OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 24
June 2, 2009
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richland County, Respondent,

v.

Carolina Chloride, Inc., Appellant.

Appeal From Richland County
Reginald I. Lloyd, Circuit Court Judge

Formerly Opinion No. 4462
Heard October 9, 2008 – Filed November 25, 2008
Withdrawn, Substituted, and Refiled May 28, 2009

AFFIRMED AS MODIFIED IN PART, REVERSED AND REMANDED IN PART

Edward D. Sullivan, Christian Stegmaier and Amy L. Neuschafer, all of Columbia, for Appellants.

Andrew F. Lindermann, William H. Davidson III and Michael B. Wren, all of Columbia, for Respondent.

PIEPER, J.: Carolina Chloride, Inc. appeals a directed verdict involving the zoning of real property in Richland County. We now withdraw our previous opinion from publication and substitute this revised opinion.[1] We affirm as modified in part, and reverse and remand in part.

FACTS

In November of 1996, Carolina Chloride purchased 7.67 acres of land in Richland County from IBM for $85,000. Prior to the purchase, Carolina Chloride's realtor contacted the Richland County Planning and Zoning Department ("County") to inquire about the zoning of the IBM property. Carolina Chloride required M-2 zoning for heavy industry because it planned to use the property for storing and distributing calcium chloride, a nonhazardous chemical used for ice or dust control on roads and for treating drinking water. In response to the inquiry, County allegedly informed the realtor of the property's M-2 zoning designation.[2]

The month after purchase of the property, Carolina Chloride's president, Robert Morgan ("Morgan"), went to County seeking a building permit. The zoning administrator, Terry Brown, told Morgan he believed the County zoned the property M-2, but there was a question about the tax map. The following day, the zoning administrator wrote Morgan a letter confirming County zoned the property M-2.

Over the ensuing six years, Carolina Chloride invested more than four hundred thousand dollars to improve the property, including building a mini-warehouse business. In order to build and maintain the businesses on the property, Carolina Chloride sought multiple licenses, certificates, and permits from County. Either the zoning administrator or other authorized County employees approved all such requests with each reflecting M-2 zoning.

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[1] After filing the petition for rehearing, the parties requested this court delay its decision on the petition for the last few months.

[2] Carolina Chloride's realtor could not recall who told him of the property's M-2 zoning.

In 2002, Morgan began negotiating the sale of the business with Allen, Johnette and Luke Watson ("the Watsons"). In pursuit of Carolina Chloride's purchase, the Watsons entered discussions with a bank to obtain financing, reviewed Carolina Chloride's financial records, and created a business plan for their intended expansion of the company. After continued discussions, Morgan agreed to sell Carolina Chloride and all its assets for 1.1 million dollars; however, Morgan and the Watsons never reduced the agreement to writing.

Thereafter, Carolina Chloride and the Watsons contacted John W. Hicks ("Hicks"), County's employee authorized to inform citizens whether their intended property use conformed to applicable zoning ordinances. Carolina Chloride sought County's approval for the Watsons' planned expansion of Carolina Chloride's property. On February 13, 2003, Hicks advised Carolina Chloride the property was zoned rural (RU). Hicks further advised that the current use of the property did not conform to the zoning ordinances; therefore, County would not permit any future expansion of the property. Hicks did state Carolina Chloride could continue its non-conforming use and could petition the Planning Commission to amend the zoning map to reflect M-2 zoning. As a result, the Watsons decided they did not want to purchase Carolina Chloride alleging RU zoning "totally killed the sale."

In August of 2003, Carolina Chloride petitioned to change the property's zoning from RU to M-2. On November 4, 2003, Richland County Council approved the request and amended the zoning map. Carolina Chloride subsequently filed suit against County alleging multiple causes of action associated with the unsuccessful sale of Carolina Chloride's property.

At trial, County denied all claims and asserted defenses under the South Carolina Tort Claims Act. During trial, the court refused to allow Carolina Chloride to read sections of Terry Brown's deposition to the jury because Terry Brown was no longer the zoning administrator. At the end of Carolina Chloride's case-in-chief, the trial court granted County's motion for directed

verdict on all causes of action. Carolina Chloride filed a motion to reconsider, which the trial court denied. Carolina Chloride now appeals.[3]

ISSUES

I. Did the trial court err in excluding the testimony of the former zoning administrator?

II. Did the trial court err in finding there was no right to rely regarding the constructive fraud claim?

III. Did the trial court err as a matter of law in finding Richland County did not owe a duty to Carolina Chloride?

IV. Did the trial court err as a matter of law in finding the Tort Claims Act provided Richland County with immunity?

V. Did the trial court err in finding no evidence of gross negligence by Richland County?

IV. Did the trial court err in ruling as a matter of law there was no governmental taking by Richland County?

VII. Did the trial court err in ruling as a matter of law there was no deprivation of substantive due process by Richland County?

VIII. Did Carolina Chloride waive its governmental estoppel and promissory estoppel arguments?

[3] Prior to oral arguments, County filed a motion with this court to strike materials Carolina Chloride designated for inclusion in the record on appeal, including the depositions of Terry Brown, Carl Gosline, and Geonard Price. This court denied the motion stating County was entitled to argue in its appellate brief whether the contested items should be considered on appeal.

STANDARD OF REVIEW

When ruling on a motion for directed verdict, appellate courts apply the same standard as the trial court viewing evidence and all reasonable inferences in the light most favorable to the non-moving party. Gadson ex rel. Gadson v. ECO Servs. of South Carolina, Inc., 374 S.C. 171, 175-76, 648 S.E.2d 585, 588 (2007). A court should deny a motion for directed verdict "when the evidence yields more than one inference or its inference is in doubt." Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). This court will reverse only when there is no evidence to support the ruling or when the ruling is controlled by an error of law. Law v. South Carolina Dep't of Corr., 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006).

I. Deposition Testimony

The admission of evidence is within the sound discretion of the trial court. Gamble v. Int'l Paper Realty Corp. of South Carolina, 323 S.C. 367, 373, 474 S.E.2d 438, 442 (1996). The exclusion of evidence will not be reversed on appeal absent an abuse of discretion. Id.

The trial court prohibited Carolina Chloride from reading excerpts of the deposition of Terry Brown (the former zoning administrator) at trial based on Rule 32(a)(2), SCRCP. The rule provides, "[t]he deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent . . . may be used by an adverse party for any purpose." Rule 32(a)(2), SCRCP.

Carolina Chloride argues Brown qualified as an officer, director, or managing agent under Rule 32(a)(2), SCRCP. While Brown was no longer the zoning administrator for County when deposed, Carolina Chloride asserts he met the requirements of Rule 32(a)(2), SCRCP, as a current member of the Zoning Board of Adjustment. Carolina Chloride, however, has not demonstrated the trial court abused its discretion by excluding Brown's deposition testimony. Furthermore, Brown's current status as a member of the Zoning Board of Adjustment, in and of itself, does not require admission of the deposition under Rule 32(a)(2), SCRCP. Carolina Chloride did not lay

any foundation as to why Brown's role on the Board qualifies under Rule 32(a)(2). If not admissible under Rule 32(a)(2), Carolina Chloride needed to demonstrate Brown was unavailable pursuant to Rule 32(a)(3), SCRCP, or alternatively, if Brown was available, Carolina Chloride should have called him as a witness at trial. Indeed, Carolina Chloride opined at trial that the application of Rule 32(a)(2), SCRCP, to the admissibility of Brown's deposition was "a weak argument." Consequently, the trial court did not abuse its discretion in excluding Brown's deposition at trial in the absence of the requisite foundation.[4]

II. Constructive Fraud and Right to Rely

Carolina Chloride argues the trial court erred in dismissing the constructive fraud claim because a right to rely exists when there is no evidence the government employee is acting outside the scope of his authority.

To prove constructive fraud, all elements of actual fraud except the element of intent must be established. Armstrong v. Collins, 366 S.C. 204, 219, 621 S.E.2d 368, 375 (Ct. App. 2005). To sustain a claim for fraud, the following elements must be demonstrated "by clear, cogent, and convincing evidence: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of the falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." Schnellmann v. Roettger, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (2007). "Actual fraud is distinguished from constructive fraud by the presence or absence of the intent to deceive." Armstrong, 366 S.C. at 219, 621 S.E.2d at 375. "However, in a constructive fraud case, where there is no confidential or fiduciary

[4] While Carolina Chloride also references Rule 801(d)(2), SCRE in its brief on appeal, this argument was not made to the trial court and is not preserved for our review. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (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).

relationship, and an arm's length transaction between mature, educated people is involved, there is no right to rely." Id. (internal quotations omitted).

Here, Carolina Chloride has failed to offer evidence demonstrating a confidential or fiduciary relationship arose between Carolina Chloride and County employees. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard for the interests of the one imposing the confidence." Hendricks v. Clemson Univ., 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003) (declining to find a fiduciary relationship between a student and an academic advisor). Carolina Chloride suggests a confidential or fiduciary relationship arose between Carolina Chloride and County merely based on the fact the zoning administrator had a one-on-one conversation with the owner of Carolina Chloride. See Armstrong 366 S.C. at 219, 621 S.E.2d at 375 ("A relationship must be more than casual to equal a fiduciary relationship."). Our courts have not recognized a confidential or fiduciary relationship between individuals and zoning administrators. Moreover, the imposition of fiduciary relationships generally has been reserved to special relationships or "to legal or business settings, often in which one person entrusts money to the other, such as with lawyers, brokers, corporate directors, and corporate promoters." Hendricks, 353 S.C. at 459, 578 S.E.2d at 716. Thus, the trial court did not err in dismissing Carolina Chlorides' constructive fraud claim as a matter of law.[5]

III. Public Duty Rule

The trial court ruled as a matter of law County owed Carolina Chloride no "special duty," warranting a directed verdict on Carolina Chloride's negligence claims. Carolina Chloride asserts this ruling was in error because the public duty rule does not apply to its tort claims. We agree.

To establish liability in a negligence action, the claimant must show: (1) a duty of care owed by the defendant to the plaintiff; (2) breach of that

[5] This court may affirm the trial court based on any ground found in the record. I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000).

duty; and (3) damages resulting from the breach. Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998). Statutes, contractual relationships, property interests, and other special circumstances may give rise to an affirmative legal duty to act. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 656-57 (2006). "When, and only when, the plaintiff relies upon a statute as creating the duty does a doctrine known as the 'public duty rule' come into play." Arthurs ex rel. Estate of Munn v. Aiken County, 346 S.C. 97, 103, 551 S.E.2d 579, 582 (2001).

In Arthurs, our state's supreme court analyzed whether the Tort Claims Act and the public duty rule were incompatible. Id. at 102, 551 S.E.2d at 581-82. While the court did confirm the viability of the public duty rule, the court clarified what types of situations could give rise to the rule. Id. at 105, 551 S.E.2d at 583. Accordingly, only when the plaintiff relies upon a statute as creating the duty does the public duty rule come into play. Id. at 103, 551 S.E.2d at 582. In other words, "where the duty relied upon is based upon the common law . . . then the existence of that duty is analyzed as it would be were the defendant a private entity." Trousdell v. Cannon, 351 S.C. 636, 641, 572 S.E.2d 264, 266-67 (2002) (analyzing the implications of the holding in Arthurs) (internal quotations omitted).

Here, Carolina Chloride asserts a negligence claim based upon the common law duty to exercise reasonable care. Specifically, Carolina Chloride argues County breached its duty of reasonable care in maintaining the zoning records. Carolina Chloride does not base its negligence claims on any statutory duty. Because Carolina Chloride relies on a common law duty and not a statutory duty, the trial court erred in applying the public duty rule. See Trousdell, 351 S.C. at 641, 572 S.E.2d at 267 (holding the public duty rule did not bar an alleged breach of the common law duty to exercise reasonable care).

Nevertheless, Carolina Chloride's claims may still be barred under an exception to the waiver of immunity enumerated in the South Carolina Tort Claims Act. See Madison, 371 S.C. 123, 142, 638 S.E.2d 650, 660 (stating "[w]hen a governmental entity owes a duty of care . . . under the common law and other elements of negligence are shown, the next step is to analyze the

applicability of exceptions to the waiver of immunity . . . asserted by the governmental entity."). Accordingly, we now address whether the exceptions County raised bar Carolina Chloride's negligence claim.

IV. Sovereign Immunity

Carolina Chloride asserts the trial court erred in finding County immune from liability under Section 15-78-40 of the South Carolina Tort Claims Act.

The South Carolina Tort Claims Act ("the Tort Claims Act" or "the Act") constitutes the exclusive civil remedy for any tort committed by a governmental employee while acting within the scope of the employee's official duties. S.C. Code Ann. § 15-78-200 (2005). The Tort Claims Act does not create causes of action, but removes the common law bar of governmental immunity. Arthurs, 346 S.C. at 105, 551 S.E.2d at 583. The Act is a limited waiver of sovereign immunity. Steinke v. South Carolina Dep't of Labor, Licensing, and Regulation, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999).

The trial court interpreted § 15-78-40 to require a private sector analogy for a governmental entity to be held liable under the Act. This section provides, "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code Ann. § 15-78-40 (2005).

Recently, this court reversed an order of summary judgment where the trial court, relying on § 15-78-40, determined the government could only be held liable under the Tort Claims Act if a private individual could be held liable for similar conduct. Quail Hill, L.L.C. v. County of Richland, 379 S.C. 314, 665 S.E.2d 194 (Ct. App. 2008) cert. granted, (April 22, 2009). However, this decision did not hold our state's Tort Claims Act lacked a private analogy mandate; instead, this decision merely emphasized the summary judgment procedural posture of the case and the absence of state precedent supporting or opposing a private sector analogy requirement.

Moreover, Quail Hill expressly acknowledged persuasive federal authority supporting the trial court's interpretation of § 15-78-40. 379 S.C. at 322, 665 S.E.2d at 198.

In United States v. Olson, 546 U.S. 43 (2005), the United States Supreme Court analyzed a provision of the Federal Tort Claims Act similar to § 15-78-40. The federal provision allows tort actions against the United States government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The Court noted the words, "'like circumstances' do not restrict a court's inquiry to the same circumstances, but require it to look further afield." Olson, 546 U.S. at 46 (internal citations omitted). The Court suggested a further inquiry to determine whether an analogous situation could exist in which a private individual could be found liable for the same conduct. Id. at 47. In essence, the Court concluded if a private citizen could be held liable for negligently performing a task, then the government could be held liable for negligently performing a similar task.

Here, we need not resolve the private analogy question. Carolina Chloride argues County negligently maintained its zoning records resulting in Carolina Chloride's injury. Even if a private analogy is required, this claim is analogous, for example, to allegations of negligence against a private hospital or private school for negligently maintaining an individual's records. An analogy may be present where, as a result of negligently maintaining a patient's medical records, a hospital gives a patient his or her wrong blood type causing the patient harm. Similarly, an analogous situation may exist where a private school sends the wrong transcript to a former student's potential employer and, as a direct result, the employer does not hire the former student. In both instances, the private entities could be held liable for negligently maintaining an individual's records and thereby causing the individual's injury. Therefore, even if required, a private individual analogy does exist where a private individual or private entity could be held liable for similar conduct as alleged herein. Accordingly, the trial court erred in granting summary judgment against Carolina Chloride based on the absence of a private sector analogy.

In addition to finding Carolina Chloride's claims barred under § 15-78-40, the trial court alternatively found § 15-78-60(4) of the Tort Claims Act barred Carolina Chloride from relief. However, Carolina Chloride argues the trial court erred because this Court is bound by our recent Quail Hill decision. We agree.

Section 15-78-60 of the Tort Claims Act contains affirmative defenses exempting the government from liability. The governmental entity bears the burden of establishing an affirmative defense under § 15-78-60. Pike v. South Carolina Dep't of Transp., 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000). The exceptions listed in § 15-78-60 should be liberally construed to limit liability. Steinke, 336 S.C. at 396, 520 S.E.2d at 154. Section 15-78-60(4) provides that the government is not liable for injuries resulting from: "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." S.C. Code Ann. § 15-78-60(4) (2005).

County argues the trial court did not err because any alleged damage claimed by Carolina Chloride arose as a result of County's enforcement of the zoning ordinances for which § 15-78-60(4) specifically grants governmental immunity. However, Carolina Chloride asserts its claims did not emanate from the County's enforcement of local ordinances. In support of this assertion, Carolina Chloride argues the "mistake" or injuries in this case are directly on point with the facts considered in Quail Hill.[6]

In Quail Hill, the petitioner purchased over seventy acres of land after a Richland County Planning Department staff member mistakenly advised him the land was zoned for his intended use. Quail Hill, 379 S.C. at 317, 665 S.E.2d at 195. After the petitioner purchased the property, another staff member informed him the property had a different zoning designation and he could not develop the land as he had intended. Id. At trial and on appeal,

[6] Carolina Chloride supplemented the record pursuant to Rule 208(b)(7), SCACR, requesting the Court consider the Quail Hill decision. We respectfully note Quail Hill was not available to the trial court at the time of its decision.

Richland County asserted § 15-78-60(4) as an affirmative defense arguing it was immune from liability for the incorrect zoning assessment because appellant's claims arose as a result of the enforcement of local zoning ordinances. Id. This court reversed summary judgment in favor of appellant opining the claims asserted were not connected to the enforcement of the zoning ordinance, but arose as a result of a Richland County staff member's mistaken advice to appellant. Id. Therefore, this court concluded Richland County was not immune from liability under § 15-78-60(4). Id.

Here, Carolina Chloride asserts County's alleged mistaken zoning assessment resulted in the loss of a sale of real property and an associated business. Viewing the facts in the light most favorable to Carolina Chloride, the alleged mistake purportedly occurred on February 13, 2003, when John Hicks, the employee duly authorized to inform citizens whether their property was appropriately zoned for their intended uses, informed Carolina Chloride the property at issue was zoned rural (RU) and was not zoned heavy industrial (M-2). Hicks made this determination in response to a proposal for the development of the property sent to County from the Watsons, the interested buyers. However, in the letter, Hicks rejected the Watsons' proposed plans because under RU zoning County could not permit the expansion of "the current . . . structural area."

Appellants in this case and in Quail Hill alleged a governmental entity negligently advised them of the zoning designations applicable to their properties. In Quail Hill, the mistake arguably resulted in the purchase of property that would not have been purchased had Richland County accurately advised the purchaser. On the other hand, in the case at bar, the alleged mistake ostensibly prevented the sale of property that would have been sold but for County's authorized employee informing Carolina Chloride the property was zoned for rural use only. Regardless, both instances deal with tortious claims emanating from a governmental entity issuing allegedly mistaken advice to someone regarding applicable zoning ordinances. Accordingly, because we are bound by this court's precedent, the trial court erred in ruling as a matter of law that § 15-78-60(4) barred Carolina Chloride's tort claims.

In addition to dismissing Carolina Chloride's claims for negligence, gross negligence, and negligent misrepresentation on account of the Tort Claims Act, the trial court made a separate finding that the cause of action for negligent misrepresentation should also be dismissed on the ground Carolina Chloride could have acquired knowledge of the proper zoning designation from the public record. Carolina Chloride argues the trial court erred in this finding because Carolina Chloride did not have the ability to ascertain the true zoning designation from the public records. We agree.

We note when ruling on a motion for a directed verdict, all reasonable inferences are viewed in the light most favorable to the non-moving party. Gadson, 374 S.C. at 175-76, 648 S.E.2d at 588. Under the present facts, two different zoning department employees, including the zoning administrator, reached different conclusions as to the zoning designation of Carolina Chloride's property; therefore, it is difficult for this court to conclude, as a matter of law, Carolina Chloride could have ascertained the true zoning designation of the property merely by examining the public record on its own. Further, even assuming Carolina Chloride could have discovered the subject property's true zoning designation through the public records, generally, a question of fact exists as to whether reliance on a misrepresentation was reasonable although the falsity of the alleged misrepresentation could have been ascertained by examining public records. See Slack v. James, 364 S.C. 609, 615, 614 S.E.2d 636, 639 (2005) (holding a question of fact existed as to whether real estate purchasers' reliance on a misrepresentation was reasonable when the falsity could have been discovered by examining public records). Thus, we find the trial court erred in dismissing the negligent misrepresentation claim as a matter of law at the directed verdict stage of the case.

V. Gross Negligence

Notwithstanding our determination concerning sovereign immunity, County argues the trial court properly dismissed the gross negligence claim because Carolina Chloride offered no evidence supporting this claim. We agree.

Gross negligence is the failure to exercise slight care. Jinks, 355 S.C. at 345, 585 S.E.2d at 283. It also has been defined as a relative term and means the absence of care that is necessary under the circumstances. Id. In determining whether a directed verdict was proper, this court must construe inferences arising from the evidence in the light most favorable to the non-moving party. Gadson, 374 S.C. at 175-76, 648 S.E.2d at 588.

In support of its gross negligence claim, Carolina Chloride references depositions not presented at trial as replete with evidence of gross negligence. "We are confined to the record in deciding issues on appeal." Timms v. Timms, 286 S.C. 291, 294, 333 S.E.2d 74, 75 (Ct. App. 1985) (refusing to review evidence of insurance coverage outside the record on appeal). As previously indicated, the trial court did not abuse its discretion in excluding Brown's deposition in the absence of the requisite foundation; therefore, it was not part of the record. Additionally, Carolina Chloride did not attempt to include the Gosline or Price depositions in the record during trial and did not request that the record remain open in order to supplement the record. Consequently, these depositions were not in evidence and will not be considered on appeal.

Taking the evidence in the light most favorable to Carolina Chloride, the only evidence demonstrating County failed to exercise slight care was in Hicks' mistaken zoning designation of the property at issue. The presence of a mistake alone, however, is not sufficient evidence to conclude County failed to exercise slight care. Furthermore, the February 13, 2003, letter did state Hicks conferred with County's legal department prior to making determinations about the subject property suggesting Hicks, and therefore County, did exercise at least slight care. Absent evidence to the contrary, the only reasonable inference to be drawn from these facts is County, at a minimum, exercised slight care. See Pack v. Associated Marine Insts., Inc., 362 S.C. 239, 246, 608 S.E.2d 134, 138 (Ct. App. 2004) (holding no genuine issues of material fact existed for gross negligence claim where employees at the very least exercised slight care). Accordingly, the trial court did not err in granting a directed verdict in favor of County on the gross negligence claim.

VI. Inverse Condemnation

Carolina Chloride further alleges the trial court erred in granting a directed verdict in favor of County on its inverse condemnation claim. We disagree.

"An inverse condemnation may result from the government's physical appropriation of private property, or it may result from government-imposed limitations on the use of private property." Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). In essence, inverse condemnation is a governmental taking absent an eminent domain proceeding. Id. Successful inverse condemnation actions require a plaintiff to establish the government committed an affirmative, aggressive, and positive act causing damage to the plaintiff's property. WRB Ltd. P'ship v. County of Lexington, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006).

The only time frame in which the alleged taking could have occurred would have been after County's February 13, 2003 letter. Prior to this event, Carolina Chloride used the property in compliance with M-2 zoning and absent any alleged governmental interference. Furthermore, Carolina Chloride cannot allege a taking subsequent to County amending the property's zoning to M-2 on November 4, 2003, because M-2 zoning allowed all of Carolina Chloride's and the Watsons' intended uses. As such, the only taking, if any, occurred between February 13 and November 4, 2003.

The sole evidence Carolina Chloride presents of governmental action constituting an affirmative act is Hicks' alleged mistaken assessment of the zoning ordinances applicable to Carolina Chloride's property. Even construing the facts under a favorable light analysis, this action is not an "affirmative, aggressive, positive act" damaging Carolina Chloride's property. See WRB Ltd. P'ship, 369 S.C. at 32, 630 S.E.2d at 481; see also Quail Hill, 379 S.C. at 322, 665 S.E.2d at 198 (finding no reported case holding "a mistake may rise to the level of an affirmative, aggressive, and positive act sufficient to constitute inverse condemnation."). Accordingly, the trial court properly granted a directed verdict in County's favor on the inverse condemnation claim.

VII. Due Process

Carolina Chloride argues the trial court erred in finding County did not deprive Carolina Chloride of substantive due process. Substantive due process prohibits the government from depriving a person of life, liberty, or property for arbitrary reasons. Worsley Cos., Inc., 339 S.C. at 56, 528 S.E.2d at 660. "To establish a substantive due process claim, a plaintiff must show he possessed a constitutionally protected property interest that was deprived by state action so far beyond the limits of legitimate governmental action, no process could cure the deficiency." Seabrook v. Knox, 369 S.C. 191, 198, 631 S.E.2d 907, 911 (2006). To prove a denial of substantive due process, the plaintiff must also show "he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Sloan v. South Carolina Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 483, 636 S.E.2d 598, 615 (2006).

At trial, County and Carolina Chloride appear to have confused substantive and procedural due process. However, Carolina Chloride only makes a substantive due process claim on appeal. Specifically, Carolina Chloride asserts deprivation of substantive due process because it claims County arbitrarily and capriciously changed the zoning of the property. Even assuming Carolina Chloride had a property interest in the zoning designation of its property, Carolina Chloride fails to proffer any evidence County actually changed the zoning of the property. Carolina Chloride merely evidences apparent confusion within the zoning department as to the zoning designation of the property arguably resulting in a mistake. Accordingly, the trial court did not err in granting a directed verdict in favor of County on the substantive due process claim.

VIII. Governmental Estoppel and Promissory Estoppel

Issues cannot be raised for the first time on appeal, but must be raised to and ruled upon by the trial court to preserve it for appellate review. Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733.

In Carolina Chloride's statement of the issues on appeal, it argues the trial court erred as a matter of law in finding no right to rely on government employees. While reliance is an element of several causes of action, Carolina

Chloride avers a right to rely on County in the context of governmental estoppel. At trial, Carolina Chloride initially argued governmental estoppel and promissory estoppel. Nevertheless, Carolina Chloride is barred on appeal from asserting governmental estoppel since it subsequently expressly waived this argument during trial. Additionally, Carolina Chloride waives promissory estoppel having failed to argue this issue in its initial appellate brief. While Carolina Chloride extensively briefs governmental estoppel and why the issues of reliance and reasonableness are questions best resolved by a jury, it specifically failed to address promissory estoppel as an issue on appeal. As such, neither of these issues are preserved for our review.

Accordingly, we affirm the trial court's decision directing a verdict as to constructive fraud, gross negligence, and inverse condemnation and reverse the trial court's decision directing a verdict in favor of County on Carolina Chloride's negligent misrepresentation and negligence claims and remand these two causes of action for trial.[7] The trial court's decision is

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

SHORT and THOMAS, JJ., concur.

[7] We note the dissent in Quail Hill focused on the fact the appellant therein had not dealt with the employee duly authorized to deal with zoning, i.e. the zoning administrator. Here, the facts are different. Carolina Chloride was interacting with the zoning administrator or a duly authorized employee throughout the time period involved. We also note, unlike Quail Hill, this decision does not reach the governmental estoppel argument because Carolina Chloride expressly waived the issue at trial.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gail Mungo, Respondent,

v.

Rental Uniform Service of Florence, Inc., and Companion Commercial Ins., Appellants.

Appeal From Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 4550
Heard March 3, 2009 – Filed May 27, 2009

AFFIRMED IN PART, REVERSED IN PART, and REMANDED

Ellen H. Goodwin, of Columbia, for Appellants.

Edward L. Graham, of Florence, for Respondent.

WILLIAMS, J.: Rental Uniform Service of Florence, Inc. and Companion Commercial Insurance (collectively referred to as Employer) appeal from the circuit court's order that found Gail Mungo (Claimant) was entitled to workers' compensation benefits for a change in condition to her spine and for psychological benefits. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

In May 2000, Claimant sustained an admitted compensable injury to her cervical spine while working for Employer. Employer provided Claimant treatment by several physicians, including Dr. Bill Edwards of Pee Dee Orthopaedic Associates. Dr. Edwards performed a two-level cervical discectomy and fusion at discs C4/5 and C5/6 on Claimant in March 2001. Dr. Edwards later released Claimant on May 29, 2001, with a twenty percent impairment rating on her spine. Claimant was reevaluated by Dr. Edwards on May 2, 2003, and he found Claimant had reached maximum medical improvement (MMI) as of that date. Dr. Edwards reiterated Claimant's twenty percent impairment rating and placed Claimant on a twenty pound lifting restriction.

Claimant later sought treatment from Dr. Elizabeth Snoderly, an interventional anesthesiologist specializing in pain management, for ongoing pain. Dr. Snoderly first examined Claimant on June 3, 2003, and the records from this examination were made available on June 6, 2003. In these records, Dr. Snoderly diagnosed Claimant with (1) cervical facet joint syndrome, (2) muscle spasms not seen in earlier doctors' visits, and (3) loss of gross muscle strength.

A hearing was held on the matter before Commissioner Bryan Lyndon on June 10, 2003. At the start of this hearing, Employer objected to the introduction of Dr. Snoderly's report from her June 3, 2003 examination of Claimant, arguing the records were untimely. Commissioner Lyndon sustained this objection because Claimant failed to submit the report to Employer fifteen days prior to the hearing as required by Regulation 67-612

of the South Carolina Code of Regulations. Commissioner Lyndon proceeded with the hearing without any use or consideration of Dr. Snoderly's office notes or records.

After considering the other documents and testimony presented by both parties, Commissioner Lyndon found Claimant reached MMI on May 2, 2003, making her ineligible for any further medical treatment. Claimant was found to have sustained a forty percent partial disability from the original injury. Commissioner Lyndon allowed Employer to discontinue payments to Claimant for temporary total disability benefits and ordered any payments already made after the date of MMI to be applied against Claimant's permanent partial disability award. Employer was additionally ordered to pay for all of Claimant's causally-related and authorized medical treatment through May 2, 2003. Neither party appealed this decision.

On July 23, 2004, Claimant filed a Form 50, Request for Hearing, alleging a change of condition to her cervical spine and development of problems with her neck, right shoulder, right arm, and significant psychological conditions. A hearing was held before Commissioner Alan Bass on March 3, 2005. Commissioner Bass denied Claimant's request for benefits for a change of condition, and he filed his order on October 24, 2005. Significantly, however, Commissioner Bass stated:

> I find that Claimant has not sustained a change of condition from an orthopaedic standpoint. That said, I must say that, if Dr. Snoderly's exam and diagnoses . . . could be taken into account, I would have found a [c]hange of [c]ondition because of (1) Cervical facet joint syndrome; (2) Spasm absent in visits prior to hearing [on June 10, 2003]; and (3) Loss of strength from [5 out of 5 strength] to [2 out of 5 strength]. I find, as a matter of law, that because Dr. Snoderly's diagnoses were made prior to the hearing, they cannot be considered for [c]hange of [c]ondition.

Commissioner Bass additionally stated, "The Claimant may not now raise the issue of depression when she could have done so [at the] last hearing."

Claimant filed a Form 30, Request for Commission Review, alleging eighteen errors of law, and the Appellate Panel of the Workers' Compensation Commission (the Appellate Panel) affirmed Commissioner Bass's decision and order in all respects. Thereafter, Claimant appealed the Appellate Panel's decision to the circuit court.

Following a hearing, the circuit court reversed Commissioner Bass's findings Claimant had not proven a change of condition for the worse of her cervical spine and Claimant had not proven entitlement to psychological benefits. The circuit court found Claimant's original award from the June 10, 2003 hearing was based on medical records created on or before May 2, 2003, the date of MMI. Therefore, Commissioner Bass erred in stating he could not consider records created between May 2, 2003, and June 10, 2003, at the change of condition hearing. The circuit court additionally noted "the reliable, probative and substantial evidence of record proves that any symptoms of depression or other psychological conditions before the first hearing were mild, undiagnosed and untreated; and became full-blown thereafter, meeting formal diagnostic criteria and necessitating formal treatment by [the doctor] only after the first hearing[,]" meaning Claimant could not have raised the issue of depression at the June 10, 2003 hearing. The circuit court, therefore, remanded the case to the single commissioner to determine the precise benefits owed to Claimant for her change of condition and for her psychological condition. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (the APA) establishes the standard of judicial review for appeals from the Workers' Compensation Commission (the Commission). Jones v. Harold Arnold's Sentry Buick, Pontiac, 376 S.C. 375, 378, 656 S.E.2d 772, 774 (Ct. App. 2008). Under the scope of review established in the APA, this Court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but it may reverse where the decision is affected by an error of law. Hall v. United Rentals, Inc., 371 S.C. 69, 79, 636 S.E.2d 876, 882 (Ct. App. 2006). This Court's review is, therefore, limited to determining whether the Appellate Panel's decision is unsupported by

substantial evidence or controlled by an error of law. Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002).

LAW/ANALYSIS

As a threshold matter, we must determine the appealability of the circuit court's order. This Court has held "that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable." Foggie v. Gen. Elec. Co., 376 S.C. 384, 388, 656 S.E.2d 395, 398 (Ct. App. 2008). However, if the circuit court's order is a final judgment, then it is immediately appealable. Id. at 389, 656 S.E.2d at 398. "Generally, an order is a final judgment on one or more issues if it constitutes an ultimate decision on the merits." Brown v. Greenwood Mills, Inc., 366 S.C. 379, 387, 622 S.E.2d 546, 551 (Ct. App. 2005). "An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case." Id.

In the current case, the circuit court ruled it was error for Commissioner Bass and the Appellate Panel (1) to exclude Dr. Snoderly's records from the change of condition hearing and (2) to not consider Claimant's psychological claims at the change of condition hearing. These rulings led the circuit court to order a reversal of the Appellate Panel's conclusions that Claimant had not proven a change of condition for the worse of her cervical spine involving problems with the neck, right shoulder, and right arm and Claimant had not proven entitlement to psychological benefits. The circuit court remanded the case to the single commissioner for a determination of what precise benefits were due to Claimant for her change of condition of her cervical spine and for her psychological conditions.

The circuit court's order mandates an award for change of condition to the cervical spine and for psychological benefits. This ruling is a decision on the merits because it decides with finality whether Claimant proved these changes in her condition. Although the circuit court remanded the issue of the precise damages to be awarded to Claimant, the single commissioner would have no choice but to award some damages to Claimant. Accordingly, the circuit court's order constitutes a final decision and is appealable. See id. at 388, 622 S.E.2d at 551 (finding that because the circuit court's order

mandated apportionment, the court left the percentage of apportionment to the Commission on remand, so the Appellate Panel would have no choice but to allocate some part of the claimant's disability to the non-compensable cause, thus the circuit court's order constituted a final decision on the issue of apportionment, making it appealable).

Finding Employer's appeal is properly before us, we now address the merits of Employer's arguments. Employer first argues the circuit court erred in reversing the Appellate Panel's determination that Claimant did not sustain a change of condition for the worse. We disagree.

"The determination of whether a claimant experiences a change of condition is a question for the fact finder." Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 107, 576 S.E.2d 191, 194 (Ct. App. 2003). The Appellate Panel is the ultimate fact finder in workers' compensation cases, and if its findings are supported by substantial evidence, it is not within our province to reverse those findings. Robbins v. Walgreens & Broadspire Servs., Inc., 375 S.C. 259, 264, 652 S.E.2d 90, 93 (Ct. App. 2007). "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Id.

Generally, an appeal of a workers' compensation order is concerned with the conditions prior to and at the time of the original award, while review for a change of condition is concerned with conditions that have arisen thereafter. Gattis, 353 S.C. at 109, 576 S.E.2d at 195. Review of an award through a change of condition hearing is not an alternative to or substitute for an appeal, but if a claimant can show a change of condition, the award may be reviewed and either increased, diminished, or terminated by the Appellate Panel. Id.

"A change in condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award." Id. at 109, 576 S.E.2d at 196. When the original order is limited to a determination of the claimant's condition as of a specific date, it is appropriate for the Appellate Panel to then consider any subsequent events or diagnoses made after that date when making a determination about an alleged

change of condition. See id. at 109, 576 S.E.2d at 195-96 ("Because the [C]omission limited its order to a determination of Claimant's condition prior to August of 1998, subsequent events, including [the doctor's] changed diagnosis in August of 1998, were appropriate for consideration in an action alleging a change of condition."); see also Clark v. Aiken County Gov't, 366 S.C. 102, 110, 620 S.E.2d 99, 103 (Ct. App. 2005) (explaining Gattis held "because the [Appellate Panel] limited its initial order to a determination of the claimant's condition prior to the advent of the evidence in question, the evidence was appropriate for the change of condition proceeding"). Review of an award at a change of condition hearing is, therefore, concerned with the date as of which the claimant's condition was determined rather than the date of the actual hearing in which that award was rendered. See Gattis, 353 S.C. at 109, 576 S.E.2d at 195-96 (finding it appropriate for the Appellate Panel to consider the doctor's August 18, 1998 letter at the change of condition hearing when it made a determination at the initial hearing based on the facts and circumstances considered by the single commissioner at the August 19, 1998 hearing, which did not include the doctor's August 18 letter).

The original hearing concerning Claimant's injury was held before Commissioner Lyndon on June 10, 2003. One week prior, on June 3, 2003, Dr. Snoderly examined Claimant concerning the continuing pain she was experiencing because of her injury. Dr. Snoderly's records were not available to be offered as exhibits until June 6, 2003, at which time they were promptly turned over to Employer. At the hearing, Employer objected to the admission of the records because they were not timely submitted. Commissioner Lyndon sustained this objection and excluded the records. Commissioner Lyndon did not consider Dr. Snoderly's records at the hearing or when making his final order and, instead, based his findings and conclusions on medical records created on or prior to May 2, 2003, when Dr. Edwards released Claimant as being at MMI.

A change of condition hearing was then held before Commissioner Bass on March 2, 2005. In his order, Commissioner Bass stated:

> [I]f Dr. Snoderly's exam and diagnoses . . . could be taken into account, I would have found a [c]hange of [c]ondition because of (1) Cervical facet joint

> syndrome; (2) Spasm absent in visits prior to hearing; and (3) Loss of strength from 5/5 to 2/5. I find, as a matter of law, that because Dr. Snoderly's diagnoses were made prior to the hearing, they cannot be considered for [c]hange of [c]ondition.

The Appellate Panel fully adopted this finding.

Pursuant to Gattis, this conclusion is erroneous. Although Dr. Snoderly's diagnoses were made and recorded prior to Claimant's initial hearing, her records were excluded as untimely and not considered or factored into Commissioner Lyndon's award. Commissioner Lyndon specifically stated Claimant's award was based on her condition as of May 2, 2003, the date Dr. Edwards found Claimant reached MMI. The appropriate date from which the single commissioner should evaluate a change in Claimant's condition is therefore May 2, 2003, not June 10, 2003, the date of the hearing. Dr. Snoderly's diagnoses were not made prior to May 2, 2003, and therefore, her records should have been considered at the change of condition hearing.

Giving effect to the correction of that legal error, and by the plain language in Commissioner Bass' order, which was fully adopted by the Appellate Panel, the circuit court found that the single commissioner and the Appellate Panel would have found as a fact that Claimant sustained a change of condition. The circuit court then found "[t]he reliable, probative and substantial evidence of record supports that finding." After our review of the record, including Dr. Snoderly's office notes and records, we find substantial evidence supports the Appellate Panel's finding that Claimant sustained a change of condition. We, therefore, affirm the order of the circuit court finding Claimant proved a change of condition for the worse.

Employer next argues the circuit court erred in awarding Claimant benefits for psychological conditions because substantial evidence proves such conditions existed prior to the original hearing and because Claimant failed to present sufficient evidence to support the change of condition claim. We agree in part and remand the issue to the Commission.

Just as physical changes of condition are properly considered when reviewing a claimant's initial award, so too are mental changes of condition. Estridge v. Joslyn Clark Controls, Inc., 325 S.C. 532, 537-38, 482 S.E.2d 577, 580 (Ct. App. 1997). If the mental condition is causally connected to the original injury, is a newly manifested symptom of that injury, and has caused a worsening of the claimant's condition, then it is proper for the single commissioner to consider the mental condition at a change of condition hearing. Id. at 538, 482 S.E.2d at 580.

A mental condition is causally related to the original injury if the condition was induced by the physical injury. Id. The mental condition would be a new symptom manifesting from the same harm to the body, and "[i]n such circumstances, it may properly be compensated in a change of condition proceeding as a part of the original injury." Id. at 538-39, 482 S.E.2d at 581. Additionally, "[a] symptom which is present and causally connected, but found not to impact upon the claimant's condition at the time of the original award, may later manifest itself in full bloom and thereby worsen his or her condition[,]" and such an occurrence is one of the reasons the Commission may review awards through change of condition hearings. Id. at 540, 482 S.E.2d at 581. Therefore, even if the mental condition was not raised at the original hearing, it may be raised at the change of condition hearing. Id.

Claimant did not seek benefits for any mental condition in her original Form 50, and therefore, Claimant's initial award was based solely on her physical injuries. Prior to May 2, 2003, the date used by Commissioner Lyndon to assess Claimant's condition, no physician had diagnosed Claimant with depression or any other psychological condition. In September 2001, Dr. William Stewart, a certified rehabilitation counselor and certified vocational evaluator, evaluated Claimant and noted Claimant's test results indicated "a mild level of depression" and "a minimal level of anxiety." Dr. Stewart, however, did not diagnose Claimant with any psychological condition or provide any treatment following this evaluation.

Not until February 3, 2004, did a physician, Dr. Snoderly, formally recognize Claimant's problems with any psychological condition and refer her to a mental health professional for evaluation and treatment. Dr. Snoderly noted at her initial meeting and examination of Claimant on June 3, 2003, that "[Claimant] does state the pain has definitely affected her ability to sleep, be physically active, and concentrate. It has affected her emotionally and also has affected her social relationships." Dr. Snoderly, however, did not recommend any further evaluation or treatment for Claimant and made no diagnosis of depression at that examination. Additionally, these records were not considered by Commissioner Lyndon when making the initial award.

In Dr. Snoderly's records from Claimant's February 3, 2004 examination, Dr. Snoderly stated:

> [Claimant] did confide in me today that she is feeling a little depressed. She has never really had a problem with depression, but after this injury and the continued problems that she has been having, she does have some feelings of depression. She and I did discuss having her referred to Dr. A.J. Rainwater . . . .

Dr. Snoderly later clarified her referral stating, "I became concerned since the [June 10, 2003] hearing about the psychological effects of [Claimant's] chronic pain. I have thus referred her to [Dr. Rainwater], a psychologist in Florence for evaluation, treatment and biofeedback."

Thereafter, Claimant visited Dr. Rainwater on March 3, 2004. Following this evaluation, Dr. Rainwater diagnosed Claimant with (1) depression secondary to chronic pain, (2) mixed pain disorder with conversion dynamics, (3) insomnia secondary to pain, and (4) hypolibido secondary to pain.

On February 4, 2005, Claimant was evaluated by Dr. Robert Brabham, a psychologist. Dr. Brabham found Claimant's pain disorder was worsening instead of improving, her depression was worsening with the continuation of pain and her inability to function, and her anxiety concerning her future

financial expenses was considerable. Dr. Brabham then diagnosed Claimant with (1) pain disorder associated with both psychological factors and a generalized medical condition; (2) depressive disorder, secondary to on-the-job injuries; and (3) generalized anxiety disorder, secondary to on-the-job injuries. Dr. Brabham concluded his report by stating that it was "[his] opinion that [Claimant's] conditions have indeed deteriorated since the time of her Worker's Compensation hearing in 2003."

After hearing and reviewing all of this evidence, Commissioner Bass found Claimant could not raise the issue of depression at the change of condition hearing because she failed to raise that issue at the initial hearing. The Appellate Panel affirmed this ruling. The circuit court reversed, finding the holding was controlled by an error of law and the reliable, probative, and substantial evidence of record supported a finding that Claimant was entitled to benefits for her psychological conditions.

Pursuant to Estridge, we find the circuit court was correct to hold the single commissioner and the Appellate Panel committed legal error in ruling they could not consider the issue of depression raised by Claimant at the change of condition hearing. 325 S.C. at 538-39, 482 S.E.2d at 580-81 ("A [mental] condition which is induced by a physical injury, is thereby causally related to that injury[, and] . . . may properly be compensated in a change of condition proceeding as a part of the original injury."). Claimant could raise the issue of depression at the change of condition hearing because the psychological condition was induced by the original physical injury and any symptoms of depression she experienced prior to the June 3, 2003 hearing were mild, undiagnosed, and untreated. See id., 325 S.C. at 540, 482 S.E.2d at 581 ("A symptom which is present and causally connected, but found not to impact upon the claimant's condition at the time of the original award, may later manifest itself in full bloom and thereby worsen his or her condition. Such an occurrence is within the reasons for the code section involving a change of condition."). Further, because Claimant did not raise the issue of depression in her original Form 50 or at the initial hearing and because all records from Dr. Snoderly's June 3, 2003 evaluation, in which she mentioned psychological effects from the physical injury, were excluded from evidence, the doctrine of res judicata does not prevent this issue from being litigated. See id. ("The doctrine of res judicata only acts to preclude relitigation of

issues actually litigated or which might have been litigated in the first action."). Consequently, the change of condition hearing was the first opportunity a single commissioner could consider Claimant's psychological condition, and it was error for the single commissioner and the Appellate Panel to not consider the issue.

Although we find the circuit court was correct to rule the issue of depression could have been raised and considered at the change of condition hearing, we find the circuit court exceeded its scope of authority by finding Claimant had proven entitlement to psychological benefits. Both the single commissioner and the Appellate Panel found they could not consider the issue of depression at the change of condition hearing, and therefore, no factual findings were made concerning whether Claimant carried her burden of proving her psychological condition had worsened since the initial hearing. In workers' compensation cases, this Court, as well as the circuit court, serves only to review the factual findings of the Appellate Panel and to determine whether the substantial evidence of record supports those findings. See Brown, 366 S.C. at 392, 622 S.E.2d at 553 ("Pursuant to the APA, this Court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law."). Where the Appellate Panel has made no factual findings, the issue must be remanded. See Estridge, 325 S.C. at 540, 482 S.E.2d at 581 (finding the issue of change of psychological condition should be remanded for the workers' compensation commission to determine rather than have this Court make that determination). We therefore reverse the circuit court's holding that Claimant has proven her entitlement to psychological benefits and remand the issue to the Commission.

CONCLUSION

Based on the foregoing, the circuit court's order is

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HUFF AND KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

W. Harold Jones, Appellant,

v.

Mandy Leagan, Jeff Leagan, James D. Owens and Helen M. Owens, Respondents.

Appeal From Lexington County
Clyde N. Davis, Jr., Special Referee

Opinion No. 4551
Heard April 22, 2000 – Filed May 27, 2009

AFFIRMED

C. Joseph Roof, of Columbia, for Appellant.

William P Walker, of Lexington, for Respondents.

PER CURIAM: In this civil case, we must determine whether the Special Referee erred in holding (1) James and Helen Owens (collectively the Owens) acquired title to a piece of property owned by W. Harold Jones (Jones) by adverse possession, and (2) Jones' claim of ownership was barred under the doctrine of laches. We affirm.

FACTS/PROCEDURAL HISTORY

On October 10, 1966, C. W. Metts (Metts) conveyed the real property known as Lot 31 on the Metts Lake Subdivision Plat (Lot 31 or the Lot), along with other property, to Jones for the sum of five dollars. This conveyance was recorded on October 17, 1966, in the Office of the Lexington County Register of Deeds. From the time Jones purchased Lot 31 until 1987, the Lot remained unimproved, uncultivated, and unmarked.

On October 21, 1987, the Owens purchased Lot 31 for $2,000 from Alice P. Shoaf (Shoaf). In the deed, Shoaf stated when Metts conveyed Lot 32 to her by an earlier deed, he did so inadvertently and Metts actually intended to convey Lot 31 to Shoaf.

The Owens claim after purchasing Lot 31 from Shoaf in 1987, they performed several "acts of ownership" on the Lot. These purported acts included (1) having the Lot surveyed in 1987; (2) seasonal bush-hogging and brush burning on the Lot beginning in 1987; (3) putting down a driveway from the road leading onto the Lot in 1987; (4) installing four white-tipped corner posts, each four feet above the ground at the four corners of the Lot in 1987; (5) placing a mesh wire fence with a gate along the back side of the Lot in 1987; (6) installing "No Trespassing" signs on the Lot between 1988 and 1989; (7) using the Lot to store business supplies, such as cement blocks, a tractor trailer, and fallen timber cut from the Lot starting in 1987; (8) installing a mobile home, septic tank, and a well in 1998 and privacy fence in 2000; and (9) paying property taxes on the Lot from 1987 to present. As further evidence of ownership, the Owens assert outside companies twice asked their permission to access Lot 31. The first time was in the 1990s when they were contacted by Corley Brothers Lumber Company (Corley) requesting permission to cut trees on Lot 31. The second instance was in

2000 when South Carolina Electric & Gas (SCE&G) contacted the Owens requesting permission for an easement to install a power pole on Lot 31.

In 1998, the Owens' daughter, Mandy Leagan, and son-in-law, Jeff Leagan, (collectively the Leagans) moved onto Lot 31 as their residence. In 1998, the Owens conveyed Lot 31 to the Leagans, and eventually in 2004, the Leagans reconveyed Lot 31 back to the Owens for the purpose of securing a loan.

In 2004, after seeing for the first time that "something [was] going on with [Lot 31]," Jones met with an attorney. On May 6, 2005, Jones filed an action in ejectment and trespass to try title and sought to quiet title to Lot 31. In response, the Owens sought title to Lot 31 by adverse possession under color of title and also raised the equitable defense of laches.

A hearing was held before the Special Referee on August 23, 2007. The Owens testified as to all of the acts described above. The Owens also presented copies of the deed from Shoaf as well as tax receipts for Lot 31 However, several of the Owens' purported acts of ownership were not corroborated by any witnesses or documentary evidence. For instance, the Owens claim to have had Lot 31 surveyed, but they presented no plat. Also, the Owens presented neither pictures of nor receipts for the corner posts, the fences, or the "No Trespassing" signs. Furthermore, the Owens presented no witnesses from either SCE&G or Corley to testify as to what research, if any, they conducted before concluding the Owens were the legal owners of Lot 31.

Jones testified several times he had never once been to Lot 31 within the period from 1987 to 2004. Contrary to this, Jones also testified he had been to the Lot twice during that time, once in 1992 to level a road adjacent to Lot 31, and again in 1997 with Lexington County officials. Jones testified he did not see any change in Lot 31 on either of these occasions.

In an order dated November 30, 2007 (the Order), the Special Referee found the Owens to be the owners of Lot 31 by adverse possession and denied Jones' request for ejectment and his action for trespass to try title and

barred his claim of ownership under the equitable doctrine of laches. This appeal followed.

STANDARD OF REVIEW

In this case, Jones filed an action in ejectment, trespass to try title and sought to quiet title to Lot 31. Normally, an action to quiet title to property is an action in equity. Clark v. Hargrave, 323 S.C. 84, 86, 473 S.E.2d 474, 476 (Ct. App. 1996). However, the character, as legal or equitable, of an action is determined by the complaint in its main purpose, the nature of the issues as raised by the pleadings or the pleadings and proof, and the character of the relief sought under them. Id. In their answer to Jones' complaint, the Owens sought title to Lot 31 by adverse possession. The determination of title to real property is legal in nature. Id. at 87, 473 S.E.2d at 476. Moreover, an adverse possession claim is an action at law. Id. Thus, an action to quiet title to real property, primarily involving the determination of title to real property based on adverse possession, should be characterized as an action at law. Id. Because an adverse possession claim is an action at law, the character of the possession is a question for the jury or fact finder. Miller v. Leaird, 307 S.C. 56, 61, 413 S.E.2d 841, 843 (1992). Therefore, appellate review is limited to a determination of whether any evidence reasonably tends to support the trier of fact's findings. Id.

LAW/ANALYSIS

I. Clear and Convincing Evidence of Adverse Possession

Jones argues the Special Referee erred in concluding the Owens proved by clear and convincing evidence that they had acquired title to Lot 31 by adverse possession. We disagree.

When it is asserted by the defendant, adverse possession is an affirmative defense. Miller v. Leaird, 307 S.C. 56, 62, 413 S.E.2d 841, 844 (1992). The party asserting adverse possession must show continuous, hostile, open, actual, notorious, and exclusive possession for a certain period of time. Mullis v. Winchester, 237 S.C. 487, 491, 118 S.E.2d 61, 63 (1961).

In South Carolina, adverse possession may be established if the elements of the claim are shown to exist for at least ten years. S.C. Code Ann. § 15-67-210 (Supp. 2008). To meet this burden of proof, the party asserting the claim must show by "clear and convincing" evidence he has met the requirements for adverse possession. Davis v. Monteith, 289 S.C. 176, 180, 345 S.E.2d 724, 726 (1986).

Jones first argues the Special Referee applied the wrong test when he found the Owens had established actual possession of Lot 31 by "ample evidence." Jones asserts the use of this phrase shows the Special Referee failed to apply a clear and convincing standard and instead applied a lower burden of proof. We disagree for two reasons.

First, the Special Referee recited the correct "clear and convincing" standard in the opening of the "Conclusions of Law" section in the part of the Order discussing the principles of adverse possession. The use of the word "ample" was merely part of a statement concluding the portion of the Order pertaining to the actual possession requirement. Second, when the Special Referee found "ample evidence," we believe the word "ample" was merely an adjective to describe the evidence provided by the Owens that sufficiently met the clear and convincing evidentiary standard. See, e.g., State v. Cutro, 332 S.C. 100, 110, 504 S.E.2d 324, 329 (1998) ("A review of the record reveals there is ample evidence to uphold the trial court's ruling that the prior bad acts were proven by clear and convincing evidence."); Berry v. Ianuario, 286 S.C. 522, 525, 335 S.E.2d 250, 251 (Ct. App. 1985) ("We find sufficient evidence in the record . . . to meet the 'clear and convincing' evidence standard."). We believe the Order, when read in its entirety, makes clear the Special Referee applied the correct clear and convincing standard to the adverse possession claim.

Jones next argues even if the Special Referee did apply the correct burden of proof, he nevertheless erred in concluding the evidence presented by the Owens was clear and convincing as to the elements of adverse possession. However, given that ours is an "any evidence" standard of review, we disagree.

Acquiring title by adverse possession requires proof of actual, open, notorious, hostile, continuous, and exclusive possession by the claimant, or by one or more persons through whom he claimed, for the full statutory period. Miller, 307 S.C. at 61, 413 S.E.2d at 844. As discussed below, we believe the Owens presented evidence establishing each of these requirements.

A. Actual Possession

Acts of ownership of open land need only be exercised in a way consistent with the possible uses of the land and as the situation of the property permits, without actual residency or occupancy. Butler v. Lindsey, 293 S.C. 466, 471, 361 S.E.2d 621, 623 (Ct. App. 1987). For the purpose of constituting adverse possession by a person claiming title founded upon a written instrument, land shall be deemed to have been possessed and occupied when it has been "usually cultivated or improved," and when it has been "protected by substantial enclosure." S.C. Code Ann. § 15-67-230 (Supp. 2008).

The Owens purchased Lot 31 from Shoaf in 1987 for $2,000, and the deed was recorded at the Lexington County Register of Deeds on the date of the closing. At trial, the Owens testified that between 1987 and 1998, they posted landscape stakes at the corners of the Lot, bush-hogged and landscaped the Lot, graded a driveway leading onto the lot, placed "No Trespassing" signs throughout the Lot, raised a mesh wire fence along the back of the Lot, stored business supplies on the Lot, paid taxes on the Lot, and cut down timber on the Lot. Between 1998 and 2000, a septic tank, a well, and wood privacy fences were installed on the Lot. On the basis of this evidence, the Special Referee held the Owens acquired Lot 31 by adverse possession under color of title.

Jones argues the "first clear act of ownership," if any, exercised by the Owens was the installation of the mobile home, well, and septic tank in 1998. Thus, the Owens' period of actual possession had not reached ten years by the time this action was filed in 2005. As for the Owens' activities prior to 1998, Jones argues the Owens' evidence of these activities did not rise to the level

of clear and convincing because their testimony regarding these acts was contradictory and self-serving and was neither supported by documentary evidence nor corroborated by any witnesses.

The Special Referee, as trier of fact, has the task of assessing the credibility, persuasiveness, and weight of the evidence presented. Evatt v. Campbell, 234 S.C. 1, 6, 106 S.E.2d 447, 451 (1959). In an action at law, this Court must affirm the factual findings of the Special Referee unless no evidence reasonably supports those findings. Clark, 323 S.C. at 87, 473 S.E.2d at 476. Sworn testimony, albeit self-serving, is still evidence. Id. at 90, 473 S.E.2d at 478 (affirming the master's holding that the lot in question had been adversely possessed based, in part, on the testimony of the adverse possessor). In reviewing an action tried at law, it is not the place of this Court to substitute its own view as to the facts. United Farm Agency v. Malanuk, 284 S.C. 382, 385, 325 S.E.2d 544, 546 (1985).

Here, the Special Referee found the Owens' testimony credible. Although the Owens' testimony could have been bolstered by corroborating documentary evidence, the Special Referee was convinced of the Owens' claim despite its absence. To the extent the Owens' testimony was contradictory[1] and self-serving, Jones' own testimony was also self-serving and, at times, inconsistent.[2] The Special Referee, as trier of fact, assessed the credibility of the evidence presented by both parties, and we believe his findings are supported by the evidence.

[1] Jones argues the Owens' testimony was inconsistent because at one point, Mr. Owens testified he had "[no] serious doubts" as to their ownership of Lot 31, but later testified he acquired quitclaim deeds for "further verification," as sort of a "second opinion."

[2] Jones testified at times that he had not stepped onto Lot 31 for seventeen years from 1987 to 2004. However, at other times, he claimed to have been to Lot 31 in 1992 and 1997.

B. Open and Notorious

Jones argues the Special Referee erred in concluding the period of the Owens' adverse possession was of sufficient length because prior to 1998, the Owens' activity on Lot 31 did not rise to the level of open and notorious.[3] We disagree.

While the legal owner need not have actual knowledge the claimant is claiming property adversely, the hostile possession should be so notorious that the legal owner by ordinary diligence should have known of it. Graniteville Co. v. Williams, 209 S.C. 112, 120-21, 39 S.E.2d 202, 206 (1946).

In this case, the Owens performed several acts prior to 1998 that, had Jones exercised ordinary diligence, would have put Jones on notice his land was being possessed by another. Starting in 1987, the Lot was bush-hogged regularly, a driveway and wire fence were installed, timber was cut down, "No Trespassing" signs and property stakes were installed, and business supplies such as concrete blocks, timber, and a trailer were stored on the Lot. All of these acts presumably resulted in physical changes to the Lot that would be visible to a landowner exercising ordinary diligence in the ownership of his property.

Jones presents three arguments as to why the Owens' activities were not sufficiently open and notorious. We believe all three are without merit.

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[3] In his brief, Jones treats the open and notorious requirement of adverse possession as a separate issue, under the sub-heading "The Special Referee erred in his calculation of the respondent's period of adverse claim and the determination of time of appellant's first notice of such claim." We address this under the more general issue of whether the Special Referee erred in finding clear and convincing evidence of each of the elements of adverse possession.

First, Jones argues the Owens' activities on Lot 31 prior to 1998 were insufficiently open and notorious because they were "temporary and transient." In support of this, Jones cites Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 430, 489 S.E.2d 223, 226 (Ct. App. 1997), for the proposition "[o]ccasional and temporary use or occupation does not constitute adverse possession," and notes the Owens testified the timber, cement blocks, and trailer were kept on the Lot merely for storage and that these items were never stored on the Lot for very long. However, this argument seems to be directed more towards the continuousness requirement, rather than the open and notorious requirement. We will, therefore, address this argument in the next section.

Next, Jones argues the Owens' activities were not open and notorious because no one lived on Lot 31 and there were no permanent structures on the Lot from 1987 until 1998. However, acts of ownership of open land for purposes of adverse possession need not include actual residency or occupancy. Butler, 293 S.C. at 471, 361 S.E.2d at 623. Moreover, activities that do not involve the creation of permanent structures on the land can be sufficiently open and notorious as to put the legal owner on notice that his land is being adversely possessed. See, e.g., Miller, 307 S.C. at 62, 413 S.E.2d at 844 (holding evidence supported Special Referee's finding of adverse possession when respondent paid the mortgages on the property, paid taxes on the property, and marked the boundary lines of the disputed property, and cut and sold timber on the tract in question for the statutory period).

Finally, Jones argues the Owens' activities were not open and notorious because (1) Mrs. Owens testified an observer standing on the Owens' lot across the street from Lot 31 could not have seen the mesh fence in the back of Lot 31, and (2) Mr. Owens testified it was possible an observer might not have been able to see the "No Trespassing" signs. We disagree.

First, the determination of whether possession is open and notorious is made from the viewpoint of the legal owner exercising ordinary diligence, not of the adverse possessor. Graniteville Co., 209 S.C. at 120-21, 39 S.E.2d at 206. Jones asks this Court to determine the open and notorious nature of

the Owens' possession from the viewpoint of the Owens by using Mrs. Owens' testimony as evidence the possession was not open and notorious. Essentially, Jones asks this Court to assume the exercise of ordinary diligence would not require him to view Lot 31 from any closer than the Owens' house across the street. We do not believe ordinary diligence is so limited. Second, even assuming, arguendo, both of the Owens' statements above are true, the other acts of ownership (e.g., the bush-hogging, brush burning, and the installation of the driveway) would still suffice to put Jones on notice of the Owens' possession had he exercised due diligence.

C. Continuous

Jones first contends the Owens' possession of Lot 31 was not continuous because the Leagans' ownership of and residence on Lot 31 from 1998 to 2004 "interrupted" the Owens period of adverse possession. We disagree.

A person claiming adverse possession must have personally held the property for ten years, and tacking is allowed only between ancestor and heir. Getsinger, 327 S.C. at 430-31, 489 S.E.2d at 225. During the ten year period, tacking is not allowed between successive occupants. Id. If the claimant's period of adverse possession is interrupted, constructive possession is restored to the owner. Mullis, 237 S.C. at 496, 118 S.E.2d at 65.

In this case, Jones argues the Special Referee erred in holding the Leagans were the Owens' "heirs" and their period of residence could, therefore, be tacked onto the Owens' period of adverse possession. On this point, we agree with Jones because the Leagans are not the Owens' "heirs." See Alley v. Strickland, 279 S.C. 126, 127, 302 S.E.2d 866, 867 (1983) ("Heirs are not determined until the death of the ancestor in question."). However, the Special Referee's error is irrelevant in light of the fact that the Owens' possession of Lot 31 began in 1987 and continued until at least 1997, at which time they acquired title by adverse possession under the ten year statute of limitations. It was not until 1998 that the Owens deeded Lot 31 to the Leagans. Thus, the Leagan's residence and ownership could not have interrupted the Owens period of adverse possession.

Jones also argues the Owens' possession was "temporary and transient," rather than "continuous," because the Owens testified the timber, cement blocks, and trailer were kept on the Lot merely for storage and these items were never stored on the Lot for very long. We disagree.

Occasional and temporary use or occupation does not constitute adverse possession. Getsinger, 327 S.C. at 430, 489 S.E.2d at 226. However, the rule requiring continuity of possession does not mean the person in possession must be actually on the land during the whole of the statutory period. Mullis, 237 S.C. at 495, 118 S.E.2d at 65. "Actual possession, once taken, will continue, though the party taking such possession should not continue to rest with his foot upon the soil, until he be disseised, or until he [does] some act which amounts to a voluntary abandonment of the possession." Id. In determining whether continuity of possession is broken, the nature and location of the land should be considered and whether the use to which the land has been put comports with the usual management of such property. Id.

In this case, the fact the trailer and building supplies were not stored on Lot 31 for very long does not mean the Owens' possession was "occasional and temporary." Mr. Owens is in the landscaping business and he used Lot 31 as storage for his supplies. In the course of running a landscaping business, presumably the trailer is brought along to job sites along with building supplies. It is, therefore, understandable his trailer would occasionally be absent from the lot. The same holds true for his building supplies such as timber, bricks, and cement blocks. As supplies get used, new ones come in, such that no one set of blocks, bricks, or timber would remain on the Lot for long.

Furthermore, the fact that the presence of the trailer and building supplies may not have been continuous does not undo the fact the other acts of ownership were. The Owens testified they seasonally bush-hogged the Lot, burned brush on the Lot, put up a mesh wire fence, and installed "No Trespassing" signs. Taken together, we believe the evidence presented supports the Special Referee's finding of continuous possession.

Accordingly, we believe the Owens have met the requirement of continuous possession of Lot 31.

D. Exclusive and Hostile

Jones does not dispute the Special Referee's findings as to these two elements of adverse possession. An issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal. Rule 208(b)(1)(D), SCACR; Jinks v. Richland County, 355 S.C. 341, 344 n.3, 585 S.E.2d 281, 283 n.3 (2003). Accordingly, any argument regarding exclusivity or hostility is abandoned.

II. Burden of Proof

Jones argues the Special Referee impermissibly shifted the burden of proof to him "by promulgating a series of acts a landowner must seemingly perform to give notice to the world of ownership." We disagree.

In an action to quiet title, the burden of proof is on the party asserting adverse possession as an affirmative defense. Clark, 323 S.C. at 87, 473 S.E.2d at 476. The Special Referee recited this principle of law at the outset of the "Conclusions of Law" section of the Order. Nevertheless, Jones argues the Special Referee placed the burden of proof on him to establish ownership by some set of affirmative acts. In support of this, Jones points to certain findings of fact by the Special Referee as evidence the Special Referee implicitly required more of Jones than is normally required in a quiet title action. For instance, the Special Referee noted Jones had left Lot 31 "unimproved, uncultivated[,] and unmarked" and "untouched as an investment." He further noted Jones "neglected to perform any act whatsoever to give notice to the world that he was the owner of Lot 31."

We believe these findings of fact speak only to what Jones did and did not do with Lot 31, not what he should have done or what he was required to do under the law. While evidence of affirmative acts of ownership by Jones might have made it more difficult for the Owens to meet their burden,

nothing in the Order suggests the Special Referee required Jones to produce evidence of such acts to succeed in his quiet title action. We also believe these findings of fact are relevant to the defenses raised by the Owens. The fact Jones had not made any use of Lot 31 was relevant to the question of whether the Owens' use of Lot 31 was exclusive for purposes of adverse possession. See Butler, 293 S.C. at 472, 361 S.E.2d at 624 ("The exclusive possession necessary to acquire title by adverse possession is not satisfied if occupancy is shared with the owner or with agents of the owner."). Also, the fact that Jones had not visited Lot 31 for seventeen years was relevant to the question of Jones' due diligence on both the laches defense, as discussed below, and the open and notorious requirement of adverse possession. See Jefferson Pilot Life Ins. Co. v. Gum, 302 S.C. 8, 11, 393 S.E.2d 180, 181 (1990) (holding laches is neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done); Graniteville Co., 209 S.C. at 120-21, 39 S.E.2d at 206 (holding possession should be so notorious that the legal owner by ordinary diligence should have known of it).

Jones also criticizes the Order to the extent it implies "owning a piece of property for purposes of leaving it undeveloped is not enough for a record owner to maintain an interest in his property." Certainly, owning property as an investment with a duly recorded, valid instrument of title will suffice for a landowner to be able to claim proper legal title and ownership in many instances. However, the mere fact a landowner holds valid record title does not immunize the landowner from claims of adverse possession. It is possible such a landowner, despite his superior title, could nevertheless be divested of his right to title if an adverse possessor successfully establishes his claim. See Clark, 323 S.C at 90-91, 473 S.E.2d at 478 (holding even though Clark held superior record title over adverse possessor to the land in question, that fact alone could not divest one who properly acquired title to the land by adverse possession); Sumner v. Murphy, 20 S.C.L. (2 Hill) 488 (1834) (finding a showing of adverse possession of land for the time prescribed by the statute of limitations practically extinguishes the right of the party having true paper title and vests a perfect title in the adverse possessor).

Jones also assigns error to the Special Referee's failure to make a finding as to which party held legal title to Lot 31. However, the Owens did not offer their instrument of title for its superiority over Jones' deed. Rather, their deed was offered in support of their color of title claim. "A deed may be color of title although the grantor was without interest or title in the land conveyed." Mullis, 237 S.C. at 495, 118 S.E.2d at 63. Thus, the validity of the Owens deed is irrelevant to an adverse possession claim. Accordingly, the Special Referee did not need to determine which party held superior record title on the basis of their competing instruments. See id. ("The extent of the occupant's claim founded on an instrument of writing is not dependent upon the validity of such instrument.").

We, therefore, find no error in the Special Referee's failure to determine which party held legal title to Lot 31.

III. Laches

Jones argues the Special Referee erred in applying the equitable doctrine of laches to this case or, if laches is applicable, in misconstruing its application. We disagree.

Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible. Ex Parte Dibble, 279 S.C 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983). The equitable doctrine of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1998). The party seeking to establish laches must show (1) delay, (2) that was unreasonable under the circumstances, and (3) prejudice. Kelley v. Kelley, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct. App. 2006). To establish laches as a defense, the defendant must show the complaining party unreasonably delayed its assertion of a right, thereby prejudicing the defendant. Id. "[T]he determination of whether laches has been established is largely within the discretion of the trial court." Id. at 607, 629 S.E.2d at 391. Additionally, for the defense of laches to be sustained, "the circumstances must have been such

as to import that the complainant had abandoned or surrendered the claim or right which he now asserts." Id. (quoting Byars v. Cherokee County, 237 S.C. 548, 560, 118 S.E.2d 324, 330 (1961)).

In this case, Jones testified he did not visit Lot 31 for the seventeen years between 1987 and 2004. This delay was unreasonable under the circumstances because Lot 31 is located in the same county where Jones is a resident. Thus, visiting Lot 31 should not have presented any great difficulty for Jones. Furthermore, the Owens would be prejudiced if they were ejected from Lot 31 because they have invested a substantial amount of time and money into Lot 31, whereas Jones has invested practically nothing. The Owens purchased Lot 31 in good faith from Shoaf and had no knowledge of Jones' potential claim of ownership. Because Jones was in a better position to protect himself and avoid the issue now facing the Court, we believe the equities favor the Owens.

Accordingly, we find no error in the Special Referee's application of laches.

IV. Admission of Hearsay Evidence

Jones argues the Special Referee erred by giving significant credibility and weight to testimony by the Owens that they had numerous title searches performed because Owens offered no documentation to support this. However, Jones has cited no legal authority to support the argument that this was an error of law. As such, this argument is conclusory, and such arguments are deemed abandoned on appeal. See Mulherin-Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding party abandoned an issue on appeal due to failure to cite any supporting authority and making only conclusory arguments).

CONCLUSION

Accordingly, the Special Referee's decision is

AFFIRMED.

HUFF, WILLIAMS, and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Amaurys Columbie Fonseca, Appellant.

Appeal From McCormick County
R. Knox McMahon, Circuit Court Judge

Opinion No. 4552
Heard February 4, 2009 – Filed May 27, 2009

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General William M. Blitch, Jr., of Columbia, and Solicitor Donald V. Myers, of Lexington, for Respondent.

THOMAS, J.: Amaurys Columbie Fonseca appeals his conviction for the commission of a lewd act on a minor. The original indictment charged one count of a lewd act against a minor, but alleged two distinct incidents: one occurring in 2001 and another in 2003. By order of the court, the indictment was amended, and the State elected to proceed only on the 2003 lewd act. Appellant alleges it was error to: (1) permit the State to proceed under the amended indictment; (2) allow Victim to testify about the previous 2001 incident; and (3) admit a portion of Victim's testimony he asserts was hearsay, and impermissible bolstering. We affirm in part, reverse in part, and remand.

FACTS

In 2007, Appellant was indicted on one count of committing a lewd act against a minor. The original indictment alleged that "on or between August 1, 2001 and October 30, 2003, [Appellant] willfully and lewdly [did] commit a lewd and/or lascivious act upon or with the body of" Victim. The indictment alleged two separate offenses: one in 2003, in which Appellant allegedly pushed Victim down and proceeded to rub himself in a sexual manner against her; and an earlier incident in 2001, in which Appellant allegedly lay beside Victim in bed and touched her beneath her underwear, rubbing her vagina, as well as exposing his penis to her.

Appellant was married to Victim's older sister, and the assaults occurred when Victim was visiting to help care for her sister's children. It is alleged when Victim was ten years old, in 2001, Victim was lying on a couch at her sister's home when Appellant approached her and asked if she wanted to see his penis. Despite Victim declining, Appellant allegedly exposed his penis to her at which time she retreated to a bedroom and pretended to be asleep. Appellant followed Victim to the bedroom; laid beside her on the bed; touched her beneath her underwear; and began "feeling" and "groping" her genitals. Victim did not immediately tell anyone of this incident.

Victim continued to visit until 2003 without incident. In 2003, when Victim was twelve years old and visiting her sister's home, her sister asked her to retrieve something from another room. Appellant followed Victim into

the other room, and when Victim bent over to pick up an item, Appellant pushed her down, pulled her legs apart, and although fully clothed, put his genitals up against hers in a manner simulating intercourse. After Victim threatened to scream, Appellant ceased the assault.

Upon Appellant's motion, the trial court required the State to elect which allegation it wished to pursue at trial. The State indicated it wished to pursue the 2003 allegation, and the indictment was modified. However, the trial court permitted Victim to testify about the 2001 incident, allowing the testimony as evidence of motive and intent. The trial court found the 2001 incident did not establish a common scheme or plan but it did serve to demonstrate Appellant's intent in the 2003 sexual acts was for the purpose of gratifying his lust, passion, or sexual desires.

Sometime after the 2003 incident, Victim told a friend, and later the friend's mother about the sexual assault. During Victim's cross-examination, Appellant elicited testimony that Victim had denied the incident when first confronted by her friend's mother. On redirect, the State sought to establish how much time elapsed between Victim's initial denial and later disclosure of the assault. Appellant objected on the basis of hearsay and impermissible bolstering. The trial court allowed the testimony based on counsel's cross-examination opening the door and the closeness in time of the two events. Additionally, the court opined "it [was] very very relevant."

Victim's sister testified at trial on behalf of Appellant as his only witness. She stated she never heard or saw anything occur between Appellant and Victim.

The jury convicted Appellant of the commission of a lewd act on a minor. This appeal followed.

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). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.

LAW/ANALYSIS

I. INDICTMENT

Appellant avers the trial court erred in allowing the State to proceed under the amended indictment. We disagree.

A. Error Preservation

Initially, we address the State's contention that Appellant's issue is not preserved for review. We find the issue is preserved.

The sufficiency of an indictment is not a matter of subject matter jurisdiction, and thus cannot be raised at anytime. State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005) ("[S]ubject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts.") (emphasis added). An objection to the sufficiency of an indictment must be made before the jury is sworn as provided by section 17-19-90 of the South Carolina Code of Laws. An objection to the sufficiency of the indictment made after the jury is sworn is untimely. Gentry, 363 S.C. at 101-02, 610 S.E.2d at 499.

Here, Appellant first argued to the trial court the original indictment should be severed. The court agreed and instructed the State to elect which incident to prosecute. The indictment was amended once the State chose to proceed on the 2003 incident. Accordingly, the next question was whether the 2001 incident was admissible as a prior bad act. The Court heard Victim's proffered testimony and arguments from counsel, and ultimately admitted the 2001 incident as evidence. Immediately following the court's ruling, and prior to the jury being sworn, Appellant objected:

> Your Honor, for the record, the indictment has been considerably changed and excised and so forth, and I understand the Court is putting in the August date. So it runs August 1 to October 30, I believe of 03, being the relevant dates for the charged offense.

> We would submit this type of date change, although the other language was in there, we would submit that the change to the indictment is such that from a due process standpoint, we feel like this indictment has not been presented to a grand jury, and we would object to the lack of presentment at this time.

We find this objection properly preserves this issue for appeal.

B. Sufficiency of the Indictment

Appellant argues the trial court erred in allowing the State to proceed under the amended indictment, arguing it provided insufficient notice. We disagree.

An indictment is a notice document. Id. at 101, 610 S.E.2d at 499. "The primary purpose[] of an indictment [is] to put the defendant on notice of what he is called upon to answer, i.e., to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." Evans v. State, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005). An indictment may be amended if: (1) it does not change the nature of the offense; (2) the amended charge is a lesser included offense of the original crime charged in the indictment; or (3) the defendant waives presentment to the grand jury and pleads guilty. State v. Myers, 313 S.C. 391, 393, 438 S.E.2d 236, 237 (1993).

Here, the substance and nature of the crime charged was not affected by amending the indictment. Appellant conceded the language in the amended indictment was the same as the original. The only change made to the indictment concerned the year of the alleged act. Therefore, the amendment did not prejudice Appellant. State v. Horton, 209 S.C. 151, 155, 39 S.E.2d 222, 223-24 (1946) (permitting the striking through of "surplusage" in an indictment where the amendment worked no prejudice on the defendant). Thus, we find the amended indictment provided Appellant with sufficient notice.

II. Prior Bad Act

Appellant avers the trial court erred in allowing evidence of his prior 2001 "bad act" under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and Rule 404(b), SCRE. We agree.

A. Motive and Intent

Generally, "evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged." Lyle, 125 S.C. at 415, 118 S.E. at 807. However, there are certain well-established exceptions to this general rule:

> [E]vidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

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

Here, the trial court found the evidence of Appellant's prior bad act admissible to show motive or intent under the Lyle exception and Rule 404. Although Lyle does not distinguish between sexual offenses and non-sexual offenses, the common trend in South Carolina is to apply the Lyle exceptions differently to sexual offenses. Compare Lyle, 125 S.C. 406, 118 S.E. 803 (a forgery case), to State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998) (a child molestation case, distinguishing the application of the Lyle exceptions for motive and intent from cases that were not sexual in nature).

The exceptions of motive and intent are closely related, especially in the prosecution of a sex crime. Due to the unfortunate frequency in which this issue arises, we take this opportunity to address the applicability of the motive and intent exceptions of Lyle and Rule 404, SCRE, in the context of sex crimes.

In Nelson, our supreme court noted there is little doubt the motivation behind a sex crime is, at least in part, sexual gratification. Nelson, 331 S.C. at 10-11, 501 S.E.2d at 721. In finding evidence inadmissible to prove motive for the sexual offense, the Nelson court stated:

> [T]he motive for the alleged crimes involved in the present case [is] apparent. A person commits or attempts to commit [a sexual offense] for the obvious motive of sexual gratification. Since motive cannot be deemed to have been a material issue at [defendant's] trial . . . testimony [as to prior bad acts] was not admissible to prove [intent].

Id. at 11, 501 S.E.2d at 721 (citing State v. Smith, 617 N.E.2d 1160, 1172 (Ohio Ct. App. 1992)) (internal citations omitted).[1]

As in Nelson, Appellant was accused of a sexual offense (lewd act on a minor), and his motive was not made a material issue at trial. Therefore, we find the introduction of the prior bad act under the motive exception provided in Lyle and Rule 404 was error.

Similar reasoning is applicable to the exception of intent. See Nelson, 331 S.C. at 11, 501 S.E.2d at 721 ("In the trial of sex offenses, extrinsic evidence of intent is admissible only in those cases where there is no challenge to the occurrence of the physical contact itself, but the intent of the actor is at issue because the nature of the contact is subject to varying

[1] Nelson distinguishes State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), and State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991), where prior bad acts were permitted to demonstrate motive in non-sexual cases.

interpretations") (quoting People v. Bagarozy, 132 A.D.2d 225, 236, 522 N.Y.S.2d 848, 854 (N.Y. App. Div. 1987), wherein the court found intent was not an issue when the appellant denied any sexual contact).

Thus, as in Nelson, because Appellant denies that the contact ever occurred, intent was not made a material issue. Furthermore, because intent is an element of most crimes, if we hold this evidence admissible, prior sexual acts would be admissible to prove the required intent in all prosecutions of subsequent sex crimes. Such is a thin disguise for impermissible character evidence and would undermine the protections of Rule 404. Without motive or intent being a material issue, it is error to admit prior bad acts as evidence of the same in a sexual crime. Thus, it was error to allow evidence of the 2001 incident as evidence of motive or intent.

B. Common Scheme or Plan

The State argues as an additional sustaining ground, the 2001 incident should be permitted to show a common scheme or plan. We disagree.

The State provides no compelling argument of any similarities between the two occurrences,[2] or any argument to overcome the fact that the incidents are remote in time. Accordingly, the State's argument is without merit. See State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001) (finding "[a] close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception" and remoteness between the two alleged acts is a factor to consider); State v. Kirton, 381 S.C. 7, 9, 671 S.E.2d 107, 117 (Ct. App. 2008) (holding a common scheme or plan requires similarity between the prior act and the charged act that increases the probative value of the evidence); State v. Aiken, 322 S.C. 177, 180, 470 S.E.2d 404, 406 (Ct. App. 1996) (noting the more similar the prior act is to the charged act, the more likely the evidence will be admissible); State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (finding prior bad

[2] The State avers that the fact that both of the incidents occurred in Appellant's marital home while his wife was in the other room, demonstrates that the Appellant had a common scheme or plan to attack the victim while his wife was not present or was in the other room.

acts are admissible when close similarity between the acts enhances the probative value of the evidence so as to outweigh the prejudice); State v. Stokes, 279 S.C. 191, 193, 304 S.E.2d 814, 815 (1983) (holding to allow evidence as demonstrative of a common scheme or plan requires more than merely the commission of two similar crimes); see also Kirton, 318 S.C. at 10, 671 S.E.2d at 117 ("The common scheme or plan exception 'is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged . . . is held admissible as tending to show continued illicit intercourse between the same parties.'") (citing State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955)).

C. Harmless Error

The State also contends if it was error to allow the testimony, any error was harmless. We disagree.

To deem an error harmless, this court must determine "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993) (citing Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)) (internal quotations omitted). However, when "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached," an insubstantial error not affecting the verdict will be deemed harmless. State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). Due to the prejudicial tendency of admitting the prior bad act testimony, we cannot find beyond a reasonable doubt that the verdict was not affected by the evidence. Accordingly, this error was not harmless.

D. Other Issues

In light of our decision that it was error to permit the evidence of the 2001 prior bad act, we need not address Appellant's remaining arguments on appeal. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive); Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (holding the appellate court need not address all issues when decision on a prior issue is dispositive).

CONCLUSION

Accordingly, the decision of the circuit court is, **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Glenda Barron, Appellant,

v.

Labor Finders of South Carolina, Respondent.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 4553
Heard February 4, 2009 – Filed May 28, 2009

AFFIRMED

A. Christopher Potts, of Charleston, for Appellant.

Paul M. Platte and Katherine B. Barroll, both of Columbia, for Respondent.

THOMAS, J.: On appeal from Charleston County, the appellant challenges the trial court's grant of summary judgment on a wrongful termination claim, as well as the denial of her Rule 54(b) motion to change a previous summary judgment order pertaining to other related claims. We affirm.

FACTS

Glenda Barron (Appellant) began employment with Labor Finders of South Carolina (Respondent) in or around 1990 or 1991. Appellant reported to two main superiors, Fields (the owner) and Ray (a regional manager). During the course of Appellant's employment, a second location opened in the Charleston area, and Appellant was told that she was being promoted to sales manager for both Charleston locations. In 2004, Appellant signed an employment agreement setting her compensation in "straight commission" of 3% of customer payments deposited and posted by both Charleston area offices each week within ninety days of invoice date. Neither party disputes Appellant's status as an at-will employee.

The second Charleston location opened for business in September 2004, and began earning income that November. By January 2005, Appellant believed Respondent had not paid the full amount of commissions owed to her. Appellant reported her concerns of unpaid commissions and subsequently met with Ray on February 8, 2005, to discuss the matter. Appellant alleges that at the time of the meeting she was due at least $1,691.45 in unpaid commission.

The following day, February 9, 2005, Respondent terminated Appellant's employment citing the need to downsize in light of recent budget cuts. Eight or nine days later, Respondent paid Appellant all commissions owed to her.[1]

[1] It also appears Respondent included an additional amount for "severance."

PROCEDURAL BACKGROUND

On August 2, 2005, Appellant filed suit alleging: (1) violation of SC Payment of Wages Act; (2) breach of contract; (3) breach of contract accompanied by a fraudulent act; and (4) wrongful discharge.

On September 13, 2006, Respondent moved for summary judgment before Judge Dennis, asserting, inter alia, that it had paid all wages due Appellant. It appears that initially this motion for summary judgment was denied; however, the initial order supposedly entered on September 23, 2006, is not included in the record on appeal. Subsequently, Appellant's counsel agreed not to contest summary judgment on any of the causes of action except the claim for wrongful termination. Accordingly, on February 26, 2007, Judge Dennis entered an amended order, granting summary judgment on all claims except the wrongful termination.

The wrongful termination claim then proceeded to trial, before Judge Pieper, where Respondent made another motion for summary judgment. Judge Pieper orally granted summary judgment; however, before he entered a final order, Appellant filed a Rule 54(b) motion, requesting that Judge Pieper amend Judge Dennis's February 26 summary judgment order. Judge Pieper withheld ruling on any matters and instead instructed Appellant to direct her Rule 54(b) motion to Judge Dennis.

Subsequently, Appellant filed an amended Rule 54(b) motion to change the February 26 order, requesting that Judge Dennis: (1) state further facts to demonstrate Appellant did not intend to prejudice the wrongful termination claim by consenting to summary judgment on the related three causes of action; (2) deny summary judgment entirely; or in the alternative (3) permit Appellant to voluntarily dismiss the three causes of action. On September 14, 2007, Judge Dennis denied Appellant's Rule 54(b) motion.

On January 11, 2008, Judge Dennis entered an order which granted Respondent's renewed motion for summary judgment on the wrongful termination claim.

Appellant appeals the January 11 order, as well as the denial of the Rule 54(b) motion.

ISSUES ON APPEAL

I. Did the trial court err in granting summary judgment to Labor Finders on the wrongful termination claim?

II. Did the trial court err in denying Appellant's Rule 54(b) motion to revise the prior summary judgment?

III. In the alternative, even if the Rule 54(b) motion should not have been granted, did the initial grant of summary judgment work to bar Appellant's wrongful termination claim?

STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005); Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). The circuit court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003); Knox v. Greenville Hosp. Sys., 362 S.C. 566, 569-70, 608 S.E.2d 459, 461 (Ct. App. 2005); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004). 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 non-moving party. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642,

648 (2006); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 304 (Ct. App. 1999).

LAW/ANALYSIS

I.

Appellant contends that a wrongful termination claim is sustainable under the "public policy exception" when an at-will employee is terminated subsequent to complaining of unpaid wages. We disagree.[2]

South Carolina "has long recognized the doctrine of employment at-will." Lawson v. S.C. Dep't of Corr., 340 S.C. 346, 350, 532 S.E.2d 259, 260 (2000); Culler v. Blue Ridge Elec. Coop., Inc., 309 S.C. 243, 422 S.E.2d 91 (1992); Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985). An employee without a contract for a stated period of time is presumptively considered an employee at-will, and employers may terminate such employees at anytime. Cape v. Greenville Sch. Dist., 365 S.C. 316, 319, 618 S.E.2d 881, 883 (2005) (noting that even this presumption can be overcome and that occasionally an employment contract for a definite period of time can be terminable at will).

However, our supreme court has adopted a public policy exception to the doctrine of employment at-will, that "[w]here [a] retaliatory discharge of an at-will employee constitutes a violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises." Lawson, 340 S.C. at 350, 532 S.E.2d at 260 (citing Ludwick, 287 S.C. at 225, 337 S.E.2d at 216) (internal quotations omitted). This exception is generally applied in a

[2] We note that the Appellant alleges that termination by an employer who is in violation of the South Carolina Payment of Wages Act, section 41-10-20 et. seq. S.C. Code Ann. (Supp. 2005), would fall within the ambit of the public policy exception; however, the record does not support the position that Labor Finders was in fact in violation of the Act. The record demonstrates merely a cursory accusation of such a violation.

situation in which an employer requires an employee to violate a law, or when the reason for the termination is itself a violation of criminal law. Id.

Appellant urges this Court to expand the public policy exception, relying on the supreme court's 1995 decision in Garner v. Morrison Knudsen Corporation, 318 S.C. 223, 456 S.E.2d 907 (1995). The Garner court stated that although "we have applied the public policy exception to situations where an employer requires an employee to violate a law, and situations where the reason for the employee's termination was itself a violation of criminal law, we have never held the exception is limited to these situations."[3] Id. at 226, 456 S.E.2d at 909 (emphasis added and relied upon by Appellant).

However, more recently in Lawson, the supreme court cited Garner and held that where the "[a]ppellant was not asked to violate the law and his termination did not violate criminal law…[the] allegations [did] not support a wrongful discharge action," suggesting that the exception has now been so limited. Lawson, 340 S.C. at 261, 532 S.E.2d at 350.

Further, we find Appellant's reliance on this Court's decisions in Keiger v. Citgo Coastal Petroleum Inc., 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997) and Evans v. Taylor Made Sandwich Co., 337 S.C. 95, 522 S.E.2d 350 (Ct. App. 1999) to be misplaced.

In Keiger, an appeal from a grant of a 12(b)(6) motion, unlike the case at hand, the appellant was fired for threatening to make a complaint to the Employment Commission for a violation of the Payment of Wages Act. Keiger, 326 S.C. 369, 482 S.E.2d 792. Thus, Keiger holds that whether a

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[3] We point out that procedurally the Garner decision was an appeal of a 12(b)(6) SCRCP motion to dismiss. Much of the discussion surrounded whether it was proper to make a decision as to whether the conduct of the employer violated public policy before any information had been developed for trial.

termination in retaliation for threatening to make a complaint will support a wrongful termination claim is not properly decided on a 12(b)(6) motion. Id.

Similarly, in Evans, an appeal from the denial of motions for judgment notwithstanding the verdict and a new trial nisi remittitur, the record demonstrated that the appellant was terminated in retaliation for actually making a complaint to the Employment Commission. Evans, 337 S.C. 95, 522 S.E.2d 350. Accordingly, Evans stands for the proposition that when the record demonstrates an employee was terminated for making an actual complaint to the Employment Commission, a jury finding of wrongful termination will not be set aside. Id.

Procedurally, the case at hand arises from a grant of summary judgment. Thus, we do not find either Keiger or Evans to be controlling in the case sub judice. Cf. Rule 56(c), SCRCP; Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003) (finding the circuit court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); Law, 368 S.C. at 434-35, 629 S.E.2d at 648 (2006) (stating the appellate court will reverse the circuit court's ruling on a directed verdict or JNOV motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law); Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006) (finding that in deciding whether the trial court properly granted a 12(b)(6) motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief); and Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 319-21, 628 S.E.2d 496, 518 (Ct. App. 2006) (ruling the grant or denial of new trial motions rests within the discretion of the trial judge, and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law).

Because Appellant was not asked to violate the law and her termination itself was not a violation of criminal law, summary judgment was proper;

accordingly, the wrongful termination claim could not be maintained.[4] Lawson, 340 S.C. at 350, 532 S.E.2d at 261 (finding that where the appellant was not asked to violate the law nor was his termination itself a violation of criminal law, a claim for wrongful termination could not be maintained).

II. & III.

In light of our decision supra neither the denial of the Rule 54(b) motion, nor the initial grant of summary judgment prejudiced Appellant's wrongful termination claim. We therefore do not address Appellant's remaining issues on appeal. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating an appellate court need not address remaining issues when a decision on a prior issue is dispositive); Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (holding the appellate court need not address all issues when decision on a prior issue is dispositive).

CONCLUSION

Accordingly, the ruling of the trial court is **AFFIRMED**.

SHORT and GEATHERS, JJ., concur.

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[4] "Whether the [Payment of Wages Act] itself, which was designed to protect working people and assist them in collecting wrongfully withheld compensation, see Dumas v. InfoSafe Corp., 320 S.C. 188, 463 S.E.2d 641 (Ct. App. 1995), constitutes a legislative declaration of public policy has never been addressed by the courts of this state." Keiger, 326 S.C. at 373, 482 S.E.2d at 794. However, because there is no evidence in the record to demonstrate that Labor Finders violated the Payment of Wages Act we do not find it necessary at this time to decide whether the Act is such a legislative declaration.