" of a prisoner's sentence.

Id. at 624, 602 S.E.2d at 752. Applying the above-outlined reasoning, the Court affirmed the circuit court judge's sentence of five months and seven days on the ground that Mills had served three weeks on his prior revocation and his time for all revocations could not exceed six months. Id. at 625, 602 S.E.2d at 752.

Justice Pleicones disagreed with the majority's reading of section 24-21-560, stating that "[t]he majority holds that S.C. Code Ann. § 24-21-560 (Supp. 2003) permits an inmate found to have violated the terms of his community supervision (CSP) to serve an additional sentence, up to an amount equal to the period of incarceration imposed as part [of] his original sentence." Id. at 625, 602 S.E.2d at 752. Justice Pleicones explained, "if the revocation judge is truly imposing a new sentence of up to one year, then the protections afforded all criminal defendants, including but not limited to the right to an indictment, counsel, and a jury, must be afforded her." Id. at 625 n.3, 602 S.E.2d at 752 n.3. Although Justice Pleicones agreed with the majority's literal interpretation of the statute, he believed such a reading rendered the statute unconstitutional. Id. at 626, 602 S.E.2d at 752. In his opinion, Justice Pleicones read the statute "as putting an outside limit on incarceration of twice the period imposed by the trial judge. The outside limit on the total amount of time an inmate could be incarcerated and/or required to participate in the CSP program is the length of the original sentence, that is, the term of incarceration plus any period of suspension." Id. at 626, 602 S.E.2d at 753. Based on this analysis, Justice Pleicones found the maximum time Mills "could constitutionally be subjected to incarceration and/or required to participate in the CSP program pursuant to [his original sentence] was

six months." Because the six-month period had expired, Justice Pleicones found the circuit court judge erred in reincarcerating Mills. Id.

At least facially, Mills would require this Court to affirm the circuit court's order in the instant case. Because McGrier has served an aggregate of nineteen months as the result of his CSP revocations, under Mills, the circuit court's order was appropriate given McGrier's additional periods of incarceration have not exceeded his original, thirty-six month sentence. However, we believe this case presents an opportunity for the Court to reconsider its decision in Mills in light of several arguments that were not previously raised. See Mills, 360 S.C. at 624, 602 S.E.2d at 752 (stating "we emphasize that the only issue before us is the construction of this particular statute and not the wisdom of the CSP statutory scheme as a whole").

Although we believe this Court properly employed the rules of statutory construction in deciding Mills, we did not at that time envision the problems that would arise out of a practical application of the decision. Upon further reflection, we believe Mills does not effectuate what the Legislature intended by enacting the CSP. We reach this result cognizant of our duty to ascertain the intent of the Legislature and to give it effect so far as possible within constitutional limitations. Brown v. County of Horry, 308 S.C. 180, 183, 417 S.E.2d 565, 567 (1992) ("It is a settled rule of statutory construction that it is the duty of the court to ascertain the intent of the Legislature and to give it effect so far as possible within constitutional limitations.").

An elementary and cardinal rule of statutory construction is that courts must ascertain and effectuate the actual intent of the Legislature. Horn v. Davis Elec. Constructors, Inc., 307 S.C. 559, 563, 416 S.E.2d 634, 636 (1992); Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); see State v. Ramsey, 311 S.C. 555, 561, 430 S.E.2d 511, 515 (1993) ("In the interpretation of statutes, our sole function is to determine and, within constitutional limits, give effect to the intention of the legislature, with reference to the meaning of the language used and the subject matter and purpose of the statute.").

"This Court has long recognized that legislative acts are to be construed in favor of constitutionality and will be presumed constitutional absent a showing to the contrary." Bailey v. State, 309 S.C. 455, 464, 424 S.E.2d 503, 508 (1992). "'It is always to be presumed that the Legislature acted in good faith and within constitutional limits; and this declaration of the Legislature is a conclusive finding of fact and imports a verity upon its face which cannot be impugned by litigants, counsel, or the courts, but is absolutely binding upon all.'" Scroggie v. Scarborough, 162 S.C. 218, 231, 160 S.E. 596, 601 (1931) (quoting State ex rel. Weldon v. Thomason, 221 S.W. 491, 495 (Tenn. 1919)). "Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." Henderson v. Evans, 268 S.C. 127, 132, 232 S.E.2d 331, 333-34 (1977).

As we read section 24-21-560(B) in light of Mills, the continuous two-year term in CSP begins anew each time a participant is released into the program after a period of incarceration. See S.C. Code Ann. § 24-21-560(B) (2007) ("A community supervision program operated by the Department of Probation, Parole, and Pardon Services must last no more than two continuous years."). If, as in McGrier's case, there are successive revocations, the two-year period could produce a never-ending cycle of participation in CSP and an incarceration period which would clearly exceed or extend past the originally ordered term of incarceration. See State v. Bennett, 375 S.C. 165, 174 n.6, 650 S.E.2d 490, 495 n.6 (Ct. App. 2007) (discussing the fact that successive CSP revocations resulted in defendant serving seven years, four months, and three days for an original four-year sentence). To read the statute in this manner, as Justice Pleicones' noted in his dissent, would render it unconstitutional in several respects.

Initially, we find a practical application of Mills would violate a defendant's procedural due process rights. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 (No person shall be deprived of life, liberty, or property without due process of law.). Here, the imposition of a sentence which exceeds the defendant's original term of incarceration involves a situation where the defendant has not received notice that the

terms of his original sentence would be modified and a greater punishment imposed. See State v. Allen, 370 S.C. 88, 97, 634 S.E.2d 653, 657 (2006) ("'It is an essential component of due process that individuals be given fair warning of those acts which may lead to a loss of liberty. This is no less true whether the loss of liberty arises from a criminal conviction or the revocation of probation . . . [W]here the proscribed acts are not criminal, due process mandates that [a probationer or parolee] cannot be subjected to forfeiture of his liberty for those acts unless he is given prior fair warning.'" (quoting U.S. v. Dane, 570 F.2d 840, 843-44 (9th Cir. 1977))); Hord v. Commonwealth, 450 S.W.2d 530, 531-32 (Ky. Ct. App. 1970) ("Due process of law . . . must be followed to insure a valid conviction of [a defendant's] felonious charge. Due process does not contemplate that months or years later his 'trial' may be opened and a greater punishment imposed.").

Although McGrier was on notice by the terms of the statute that the completion of the CSP was a requirement of his originally-imposed sentence,[4] he would not have been aware that his participation in this program could potentially be in perpetuity. See State v. Dawkins, 352 S.C. 162, 167, 573 S.E.2d 783, 785 (2002) (finding defendant's five-year probation sentence was discharged after he successfully completed a community supervision program pursuant to section 24-21-560(E) of the South Carolina Code); State v. Scott, 351 S.C. 584, 590, 571 S.E.2d 700, 703 (2002) (holding, pursuant to section 24-21-560 of the South Carolina Code, defendant was required to participate in CSP and not be placed on probation even though he "maxed out" his active sentence through good-conduct credits given defendant had not served his entire active term of incarceration until he **completed** a CSP). Conceivably,

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[4] Section 24-21-560(E) of the South Carolina Code provides:

> (E) A prisoner who successfully completes a community supervision program pursuant to this section has satisfied his sentence and must be discharged from his sentence.

S.C. Code Ann. § 24-21-560(E) (2007).

had McGrier been aware of the potential sentencing consequences, he may not have decided to plead guilty.

Furthermore, we believe a literal interpretation of the CSP statute, as in Mills, would improperly permit a CSP violation to become a separate and distinct criminal offense from that which a defendant was convicted without the benefit of the requisite Sixth Amendment constitutional protections.

"The Sixth Amendment rights to notice, confrontation, and compulsory process guarantee that a criminal charge may be answered through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 402 (1986). "These basic rights are applicable to the states through the due process clause of the Fourteenth Amendment." Id. "The Amendment essentially 'constitutionalizes' the right to present a defense in an adversary criminal trial." Id.

It is undisputed that neither McGrier nor other CSP violators have been afforded these protections. To contend, as does the Department, that the Sixth Amendment protections are inapplicable to the revocation of CSP because it does not involve a criminal prosecution would be a matter of semantics that minimizes or essentially ignores the consequences of a revocation. Our United States Supreme Court has repeatedly held that, "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a **jury**, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." Cunningham v. California, 127 S.Ct. 856, 863-64 (2007) (emphasis added). Although McGrier, and other similarly situated defendants, are not in actuality being convicted for a second time, they are being given an additional sentence for violating the terms of CSP. Because CSP is a collateral consequence of a conviction for a "no-parole offense," revocations for successive CSP violations should not extend or exceed the term of incarceration that was originally ordered for the underlying offense. Jackson v. State, 349 S.C. 62, 64, 562 S.E.2d 475, 475 (2002) (holding participation in CSP is a collateral consequence of sentencing).

As illustrated by the foregoing, we believe a practical application of our decision in Mills renders the CSP statute unconstitutional. Moreover, in our view, the purpose of the CSP statute is to continue supervision during the remaining term of the original sentence. Because the CSP program is a more stringent program than traditional probation, we believe the Legislature did not intend for this form of supervision to have the effect of increasing an inmate's original sentence for a "no parole offense." See Dawkins, 352 S.C. at 167, 573 S.E.2d at 785 ("The CSP is a more stringent, closely monitored form of supervision than normal probation. Even considering Part E in the context of the statute as a whole, we believe the legislature intended mandatory participation in the CSP to serve as a more rigorous term of probation for those convicted of no-parole offenses, in lieu of normal probation.").

Therefore, to effectuate the intent of the Legislature and remain within the confines of constitutional limitations, we have decided to change our position regarding an interpretation of the following statutory language:

> The maximum aggregate amount of time the prisoner may be required to serve when sentenced for successive revocations may not exceed an amount of time equal to the length of incarceration imposed for the original "no parole offense." The original term of incarceration does not include any portion of a suspended sentence.

S.C. Code Ann. § 24-21-560(D) (2007). We now read this language as limiting the total amount of time an inmate could be incarcerated after a CSP revocation to be the length of the remaining balance of the sentence for the "no parole offense." Based on this interpretation, a circuit court may not impose a sentence for a CSP revocation that would result in an inmate being incarcerated for an aggregate period of time that extended beyond the unsuspended portion of the original sentence. Thus, assuming an inmate has served at least eighty-five percent of the unsuspended portion of his original sentence, an inmate whose CSP is revoked is limited to serving an amount of time equal to the remaining fifteen percent balance of this sentence. We believe this

construction preserves the presumed validity and constitutionality of the CSP statute as mandated by our rules of statutory construction. Cf. Thomas v. State, 838 So. 2d 701, 702 (Fla. Dist. Ct. App. 2003) (holding sentence of incarceration that exceeded suspended portion of previously imposed sentence of incarceration, which resulted from violation of community control, was illegal).

Applying our holding to the facts of the instant case, we find the circuit court erred in reincarcerating McGrier given he has served eighty-five percent of the original, three-year term of imprisonment and has participated in the CSP program an aggregate of nineteen months. Accordingly, the decision of the circuit court is

REVERSED.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Cedric Emmanuel Perkins, Appellant.

Appeal from Greenville County
Charles B. Simmons, Jr., Circuit Court Judge

Opinion No. 26490
Heard April 3, 2008 – Filed May 12, 2008

AFFIRMED

Kenneth Clifton Gibson, of Greenville, for Appellant.

Solicitor Robert M. Ariail, Deputy Solicitor Betty C. Strom, of Greenville, for Respondent.

CHIEF JUSTICE TOAL: In this case, Appellant Cedric Perkins was terminated from the Thirteenth Circuit Drug Court Program, and the trial court imposed Appellant's suspended sentence. Appellant argues positive

"sweat patch" drug tests and certain violations should not have been considered in the decision to terminate Appellant from the Drug Court Program. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The Thirteenth Circuit Drug Court Program (hereinafter "Drug Court Program" or "Program") is a voluntary therapeutic program which may be offered to a defendant that is charged with a drug abuse offense within the thirteenth circuit jurisdiction. The defendant pleads guilty to the charge and agrees with the solicitor to enter the Program. As a result, the trial court imposes a sentence on the defendant, but suspends the sentence, conditioned upon the successful completion the Program. The participant agrees to abide by certain terms and conditions of participation and may be sanctioned or ultimately terminated for failure to comply with the terms of the Program.

In the instant case, Appellant pled guilty to possession with intent to distribute crack cocaine. The trial court sentenced him to ten years imprisonment, suspended upon his successful completion of the Drug Court Program. Appellant entered the Program on September 13, 2002. On September 25, 2003, after numerous violations, Appellant met with the Program's chief administrator where she told Appellant that he could remain in the Program so long as he had no more violations. However, Appellant subsequently tested positive for drugs, and on October 12, 2003, program administrators recommended his termination.[1] Following a hearing, the trial court issued an order terminating Appellant from the Program and imposing his original sentence.

[1] Appellant was sanctioned eighteen times while in the Program. Appellant's violations included positive drug tests, missed drug tests, tardiness for court appearances, missed appointments with program administrators, and failure to pay fees.

Appellant appealed the trial court's order. This Court certified the appeal pursuant to Rule 204(b), SCACR, and Appellant presents the following issues for review:

> Did the lower court wrongfully terminate Appellant from the Drug Court Program?[2]

LAW/ANALYSIS

Appellant argues that he was wrongfully terminated from the Drug Court Program. Because undertaking such a review would require that this Court evaluate and assess the manner in which the Program's administrators execute the rules and regulations of the Program – an inquiry over which this Court has no authority – we decline to answer this question.

Several counties across the State have implemented Drug Court Programs similar to the Thirteenth Circuit Drug Court Program. These Programs are aimed at rehabilitating the participant and helping him overcome addiction, but the specific manner in which each Drug Court Program operates varies. For example, under the procedures of other Programs, a social worker, a magistrate, or a Drug Court team member may terminate the participant from the Program. However, pursuant to the Thirteenth Circuit Drug Court Program procedures, Program administrators recommend a participant for termination, and the trial court decides whether to terminate a participant from the Program.

We decline to review whether Appellant's positive sweat patch results or violations occurring after the meeting with the chief administrator were properly considered in the decision to terminate Appellant from the Drug

[2] Specifically, Appellant argues that the lower court wrongfully terminated him from the Program because it erred in considering positive drug test results from "sweat patches" when the Drug Court Program's contract did not provide for such testing methods and erred in considering violations that occurred prior to the September 25, 2003 meeting with the Program's chief administrator.

Court Program. In our view, it would be improper for the judiciary to interject itself into such matters which are wholly internal and specific to each Program and to each participant. To do so would transform the Drug Court Programs into a judicially-supervised institution. Thus, in order to assess what issues Appellant may appeal and what issues this Court may review, it is necessary to begin by clarifying the judicial determinations below.

After Appellant's guilty plea, the trial court sentenced Appellant to ten years imprisonment, but suspended the imposition of that sentence conditioned upon the successful completion of the Drug Court Program. Thus, the trial court's imposition of his original sentence after being terminated from the Drug Court Program deprived Appellant of a conditional liberty interest, and thereby entitled him due process rights. *See Dangerfield v. State*, 376 S.C. 176,_____, 656 S.E.2d 352, 355 (2008) (holding that the imposition of a suspended sentence deprived the defendant of a conditional liberty interest and implicated the defendant's due process rights). Therefore, like any other defendant who is subject to the imposition of a suspended sentence, we conclude that a Drug Court Program participant is entitled to notice and a hearing to determine whether he has violated the conditions of his suspended sentence before his sentence may be imposed. *See id.* (holding that due process required notice and a hearing on the willfulness of the defendant's failure to pay restitution before imposition of a suspended sentence). Accordingly, while we hold that it is inappropriate for the courts to review whether a participant was *properly* terminated from a Drug Court Program, the participant is entitled to a hearing to determine whether he was in fact terminated from a Drug Court Program (i.e., whether the defendant violated a condition of his suspended sentence) before his sentence may be imposed.[3]

[3] That the trial court in the instant case had the authority, pursuant to the Thirteenth Circuit Program rules, to terminate Appellant from the Program and also had subject matter jurisdiction to impose Appellant's suspended sentence and memorialized these decisions in the same order is irrelevant to our scope of review. We note that although magistrates, social workers, or Drug Court team members in other Programs determine whether to terminate the

The decision of whether a defendant has violated a condition of his suspended sentence rests within the sound discretion of the trial court. *See State v. Miller*, 122 S.C. 468, 474-75, 115 S.E. 742, 745 (1923) (holding that the nature of the inquiry and extent of the investigation to be conducted by a lower court in determining whether the condition of a suspended sentence has been violated are matters that rest in the sound discretion of that court). An appellate court will not reverse the trial court's decision unless that court abused its discretion. *See State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006) (addressing the applicable standards of review in a probation revocation hearing).

In the instant case, it is undisputed that a condition of Appellant's suspended sentence was the successful completion of the Drug Court Program and that Appellant was terminated from the Program. Thus, the trial court correctly determined that Appellant violated a condition of his suspended sentence, and therefore, properly imposed Appellant's original sentence. Accordingly, we must uphold the imposition of Appellant's sentence.

CONCLUSION

For the foregoing reasons, we affirm the trial court's order imposing Appellant's original sentence.

MOORE, WALLER, BEATTY, JJ., and Acting Justice Diane Schafer Goodstein, concur.

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participant, these bodies do not have the authority to impose the suspended sentence. A terminated participant should always be afforded a hearing before the proper tribunal with the authority to impose a suspended sentence.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Delmore Cain, Appellant,

v.

Nationwide Property and
Casualty Insurance Company, Respondent.

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

Opinion No. 26491
Heard April 3, 2008 – Filed May 12, 2008

AFFIRMED

Gary W. Popwell, Jr., of Lee, Eadon, Isgett & Popwell, of Columbia, for Appellant.

J.R. Murphy, of Murphy & Grantland, of Columbia, for Respondent.

JUSTICE BEATTY: In this insurance case, Delmore Cain appeals the circuit court's order denying him uninsured motorist proceeds pursuant to a compensation section in the South Carolina Tort Claims Act. We affirm.

FACTS

The parties essentially agree to the facts of this case, leaving the Court solely with a matter of statutory construction.

On April 21, 2003, the work vehicle in which Delmore Cain was a passenger was hit head-on by a Richland County dump truck that crossed the center line. Cain suffered serious injuries to his head, chest, hips, and legs, which will require years of medical treatment and caused him "physical pain, suffering, mental anguish, emotional distress and impairment of health and bodily efficiency." Cain sought damages for his injuries and future medical costs against Richland County. Richland County carried insurance on the dump truck in an amount exceeding the minimum limits required by law. The parties settled the lawsuit, and Cain received $300,000, which is the maximum amount allowed under the South Carolina Tort Claims Act.[1] He also received $40,000 from the underinsured motorist coverage policy covering the vehicle in which he was a passenger.

The parties to the underlying case stipulate Cain's damages exceeded $370,000. At the time of the accident, Cain was covered under an automobile policy issued by Nationwide Property and Casualty Insurance Company that contained uninsured motorist coverage in the amount of $15,000 per person for each insured vehicle. The policy holder specifically refused underinsured motorist coverage.[2] The policy defined "uninsured

[1] The South Carolina Tort Claims Act caps liability for damages caused by a governmental agency at $300,000 for a single occurrence. S.C. Code Ann. § 15-78-120(a)(1) (2005).

[2] The policy was issued to Lekettia Pough and it included Cain as one of the named drivers.

motor vehicle" as one which does not have liability coverage in the minimum amounts required by the law where the insured's car is principally located. The policy went on to state that Nationwide does not consider as an uninsured vehicle: a motor vehicle owned by the government or an agency; or a vehicle defined as underinsured. The policy defined "underinsured motor vehicle" as one for which liability coverage meets the minimum amounts required by law but is in an amount less than the insured's damages.

The underlying claim[3] arose when Cain filed a declaratory judgment action against Nationwide to determine whether Nationwide was required to pay $30,000 in uninsured motorist coverage for Cain's remaining damages pursuant to the Tort Claims Act and section 15-78-190 of the South Carolina Code.

After a hearing on the declaratory judgment action, the circuit court issued an order in favor of Nationwide. Noting Cain's admission that he did not have underinsured motorist coverage, the court found the dump truck did not meet the definition of an "uninsured" vehicle under either the policy or under the automobile insurance statute. In interpreting section 15-78-190, the court also held Cain was not entitled to uninsured motorist coverage. Cain appealed. The Court of Appeals certified the case to this Court.

DISCUSSION

Cain first argues the circuit court erred in interpreting section 15-78-190. He asserts the statute: (1) should be read as a separate and distinct requirement of insurance carriers; (2) was intended to assuage the hardship on a plaintiff who cannot be fully compensated because damages exceed the statutory cap in Tort Claims Act cases; and (3) was not merely a restatement of an injured party's right to obtain compensation under his uninsured and underinsured motorist coverage. Cain also argues the court erred in turning

[3] Brenda Cain, Delmore's wife, was also a passenger in the vehicle and also suffered serious injuries. Although she was a party in the lawsuit against Richland County, she was not a party in the underlying claim against Nationwide.

to the definitions found within the insurance statutes and his uninsured motorist policy to determine he could not recover under section 15-78-190. Because these two issues deal with interrelated matters, we have addressed them as one in this discussion.

The primary purpose in interpreting statutes is to ascertain the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "We cannot construe a statute without regard to its plain and ordinary meaning, and this Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope." New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 310, 649 S.E.2d 28, 29-30 (2007). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges, 341 S.C. at 85, 533 S.E.2d at 581. The statute's language is considered the best evidence of legislative intent. Id. However, the Court will reject the plain meaning of the words used in a statute if it would lead to an absurd result and will "construe the statute so as to escape the absurdity and carry the intention into effect." Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998). Further, when a plain reading of the statute "lends itself to two equally logical interpretations, this Court must apply the rules of statutory interpretation to resolve the ambiguity and to discover the intent of the General Assembly." Kennedy v. South Carolina Ret. Sys., 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001).

Section 15-78-190, which is part of the Tort Claims Act, is encaptioned: "Compensation of plaintiff pursuant to underinsured or uninsured defendant provisions of plaintiff's insurance policy."[4] (emphasis added). The section states, in relevant part, as follows:

> If the amount of the verdict or judgment is not satisfied by reason of the monetary limitations of this

[4] It is interesting to note that Act 463, enacting the Tort Claims Act, just listed this section as "Plaintiff to be compensated." 1986 S.C. Acts 463, § 6.

> chapter upon recovery from the State or political subdivision thereof, the plaintiff's insurance company, subject to the underinsured and uninsured defendant provisions of the plaintiff's insurance policy, if any, shall compensate the plaintiff for the difference between the amount of the verdict or judgment and the payment by the political subdivision. If a cause of action is barred under § 15-78-60 of the 1976 Code, the plaintiff's insurance company must compensate him for his losses subject to the aforementioned provisions of his insurance policy.

S.C. Code Ann. § 15-78-190 (2005) (emphasis added).

A clear reading of the statute shows that the purpose is to allow injured parties with damages above the statutory cap in the Tort Claims Act to obtain further compensation. While Cain argues the statute was intended to compensate all persons with damages above the statutory cap in a Tort Claims Act case, regardless of whether they meet the statutory or policy definitions for uninsured or underinsured defendant coverage, we take the more limited view that it was intended only to allow compensation where the definitions were met.

Section 15-78-20 contains the declaration of public policy for the enactment of the Tort Claims Act and states that "[t]he remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)." S.C. Code Ann. § 15-78-20(b) (2005) (emphasis added). While limiting recovery under the Tort Claims Act as the sole method of obtaining compensation from the government is not unusual, the uninsured motorist and underinsured motorist insurance arena is unique. Certainly, the sole purpose of the existence of these kinds of insurance is to provide compensation where the at-fault motorist either is not insured or does not have enough insurance. Thus, by enacting section 15-78-190, the Legislature assured that an insurance company could not cite the "exclusive civil

remedy" portion of section 15-78-20 to deny payment from the plaintiff's uninsured or underinsured motorist coverage where recovery pursuant to the Tort Claims Act was insufficient. Injured parties are free to seek recovery under their underinsured or uninsured motorist policies any time recovery from the at-fault motorist is insufficient, and section 15-78-190 was specifically intended to inform insurance companies that nothing changes when an at-fault government vehicle is involved. Thus, the enactment of this section, which appears to restate portions of other sections in the Insurance Code, was not redundant.[5] Steinke v. S.C. Dep't of Labor, Licensing, & Regulation, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999) ("While provisions establishing limitations upon and exemptions from liability of a governmental entity must be liberally construed to limit liability, we also must presume in construing a statute that the Legislature did not intend to perform a futile thing.").

Considering the facts of this case, 15-78-190 would be applicable if an uninsured or underinsured at-fault government vehicle is involved. Both "underinsured motorist" and "uninsured motorist" are terms statutorily defined in the Insurance Code.[6] Section 15-78-190 provides that recovery is

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[5] See S.C. Code Ann. § 38-77-150 (2002) (providing that an insured may select "uninsured motorist coverage" and proceed under the section to obtain damages from the owner of an uninsured vehicle); S.C. Code Ann. § 38-77-160 (2002) (providing recovery under "underinsured motorist coverage").

[6] Similar to the definition found in the Nationwide policy, our Legislature has defined an "underinsured motor vehicle" as one where "there is bodily injury liability insurance or a bond applicable at the time of the accident in an amount of at least that specified in Section 38-77-140 and the amount of the insurance or bond is less than the amount of the insured's damages." S.C. Code Ann. § 38-77-30(15) (2002). An "uninsured motor vehicle" is one as to which:

> (a) there is not bodily injury liability insurance and property damage liability insurance both at least in the amounts specified in Section 38-77-140, or

"subject to" the terms of the insured's underinsured or uninsured policy. Thus, in order to recover, the plaintiff must first meet the requirements and terms found both in the statute and within the policy, assuming the policy provisions do not violate the law or public policy of this State. In most instances, this will necessarily limit recovery to an injured party who meets the definitions.

Turning to the instant case, we agree with the circuit court that Cain was not entitled to recover under the "uninsured motorist" section of his policy. Strictly applying the statutory and policy definitions, it is apparent that the dump truck was an "underinsured" vehicle because the dump truck had insurance protection greater than the minimum limits but less than Cain's

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> (b) there is nominally that insurance, but the insurer writing the same successfully denies coverage thereunder, or
> (c) there was that insurance, but the insurer who wrote the same is declared insolvent, or is in delinquency proceedings, suspension, or receivership, or is proven unable fully to respond to a judgment, and
> (d) there is no bond or deposit of cash or securities in lieu of the bodily injury and property damage liability insurance.
> (e) the owner of the motor vehicle has not qualified as a self-insurer in accordance with the applicable provisions of law.
>
> . . .
>
> Any motor vehicle owned by the State or any of its political subdivisions is considered an uninsured motor vehicle when the vehicle is operated by a person without proper authorization.

S.C. Code Ann. § 38-77-30(14) (2002).

damages.[7] Cain admitted that he did not have "underinsured motorist" coverage on his policy. Because recovery under section 15-78-190 is subject to the requirements in his policy, Cain failed to meet the definitions and cannot recover.

CONCLUSION

While we sympathize with Cain's need for further compensation, we cannot ignore the clear meaning attached to the terms "underinsured" and "uninsured" contained within section 15-78-190. It is evident the Legislature intended this section to prevent insurers from denying further compensation above amounts recovered pursuant to the Tort Claims Act. Thus, it does not change the fact that recovery is limited to situations where the policy terms are met. Accordingly, the circuit court's order denying recovery is

AFFIRMED.

TOAL, C.J., MOORE, WALLER, JJ., and Acting Justice Diane Schafer Goodstein, concur.

[7] In fact, Cain stipulates in his brief that the dump truck does not meet either definition of an "uninsured" vehicle. He argues, however, that it does not matter for purposes of recovery under section 15-78-190.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sandra Blanding, Appellant,

v.

Long Beach Mortgage Company, Washington Mutual, Inc., Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust, Respondents.

Appeal From Berkeley County
Robert E. Watson, Master-in-Equity

Opinion No. 4387
Submitted May 1, 2008 – Filed May 6, 2008

AFFIRMED

Jay J. Hulst, of Moncks Corner, for Appellant.

Tina Cundari and Elizabeth Van Doren Gray, both of Columbia, for Respondents.

HUFF, J.: In this declaratory judgment action involving insurance proceeds, Sandra Blanding appeals the master's grant of summary judgment in favor of Long Beach Mortgage Company, Washington Mutual, Inc., and Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust. We affirm. [1]

FACTUAL/PROCEDURAL BACKGROUND

The present case arises out of a dispute regarding the parties' rights with respect to casualty insurance proceeds paid for foreclosed property owned by Sandra Blanding. In February 2003, Blanding executed and delivered a mortgage for $40,000 to Money First Financial Services, Inc., for the purchase of a manufactured home. The mortgage was secured by real property located in Berkley County, South Carolina, to which the manufactured home was permanently attached. Shortly thereafter, the mortgage was assigned to Long Beach Mortgage Company, a wholly owned subsidiary of Washington Mutual, Inc. Approximately one year later, in January 2004, the mortgage was assigned to Deutsche Bank National Trust Company, as trustee for Long Beach Mortgage Loan Trust 2003-4.[2]

As the borrower, Blanding was required to maintain insurance on her property which named Lender as mortgagee and/or as an additional loss payee. Specifically, the mortgage requires as follows:

> **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire . . . . All insurance policies required by Lender and

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

[2] Collectively, Long Beach Mortgage Company, Washington Mutual, Inc. and Deutsche Bank National Trust Company are the lender and defendants in this case (hereinafter "Lender").

> renewals of such policies . . . shall name Lender as mortgagee and/or as an additional loss payee.

Additionally, the mortgage provides: "[i]f Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense." The mortgage further states that in the event of loss:

> Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance proceeds were required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened . . . . If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

Finally, the mortgage provides that attorneys' fees incurred in "a legal proceeding that might significantly affect Lender's interest in the property and/or rights under this Security Instrument" shall become the additional debt of Blanding as the borrower.

In August 2004, Blanding purchased a home insurance policy from Foremost Insurance Company (Foremost). The policy issued by Foremost provided for $63,000 worth of coverage on Blanding's residence and named Washington Mutual as the lienholder. In addition, the policy included an "other insurance" clause providing "[i]f both this and other insurance apply to a loss, [Foremost] will pay our share. Our share will be the proportionate amount that this insurance bears to the total amount of all applicable insurance." In November 2004 Lender, apparently under the misapprehension that Blanding had not obtained coverage on the property as required, obtained an insurance policy from American Security Insurance Company (American Security) providing $48,000 worth of coverage on Blanding's property. The American Security policy also included an "other

insurance" clause which states "[i]f there is any other valid or collectible insurance which would attach if the insurance under this policy had not been effected, this insurance shall apply only as excess and in no event as contributing insurance and then only after all other insurance has been exhausted."

On December 7, 2004, the Master-in-Equity issued an order finding Blanding failed to make payments due as provided on the note. He ordered Blanding's mortgage be foreclosed and the property sold at public auction. At the time of foreclosure, the total debt due on the mortgage, including interest, escrow adjustments, late charges, costs, and attorneys' fees, was $51,995.14. On January 1, 2005, prior to the foreclosure sale, Blanding's residence was destroyed by fire. On January 5, 2005, the property was sold at public auction to Lender for $2,500.

On January 31, 2005, American Security issued a check to Washington Mutual Bank in the amount of $22,403.91 for losses arising out of the fire. Thereafter, on May 27, 2005, Foremost issued a check in the amount of $62,750[3] made payable to Blanding and her attorneys, as well as Washington Mutual and Deutsche Bank. When Lender discovered proceeds were issued under the Foremost policy, Lender returned the $22,403.91 to American Security based on its determination it was required to do so under the terms of the policy. The parties disagreed as to their rights to the Foremost proceeds, with Lender asserting these proceeds were to be applied first to the full amount of Blanding's debt due on the mortgage.

Blanding filed this declaratory judgment action on November 10, 2005 asserting Lender failed and refused to apply the other insurance proceeds paid in connection with the loss, and claiming she was entitled to an accounting of her debt and application of "any and all insurance proceeds paid or payable to or received by [Lender]." Lender answered and counterclaimed, asserting the

[3] The check initially issued by Foremost, in the amount of $62,750, represents the total amount of coverage less the $250 deductible. Later, when the initial check expired and Blanding requested a new one, Foremost issued a check in the amount of $63,000, instead of $62,750.

American Security policy applied only "as excess and in no event as contributing," and it was therefore entitled to receive from Blanding the amount of the debt at the time of foreclosure, less the $2,500 received in the foreclosure sale, together with prejudgment interest and attorneys' fees. Blanding replied to Lender's counterclaim, maintaining she was entitled to a set-off or credit for insurance proceeds received by Lender, including those retuned to American Security. She further generally denied Lender's counterclaim for prejudgment interest and attorneys' fees, and asserted her own right to recover attorneys' fees and costs.

The matter was referred to the Master-in-Equity by order dated January 27, 2006. Subsequently, both Blanding and Lender filed motions for summary judgment seeking a determination of the parties' rights with respect to the casualty insurance proceeds paid for Blanding's foreclosed property. Blanding argued she was entitled to have the proceeds from the American Security policy credited toward her debt and she was therefore due $35,908.77 from the Foremost proceeds, while Lender was entitled to only $27,091.23. In the alternative, Blanding maintained the excess "other insurance" clause in the American Security policy was void as a matter of law, and therefore the American Security coverage was contributive insurance. Under this application, Blanding claimed entitlement to a credit of $27,216, leaving a balance due to Lender of $22,279.14 and $40,720.86 due Blanding from the Foremost proceeds. Lender asserted the American Security policy provided excess coverage only, and that Blanding was seeking to recover insurance proceeds to which she was not entitled and had refused to endorse the Foremost check to allow the proceeds to be applied to her debt. Accordingly, Lender maintained it was entitled to recover prejudgment interest and attorneys' fees incurred in the current litigation. Blanding argued Lender was not entitled to attorneys' fees as the mortgage had been released, and any obligations under the mortgage agreement were therefore terminated.

Upon consideration of the cross-motions for summary judgment, and following a separate hearing on attorneys' fees, the Master ruled Lender was "entitled to be paid for the debt owed at the time of foreclosure, less $2,500, the amount bid by [Lender] at the foreclosure sale, plus pre-judgment

interest, [attorneys'] fees, and costs" from the proceeds available in this case. The master further determined the Foremost policy provided primary coverage while the American Security policy provided secondary or excess coverage only, and the insurance proceeds from Blanding's Foremost policy should be the first applied to the sums secured by the mortgage agreement. He found Lender entitled to $49,495.14 on Blanding's debt due, plus $6,736.48 in prejudgment interest and $6,768.38 in attorneys' fees. Accordingly, the Master ordered Lender was entitled to the full amount of the $63,000 in available insurance proceeds. Blanding then filed a motion for reconsideration and to alter or amend judgment pursuant to Rule 59 of the South Carolina Rules of Civil Procedure which, with the exception of the deletion of one sentence from the order, was denied. This appeal followed.

STANDARD OF REVIEW

Summary judgment is proper where no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Hurst v. E. Coast Hockey League, Inc., 371 S.C. 33, 36, 637 S.E.2d 560, 561 (2006). On appeal from a grant of summary judgment, the appellate court applies the same standard governing the trial court. Id. at 35, 637 S.E.2d at 561. The trial court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

LAW/ANALYSIS

I. Master's Refusal to Apply American Security Proceeds

Blanding first contends the master erred in failing to apply the insurance proceeds paid by American Security to reduce her outstanding debt. She argues that the American Security payment of $22,403.91 was paid in settlement of the fire and, under the terms of the mortgage agreement, these sums must therefore be applied to her debt. Specifically, she points to the language of the agreement that "any insurance proceeds, . . . shall be applied to restoration or repair," and if " restoration or repair is not economically feasible . . . , the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower." Blanding asserts this language requires Lender to apply the proceeds of the American Security policy to her debt, and that she is then entitled to any excess proceeds after application of both the American Security and Foremost policy proceeds.

In making this argument, Blanding does not dispute that the sums originally paid by American Security were returned by Lender after discovery of the Foremost coverage. However, she contends the return of those funds did not "expunge the payment of those proceeds" nor alter the requirement that these proceeds be applied to her mortgage debt. Blanding makes several arguments as to why the returned funds must be included in the payment of insurance proceeds under the mortgage agreement.

A. "Other Insurance" Clauses

Blanding argues the Master's determination of which policy pays first is irrelevant, as both insurers have already paid. She asserts the "other insurance" clauses, used by the Master to determine which policy was primary, do not apply because this is not a contribution action between insurers, but a dispute between insureds over proceeds that have already been paid. Accordingly she maintains the Master erroneously relied on the "other

insurance" clauses in the two policies in refusing to apply the American Security proceeds. We disagree.

"[C]ourts faced with the distasteful chore of apportioning liabilities among multiple insurers should look to the language of the policies to ascertain whether the policies are intended to provide primary or secondary coverage." S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc., 327 S.C. 207, 214, 489 S.E.2d 200, 203 (1997) (emphasis in original). "In other words, the relevant question is not whether a policy is blanket or specific, but what is the 'total policy insuring intent' embodied within the policy." Id. "One method insurance companies use to indicate whether they intend to provide primary, secondary, or other coverage is to include in their policies 'other insurance' clauses that attempt to apportion liability among multiple insurers." Id. at 215, 489 S.E.2d at 204. "An 'excess' clause, the most common kind of 'other insurance' clause, provides a policy will cover only amounts exceeding the policy limits of other insurance covering the same risk to the same property." Id.

We find disingenuous Blanding's assertion that the rules concerning determination of policy coverage among more than one policy do not apply because this is an action between insureds, as opposed to insurers. The crux of this litigation is which proceeds are available to be applied to the loss. In the present case, the mortgage agreement provides Blanding is required to maintain property insurance naming Lender "as mortgagee and/or an additional loss payee." In the event of loss, the mortgage further provides: "the insurance proceeds shall be applied to the sums secured by [the mortgage agreement], whether or not then due, with excess, if any, paid to Borrower." Therefore, under the plain and unambiguous terms of the mortgage agreement, any insurance proceeds must be first applied to sums secured by the mortgage agreement, with any excess paid to Blanding. The American Security policy provided that if there were "any other valid or collectible insurance which would attach if the insurance under this policy had not been effected, this insurance shall apply only as excess and in no event as contributing insurance and then only after all other insurance has been exhausted." (emphasis added). Here, it is undisputed that the Foremost policy was collectible insurance that would attach had the American Security

policy not been effected. Additionally, the Foremost policy was sufficient to cover the loss of the insured property and, thus, the American Security policy, as an excess policy, would provide no proceeds.

B. Policies' Coverage of the Same Interests for Same Insureds

Blanding maintains, however, even if the Master properly considered the "other insurance" clauses to apply in a dispute between insureds, his analysis was still flawed because, in order for the "other insurance" clauses to apply, the policies must cover the same risk and same interest for the benefit of the same insured over the same period of time. She argues the policies cover different interests for the benefit of different insureds, and therefore the "other insurance" clauses are inapplicable. We disagree.

Our courts have held that "'[o]ther insurance' clauses are intended to apportion an insured loss between or among insurers where two or more policies offer coverage of the same risk and same interest for the benefit of the same insured for the same period." S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc., 327 S.C. 207, 212, 489 S.E.2d 200, 202 (1997). "These clauses began their lives as an attempt to prevent fraud in the overinsuring of property." Id. Further, our courts have held that a mortgagor and mortgagee have separate and distinct interests in the same property which they may insure. Johnson v. Fid. & Guar. Ins. Co., 245 S.C. 205, 209, 140 S.E.2d 153, 155 (1965); Murdaugh v. Traders & Mechs. Ins. Co., 218 S.C. 299, 307-308, 62 S.E.2d 723, 726-27 (1950).

While we agree with Blanding that she and Lender had separate and distinct interests in the property for insurance purposes, we disagree that, as a result, the two policies in question fail to cover the same interests for the benefit of the same insureds. Although the parties have separate insurable interests, it is possible for both to have contracted to insure the same insurable interest. Thomas v. Penn Mut. Fire Ins. Co., 244 S.C. 581, 585, 137 S.E.2d 856, 858 (1964). The policy issued by Foremost provided for $63,000 worth of coverage on Blanding's dwelling at her Pineville address, naming Blanding as the insured but also denoting Washington Mutual as the lienholder, as required by the mortgage agreement which states Blanding

"shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire" and that "[a]ll insurance policies required by Lender and renewals of such policies . . . shall name Lender as mortgagee and/or as an additional loss payee." Accordingly, the Foremost policy, while insuring Blanding's interest in the property, likewise insured Lender's interest in the property. The American Security policy provided the named insured mortgagee was Washington Mutual Bank, and named Blanding as the additional insured. It likewise insured the property at Blanding's Pineville address stating, "it is agreed that the insurance applies to the property described above and to any person shown as an Additional Insured with respect to such property. . . ." It further noted "[l]oss, if any, shall be adjusted with and payable to the above Named Insured Mortgagee, and the Additional Insureds as their interests may appear. . . ." Thus, the American Security policy insured the same property, during the same period, against the same risk for the benefit of the same insureds. Both policies were intended to provide coverage for the mortgaged property that was security for the debt. Thus, the two policies, while insuring the parties' separate and distinct interests, each insured the same interest of the mortgagor and the same interest of the mortgagee. In other words, while Blanding and Lender may have separate and distinct interests insured by the policies, both policies insured both parties' interests. Accordingly, we find the two policies contracted to insure the same insurable interest, and there is no merit to Blanding's assertion that the "other insurance" clause in the American Security policy is inapplicable on this basis.

C. "Other Insurance" Clause Conflict with Statutory Law

Finally Blanding claims, even if the policies did cover the same risks, interests, and insureds during the same period of time, the "other insurance" clause in the American Security policy conflicts with statutory law and is therefore invalid. Specifically, Blanding points to sections 38-75-20 and 38-75-220 of the South Carolina Code of Laws in support of this argument. Section 38-75-20 provides in pertinent part:

> No insurer doing business in this State may issue a fire insurance policy for more than the value stated in the policy or the value of

> the property to be insured. . . . If two or more policies are written upon the same property, they are considered to be contributive insurance, and, if the aggregate sum of all such insurance exceeds the insurable value of the property, as agreed by the insurer and the insured, each insurer, in the event of a total or partial loss, is liable for its pro rata share of insurance.

S.C. Code Ann. § 38-75-20 (2002). Section 38-75-220 provides in part:

> No insurer transacting a mobile home insurance business in this State and writing hazard insurance covering loss from physical damage to the mobile homes may issue a policy for more than the value stated in the policy or the value of the property to be insured. . . . If two or more such policies are written upon the same property and covering the same interests, they are considered to be contributive insurance, and, if the aggregate sum of all such insurance exceeds the insurable value of the property, as agreed by the insured and insurer, each insurer, in the event of a total or partial loss, is liable for its pro rata share of insurance.

S.C. Code Ann. § 38-75-220 (2002).

Blanding argues, to the extent the two policies in question cover the same interests, the "other insurance" clause in the American Security policy is invalid because it conflicts with sections 38-75-20 and 38-75-220 of the South Carolina Code. She argues under these sections such policies are deemed to be concurrent and contributive as a matter of law, and as such, each insurer is primarily liable for its pro rata share of the loss to the extent the aggregate sum of insurance exceeds the insurable value of the property. Again, we disagree.

"[I]f policies insure the same entity and interest against the same casualty, then the coverage provided by the policies is concurrent, thus requiring pro rata contribution absent a contrary provision in an 'other insurance' clause contained in one of the policies." S.C. Ins. Co. v. Fid. & Guar. Ins. Underwriters, Inc., 327 S.C. 207, 214, 489 S.E.2d 200, 203 (1997)

(emphasis added). Here, the American Security policy contains an "other insurance" clause that provides "[i]f there is any other valid or collectible insurance which would attach if the insurance under this policy had not been effected, this insurance shall apply only as excess and in no event as contributing insurance and then only after all other insurance has been exhausted." Thus, the policy language clearly provides to the contrary and the coverage provided by the policy is not "concurrent and contributive as a matter of law."

II. Award of Attorneys' Fees

Blanding raises as her next issue the propriety of the award of attorneys' fees.[4] The Master determined attorneys' fees were warranted under the terms of the mortgage agreement, which provided such fees became the additional debt of Blanding. Here, the mortgage agreement contains broad language regarding Lenders' rights to recover attorneys' fees:

> **Protection of Lender's Interest in the Property and Rights Under this Security Agreement**. If . . . there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations) . . . then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument . . . . Lender's actions can include, but are not limited to . . . (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument.

[4] In the present case, the master awarded Lender attorneys' fees in the amount of $6,768.38, which is the amount of proceeds remaining after the debt ($49,495.14) and prejudgment interest ($6,736.48) were satisfied. The amount of attorneys' fees, which is only a small portion of the $39,335.50 Lender asserted it incurred, is not in dispute.

> Any amount disbursed by Lender under this [section] shall become additional debt of Borrower secured by this Security Instrument.

Blanding maintains, however, attorneys' fees are not recoverable under the terms of the mortgage because Lender's rights under the mortgage were extinguished when the foreclosure judgment was entered. We disagree.

Blanding cites section 29-3-780 of the Code for the proposition that once Lender foreclosed the mortgage and the property was sold, Lender's lien against the property was released, cancelled, and satisfied. This section provides that "[u]pon confirmation of the circuit court of the report of the master . . . pursuant to decree of foreclosure, the officer of the court making the sale shall cause to be recorded in the office where the foreclosed mortgage is recorded a release, cancellation, and satisfaction of the lien. . . ." S.C. Code Ann. § 29-3-780 (2007). This section further provides, "However, nothing in this section may be construed to satisfy any unpaid portion of the debt secured by the mortgage." Id. Thus, while the mortgage may well have been deemed "released, cancelled, and satisfied" under this section, the sale is not construed to satisfy any unpaid portion of the debt secured by the mortgage agreement. By the clear terms of the agreement, the attorneys' fees incurred by Lender in pursuing the insurance proceeds became the additional debt of Blanding secured by the mortgage agreement and were thus unpaid debt secured by the mortgage agreement that remained unsatisfied under section 29-3-780.

Blanding further cites Ryan v. S. Mut. Bldg. & Loan Ass'n, 50 S.C. 185, 27 S.E. 618 (1897) for the proposition that the mortgage agreement merged into the foreclosure judgment such that the contract was extinguished, and therefore the attorneys' fee provision was no longer viable. However, Ryan involved a suit for double the sum of interest collected by the defendant alleged to be received in excess of lawful interest, challenging the collection of the money as usurious, instituted subsequent to receipt of the proceeds in a foreclosure judgment and sale. Id. at 186, 27 S.E.2d at 618-19. There, the court determined the contract said to be usurious had become

merged into the judgment of foreclosure, extinguishing the original contract. Id. at 190, 27 S.E. at 619. The court further noted "[t]he judgment became a new debt," and was not "infected by the usurious nature of the cause of action." Id. In so ruling, the court was guided by the law that "[a] judgment is the final determination of the rights of the parties in an action . . . and is conclusive of all matter necessarily involved, whether raised or not; especially if the party denying the adjudication knew of the matter, and could have interposed it at the previous trial, either in support of a claim or as a defense." Id. at 188, 27 S.E. at 619. In the case at hand, Lender could not have raised the issue of attorneys' fees incurred in the collection of the insurance proceeds, as no insurance issues were implicated at that time since the property had not yet been destroyed by fire. Thus, this matter could not have been raised at the foreclosure proceeding and we do not believe the mortgage agreement was completely merged into the foreclosure such as to extinguish the broad conveyance of rights to collect attorneys' fees in "a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under" the mortgage agreement. Accordingly, we find no error in the award of attorneys' fees.

III. Award of Prejudgment Interest

Lastly, Blanding contends the Master erred in awarding prejudgment interest to Lender, running from the date of issuance of the Foremost check to Blanding until the date of the summary judgment hearing. We disagree.

Blanding asserts the $49,495.14 awarded to Lender from the insurance proceeds does not constitute damages and this is, therefore, not a liquidated damages case with a stated account. She further maintains she never had possession or control of the proceeds and, accordingly, could not have paid the proceeds to Lender. "The law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty." Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 133, 631, S.E.2d 252, 258 (2006). Thus, "the proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by

conditions existing at the time the claim arose." Id. at 133, 631 S.E.2d at 259. Consequently, "[t]he right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party." Id. at 133-34, 631 S.E.2d at 259. Rather, "[i]t is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable." Id. at 134, 631 S.E.2d at 259.

Here, Blanding's indebtedness was certain throughout litigation. The measure of recovery was fixed by conditions existing at the time the proceeds were issued. Accordingly, Blanding was obligated to pay the insurance proceeds when she received them in May 2005. We further find no merit to Blanding's assertion she had no control over the proceeds because the check was made out to her along with Lender. She merely had to endorse the check along with Lender to have the proceeds applied to her debt.

Blanding also argues Lender is entitled to no more than $49,495.14 from the available insurance proceeds as that is the extent of Lender's interest in the property at the time of the fire. Thus, she maintains, by awarding prejudgment interest, the Master effectively allowed Lenders to recover a deficiency judgment. However, the award of prejudgment interest did not alter or add to the Lender's interest in the property. As noted by the master, "[t]he foreclosure judgment fixed the amount of [Blanding's] debt and was a final adjudication thereof. The award of prejudgment interest does not alter the foreclosure judgment. The interest is being awarded on top of the amount due and owing, not in alteration of that amount."[5]

Blanding also contends the original foreclosure judgment included $7,517 in prejudgment interest on her debt and that by including prejudgment

[5] Blanding asserts if Lenders are entitled to prejudgment interest on their interest in the proceeds, she is likewise entitled to prejudgment interest on the remaining insurance proceeds that she was due after payment of her debt. We need not address this issue as Blanding failed to request prejudgment interest in her pleadings. See Hopkins v. Hopkins, 343 S.C. 301, 307, 540 S.E.2d 454, 458 (2000) (holding prejudgment interest must be pled in order to be recovered).

interest on this same debt, the Master's award amounted to a double recovery of prejudgment interest. Blanding fails to recognize, however, that this is a separate proceeding seeking insurance proceeds that were due to Lender. The prejudgment interest awarded by the Master here does not reflect that amount due in prejudgment interest from the mortgage foreclosure, but from the interest accrued from the time the insurance proceeds from the fire were made available by the Foremost check to Blanding, but were not paid to Lender as due.

Finally, Blanding argues, because the parties deposited the proceeds into the Clerk's Office by consent, she is relieved of any liability for prejudgment interest. She further asserts in a footnote that should Lender be entitled to an award of prejudgment interest, she should be allowed to offset the interest earned on the funds while on deposit with the Clerk.

In reviewing the record before us, it does not appear either of these arguments was raised to the Master in the summary judgment arguments. In her motion for reconsideration pursuant to Rule 59, SCRCP, Blanding stated only, "To the extent that any prejudgment interest is awarded to [Lender], [Blanding] is entitled to offset against any such award the interest earned while the funds were on deposit with the Clerk." In the hearing on her motion for reconsideration, Blanding questioned how the court intended "to treat the interest paid on the proceeds since their deposit with the court," stating that the Clerk pays interest on the funds deposited at around 4.5 percent. The Master indicated he was "not aware of that," did not know if that was correct, and stated the matter was not before him. He concluded, "I do not know anything about any interest that the Clerk of Court has been awarding on this money and I am not going to do that." Accordingly, it appears Blanding's argument that she had no liability based upon the deposit of the funds with the Clerk was never raised to the Master and therefore is not properly preserved on appeal. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."). As to the offset argument, this contention was first raised in Blanding's motion for reconsideration and therefore is not preserved for review. See Dixon v.

Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a Rule 59, SCRCP, motion is not preserved for appellate review).[6]

Based upon the foregoing, the decision of the Master is

AFFIRMED.

ANDERSON and KITTREDGE, JJ., concur.

[6] We would note that the Master found Lender entitled to a total judgment of $63,000 from the insurance proceeds, inclusive of prejudgment interest. Lender will receive this specific amount, and thus Blanding should ultimately receive any remaining accrued interest on the $63,000 deposited with the Clerk.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Horry County, **Respondent,**

v.

David Parbel, Kristen Parbel, Crystal Kawolski, Stephanie Regalado, & Laura Rajotte, **Appellants.**

Appeal From Horry County
John L. Breeden, Circuit Court Judge

Opinion No. 4388
Heard May 6, 2008 – Filed May 12, 2008

REVERSED IN PART AND AFFIRMED IN PART.

John S. Nichols, of Columbia, and Robert V. Phillips, of Rock Hill, for Appellants.

John L. Weaver and Brenda L. Gorski, both of Conway, for Respondent.

ANDERSON, J.: In 2004, several employees of Thee Doll House were arrested and cited for violating an Horry County zoning ordinance.

They appeared before the magistrate court and were acquitted of the charges against them. Horry County appealed the magistrate court's ruling to the circuit court. Thee Doll House employees contend the circuit court erred in ruling on Horry County's appeal because it violated double jeopardy clauses of the federal and state constitutions and amounted to an advisory opinion. The employees further maintain the circuit court erred in denying their request for attorneys' fees and costs pursuant to the South Carolina Frivolous Civil Proceedings Sanction Act. We reverse in part and affirm in part.

FACTUAL/PROCEDURAL BACKGROUND

The facts of the case are not in dispute. On the evening of August 16, 2004, and on the following morning, undercover officers entered Thee Doll House and other strip clubs in Horry County to investigate whether dancers' breasts were properly covered. Officers arrested and cited Kristen Parbel, Crystal Kawolski, Stephanie Regalado, and Laura Rejotte for violating an Horry County zoning ordinance by either exposing their nipples or covering their nipples with only transparent "pasties." David Parbel, the manager on duty at Thee Doll House, was cited for permitting the female dancers to work while clothed in this manner. Law enforcement declared this type of breast exposure was a criminal violation of section 526.3 of the Horry County zoning ordinances. Subsequently, the charges were amended to allege criminal violation of section 1303 of the Horry County zoning ordinances.

Section 6-29-950(A) of the South Carolina Code (2004) authorizes the governing authorities of municipalities or counties to provide for the enforcement of any ordinance and provides:

> A violation of any ordinance adopted pursuant to the provisions of this chapter is a misdemeanor. In case a building, structure, or land is or is proposed to be used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer . . . . may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding

> to prevent the unlawful . . . . use, or to correct or abate the violation . . . .

Additionally, Horry County zoning ordinance Section 1303 states:

> (A) It shall be unlawful to use, occupy or permit the use or occupancy of any building, mobile home, or premises, or all or parts thereof hereafter created, erected, changed, converted, or wholly or partly altered or enlarged in its use or structure until a certificate of zoning compliance shall have been issued therefore by the zoning administrator stating that the proposed use of the building or land conforms to the requirements of the ordinance. (B) Failure to obtain a certificate of zoning compliance shall be a violation of this ordinance punishable under section 1308 of this ordinance.

Violating section 1303, as provided in section 1308, constitutes a misdemeanor:

> Any person violating any provisions of this ordinance shall be guilty of a misdemeanor, and upon conviction shall be imprisoned for a period not to exceed thirty (30) days and/or fined not more than two hundred dollars ($200.00) for each offense. Each day such violation continues shall constitute a separate offense. Nothing herein contained shall prevent the county from taking such other lawful action as is necessary to prevent or remedy any violation.

A criminal trial was held in magistrate's court, and Appellants requested a jury trial. After Horry County rested its case, Appellants moved for a dismissal of all charges. The magistrate granted Appellant's motion for dismissal and inculcated "the County has not met the allegations of this

zoning ordinance in proving 1303." Horry County appealed the magistrate's ruling to the circuit court after Appellants' acquittal on March 8, 2005. Though the magistrate "prayed" for the circuit court to dismiss Horry County's appeal with prejudice, the circuit court found it had both subject matter jurisdiction over the issues raised in the appeal and personal jurisdiction over the Appellants. Appellants moved to dismiss Horry County's appeal based on the Double Jeopardy Clauses of the federal and state constitutions and sought sanctions for Horry County's pursuit of its appeal, averring the appeal was frivolous and violated the South Carolina Frivolous Civil Proceeding Sanction Act.

On appeal, the circuit court found Horry County's claim, "the dancers' failure to completely and opaquely cover their breasts violated [section] 1303 (A) by changing or altering Thee Doll House 'use' from a permissible nightclub into its 'use' as an adult entertainment establishment," meritorious. The circuit court elucidated: "Under [the County's] theory, [section] 1303 required the dancers and duty manager to wait until after Thee Doll House sought and successfully obtained a Certificate of Zoning Compliance for its use as an adult entertainment establishment before using or permitting Thee Doll House to be used that way." However, the circuit court found double jeopardy prevented Appellants from being retried under the same charges. Finally, the circuit court denied Appellants' request for attorney's fees and costs because the case before the magistrate was criminal in nature and not a civil proceeding. Appellants' motion to alter or amend the circuit court's judgment was denied.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Rice, 372 S.C. 302, 314, 652 S.E.2d 409, 414 (Ct. App. 2007); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). This court is bound by the circuit court's factual findings unless they are clearly erroneous. State v. Northcutt, 372 S.C. 207, 215, 641 S.E.2d 873, 877 (2007); State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000); State v. Edwards, 374 S.C. 543,

553, 649 S.E.2d 112, 117 (Ct. App. 2007); State v. Patterson, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004); see also State v. Abdullah, 357 S.C. 344, 349, 592 S.E.2d 344, 347 (Ct. App. 2004).

On review, we are limited to determining whether the circuit court abused its discretion. State v. Laney, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006); State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998); State v. Grace, 350 S.C. 19, 23, 564 S.E.2d 331, 333 (Ct. App. 2002). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the circuit court's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Moore, 374 S.C. 468, 473-74, 649 S.E.2d 84, 86 (Ct. App. 2007); State v. Mattison, 352 S.C. 577, 583, 575 S.E.2d 852, 855 (Ct. App. 2003).

LAW/ANALYSIS

I. Error in Ruling on Merits of County's Appeal

A. Double Jeopardy

Appellants maintain the circuit court violated the Double Jeopardy Clause by ruling on Horry County's appeal after they were acquitted in magistrate's court. We agree.

The United States Constitution and the South Carolina Constitution protect against double jeopardy. See U.S. Const. Amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .); S.C. Const. Art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall any person be compelled in any criminal case to be a witness against himself."); see also State v. Mathis, 359 S.C. 450, 457, 597 S.E.2d 872, 876 (Ct. App. 2004) ("The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect citizens from being placed twice in jeopardy of life or liberty."); State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 47 (Ct. App.

2003) ("Both the United States Constitution and the South Carolina Constitution protect against double jeopardy.").

Under the Double Jeopardy Clause a defendant is protected from: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple prosecution for the same offense after an improvidently granted mistrial. State v. Gordon, 356 S.C. 143, 149, 588 S.E.2d 105, 108 (2003); State v. Kirby, 269 S.C. 25, 27-28, 236 S.E.2d 33, 34 (1977); Mathis, 359 S.C. at 457, 597 S.E.2d at 876; Cuccia, 353 S.C. at 434, 578 S.E.2d at 47; see also North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989)); accord Schiro v. Farley, 510 U.S. 222, 229-30 (1994); Justices of Boston Mun. Ct. v. Lydon, 466 U.S. 294, 306-07 (1984); U.S. v. DiFrancesco, 449 U.S. 117, 129 (1980); Brown v. Ohio, 432 U.S. 161, 165 (1977); U.S. v. Wilson, 420 U.S. 332, 343 (1975); Stevenson v. State, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999); McMullin v. S.C. Dep't of Revenue & Taxation, 321 S.C. 475, 478, 469 S.E.2d 600, 602 (1996); State v. Owens, 309 S.C. 402, 405, 424 S.E.2d 473, 475 (1992).

The United States has a long history of this constitutional protection:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Ex Parte Lange, 85 U.S. 163, 168 (1873). The Supreme Court explicated: "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '(a) verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.'" U.S. v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (citing U.S. v. Ball, 163 U.S. 662, 671, (1896)). The Supreme Court reiterated the purpose of the Double Jeopardy Clause: "The standard way for a defendant to secure a final judgment in her favor is to gain an acquittal . . . . [T]he 'primary purpose' of the Double Jeopardy Clause is to 'protect the integrity' of final determinations of guilt or innocence. Sattazahn v. Pennsylvania, 537 U.S. 101, 120 (2003) (internal citations omitted). Moreover:

> An acquittal is accorded special weight. The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal, for the public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation . . . . The law attaches particular significance to an acquittal.

U.S. v. DiFrancesco, 449 U.S. 117, 129 (internal citations omitted).

The South Carolina Supreme Court has long recognized the State has no right of appeal from an acquittal in a criminal case. See State v. McKnight, 353 S.C. 238, 239, 577 S.E.2d 456, 457 (2003) ("Based primarily upon the double jeopardy provisions of the Constitution, we have long recognized that the State has no right of appeal from a judgment of acquittal in a criminal case . . . . These cases are premised upon the basic double jeopardy principle that a defendant in a criminal prosecution is in legal jeopardy when he has been placed upon trial under a valid indictment and a competent jury has been sworn."); State v. Rogers, 198 S.C. 273, 278, 17 S.E.2d 563, 565 (1941) ("[I]t is well settled that no writ of error, appeal, or other proceeding lies on behalf of the state to review or to set aside a verdict

or a judgment of acquittal in a criminal case, although there may have been error committed by the court, or a perverse finding by the jury."); State v. Lynn, 120 S.C. 258, 260, 113 S.E. 74, 75 (1922) ("[T]he state has no right of appeal from judgment upon verdict of acquittal in a criminal case seems to have been recognized and accepted as the law of this jurisdiction from the beginning of our judicial history.").

In State v. Holiday, the supreme court held the State has no right of appeal from an acquittal in a criminal case unless the acquittal was procured by the accused through fraud or collusion. 255 S.C. 142, 145, 177 S.E.2d 541, 542 (1970). The court articulated, "While a limited right of appeal in criminal cases has been conferred upon the State by statute in a number of jurisdictions, the extent of the right of the prosecution to appeal in this jurisdiction has been defined by our judicial decisions. Id. at 144, 177 S.E.2d at 542.

More recently, in State v. Tillinghast, the supreme court concluded the State did not have a right to appeal a magistrate court's ruling to the circuit court after Defendant's acquittal. 375 S.C. 201, 203, 652 S.E.2d 400, 401 (2007). The Defendant was charged with possession of alcohol by a minor and was granted his motion for a directed verdict in the magistrate's court. Id. at 202, 652 S.E.2d at 401. The State appealed to the circuit court and argued the magistrate erred by directing a verdict of not guilty. Id. The State did not seek reinstatement of the charge but sought review of the magistrate's finding the statute was unconstitutional. Id. The circuit court found it had jurisdiction to hear the appeal and found the magistrate erred in its ruling. Id. In reversing the circuit court, the supreme court asserted, "Whether or not the magistrate erred in [its] ruling of law, appellant was acquitted and is now out of court. The circuit court erred by finding the State may appeal the magistrate's ruling." Id. at 203, 652 S.E.2d at 401.

We find Tillinghast controlling of the issues in the case sub judice. Though the parties concede Appellants cannot be retried again on the criminal zoning charges under double jeopardy principles, the circuit court found it had both subject matter jurisdiction over the issues raised in the appeal and personal jurisdiction over the Appellants. The purpose of Horry

County's appeal to the circuit court was to obtain a review of the magistrate's interpretation of an Horry County zoning ordinance. Horry County posits "[w]hether the State may appeal a magistrate's order of acquittal, entered on an erroneous interpretation of law, for the limited purpose of gaining review of that error of, without seeking to retry the defendants, appears to be a muddled question in South Carolina." We disagree and find circuit courts do not possess authority to review possible legal errors of the magistrate after an acquittal. Accordingly, we reverse the circuit court's analysis regarding interpretation of Horry County Zoning Ordinance Section 1303.

B. Advisory Opinions

Appellants asseverate by appealing a ruling it knew was not appealable, Horry County essentially asked the circuit court to render an advisory opinion on the propriety of the magistrate's rulings. We agree.

"It is elementary that the courts of this State have no jurisdiction to issue advisory opinions." Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975); see also Hitter v. McLeod, 274 S.C. 616, 618, 266 S.E.2d 418, 420 (1980) ("[I]t does not ipso facto confer jurisdiction on this Court, or the court below, to render an advisory opinion, which we have repeatedly refused to do even on constitutional issues. . . ."); McDill v. Nationwide Mut. Ins. Co., 368 S.C. 29, 32, 627 S.E.2d 749, 750 (Ct. App. 2006) ("[A] court is not permitted to issue advisory opinions."). A court renders an advisory opinion when commenting on an issue will have no practical effect on the outcome of the case. See Shasta Beverages v. S.C. Tax Com'n, 280 S.C. 48, 56, 310 S.E.2d 655, 659 (1983) ("It is not the role of this [c]ourt to advise the legislative or executive branches how to proceed, nor to render an advisory opinion on a hypothetical situation."); Comm'r. of Pub. Works v. S.C. Dep't. of Health & Envtl. Control, 372 S.C. 351, 641 S.E.2d 763 (Ct. App. 2007) (declining to address an issue which would be merely advisory in nature); Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 76 n. 36, 558 S.E.2d 902, 911 n. 36 (Ct. App. 2001) ("This court will not issue advisory opinions that have no practical effect on the outcome.").

Other than granting Appellants' motion to dismiss and ruling on whether to award attorneys' fees and costs, the circuit court had no authority to rule upon any matter raised in Horry County's appeal. The role of the circuit court, or any state court, is not to give advice or render advisory opinions on hypothetical situations. See Shasta Beverages, 280 S.C. at 56, 310 S.E.2d at 659. By addressing Horry County's issues, the circuit court advised Horry County on what constitutes appropriate action under and how to interpret a county ordinance. Such a decision had no practical effect on the outcome of a contested issue because Appellants were already acquitted of the charges against them. Under South Carolina jurisprudence, the circuit court had no authority to comment on or render a decision regarding Horry County Zoning Ordinance Section 1303.

Because we find the circuit court lacked authority, we need not address Appellant's second and third issues on appeal. See Wilson v. Moseley, 327 S.C. 144, 147, 488 S.E.2d 862, 864 (1997) (holding when an appellate court affirms the circuit court's grant of summary judgment on a dispositive ground, the appellate court need not address the remaining issues on appeal); Fuller-Ahrens P'ship v. S.C. Dep't of Highways & Pub. Transp., 311 S.C. 177, 182, 427 S.E.2d 920, 923 (Ct. App. 1993) (declining to discuss the circuit court's grant of summary judgment on additional grounds, including res judicata, where summary judgment was being affirmed for other reasons and on different grounds); Ringer v. Graham, 286 S.C. 14, 20, 331 S.E.2d 373, 377 (Ct. App. 1985) (determining discussion of remaining issues was unnecessary after reversing a directed verdict).

II. Attorney's Fees and Costs

Appellants contend the circuit court erred as a matter of law by denying their motion for attorney's fees and costs pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act (the Act). Specifically, Appellants assert the County's appeal to the circuit court was reviewed as a civil proceeding because it was an appeal from a directed verdict of acquittal. We disagree.

The determination of whether attorney's fees should be awarded under the Act is treated as one in equity, and in reviewing the award at issue this court may take its own view of the preponderance of the evidence. Hanahan v. Simpson, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997); Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm), 371 S.C. 91, 97, 637 S.E.2d 316, 319 (Ct. App. 2006). " '[F]ollowing the determination of facts, an appellate court applies an abuse of discretion standard in reviewing the decision to award sanctions and the specific sanctions awarded.' " Rutland, 371 S.C. at 97, 637 S.E.2d at 319 (quoting Ex parte Beard, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004)).

Attorneys and individuals who take part in frivolous litigation may be sanctioned under the Act. See S.C. Code §§15-36-10 to -50 (2005) (amended by §15-36-10 (Supp. 2007)). The Act in effect at the time Horry County gave notice of its appeal to the circuit court, on March 9, 2005, provides:[1]

> Any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party if:
>
> (1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and

[1] The provisions of this Act are outlined in sections 15-36-10 to 15-36-50. We note that section 15-36-10 was completely revised and became effective on July 1, 2005, and sections 15-36-20 through -50 were repealed effective March 21, 2005. Because Horry County filed their motion of appeal to the circuit court on March 9, 2005, the original Act still governed the circuit court's decision. For purposes of this analysis, we reference the former version of the Act.

> (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10.

Concomitantly, in order for a litigant to receive attorney's fees and costs under the Act, the litigant has the burden of establishing:

> (1) the other party has procured, initiated, continued, or defended the civil proceedings against him;
>
> (2) the proceedings were terminated in his favor;
>
> (3) the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings;
>
> (4) the aggrieved person has incurred attorney's fees and court costs; and
>
> (5) the amount of the fees and costs set forth in item.

S.C. Code Ann. § 15-36-40 (emphasis added). The original proceedings in magistrate court were criminal rather than civil in nature. However, Appellants argue once Horry County appealed the magistrate's findings to the circuit court, or the court of common pleas, the case was converted into a civil proceeding. We disagree.

South Carolina Rules of Civil Procedure govern "the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity. . . ." Rule 1, SCRCP; see also State v. Brown, 344 S.C. 302, 307, 543 S.E.2d 568, 571 (Ct. App. 2001) ("The scope of the South Carolina Rules of Civil Procedure is limited to 'all suits of a civil nature whether cognizable as cases at law or in equity.'"). In State v. Brown, a defendant appealed a magistrate's ruling on a criminal charge against him to

the circuit court. Id. at 304, 543 S.E.2d at 569. At issue before this court was whether Brown had to serve notice of appeal on the South Carolina Department of Public Safety (SCDPS) pursuant to Rule 74, SCRCP. Id. at 305-06, 543 S.E.2d at 570. There, we clarified: "The dilemma . . . has arisen because criminal appeals from magistrates are heard in courts that operate under the Rules of Civil Procedure." Id. at 305, 543 S.E.2d at 570. Ultimately this court found Rule 74 applied only to civil actions and did not apply to Brown's appeal because his original action was criminal in nature. Id. at 307, 543 S.E.2d at 571.

Following Brown, we find Horry County's appeal to the circuit court was criminal rather than civil in nature because Appellants originally faced criminal charges before the magistrate. We hold the South Carolina Rules of Criminal Procedure rather than the South Carolina Rules of Civil Procedure apply when parties appeal a magistrate's ruling in a criminal case to the circuit court. Therefore, the Act does not apply to the proceedings concerning Appellants. The circuit court did not err by denying attorney's fees and costs pursuant to the Act.

CONCLUSION

The circuit court violated the double jeopardy provision of the federal and state constitutions by allowing Horry County's appeal. Moreover, by addressing the issues raised by Horry County, the circuit court erroneously issued an advisory opinion. The circuit court properly denied Appellant's motion for attorney's fees and costs. Accordingly, the circuit court's order is

REVERSED IN PART AND AFFIRMED IN PART.

HUFF and KITTREDGE, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Charles Ward and Robby Hodge, d/b/a R&B Amusements, **Appellants,**

v.

West Oil Company, Inc., d/b/a Markette Stores, **Respondent.**

Appeal From Darlington County
Eugene P. Warr, Jr., Special Referee

Opinion No. 4389
Heard May 6, 2008 – Filed May 12, 2008

AFFIRMED

Charles E. Carpenter, Jr. and Carmen V. Ganjehsani, of Columbia, M.M. Weinberg, Jr., of Sumter, and Kenneth D. Baker, of Darlington, for Appellants.

Martin S. Driggers, Jr. and William R. Calhoun, Jr., of Columbia, for Respondent.

ANDERSON, J.: Charles Ward and Robby Hodge, d/b/a R&B Amusements, appeal the Special Referee's award of $5,067.31 in their favor in a breach of contract action. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

I. Initial Meeting

Charles Ward (Ward) and Robby Hodge (Hodge) operated a gaming business known as R&B Amusements (R&B). They desired to place their pull tab machines in convenience stores owned by West Oil Company, Inc. (West Oil). The machines sold tickets, called "Pots of Gold," with potential for winning prizes. On September 11, 2001, Ward and Hodge met with Lex West, Jr. (West), owner of West Oil, and Camp Seegars (Seegars), an employee of West Oil, to discuss the possibility of placing the machines. Seegars was West Oil's Director of Operations and oversaw its twenty-four convenience stores. This was the first time the parties met; they had never done business together before.

R&B gave West Oil an overview of their machines and presented West Oil with a form contract, entitled "Exclusive Agreement," that R&B obtained from its machine supplier. The typewritten contract consisted of eleven paragraphs. West Oil agreed to place the machines initially at four of their stores. The terms of the agreement were negotiated at this meeting. West Oil expressed its desire to reduce the term of the agreement from the three years R&B proposed to one year and to collect a $500 placement fee from R&B for each machine situated in its stores. R&B's typical agreement was to split the profits, defined as the total money taken in by the machines less the payouts and cost of the tickets from the manufacturer, with the location owner. West Oil wanted R&B to absorb the cost of the tickets in the machines in its stores. R&B was agreeable to the modifications because of their desire to place their machines in such a large operator's stores.

There were some discussions regarding termination of the contract. West Oil contends it wanted the ability for either party to terminate the

contract at will. At trial, Seegars testified that West Oil "wanted a way out because what if down the road they didn't like us or we didn't like them. That was put into that clause." Both parties understood the impending arrival of the South Carolina Education Lottery was a concern to West Oil, and it did not want the presence of R&B's machines to jeopardize its ability to become a lottery retailer. R&B advances they intended for West Oil to be able to terminate the contract only if their machines prohibited West Oil from selling lottery tickets.

II. Execution of Agreement

Two days later, on September 13, 2001, Ward, Hodge, and Seegars met again. West did not attend this meeting, so Seegars alone represented West Oil. R&B brought a revised, typed contract. The parties do not dispute that their agreement was for R&B to pay West Oil a $500 placement fee for each machine. The parties were to evenly split the profits (total money taken in by the machine less the payouts made by West Oil), and R&B was to absorb the costs of the tickets. The revised contract was for a one year term.

The revised contract contained no language allowing termination of the agreement if the relationship between the parties was no longer amicable. The typewritten contract R&B presented to West Oil on September 13 included the following paragraph:

> 7. In the event of any breach of this Agreement, it is recognized by both parties that remedies at law are inadequate given the highly competitive nature of this industry, and the difficulty of finding alternative locations not committed to existing agreements. OWNER further acknowledges the unique nature of the location. OWNER further acknowledges that the loss of this location will result in irreparable harm to R&B. As a result, the parties agree that either party may, without notice to the other party, petition in court of competent jurisdiction and obtain a restraining order and/or injunction requiring

> compliance with the terms of this Agreement. Notwithstanding the forgoing, in the event of a breach, in addition to any other remedy available, R&B may elect to terminate this Agreement and remove all game promotions materials and equipment without interference from OWNER and shall be entitled to liquidated damages in an amount equal to R&B's highest weekly share of the net proceeds prior to said breach, multiplied by the number of weeks remaining in the unexpired term of this Agreement.

Seegars wrote an additional provision (the Addition) at the top of the contract:

> Addition * In event of contract termination up front placement money will be re-imbursed [sic] at pro-rated time with no penalties to either party of this contract. This is added this day September 13th [sic] 2001 [sic]
>
> CS RH CW

Seegars, Hodge, and Ward each initialed below the handwritten addition. All three signed the bottom of the contract. The contract originally specified four store locations where machines were to be placed. The machines performed well, and the parties agreed orally to place the machines in more stores over time. Eventually, West Oil authorized the placement of machines in thirteen additional stores.

III. Ticket Sales

Initially, each ticket machine held a total of $4,800 worth of "red" tickets at a time. When the red tickets sold out, R&B would remove the money, pay the portion due to West Oil, and refill the machine with red tickets. In late 2001, R&B approached Seegars about changing the game from the red tickets to new "green" tickets. Seegars hesitated because West Oil's accounting system was programmed for the red tickets, but R&B

insisted the green tickets would be more profitable for both R&B and West Oil. Seegars allowed the green tickets to be placed in one store in Bishopville. West Oil contends the change to the new game was only authorized for that one store, and R&B posit the contract gives them exclusive authority to decide what games to place in their machines. The contract states "R&B shall exclusively supply to OWNER any and all game promotions materials equipment for and upon the premises, including but not limited to, contests, games of chance, sweepstakes, prizes, tickets, ticket dispensing equipment, advertisement materials, and product services related to, or in connection with, such game promotions. . . ."

IV. Contract Termination and Subsequent Proceedings

R&B began adding the new green tickets to store locations other than the one store in Bishopville. According to West Oil, this change was not authorized. Seegars became upset when he learned of this at a meeting of store supervisors. West asked Seegars if he authorized placement of the new game. Seegars informed West that he did so for only one store, and West instructed him to leave the meeting to phone R&B and direct them to remove their machines from all West Oil stores.

R&B complied with West Oil's request and removed the machines. R&B counted the money in each machine and determined how much the partially played deck of cards had paid out. R&B compensated West Oil for the payouts and their share of the profits from each machine.

R&B filed a complaint asserting a breach of contract claim against West Oil seeking over $800,000 in damages. West Oil filed a counterclaim against R&B alleging breach of contract for selling products not authorized under the contract. The matter was referred to a special referee who conducted a trial. The special referee determined:

> The court finds that a written, enforceable contract existed for the initial four ticket machines. That contract was terminated. Under the handwritten Addition to the contract: "In the event of contract

> termination, up front placement money will be reimbursed at pro-rated time with no penalties to either party of this contract." (ex. A:1) The up front placement money was $500 per machine. This also applied for the thirteen additional machines that were added at other locations. Therefore, the plaintiffs initially paid the defendants $8,500 in up front placement money. Under the plaintiff's calculation, the machines were in place for twenty-one weeks. Therefore, the plaintiffs are entitled to be reimbursed the pro-rated portion of the up front placement money, which equals $5,067.31. [footnote omitted]

R&B filed a motion to alter or amend judgment pursuant to Rule 59(e), SCRCP, which was denied.

ISSUES

1. Did the special referee commit an error of law in the construction of the contract?

2. Is there any evidence that reasonably supports the decision of the special referee?

STANDARD OF REVIEW

"An action for breach of contract seeking money damages is an action at law." Sterling Dev. Co. v. Collins, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992); Moore v. Crowley & Associates, Inc., 254 S.C. 170, 172, 174 S.E.2d 340, 341 (1970); Ellie, Inc. v. Miccichi, 358 S.C. 78, 89, 594 S.E.2d 485, 491 (Ct. App. 2004); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 430, 540 S.E.2d 113, 117 (Ct. App. 2000). Generally, an action to construe a contract is one at law. Patricia Grand Hotel, LLC v. MacGuire Enter., Inc., 372 S.C. 634, 638, 643 S.E.2d, 692, 694 (Ct. App. 2007); see Jacobs v. Service Merch. Co., 297 S.C. 123, 127, 375 S.E.2d 1, 3 (Ct. App. 1988 (noting an action to construe an unambiguous written contract is one at

law); see also Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000).

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings . . . . The judge's findings are equivalent to a jury's findings in a law action." Townes Assocs., 266 S.C. at 86, 221 S.E.2d at 775; accord Patricia Grand Hotel, 372 S.C. at 638, 643 S.E.2d at 694; Cohens v. Atkins, 333 S.C. 345, 347, 509 S.E.2d 286, 288 (Ct. App.1998); Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). "[Q]uestions regarding the credibility and the weight of evidence are exclusively for the trial judge." Golini v. Bolton, 326 S.C. 333, 342, 482 S.E.2d 784, 789 (Ct. App. 1997).

A special referee, under Rule 53(c), SCRCP, "shall exercise all power and authority which a circuit [court] sitting without a jury would have in a similar manner." Thus, our review of a special referee's decision is limited to the correction of errors of law, and this court will not disturb the referee's factual findings if supported by any evidence. Jones v. Daley, 363 S.C. 310, 314, 609 S.E.2d 597, 599 (Ct. App. 2005).

LAW/ANALYSIS

I. West Oil's Right to Terminate the Contract at Will

R&B avers the special referee erred in construing the Addition to the contract so as to allow West Oil to terminate the contract at will. Specifically, R&B maintains the special referee contravened several cardinal principles of contract law by interpreting the Addition so as to render meaningless the primary contractual rights and duties of the parties. We disagree.

A. Unambiguous vs. Ambiguous Contract

R&B first argues the special referee erred by failing to exclusively look to the language of the clear and unambiguous contract in ascertaining the parties' intent. We disagree.

If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect. Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); Blakeley at 72, 221 S.E.2d at 769. "Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004) (quoting Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)). However, where an agreement is ambiguous, the court should seek to determine the parties' intent. Smith-Cooper v. Cooper, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001); Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct. App. 1998).

"A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear." Ellie at 94, 594 S.E.2d at 493; accord Bruce v. Blalock, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962); Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997). "[A]n ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning." Carolina Ceramics, Inc. v. Carolina Pipeline Co., 251 S.C. 151, 155-56, 161 S.E.2d 179, 181 (1968) (citation omitted).

The construction of a clear and unambiguous contract is a question of law for the court. S.C. Dep't of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001); S. Atl. Fin. Servs., Inc. v. Middleton, 349 S.C. 77, 80-81, 562 S.E.2d 482, 484-85 (Ct. App. 2002), aff'd as modified, 356 S.C. 444, 590 S.E.2d 27 (2003); United Dominion

Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992). Whether a contract's language is ambiguous is a question of law. S.C. Dep't of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001); S. Atl. Fin. Servs., 349 S.C. at 80-81, 562 S.E.2d at 484-85; United Dominion Realty Trust, 307 S.C. at 105, 413 S.E.2d at 868. A contract is ambiguous when the terms of the contract are inconsistent on their face, or are reasonably susceptible of more than one interpretation. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." Id. "Once the court decides that the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact for the jury." Id. at 592, 493 S.E.2d at 879; see also Charles v. B & B Theatres, Inc., 234 S.C. 15, 18, 106 S.E.2d 455, 456 (1959) ("[W]hen the written contract is ambiguous in its terms, . . . parol and other extrinsic evidence will be admitted to determine the intent of the parties.") (citation omitted); Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (Ct. App. 2007).

The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993).

The parties signed the agreement and separately initialed the Addition at the top of the contract. R&B now professes the Addition contravenes the terms of the contract so as to render meaningless the primary contractual rights and duties of the parties. R&B's understanding with regards to the operative language used in the Addition is contrary to the understanding of West Oil. Hence, the operative language used in the Addition creates an

apparent ambiguity as to the termination of the contract. Accordingly, the special referee properly allowed extrinsic evidence in ascertaining the parties' intent.

B. Intent of the Parties

R&B asserts the special referee erred by failing to interpret the contract according to the intention of the parties at the time the agreement was entered. We disagree.

A court must construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court reasonably may do so. Osteen v. T.E. Cuttino Const. Co., 315 S.C. 422, 427, 434 S.E.2d 281, 284 (1993). An agreement capable of an interpretation which will make it valid will be given such an interpretation if the agreement is ambiguous. Id. at 428, 434 S.E.2d at 284; Romanus v. Biggs, 214 S.C. 145, 51 S.E.2d 503 (1949).

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. Ecclesiastes Prod. Ministries, 374 S.C. at 497, 649 S.E.2d at 501; S. Atl. Fin. Servs., 349 S.C. at 80-81; 562 S.E.2d at 484-85; accord D.A. Davis Constr. Co., Inc. v. Palmetto Props., Inc., 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984); Williams v. Teran, Inc., 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976); RentCo., a Div. of Fruehauf Corp. v. Tamway Corp., 283 S.C. 265, 267, 321 S.E.2d 199, 201 (Ct. App. 1984). "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." Mishoe v. Gen. Motors Acceptance Corp., 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1958).

The parties' intention must, in the first instance, be derived from the language of the contract. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n., 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) ("In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties."); Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973); Jacobs v. Service Merch. Co., 297 S.C. 123, 375 S.E.2d 1 (Ct. App. 1988).

To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect. Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973). "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." Blakeley v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976); Ellie, 358 S.C. at 93-94, 594 S.E.2d at 493-94; accord Kable v. Simmons, 217 S.C. 161, 166, 60 S.E.2d 79, 81 (1950).

The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977); see also Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used."). "Documents will be interpreted so as to give effect to all of their provisions, if practical." Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citing 17A Am. Jur. 2d Contracts § 385 (1991)). "The courts, in attempting to ascertain this intention, will endeavor to determine, the situation of the parties, as well as their purposes, at the time the contract was entered." Columbia East Assocs. v. Bi-Lo, Inc., 299 S.C. 515, 519-20, 386 S.E.2d 259, 261-62 (Ct. App. 1989); see Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977); Bruce v. Blalock, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962); Mattox v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct. App. 1986). "[By] doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language." Klutts, 268 S.C. at 89, 232 S.E.2d at 25.

In Brady v. Brady, 222 S.C. 242, 72 S.E.2d 193 (1952), the South Carolina Supreme Court elucidated:

> It is fundamental that in the construction of the language of a [contract], it is proper to read together

> the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning.
>
> Agreements should be liberally construed so as to give them effect and carry out the intention of the parties. In arriving at the intention of the parties to a lease, the subject matter, the surrounding circumstances, the situation of the parties, and the object in view and intended to be accomplished by the parties at the time, are to be regarded, and the lease construed as a whole. Different provisions dealing with the same subject matter are to be read together.

Id. at 246-47, 72 S.E.2d at 195.

Incontrovertibly, the record evinces R&B's intent to include the handwritten termination provision as an additional term to the contract. R&B was aware of and agreed upon the remedies available under the handwritten termination provision. The inclusion of the Addition was discussed at the initial meeting between both parties, and the parties subsequently agreed to incorporate the handwritten provision and acknowledged its inclusion by separately initialing the Addition at the top of the Exclusive Agreement. Luculently, the record reflects R&B intended to include the Addition as an essential term of the underlying agreement. Ergo, the special referee did not err in failing to find otherwise.

C. Parol Evidence

R&B maintains the special referee erred by allowing parol evidence to aid in the interpretation of the contract. We disagree.

"Where a contract is silent as to a particular matter, and ambiguity thereby arises, parol evidence may be admitted to supply the deficiency and establish the true intent." Columbia East Assocs. v. Bi-Lo, Inc., 299 S.C.

515, 519-20, 386 S.E.2d 259, 261-62 (Ct. App. 1989); Wheeler v. Globe Rutgers Fire Ins. Co. of City of N.Y., 125 S.C. 320, 325, 118 S.E. 609, 610 (1923). Under the parol evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract. Penton v. J.F. Cleckley Co., 326 S.C. 275, 280, 486 S.E.2d 742, 745 (1997). "However, if a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties." Koontz v. Thomas, 333 S.C. 702, 709, 511 S.E.2d 407, 411 (Ct. App. 1999). An ambiguous contract is a contract capable of being understood in more than one way or a contract unclear in meaning because it expresses its purpose in an indefinite manner." Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977).

The operative language used in the Addition creates an apparent ambiguity as to the termination of the contract. Accordingly, "parol evidence may be admitted to supply the deficiency and establish the true intent of the parties." Columbia East Assocs., 299 S.C. at 519-20, 386 S.E.2d at 261-62. We rule the special referee did not err in allowing parol evidence to aid in the interpretation of the contract.

D. Interpretation of the Contract

R&B posits the special referee erred in interpreting the contract as a whole by failing to give effect to all its provisions. We disagree.

In ascertaining the intention of a contract, the court must look to the contents of the entire agreement and not from any particular clause thereof. Thomas-McCain, 268 S.C. at 197, 232 S.E.2d at 729. "The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used." Barnacle Broad., 343 S.C. at 147, 538 S.E.2d at 675.

Where multiple documents form the essential terms of a contract, the "[d]ocuments will be interpreted so as to give effect to all of their provisions, if practical." Reyhani v. Stone Creek Cove Condominium II Horizontal Prop. Regime, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citation omitted). "[I]n the absence of anything indicating a contrary

intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together." Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977). Furthermore, "where the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole." Id. As noted by our Supreme Court:

> Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated.

Id.

The Addition can be interpreted in complete harmony with the other provisions of the Exclusive Agreement. The additional handwritten provision did not affect or confuse any of the other terms, as evidenced by the parties conduct prior to the contract's termination. The record indicates R&B was aware of and agreed upon the remedies available under the handwritten termination provision. To the extent the operative language used in the Addition conflicts with any portion of the contract, South Carolina law mandates the handwritten provision prevail. See Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 593, 493 S.E.2d 875, 879 (Ct. App. 1997) ("Printed provisions of a contract should be harmonized, if possible, with handwritten ones. If there is an inconsistency between the two provisions, however, the handwritten provision prevails."). Hence, the special referee did not err in giving effect to the handwritten termination provision because the Addition was intended to serve as an essential term of the underlying agreement and is consistent with the other provisions provided therein.

E. Interpretation of the Addition

R&B asseverates the special referee erred by construing the Addition as an "escape clause" for West Oil. Particularly, R&B claims the operative language used in the Addition contradicts the terms of the contract creating an ambiguity which should be construed in R&B's favor. We disagree.

> Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.

Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981); see also Columbia East Assocs. v. Bi-Lo, Inc., 299 S.C. 515, 519-20, 386 S.E.2d 259, 261-62 (Ct. App. 1989) ("Where the contract is susceptible of more than one interpretation, the ambiguity will be resolved against the party who prepared the contract.").

While R&B correctly asserts any ambiguity in a contract should be resolved against the drafter, R&B waived any claim regarding the construction of ambiguities created by the additional termination provision. In the paragraph numbered ten in the Exclusive Agreement, "each party hereby waives the doctrine that an ambiguity should be construed and interpreted against the party that drafted this Agreement." The special referee did not err in construing the Addition against R&B.

F. Plain and Ordinary Meaning

R&B challenges the special referee erred by failing to interpret the contract according to its plain and ordinary meaning. Specifically, R&B claims the special referee improperly construed the Addition by equating the meaning of "termination" with the meaning of "breach." We disagree.

When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning. Conner v. Alvarez, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985); Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999).

Contrary to R&B's contention, the language of the Addition expressly and unambiguously sets forth what will occur in the event of contract termination—not in the event of breach. Black's Law Dictionary defines "termination" as "the act of ending something." Black's Law Dict. (8th ed. 2004). This was the same operative term used in the handwritten provision expressly consented to by R&B. R&B's express consent to the Addition further reflects R&B's acknowledgment and understanding of the terms therein. Consequently, R&B cannot claim the special referee improperly construed "termination" as employed in the Addition. The special referee did not err in interpreting the contract as terminated rather than breached based upon the plain and ordinary meaning of the Addition's operative language.

G. Good Sense Meaning

R&B maintains the special referee erred in interpreting the contract according to its "good sense" meaning. We disagree.

> Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail.

C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Comm'n., 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988) (citation omitted).

In the case sub judice, the special referee found "it makes sense to give controlling weight to the handwritten provision." According to South Carolina jurisprudence, "[p]rinted provisions of a contract should be harmonized, if possible, with handwritten ones. If there is an inconsistency between the two provisions, however, the handwritten provision prevails." Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 593, 493 S.E.2d 875, 879 (Ct. App. 1997) (citing 3 Corbin on Contracts § 548 (1960)). Thus, the court did not err in finding the Addition took priority over the pre-printed terms of the Exclusive Agreement.

II. Evidentiary Record

Although the special referee's order cites the witnesses' depositions rather than the trial transcript, all facts recited in the order are consistent with testimony given at trial and exhibits admitted into evidence. The first four machines were explicitly addressed by the written agreement. R&B placed machines in thirteen additional stores without any additional written agreement. Because R&B paid West Oil a $500 placement fee each time a machine was placed and R&B split the proceeds from the machines in the manner specified by the contract, the court appropriately found the same terms of the written contract, including the handwritten termination clause, applied to the additional thirteen machines.

CONCLUSION

"Courts are without authority to alter a contract by construction or to make new contracts for the parties." Gilstrap v. Culpepper, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984). Our duty is to interpret the contract according to the intentions of the parties themselves ". . . regardless of its wisdom or folly, apparent unreasonableness, or failure to guard [the parties'] rights carefully." Id. (quoting Blakeley v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976)). Because the record illuminates the parties' intent to include the handwritten termination provision as an additional term to the Exclusive Agreement, we hold the special referee properly construed the Addition so as to allow West Oil to terminate the contract at will.

We rule the parties' contract is ambiguous. Concomitantly, parol evidence is admissible to determine the parties' intent. The special referee correctly held the contract is ambiguous and looked to parol evidence to construe the contract. There is ample evidence to support the referee's decision that the parties intended for either to be able to terminate their agreement. The only monetary consequence for termination was the prorated repayment of the $500 placement fee, which the court ordered West Oil to pay R&B. Accordingly, the order of the special referee is

AFFIRMED.

HUFF and KITTREDGE, JJ., concur.