The Supreme Court of South Carolina

In the Matter of Florence County
Magistrate Jake Franklin
Strickland, Jr., Respondent.

ORDER

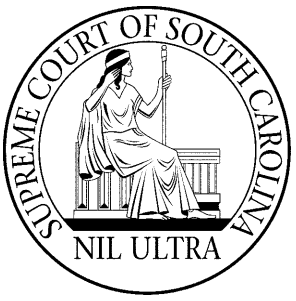
The Office of Disciplinary Counsel has filed a petition asking the Court to place respondent on interim suspension pursuant to Rule 17(b) of the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR.

IT IS ORDERED that the petition is granted and respondent is placed on interim suspension. Florence County is under no obligation to pay respondent his salary during the suspension. See In the Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991). Respondent is directed to deliver all books, records, funds, property and documents relating to his office to the Chief Magistrate for Florence County.

IT IS SO ORDERED.

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

Columbia, South Carolina
June 30, 2009



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 30
July 6, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

David Sojourner, Appellant,

v.

Town of St. George and the
County of Dorchester, Respondents.

Appeal from Dorchester County
Patrick R. Watts, Master-In-Equity

Opinion No. 26680
Submitted June 24, 2009 – Filed June 29, 2009

AFFIRMED

Frances I. Cantwell, of Charleston, for Appellant.

John G. Frampton, of Summerville, Margaret C. Pope, Gary T. Pope, and Belton T. Zeigler, all of Pope Zeigler, LLC, of Columbia, Trudy H. Robertson, of Moore & Van Allen, PLLC, of Charleston, for Respondents.

CHIEF JUSTICE TOAL: In this case, Appellant David Sojourner (Sojourner) filed suit against Respondents Town of St. George ("Town") and County of Dorchester ("County) after the Town adopted an ordinance ("Ordinance") which authorized the sale of its sewer system to the County. Sojourner filed suit against Respondents[1] alleging that pursuant to statute, the Town was required to hold an election approving the sale. The Master-In-Equity ruled that the statute requiring an election approving the sale was unconstitutional and that pursuant to provisions of the Home Rule Act, the Town was authorized to sell the sewer system pursuant to the Ordinance. Sojourner appealed the Master's decision. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

For many years, the Town has owned and operated a water system and sewer system within its corporate boundaries in compliance with applicable regulations. Likewise, the County has owned and operated a sewer collection and wastewater treatment system throughout the County, but outside the corporate limits of the Town. While the Town has been operating its water system and sewer system in full compliance with the applicable regulations, the Town will have to make substantial investments in the sewer system in the near future in order to meet increasing regulatory standards and maintenance needs. For this reason, on August 18, 2008, the Town council adopted the Ordinance approving an agreement[2] for the conveyance and transfer of assets comprising the sewer system currently owned and operated by the Town to the County.

Sojourner resides and owns real property in the Town. He is also an

[1] The Town and County are hereinafter referred to together as "Respondents".

[2] The agreement provides that the County will pay the Town $1.9 million for the assets comprising the Town's sewer system and will obtain a non-exclusive franchise to provide sewer service within the Town. The Town will retain ownership and operation of its water system and the legal right to extend sewer service to customers in its boundaries, if circumstances warrant it doing so in the future.

elector and a taxpayer of the Town and County, as well as a customer of the water system and sewer system of the Town. On August 26, 2008, Sojourner filed an action contesting the validity of the Ordinance, contending it conflicted with State law, and seeking an injunction against its enforcement. In particular, Sojourner alleged that S.C. Code Ann. § 5-31-620 (2004) (the "Election Provision") requires that an election be held prior to acquiring or disposing of a public utility and that S.C. Code Ann. § 5-31-640 (2004) (the "Freeholder Provision") requires that twenty-five percent of the resident freeholders of the municipality petition the municipality before an election may be held. Sojourner argued that Respondents' agreement to sell was in violation of the law because there was no written petition from any residents, qualified registered electors, or freeholders within the Town submitted to the Town Council or to any other public authority in the Town or County requesting an election on this matter.

Respondents countered that the Freeholder Provision is unconstitutional because it restricts the voting rights of the Town's electors and their elected representatives in violation of the Equal Protection Clauses of the United States Constitution and the South Carolina Constitution. Respondents further argued that the Freeholder Provision is inextricably intertwined with the Election Provision, and that both sections are therefore unconstitutional and unenforceable.

On January 14, 2009, the Master-In-Equity issued an order in favor of Respondents. The Master declared The Freeholder Provision unconstitutional as violative of the Equal Protection Clause, declared the Election Provision unconstitutional because it was inextricably intertwined with the unlawful Freeholder Provision, and held that Respondents' agreement was valid pursuant to authority granted to local governments by the Home Rule Act of 1975.

Sojourner appealed the Master's decision and presents the following questions for this Court's review:

I. Did the Master err in declaring the Freeholder Provision unconstitutional on the grounds that it is an unlawful

restriction on voting rights in violation of the Equal Protection Clause?

II. Did the Master err in declaring the Election Provision unconstitutional on the grounds that it is inextricably intertwined with the unconstitutional Freeholder Provision?

III. Did the Master err in holding that, in the absence of the Freeholder and Election Provisions, the Home Rule Act authorizes local governments to sell municipal utilities?

STANDARD OF REVIEW

A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). Every presumption is made in favor of a statute's constitutionality. *Gold v. South Carolina Bd. of Chiropractic Exam'rs*, 271 S.C. 74, 78, 245 S.E.2d 117, 119 (1978). The scope of review should be limited in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid. *Hendrix v. Taylor*, 353 S.C. 542, 550, 579 S.E.2d 320, 324 (2003).

LAW/ANALYSIS

I. Constitutionality of the Freeholder Provision

Sojourner argues that a compelling state interest justifies conditioning the sale of a municipally-owned sewer and water system on an election triggered by a freeholder-initiated petition and the Freeholder Provision is therefore constitutional. We disagree.

The right to vote is a fundamental right protected by heightened scrutiny under the Equal Protection Clause. *State v. Thompson*, 349 S.C. 346, 354, 563 S.E.2d 325, 329-30 (2002). Restrictions on the right to vote on

grounds other than residence, age, and citizenship generally violate the Equal Protection Clause and cannot stand unless such restrictions promote a compelling state interest. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969).

The Freeholder Provision provides:

> Before any election shall be held under the provisions of this article at least twenty-five per cent of the resident freeholders of the city or town, as shown by its tax books, shall petition the city or town council that such election be ordered.

Section 5-31-640.

Sojourner argues the Freeholder Provision is justified by the compelling state interest in protecting the property rights of freeholders. In particular, Sojourner argues that maintenance and operation of sewer systems have an effect on property owners that is different from and greater than that on the general public.

We find that there is no compelling interest to support the Freeholder Provision. Municipal utilities, as with other matters that affect public health and safety of the entire community, have long been considered to be of general interest to the community. *Hill v. Stone*, 421 U.S. 289, 299 (1975) (holding that "even under a system in which [payment] falls directly on property taxpayers, all members of the community share in the cost in various ways"). Indeed, the legislative intent of the Municipal Utility Act, of which the Freeholder and Election Provisions are a part, is expressly dedicated for the benefit of all those who own, use, or occupy dwellings or commercial buildings and exercised in accordance with the police powers necessary to regulate the maintenance and preservation of the health of the inhabitants of the State. *See* S.C. Code Ann. § 5-31-2010 (2004). Moreover, in the Equal Protection context, the right to protect one's property is not a fundamental right. *Thompson*, 349 at 353, 563 S.E.2d at 329. In our view, Sojourner's argument that property owners are so much more affected by sewer system operations than other voters so as to create a compelling state interest in

special statutory protection has no foundation in fact or in law and is therefore without merit. Accordingly, we hold that the Freeholder Provision is not supported by a compelling state interest and is therefore unconstitutional.

II. Severability of the Freeholder Provision from the Election Provision

Sojourner argues that even if the Court finds that the Freeholder Provision is unconstitutional, it may be severed because it is not so intertwined with the Election Provision that the Election Provision may not be enforced. We disagree.

The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed that the legislature would have passed it independent of that which conflicts with the constitution. *Joytime Distribs. & Amusement Co., Inc.*, 338 S.C. at 648, 528 S.E.2d at 654.

The Election Provision provides:

> Before such construction, purchase, sale, conveyance or disposal of any [municipal utility] . . . the city or town council of the municipality shall submit the question of such construction, purchase, sale, conveyance or disposal of the qualified registered electors of the city or town at an election to be ordered for that purpose by the city or town council and to be conducted in accordance with the laws governing municipal elections.

Section 5-31-620.

We agree with the Master that the Election Provision and the Freeholder Provision are mutually dependent and cannot be severed. The Freeholder Provision conditions an election authorizing the sale of a sewer system upon freeholders petitioning the city or town council for such election. Moreover, the Freeholder Provision and the Election Provision

were initially part of one section when enacted, and thus, we find that the original legislative intent was for both provisions to operate as a cohesive procedure. In other words, we do not believe it may fairly be presumed that the Legislature would have passed the Election Provision independent of the unconstitutional Freeholder Provision. *See Fairway Ford, Inc. v. Timmons*, 281 S.C. 57, 60, 314 S.E.2d 322, 324 (1984) (refusing to sever where "[t]he obvious intent of the Legislature to require approval of freeholders is so dominant that it cannot be said that the statute, without the portion declared unconstitutional, would have been enacted without the freeholder approval requirement.").

Accordingly, we hold that because the Election Provision is inextricably intertwined with the Freeholder Provision, the Election Provision may not be severed and it is therefore not enforceable.

III. Home Rule Act

Lastly, Sojourner argues that S.C. Code Ann. § 5-7-40 (2004), enacted as part of the Home Rule Act, does not properly authorize the sale of a municipal utility independent of the Freeholder and Election Provisions. We disagree.

Section 5-7-40 provides:

> All municipalities of this State may own and possess property within and without their corporate limits, real, personal or mixed, without limitation, and may, by resolution of the council adopted at a public meeting and upon such terms and conditions as such council may deem advisable, sell, alien, convey, lease or otherwise dispose of personal property and in the case of a sale, alienation, conveyance, lease or other disposition of real or mixed property, such council action must be effected by ordinance.

The Legislature did not intend, by granting particular powers to a municipality, to thereby limit the general powers of the municipality. *See* S.C. Code Ann. § 5-7-10 (2004).

For the reasons stated above, § 5-31-640 and § 5-31-620 cannot be applied to require the Town to hold a referendum prior to the sale of its sewer system. Therefore, we look to the Home Rule Act for guidance regarding the procedures the Town must follow to effectuate the sale. Pursuant to the authority granted in § 5-7-40 in conjunction with the expressed legislative intent in § 5-7-10, the Town is fully authorized to sell its sewer system pursuant to the Ordinance. In our view, to hold otherwise would completely ignore the applicable statutory framework that the Legislature has provided for municipal matters and would simultaneously subvert Legislative intent. Accordingly, we hold that the Home Rule Act authorizes the sale of the Town's sewer system pursuant to the Ordinance.

CONCLUSION

For the foregoing reasons, we hold that the Freeholder Provision is unconstitutional, the Election Provision is unenforceable, and § 5-7-40 authorizes the Town to enter into an agreement for the sale of the sewer system pursuant to the Ordinance.

AFFIRMED

WALLER, BEATTY and KITTREDGE, JJ., concur.
PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent. Assuming that S.C. Code § 5-31-640 fails to meet constitutional muster and must be struck down in its entirety,[3] I would uphold § 5-31-620 and its election requirement. This election provision not only requires an election before a municipality may sell, convey, or dispose of a sewer system but also before such a system can be constructed or purchased. As such, it effectuates the requirement found in S.C. Const. art. VIII, § 16, titled "Acquisition and operation of public utility systems," of a majority vote of the electors in a political subdivision before a municipality may acquire or operate a utility, including sewer systems. In my view, the legislature would not have intended to deny municipalities and their electors the ability to exercise their constitutional right to "acquire [a utility] by initial construction or purchase," a right they can exercise only through an election held pursuant to§ 5-31-620. I would therefore hold that § 5-31-620, the Election Provision, survives the striking of § 5-31-640, the Freeholder Provision.

[3] Compare Millsap v. Quinn, 785 S.W.2d 82 (Mo. 1990)(term freeholder struck from state constitutional provision leaving the rest intact); State v. Liggett & Myers Tobacco Co., 171 S.C. 511, 172 S.E. 857 (1933)(court will strike words and even add others or change ordinary meanings in order to uphold statute against constitutional challenge).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sherrie Jean Floyd, Respondent,

v.

Richard Morgan, Jr., Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Lexington County
Rolly W. Jacobs, Family Court Judge

Opinion No. 26681
Heard May 13, 2009 – Filed July 6, 2009

REVERSED AND REMANDED

J. Mark Taylor, of Moore Taylor & Thomas, of W. Columbia, and Katherine C. Goode, of Winnsboro, for Petitioner.

Richard G. Whiting and Spencer A. Syrett, both of Columbia, for Respondent.

JUSTICE BEATTY: In this domestic relations case, Sherrie Jean Floyd (Mother) moved to reduce the amount of her child support

payment to Richard Morgan, Jr. (Father). After the family court granted this reduction and denied each party's request for attorney's fees, Father appealed the order to the Court of Appeals. In a divided decision, the Court of Appeals affirmed the family court's order. Floyd v. Morgan, 375 S.C. 246, 652 S.E.2d 83 (Ct. App. 2007). This Court granted Father's petition for a writ of certiorari. We reverse the decision of the Court of Appeals and remand this case to family court.

FACTUAL/PROCEDURAL HISTORY

By order dated August 30, 2000, the family court granted Father a divorce from Mother on the ground of adultery. Prior to the issuance of this order, the parties entered into a custody, support, and property settlement agreement. Pursuant to this agreement, the court granted Father custody of the parties' two minor children, ages six and eight, and granted Mother visitation in excess of 109 overnights per year.[1]

Because Mother's visitation exceeded 109 overnights per year, it satisfied the threshold amount to constitute a shared custody arrangement.[2] The parties, however, agreed to calculate Mother's child support obligation pursuant to a sole custody arrangement which resulted in an amount of support greater than under a shared custody calculation. Specifically, this agreement provided: "Mother shall directly pay Father the amount of $920.00 per month in child support based upon figures set forth in the attached Child Support Obligation Worksheet A." The family court approved the agreement and incorporated it into the divorce decree.

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[1] Although the agreement did not specifically identify the number of overnight visits allotted to Mother, it set forth a weekly, monthly, and holiday time schedule. Based on this schedule, Mother was granted 147 overnight visits per year.

[2] See 27 S.C. Code Ann. Regs. 114-4730(A) (Supp. 2007) ("[S]hared physical custody means that each parent has court-ordered visitation with the children overnight for more than 109 overnights each year (30%) and that both parents contribute to the expenses of the child(ren) in addition to the payment of child support.").

In May 2004, Mother sought sole custody of the children or, in the alternative, a shared or joint custody arrangement. Additionally, Mother requested modification of her child support obligation.

In June 2005, due to an increase in Father's income and a decrease in Mother's income, the parties agreed they would temporarily reduce Mother's child support payment from $920 to $808 per month while the action was pending. By consent order, the court approved the parties' agreement.

In January 2006, Mother and Father agreed to modify their original agreement regarding the timing of Mother's visitation. They did not, however, modify the number of Mother's overnight visits with the children. The family court approved this modification.

Despite these modifications, the parties failed to reach an agreement concerning the following two issues: (1) Mother's request to permanently reduce her child support obligation, and (2) both Mother's and Father's requests for attorney's fees and costs. In terms of the child support reduction, the parties disputed whether child support should be calculated in accordance with Worksheet A (for sole custody) of the South Carolina Child Support Guidelines (the Guidelines), as referenced in the parties' agreement, or Worksheet C (for shared custody) of the Guidelines.

After a hearing, the family court[3] granted Mother's request to modify the provisions of the original divorce decree regarding child support. In so ruling, the court found the 43% increase in Father's income and the elimination of child care expenses in the amount of $544.00 per month constituted a substantial change of circumstances.

The family court calculated Mother's new child support obligation pursuant to Worksheet C (shared custody) of the Guidelines and reduced Mother's support payment to $152 per month. Although the court recognized the parties' agreement specified that child support

[3] We note the family court judge who heard the 2006 action for modification of child support was not the same judge who issued the 2000 decree of divorce.

calculations would be made using Worksheet A (sole custody), the court believed it could exercise its discretion to choose between the two methods of calculation.

In explaining this ultimate calculation, the court considered the fact that Mother's current visitation was 147 days and that she had spent approximately $3,000 in expenses above her child support obligation.

Additionally, the court found each party should be responsible for his or her own attorney's fees and costs.

Father appealed the family court's order to the Court of Appeals. In a divided opinion, the Court of Appeals affirmed the family court's reduction of Mother's child support obligation and denied Mother's and Father's requests for attorney's fees and costs. Floyd v. Morgan, 375 S.C. 246, 652 S.E.2d 83 (Ct. App. 2007).

Relying solely on this Court's decision in Rogers v. Rogers, 343 S.C. 329, 540 S.E.2d 840 (2001),[4] the Court of Appeals found the increase in Father's income as compared to Mother's, the elimination of child care expenses, and the consistent amount of medical expenses since the divorce constituted a substantial change of circumstances which warranted a modification of Mother's child support obligation. Id. at 251, 652 S.E.2d at 86.

In reaching this conclusion, the Court of Appeals pointed out that at the time of the divorce in 2000, Father earned $4,000 per month whereas Mother earned $4,067. By the time of the initial hearing in 2004, Father's monthly income increased 29% to $5,150, while Mother's income only increased 18% to $4,800. In 2005, Father's income increased to $5,421, while Mother's income decreased to $4,785. At the time of the final hearing in 2006, Father's income

[4] In Rogers, this Court found Mother was entitled to an increase in child support based on a 21% increase in Father's income and an increase in child care expenses. Rogers, 343 S.C. at 333, 540 S.E.2d at 842.

increased to $5,700, whereas Mother's income returned to $4,800. According to the family court and the Court of Appeals, these income fluctuations represented a 43% increase to Father's income since 2000 compared to only an 18% increase to Mother's income. Id. at 251, 652 S.E.2d at 86.

Referencing several provisions of section 20-7-852[5] of the South Carolina Code and the accompanying Regulations 114-4720 and 114-4730,[6] the Court of Appeals held the trial court had discretion to apply Worksheet C, the shared custody guidelines, upon Mother's showing of a substantial change of circumstances. Id. at 254, 652 S.E.2d at 88.

Because Mother's visitations were approximately 147 overnights per year, which clearly exceeded the 109 overnight visits required to put into effect the shared parenting provisions of the Guidelines, the Court of Appeals found Worksheet C was the appropriate method of calculating a reduction in Mother's child support obligation. Id. at 253, 652 S.E.2d at 87.

Although the Court of Appeals acknowledged the terms of the parties' 2000 agreement and the family court's incorporation of this agreement into the divorce decree, the Court of Appeals dismissed it as inconsequential on the grounds the 2000 divorce decree: 1) did not explain why there was a deviation from the amount that should have presumably been awarded by application of the Guidelines, and 2) did not bind the parties to use Worksheet A in future child support calculations based on a change of circumstances. Id. Citing this

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[5] The Court of Appeals referenced several subsections of section 20-7-852 which governs the award and modification of child support. S.C. Code Ann. § 20-7-852(A)-(C) (Supp. 2006). We note this code section is now designated as section 63-17-470 pursuant to the General Assembly's restructuring of the Children's Code. S.C. Code Ann. § 63-17-470 (2009); S.C. Code Ann. § 20-7-852 (Supp. 2008). Because this case arose prior to the re-codification, we use the former statutory citations.

[6] These Guidelines govern child support awards as provided in section 20-7-852 of the South Carolina Code. 27 S.C. Code Ann. Regs. 114-4720, 114-4730 (Supp. 2006).

Court's decision in Moseley v. Mosier, 279 S.C. 348, 306 S.E.2d 624 (1983), the Court of Appeals explained that "a merged child support agreement loses its contractual character after it is judicially decreed." Id. at 253, 652 S.E.2d at 87.

Having found the family court did not err in reducing Mother's child support obligation and the parties had settled the custody aspect of the case, the Court of Appeals affirmed the denial of Father's request for attorney's fees and costs. Id. at 255, 652 S.E.2d at 88.

This Court granted Father's petition for a writ of certiorari to review the decision of the Court of Appeals.

STANDARD OF REVIEW

In appeals from the family court, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. Strickland v. Strickland, 375 S.C. 76, 82, 650 S.E.2d 465, 468 (2007). This broad scope of review, however, does not require the reviewing court to disregard the findings of the family court. Id.

DISCUSSION

I.

Father contends the Court of Appeals erred in affirming the family court's reduction of child support to the amount established by an application of Worksheet C of the Guidelines. If a modification of Mother's child support obligation was warranted, Father claims any calculation should have been made pursuant to Worksheet A in accordance with the parties' agreement.

A child support award rests in the discretion of the trial judge, and will not be altered on appeal absent abuse of discretion. Hallums v. Hallums, 296 S.C. 195, 197, 371 S.E.2d 525, 527 (1988).

"The family court may always modify child support upon a proper showing of a change in either the child's needs or the supporting parent's financial ability." Upchurch v. Upchurch, 367 S.C. 16, 26, 624 S.E.2d 643, 647-48 (2006); Calvert v. Calvert, 287 S.C. 130, 336 S.E.2d 884 (Ct App. 1985) (recognizing that a substantial or material change of circumstances must occur to warrant a modification of child support). "The party seeking the modification has the burden to show changed circumstances." Upchurch, 367 S.C. at 26, 624 S.E.2d at 648. "This burden is increased where the child support award is based on a settlement agreement." Id. "However, changes within the contemplation of the parties at the time of the initial decree are not sufficient bases for the modification of a child support award." Id. Moreover, "a reduction in child support cannot be based on a decrease in the noncustodial parent's income absent a strong showing by the latter that he or she can no longer make the support payments required by the earlier order." Townsend v. Townsend, 356 S.C. 70, 73-74, 587 S.E.2d 118, 119-20 (Ct. App. 2003).

As evidenced by the above-cited case law, an analysis of Mother's request for modification of a child support obligation involves two questions: (1) did Mother prove that a substantial or material change of circumstances occurred to justify a reduction; and (2) if a reduction was warranted, what method of calculation was appropriate?

We agree with the Court of Appeals that upon a finding of a substantial change in circumstances the family court judge has discretion to utilize any Worksheet he or she finds appropriate under the facts of the case. However, in the case *sub judice*, we disagree that a substantial change in circumstances warranting a change in support has occurred. We conclude that Mother failed to meet the heightened burden necessary to warrant a downward modification of her child support obligation.[7]

[7] While we recognize the parties agreed to reduce Mother's child support obligation from $920 to $808 per month while the action was pending, we do not construe this voluntary modification as an explicit concession on the part of Father that a change of circumstances existed to warrant a permanent reduction.

Initially, we find the Court of Appeals' reliance on Rogers was erroneous. In Rogers, Mother petitioned the family court for an increase in Father's child support obligation based on Father's increase in income. In contrast, Mother, in the instant case, petitioned the family court for a decrease in her child support obligation based on Father's increase in income. Because the Court of Appeals relied exclusively on Rogers, we believe the evident factual dissimilarities of this case undermine the Court of Appeals' decision to find a substantial change of circumstances.

Although the increase in Father's income is of some import, this factor alone did not warrant a downward modification of Mother's obligation absent a strong showing that she was incapable of meeting the initial agreed-upon amount of child support. See Miller v. Miller, 299 S.C. 307, 384 S.E.2d 715 (1989) (finding Father failed to establish substantial or material change of circumstances warranting modification of his child support obligation where Father's financial declaration did not show that he was incapable of paying the previously-ordered support even though his income had decreased, Mother's income had increased, and her expenses had decreased); see also Penny v. Green, 357 S.C. 583, 594 S.E.2d 171 (Ct. App. 2004) (finding decrease in Father's income from $140,000 to $120,000 was not sufficient to constitute a substantial change in circumstances to warrant a reduction of his child support obligation); Kielar v. Kielar, 311 S.C. 466, 429 S.E.2d 851 (Ct. App. 1993) (concluding Father's involuntary resignation resulting in a salary decrease from $300,000 to $180,000 per year did not constitute a substantial change in circumstances given it did not impact on Father's standard of living or his ability to pay his support obligations); Calvert, 287 S.C. at 138, 336 S.E.2d at 888 (finding no substantial or material change of circumstances despite reduction in Father's income and stating "[t]he mere fact that a supporting spouse's salary or income has been reduced does not of itself require a reduction of either alimony or child support").

Based on the foregoing, Mother had to prove more than an increase in Father's income to warrant a downward modification of her

child support obligation. Mother failed to do so given her income actually increased 18% since the 2000 order and, thus, she could not establish that she was incapable of meeting the initially agreed-upon child support obligation of $920 per month.

Furthermore, we find the other factors relied upon by the family court and the Courts of Appeals were within the contemplation of the parties at the time of the initial decree.

First, given the children's young ages at the time of the initial decree, we believe the parties would have foreseen the eventual elimination of the $544 child care expense used to calculate Mother's initial child support obligation. Moreover, Regulation 114-4720 points out that support payments are based on data reflecting the average cost of rearing a child to its age of majority. This Regulation also recognizes that this cost increases as the child's age increases. 27 S.C. Code Ann. Regs. 114-4720 (Supp. 2006). Therefore, the reduction in child care cost is offset over time by the increase in cost associated with the needs of an aging or maturing child. Thus, it would appear that a reduction in child care cost is expected and considered in the child support guidelines formulation.

Secondly, the overnight liberal visitation schedule did not change. Clearly, the parties could have conceived that additional expenses would arise during the children's extensive visits with Mother. See Upchurch, 367 S.C. at 26, 624 S.E.2d at 648 (stating "changes within the contemplation of the parties at the time of the initial decree are not sufficient bases for the modification of a child support award").

Accordingly, we hold Mother failed to meet her burden of proving a substantial or material change of circumstances justifying a modification of her agreed-upon child support obligation. Because a modification was not warranted, we need not address Father's issue regarding the recalculation of Mother's child support obligation. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing an appellate court need not

address additional issues if the resolution of another issue is dispositive).

II.

Finally, Father asserts this Court should reverse the decision of the Court of Appeals to affirm the family court's denial of Father's request for attorney's fees and costs.

Because we reverse the Court of Appeals on the child support issue, we also reverse and remand to the family court the issue regarding attorney's fees and costs. See Sexton v. Sexton, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993) (reversing and remanding issue of attorney's fees for reconsideration when the substantive results achieved by trial counsel were reversed on appeal).

CONCLUSION

We find Mother failed to satisfy her heightened burden of proving that a substantial or material change of circumstances existed to justify a modification of her agreed-upon child support obligation. Therefore, we reverse the decision of the Court of Appeals and remand this case to the family court for a reconsideration of the issue concerning an award of attorney's fees and costs.

REVERSED AND REMANDED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Berkeley County School District, Lexington County School District No. 1, Lexington County School District No. 4, Orangeburg County Consolidated School District Five, School District No. 1 of Spartanburg County, and School District No. 5 of Spartanburg County, Plaintiffs,

v.

South Carolina Department of Revenue, Defendant.

ORIGINAL JURISDICTION

Opinion No. 26682
Heard January 8, 2009 – Filed July 6, 2009

JUDGMENT FOR PLAINTIFFS

Steve A. Matthews, Theodore B. DuBose and R. David Proffitt, all of Columbia, for Plaintiffs Berkeley County School District, Lexington County School District No. 1, and Lexington County School District No. 4.

Daniel R. McLeod, Jr., Francenia B. Heizer and Eve Ross, all of Columbia, for Plaintiffs Orangeburg County Consolidated School District Five, School District No. 1 of Spartanburg County, and School District No. 5 of Spartanburg County.

William F. Halligan and Keith R. Powell, of Columbia, for Plaintiffs Berkeley County School District, Lexington County School District No. 1, Lexington County School District No. 4, Orangeburg County Consolidated School District Five, School District No. 1 of Spartanburg County, and School District No. 5 of Spartanburg County.

Milton G. Kimpson, Ronald W. Urban, Ray N. Stevens, Harry T. Cooper, Jr. and Nicholas P. Sipe, all of Columbia, for Defendant.

JUSTICE BEATTY: The Plaintiffs, the above-listed school districts, filed this action for a declaratory judgment and injunctive relief in this Court's original jurisdiction pursuant to S.C. Const. art. V, § 5, S.C. Code Ann. § 14-3-310 (1976), and Rule 245 (formerly Rule 229), SCACR. The Court granted the Plaintiffs' petition and now reviews the South Carolina Department of Revenue's (the Department's) decision denying the Plaintiffs reimbursement from the Homestead Exemption Fund[1] for expenses incurred under lease-purchase and installment-purchase agreement obligations for capital improvement projects. Because these expenses are used for "school

[1] S.C. Code Ann. § 11-11-155(A) (Supp. 2007) ("The revenue from the tax imposed pursuant to Article 11, Chapter 36 of Title 12 is automatically credited to a fund separate and distinct from the state general fund known as the "Homestead Exemption Fund."); S.C. Code Ann. § 11-11-156(A)(1) (Supp. 2007) (outlining three-tier reimbursement mechanism to reimburse school districts out of the Homestead Exemption Fund for taxes lost as a result of various property tax exemptions).

operating purposes," for which owner-occupied residential property is tax exempt, we find the Plaintiffs are entitled to reimbursement for the taxes lost as a result of this exemption. Accordingly, we grant the Plaintiffs' request for a declaratory judgment.

FACTUAL/PROCEDURAL HISTORY

In past years, the Plaintiffs have entered into lease-purchase agreements and installment-purchase agreements to obtain the current use of, and as a method of financing, new and renovated school buildings and other school-related facilities. The school districts have utilized these types of agreements as alternative financing mechanisms that do not constitute "general obligation debt."[2]

Under the lease-purchase agreements, a school district would typically lease its land and buildings to a non-profit corporation for a long period of time. After execution of the year-to-year lease, the corporation would privately raise funds to finance the school renovation and construction by selling certificates of participation to

[2] General obligation debt has been defined by this Court as "only debt that is 'secured . . . by a pledge of the [school district's] full faith, credit and taxing power.'" Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County, 371 S.C. 224, 234, 638 S.E.2d 685, 690 (2006) (quoting Cadell v. Lexington County Sch. Dist. No. 1, 296 S.C. 397, 400, 373 S.E.2d 598, 599 (1988)). The amount of general obligation debt that a school district may incur is constitutionally limited by Article X, section 15 of the South Carolina Constitution, which provides in pertinent part, "the governing body of any school district may incur general obligation debt in an amount not exceeding eight percent of the assessed value of all taxable property of such school district subject to the provisions of subsection (3) of this section and upon such terms and conditions as the General Assembly may prescribe." S.C. Const. art. X, § 15(6). If the school district intends to exceed this constitutionally-limited amount, a majority of the voters in the school district must provide otherwise by referendum. S.C. Const. art. X, § 15(5).

investors. The school districts' payments are set at an amount sufficient to pay the principal and interest due under the certificates of participation and are made from the proceeds of school district taxes levied for general fund purposes. In a lease-purchase transaction, ownership of the facilities transfers at the end of the lease term. The agreements include a non-appropriation clause that permits the school districts to decline, without penalty, to renew the annual lease by failing or refusing to appropriate necessary funds for payments.

In terms of the installment-purchase agreements, the school districts convey the existing school facilities to the non-profit corporation and lease the land on which these facilities sit to the corporation. In turn, the corporation will then issue corporate revenue bonds to fund the renovation of the existing facilities and the construction of new facilities. The school districts, instead of annual payments, make yearly purchases of an undivided partial ownership interest in certain facilities at a sale price set at an amount sufficient to pay the principal and interest due under the financial obligations issued by the corporation. Pursuant to this type of agreement, undivided partial ownership of the facilities transfers with each installment payment. The school districts use taxes levied for general fund purposes to make the annual installment purchases. These agreements include a non-appropriation clause.

In 1988 and 1994, this Court issued decisions holding that lease-purchase agreements and installment-purchase agreements do not constitute general obligation debt. Redmond v. Lexington County Sch. Dist. No. Four, 314 S.C. 431, 445 S.E.2d 441 (1994) (discussing Caddell and finding school board had authority to enter into lease-purchase agreements to build a new school without submitting the matter to voters); Caddell v. Lexington County Sch. Dist. No. 1, 296 S.C. 397, 373 S.E.2d 598 (1988) (holding that lease-purchase agreements do not constitute general obligation debt under Article X, § 15 of the South Carolina Constitution).

In 1995, the General Assembly enacted, and in 2006 amended, section 11-27-110[3] to limit lease-purchase agreements and installment-purchase agreements. As a result of the 2006 amendment, the General Assembly specifically prohibited school districts from entering into such agreements without voter approval if counting the proposed

[3] Act No. 55, 1995 S.C. Acts 348; Act No. 388, 2006 S.C. Acts 3166. Section 11-27-110(C) provides:

> (C) If a governmental entity described in subsection (A)(8)(b) of this section has outstanding any financing agreement, other than an enterprise financing agreement, a loan agreement for energy conservation measures as provided for in Section 48-52-650, or a lease purchase agreement for energy efficiency products as provided in Section 48-52-660, or a guaranteed energy savings contract as provided in Section 48-52-670, where no such lease agreement or contract shall constitute in any manner an agreement, consent, authority, or otherwise, to provide retail sales of energy by an energy or power provider or creates the authority to sell or provide retail energy or power, on the date of issuance of any limited bonded indebtedness pursuant to any bond act, the amount of this limited bonded indebtedness plus the amount of all other limited bonded indebtedness of the governmental entity, when added to the principal balance under any financing agreement or agreements of the governmental entity must not exceed the amount of the governmental entity's constitutional debt limit unless this bonded indebtedness is approved by a majority of the electors voting on the bonded indebtedness in a referendum duly called for this purpose by the governmental entity. This requirement applies notwithstanding any other provision of any bond act and is in addition to the terms and conditions specified in any bond act.

S.C. Code Ann. § 11-27-110(C) (Supp. 2007) (emphasis added).

transaction would cause the school district to exceed its constitutional debt limit.

In response to the General Assembly's pronouncement, the school districts continued to utilize different variations of these types of agreements as financing mechanisms that did not constitute, for constitutional purposes, general obligation debt and that did not meet the statutorily-defined criteria that the General Assembly pronounced to limit lease-purchase transactions. After an installment-purchase agreement was specifically challenged as to its constitutionality, this Court refined its analysis holding that such an agreement did not constitute a "financing agreement" as defined in section 11-27-110(A)(6) at the time the agreement was entered into. Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County, 371 S.C. 224, 638 S.E.2d 685 (2006).

In so holding, the Court noted that section 11-27-110(A)(6) dealing with lease-purchase agreements had been substantially revised in 2006 to include and specifically define and explain lease-purchase and installment-purchase agreements entered into by school districts. Id. at 232, 638 S.E.2d at 689. Based on this amendment, the Court concluded that "[t]he portion of § 11-27-110(A)(6) currently in effect requires only that the school district use funds derived from the issuance of general obligation debt to make payments under an installment-purchase agreement. So long as the School District abides by this requirement, they have not violated the statute's requirements." Id. at 236, 638 S.E.2d at 691.

In order to make payments on lease-purchase agreements, the school districts have used taxes levied on owner-occupied residential real property. Between 1995 and 2006, these properties received a property tax exemption on the first $100,000 of the property's fair market value for taxes "calculated on the school operating millage imposed for tax year 1995 or the current school operating millage, whichever is lower, excluding taxes levied for bonded indebtedness and payments pursuant to lease purchase agreements for **capital**

construction." S.C. Code Ann. § 12-37-251(A)(1) (2000) (emphasis added).

In 2006, the General Assembly increased the amount of the tax exemption for owner-occupied residential property to "one hundred percent of the fair market value" of the property and provided the property was "exempt from all property taxes imposed for **school operating purposes** but not including millage imposed for the repayment of general obligation debt." S.C. Code Ann. § 12-37-220(B)(47)(a) (Supp. 2007) (emphasis added). In order to reimburse school districts for the revenue lost as a result of the exemption, the General Assembly imposed an additional one percent sales tax. S.C. Code Ann. §§ 12-36-1110 to -1130 (Supp. 2007) (outlining provisions for additional sales, use, and causal excise tax and directing taxes imposed under these sections to be credited to the Homestead Exemption Fund as established pursuant to section 11-11-155). In conjunction, the General Assembly established the "Homestead Exemption Fund," in which the collected funds are deposited. S.C. Code Ann. §§ 11-11-155, 12-36-1120 (Supp. 2007). Section 11-11-156 sets forth a three-tier reimbursement mechanism to reimburse school districts out of the Homestead Exemption Fund for taxes lost as a result of various property tax exemptions. At issue in this case is tier three, which provides:

> The tier three reimbursement is derived from revenue of the tax imposed pursuant to Article 11, Chapter 36 of Title 12, and for fiscal year 2007-2008, consists of an amount equal dollar for dollar to the revenue that would be collected by the district from property tax for **school operating purposes** imposed by the district on owner-occupied residential property for that fiscal year as if no reimbursed exemptions applied, plus an amount that a district may have received in its fiscal year 2006-2007 reimbursements pursuant to Section 12-37-251 in excess of the computed amount of that exemption from school operating millage for that year, reduced by the total of the district's tier one and two reimbursements.

S.C. Code Ann. § 11-11-156(A)(1) (Supp. 2007) (emphasis added). A district's tier three reimbursement in succeeding years is fixed at the 2007-2008 amount plus increases based on the Southeastern Consumer Price Index and population increases as determined by the Office of Research and Statistics of the State Budget and Control Board (ORS). S.C. Code Ann. § 11-11-156(A)(1), (2), (3) (Supp. 2007).

Relying on this Court's decisions that lease/installment-purchase agreements do not constitute general obligation debt and their understanding that the tax reform statutes no longer exclude payments due under lease/installment-purchase agreements, the county auditors and treasurers for Berkeley County School District, Orangeburg County Consolidated School District Five, and Spartanburg County School Districts Number One and Number Five, did not levy against or collect from owner-occupied residential property owners in those districts the taxes that would otherwise have been needed for the 2007-2008 payments due under the lease-purchase and/or installment-purchase agreements. Instead, they believed their school districts would be reimbursed for the amounts not collected as a result of the exemption from funds collected by the Department pursuant to the one-percent increase in sales tax and deposited in the Homestead Exemption Fund.

In terms of the remaining two plaintiffs, the county auditor of Lexington County imposed on owner-occupied residential property an amount of taxes for fiscal year 2007-2008 necessary to make payments on the agreements of Lexington County School Districts Number One and Number Four. The county treasurer collected those taxes from owner-occupied residential property for 2007-2008 lease/installment payments of School District Number One. The portion of a county-wide one-cent sales tax, collected pursuant to the Lexington County School District Property Tax Relief Act allocable to School District Number Four, was sufficient to make that District's annual lease/installment-agreement payments for fiscal year 2007-2008. The Lexington County treasurer did not collect the taxes levied on owner-occupied residential property for 2007-2008 lease/installment payments of School District Number Four.

In late May 2008, ORS informed the Department that certain school districts in the state were seeking tier three reimbursements for expenses incurred under lease-purchase and installment-purchase agreement obligations for capital improvement projects.

In response, the Department issued Property Opinion #2008-03, in which it concluded that the tier three reimbursement under section 11-11-156(A)(1) does not include millage imposed for payments due under the agreements. Specifically, the Department found:

> The reimbursements under S.C. Code Ann. Section 11-11-156 (Supp. 2007) for school operating purposes do not include (1) millage imposed for general obligation debt; (2) millage imposed for financing agreements as defined in Section 11-27-110(A)(6) regardless of the date the contract for the financing agreement was entered into; or (3) millage imposed for any other agreement which is in substance a financing agreement for capital improvements.

In reaching this conclusion, the Department focused its analysis on the narrow question of whether "property tax for school operating purposes" includes the millage associated with financing agreements, such as lease-purchase agreements for capital improvements. The phrase "property tax for school operating purposes" is not defined in section 11-11-156 or other provisions of the South Carolina Code. According to the Department, the phrase refers to amounts required for general day-to-day operations of a school. The Department found the phrase does not include amounts for capital improvements financed either through debt obligations such as bonds, or through other financing mechanisms such as lease-purchase agreements. The Department further reasoned that had the General Assembly intended for the term "operating" not to be significant, it would have used the phrases "school purposes" or "all school purposes."

Additionally, the Department stated that prior to the enactment of the Property Tax Reform Act, section 12-37-251(A) (2000) provided that the property tax exemption and State reimbursement for $100,000

of the fair market value of legal residences did not include bonded indebtedness or lease-purchase agreements for capital construction. Thus, the Department found no reason to believe that the General Assembly intended to expand the exemption and State reimbursement in section 11-11-156 to include those items.

The Department further found that its interpretation was supported by other statutory provisions regarding millage rate increases. Specifically, the Department pointed out that S.C. Code Ann. § 6-1-320(D) (Supp. 2007) states that restrictions on operating millage increases do not affect millage that is levied to pay bonded indebtedness or payments for real property purchased using a lease-purchase agreement or used to maintain a reserve account. Thus, the Department believed that millage for those items is not considered millage for "operating purposes" and school districts are still able to raise the millage to pay bonded indebtedness and lease-purchase agreements for the purchase of real property. The Department further reasoned that property taxes from all taxpayers, including property taxes for legal residences, continue to pay for capital improvements.

Finally, the Department asserted that S.C. Code Ann. § 11-27-110 (Supp. 2007) treats lease-purchase agreements in the same manner as general obligation bonds subject to the constitutional debt limit. Because bonds and lease-purchase agreements are both methods of financing capital improvements, the Department found that reimbursing school districts that use lease-purchase agreements to finance capital improvements and not reimbursing school districts that use bonds to finance capital improvements would be contrary to the legislative decision to treat these methods of financing in the same manner.

The Plaintiffs challenge the Department's decision and seek a declaration from this Court, in its original jurisdiction, that the Plaintiffs are entitled to reimbursement under sections 11-11-156 and 12-37-220(B)(47)(a) for expenditures of capital construction financed using lease-purchase and installment-purchase agreements. Because the reimbursement under section 11-11-156(A)(1) for fiscal year 2007-2008 establishes the school district's "base amount" tier three payment,

the Plaintiffs point out that subsequent years' tier three payments will also be affected by the Department's decision.

DISCUSSION

In challenging the Department's decision, the Plaintiffs contend the plain language of section 12-37-220(B)(47)(a) precludes them from levying or collecting taxes on owner-occupied residential property for the payment of the school district's lease/installment-purchase obligations. Given that the General Assembly narrowed the exclusion from the tax exemption to only "general obligation debt," which does not include lease/installment-purchase agreements, the Plaintiffs assert that lease-purchase obligations are no longer excluded from the exemption. Conversely, the Plaintiffs claim that they may only tax owner-occupied residential property, "insofar as school taxes are concerned, for general obligation bond debt." Thus, if section 12-37-220(B)(47)(a) provides a tax exemption for lease/installment-purchase agreements, they assert that the tax revenue lost due to the exemption should be reimbursed by "tier three" of the Homestead Exemption Fund under section 11-11-156(A)(1).

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). The instant case primarily involves the interpretation of statutes, which are questions of law. Colleton County Taxpayers Ass'n, 371 S.C. at 231, 638 S.E.2d at 688.

Although we do not disagree with the arguments posited by the Plaintiffs, we believe the analysis in this case involves a narrow review of the specific statutes at issue and not a broad-based look at the entire statutory tax reform scheme, past and present. Because this declaratory judgment action essentially involves the statutory interpretation of sections 11-11-156(A)(1) and 12-37-220(B)(47)(a), the analysis should be confined to the specific terms of these statutes, given the exemption at issue is limited to "school operating purposes." See W. Va. Pulp & Paper Co. v. Riddock, 225 S.C. 283, 287, 82 S.E.2d 189, 190 (1954)

(analyzing county tax exemption and stating "[i]t is therefore only necessary to examine the specific wording of the statute, or the intent of the legislature in enacting it, in order to determine the extent of the exemption").

Taking this approach, we find the key question is what is encompassed in the exemption "from all property taxes imposed for school operating purposes" under sections 12-37-220(B)(47)(a) and 11-11-156(A)(1). This phrase, however, is not defined in either section or any other code provisions. Accordingly, we must employ the rules of statutory construction.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

"The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Brown v. South Carolina Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002); see Nucor Steel v. South Carolina Pub. Serv. Comm'n, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992) (recognizing that where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason).

Furthermore, "[t]he language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption." Hollingsworth on Wheels, Inc. v. Greenville County Treasurer, 276 S.C. 314, 317, 278 S.E.2d 340, 342 (1981). "Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning." Lee v. Thermal Eng'g Corp., 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002).

Relying on a 1979 definition of "operating expenses" the Department contends that "school operating purposes" encompasses "[t]hose expenses required to keep the business running, *e.g.* rent, electricity, heat. Expenses incurred in the course of ordinary activities of an entity." Black's Law Dictionary 984 (5th ed. 1979). More recently, however, Black's Law Dictionary has expanded the term and defined it as "[a]n expense incurred in running a business and producing output." Black's Law Dictionary 599 (7th ed. 1999).

In light of these anomalous definitions, a determination of whether expenditures for site acquisitions and capital improvements fall under the definition of "school operating purposes" is susceptible to more than one interpretation as evidenced by the parties' divergent views. Having considered both positions in the context of a statutory construction framework, we conclude the Plaintiffs' position is logically sound and more persuasive than that of the Department.

In terms of specifics, we find payments for the lease/installment-purchase agreements should come within the definition of "school operating purposes." Clearly, a school would not be operational without an infrastructure which necessarily includes school buildings. Thus, the continued operation of a school district is dependent upon the renovation and purchase of school buildings. Because the lease/installment-purchase payments or requisite "rent payments" effectuate this goal, these payments are essential for "school operating purposes." Significantly, in the business realm, the phrase "operating expenses" has been defined to "include payroll, sales commissions, employee benefits and pension contributions, transportation and travel, **amortization and depreciation**, **rent**, repairs, and taxes, etc."[4] (emphasis added). Furthermore, to limit the definition of "school operating purposes" to only expenses incurred for the administration of a school district would be myopic. Logically, a school district cannot operate without all of its component parts, which include school

[4] This definition may be found at http://www.businessdictionary.com/definition/operating-expenses.html.

administration expenses, day-to-day expenses, and most importantly the actual facilities which are funded through lease/installment-purchase payments. Thus, we find the payments for lease/installment-purchase agreements would be exempt under section 12-37-220(B)(47)(a) and reimbursable under section 11-11-156(A)(1).

We believe the legislative history of the statutes at issue supports our decision. Significantly, section 12-37-251(A), the precursor to section 12-37-220(B)(47)(a) (Supp. 2007),[5] provided:

> (A)(1)The Trust Fund for Tax Relief must contain an amount equal to the revenue necessary to fund a property tax exemption of one hundred thousand dollars based on the fair market value of property classified pursuant to 12-43-220(c) calculated on the school operating millage imposed for tax year 1995 or the current school operating millage . . . excluding taxes levied for bonded indebtedness **and** payments pursuant to lease purchase agreements for capital construction.

S.C. Code Ann. § 12-37-251(A)(1) (2000) (emphasis added). In contrast, the version of the statute that is applicable in the instant case provides for an increased amount of the tax exemption for owner-occupied residential property to "one hundred percent of the fair market value" of the property and provided that the property was "exempt from all property taxes imposed for school operating purposes but not including millage imposed for the repayment of general obligation debt." S.C. Code Ann. § 12-37-220(B)(47)(a) (Supp. 2007).

As evidenced by the above-underlined text, the General Assembly in the 2006 amendment of 12-37-220(B)(47)(a) confined the exclusion from the tax exemption to only "general obligation debt," i.e., bonded indebtedness. By deleting lease-purchase agreements from the current statute, the General Assembly inferentially included these

[5] Section 12-37-251(A) (2000) was amended by Act No. 388, 2006 S.C. Acts 3138.

payments in the tax exemption. See Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964) (noting it is presumed the Legislature, in adopting an amendment to a statute, intended to make some change in the existing law); see also Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (stating it must be presumed the Legislature did not intend a futile act, but rather intended its statutes to accomplish something); Stuckey v. State Budget & Control Bd., 339 S.C. 397, 403, 529 S.E.2d 706, 709 (2000) (noting subsequent statutory amendment may be interpreted as clarifying original legislative intent).

Thus, by expressly excluding only general bond indebtedness from the exemption, the General Assembly by implication included the lease/installment-purchase payments within the definition of "school operating purposes." See Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative. The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed.") (citations omitted); W. Va. Pulp & Paper Co. v. Riddock, 225 S.C. 283, 288, 82 S.E.2d 189, 190 (1954) ("The inclusion in the statute of certain specified exclusions leaves the inference that the Legislature intended no other exclusions from the exemption."). Additionally, this interpretation is supported by this Court's decisions in Cadell and Colleton County Taxpayers' Association which expressly differentiated lease/installment-purchase agreements from general obligation debt. Accordingly, we believe it would be contrary to the legislative intent to "add back in" payments for lease/installment-purchase agreements when the General Assembly specifically deleted them from the exclusion from the tax exemption. See Kinard v. Moore, 220 S.C. 376, 388, 68 S.E.2d 321, 325 (1951) ("The court has no right to add the words they omitted, nor to interpolate them 'on conceits of symmetry and policy.'").

In addition to our review of the legislative history of the statutes at issue, we have also thoroughly considered the Department's claim that section 6-1-320 supports its position. We, however, are not persuaded by this argument. Instead, we believe this section actually bolsters the Plaintiffs' position. Section 6-1-320 specifically states that its limitations apply to **"general operating purposes."** S.C. Code Ann. § 6-1-320(A) (Supp. 2007).[6] Significantly, this section provides for the limitation upon millage rate increases to be suspended and, in turn, increased for such purposes as the purchase of capital equipment, the purchase of undeveloped real property or of the residential development rights, or payment for the occurrence of a catastrophic event. S.C. Code Ann. § 6-1-320(B)(2), (6), (7) (Supp. 2008).[7] Clearly,

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[6] Section 6-1-320(A) provides in relevant part:

> (A) Notwithstanding Section 12-37-251(E) a local governing body may increase the millage rate imposed for **general operating purposes** above the rate imposed for such purposes for the preceding tax year only to the extent of the increase in the average of the twelve monthly consumer price indices for the most recent twelve-month period consisting of January through December of the preceding calendar year, plus, beginning in 2007, the percentage increase in the previous year in the population of the entity as determined by the Office of Research and Statistics of the State Budget and Control Board.

S.C. Code Ann. § 6-1-320(A) (Supp. 2007) (emphasis added).

[7] In a recent amendment, the General Assembly provided for the suspension of the limitation upon millage rate increases for such purposes as the purchase of capital equipment and the purchase of undeveloped real property or of the residential development rights. This amendment became effective on June 25, 2008. Act No. 410, 2008 S.C. Acts 4024. Thus, we recognize the Department did not have the benefit of this amendment at the time it issued its decision. Because our role is to ascertain and effectuate the intent of the General

these listed items would be considered capital improvements given that a catastrophic event such as a natural disaster would inevitably necessitate new construction. If the General Assembly did not consider these listed items to constitute "operating purposes," we believe there would be no need to allow for the suspension of the limitation upon millage rate increases for them.

Furthermore, we find the Department's reliance on section 6-1-320(D)[8] is also misplaced. This section exempts from the restrictions imposed upon millage rate increases millage that is levied for real property purchased using a lease-purchase agreement, payment of bonded indebtedness, or payments to maintain a reserve account. Because section 6-1-320 addresses tax millage increases, we find it is inapplicable given the issue in the instant case involves reimbursement for taxes uncollected pursuant to state law.

Although an agency's decision should be accorded respectful consideration, we find there are cogent and compelling reasons for this Court to overrule the Department's decision. Based on the above discussion, we hold the lease/installment-purchase payments fall within

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Assembly, we believe it is essential to consider this recent amendment in our attempt to discern what the General Assembly meant by the phrase "school operating purposes" given it is not defined in our code of laws.

[8] Section 6-1-320(D) provides in pertinent part:

> The restriction contained in this section does not affect millage that is levied to pay bonded indebtedness or payments for real property purchased using a lease-purchase agreement or used to maintain a reserve account. Nothing in this section prohibits the use of energy-saving performance contracts as provided in Section 48-52-670.

S.C. Code Ann. § 6-1-320(D) (Supp. 2007) (emphasis added).

the phrase "school operating purposes." Therefore, we declare that the Plaintiffs are entitled to the tier three reimbursements pursuant to section 11-11-156(A)(1) for expenses incurred for the lease/installment-purchase agreements entered into for capital construction improvements during the 2007-2008 fiscal year.

We are cognizant that our decision may have deleterious future financial consequences in terms of treating traditional general obligation debt transactions differently than alternative lease/installment-purchase agreements and establishing the base amount for tier three reimbursements. However, we are confined by the rules of statutory construction in analyzing the question presented by this declaratory judgment action. Because our role is limited to ascertaining and effectuating the intent of the General Assembly, we believe it is for the General Assembly to revise the statutes at issue to address these potential problems.[9]

DECLARATORY JUDGMENT ISSUED FOR THE PLAINTIFFS.

WALLER, J., concurs. PLEICONES, J., concurring in a separate opinion. KITTREDGE, J., dissenting in a separate opinion in which TOAL, C.J., concurs.

[9] We respectfully disagree with the dissent's position which advocates a denial of tier-three reimbursements to the Plaintiffs. In order to adopt such a decision, we believe is to essentially ignore our jurisprudence regarding general obligation debt. Moreover, we decline to discount the extensive and significant legislative history of the statutes at issue in this case.

JUSTICE PLEICONES: I concur in the result reached by the majority, but write separately as in my view we should answer the question posed based simply on the meaning of "school operations" as the term is used in property tax statutes. The phrase "school operating millage" is found in former S.C. Code Ann. § 12-37-251 (2000), which provided for the operation of the "Trust Fund for Tax Relief." Section 12-37-251 (A)(1) specified that the Trust was to be funded in an amount necessary to fund a $100,000 exemption on certain residential property "calculated on the school operating millage . . . **excluding taxes levied for bonded indebtedness and payments pursuant to lease purchase agreements for capital construction** . . . ." (emphasis supplied). In my view, the fact that these types of payments were to be excluded from the "school operating millage" calculations necessarily means that these types of payments are "school operating" expenses. When the legislature reconfigured the property tax statutes in 2006, it eliminated § 12-37-251 (A)(1)[10] but added § 12-37-220 (B)(47).[11] This new section provides that the full value of the qualifying residential property is now exempt "from all property taxes imposed for school operating purposes but not including millage imposed for the payment of general obligation debt." Since it is well established that debt incurred for lease-purchase agreements or installment purchase arrangements are not general obligation debt,[12] the effect of this statutory revision was to exempt the full value of qualifying residential property from taxation for lease-purchase debt, but not from that attributable to bonded indebtedness. Moreover, while S.C Code Ann. § 11-27-110 (Supp. 2008) subjects school district lease-purchase agreements to the constitutional limits on general obligation debt, it cannot and does not purport to convert those obligations into general obligation debt. Cf. § 11-27-110 (D)(State payment under financing agreement is deemed general obligation debt service).

[10] 2006 Act No. 388, Pt. I, §4.C.
[11] 2006 Act No. 388, Pt. I, §3.
[12] Colleton Cty Taxpayers Ass'n v. School Dist. of Colleton Cty., 371 S.C. 224, 638 S.E.2d 685 (2006).

Accordingly, I would hold that Homestead Fund[13] tier three reimbursement under S.C. Code Ann. § 11-11-156 (A)(1) (Supp. 2008) includes payments made pursuant to lease-purchase agreements and other non-general obligation capital construction arrangements. I therefore concur in the result reached by the majority.

[13] This Fund, created by 2006 Act No. 388, Pt. I, §2. is essentially the successor to the Trust Fund.

JUSTICE KITTREDGE: I respectfully dissent. I vote to deny tier three reimbursements to Plaintiffs. I would hold that section 12-37-220(B)(47)(a) permits school districts, through proper taxing authorities, to tax owner-occupied residential property to make payments on capital construction projects financed by lease/installment-purchase agreements. S.C. Code Ann. § 12-37-220(B)(47)(a) (Supp. 2008).

I.

There are 85 school districts in South Carolina. Six of those school districts (Plaintiffs) filed this action, which the Court accepted in its original jurisdiction. To avoid the constitutional limit on general obligation debt, some school districts construct capital improvements through financing mechanisms generally referred to as lease-purchase or installment-purchase agreements.[14] A key feature of these financing mechanisms is the ability of the school districts to bypass the voters. Payments made under the lease/installment-purchase are sometimes characterized as "rent," but this characterization is a misnomer, for each payment results in the school district acquiring an ownership interest in the facilities, with full ownership vesting upon the final payment.

The question before the Court concerns the proper method for acquiring tax dollars to pay for these capital financing arrangements. In 2006, the Legislature precluded school districts from entering into such financing arrangements if they would cause the school district to exceed its constitutional debt limit if considered general obligation debt. Also in 2006, the Legislature increased the tax exemption for

[14] S.C. CONST. art. X, § 15 (stating that "the governing body of any school district may incur general obligation debt in an amount not exceeding eight percent of the assessed value of all taxable property of such school district" but to exceed the eight percent general obligation debt limit the school district must first receive the approval of "a majority vote of the qualified electors of the school district voting in a referendum authorized by law").

owner-occupied residential property to "one hundred percent of the fair market value" of the property and provided the property "is exempt from all property taxes imposed for **school operating purposes** but not including millage imposed for the repayment of general obligation debt." S.C. Code Ann. § 12-37-220(B)(47)(a) (Supp. 2008) (emphasis added).

To offset this loss of tax revenue for school operating expenses, the Legislature imposed a one percent sales tax to replace the property tax formerly levied on owner-occupied residential property. S.C. Code Ann. §§ 12-36-1110–1120 (Supp. 2008). The money collected pursuant to the one percent sales tax increase is placed in the Homestead Exemption Fund and distributed to the school districts pursuant to statutory formula. S.C. Code Ann. § 12-36-1120 (Supp. 2008); S.C. Code Ann. § 11-11-156 (Supp. 2008).

One of the methods of distribution from the Homestead Exemption Fund is known as "tier three." Reimbursement from tier three "consists of an amount equal dollar for dollar to the revenue that would be collected by the district from property tax for school operating purposes imposed by the district on owner-occupied residential property for that fiscal year as if no reimbursed exemptions applied." S.C. Code Ann. § 11-11-156(A)(1) (Supp. 2008).

Plaintiffs seek tier three reimbursement for payments made pursuant to their respective lease/installment-purchase agreements. Plaintiffs contend that these payments are included in the school operating expense exemption, and as a result, owner-occupied residential property may not be taxed for this purpose. Hence, Plaintiffs assert their entitlement to tier three reimbursements from the Homestead Exemption Fund.

The South Carolina Department of Revenue rejected tier three reimbursements and construed the statutory scheme as excluding lease/installment-purchase agreements from the "school operating purposes" exemption. The Department of Revenue issued Property

Opinion #2008-03 setting forth its construction of the statutory scheme. I include that opinion in its entirety.

PROPERTY OPINION
OPINION #2008-03

QUESTION:

Do the reimbursements for school operating purposes under S.C. Code Ann. Section 11-11-156 (Supp. 2007) include (1) millage imposed for general obligation debt; (2) millage imposed for financing agreements as defined in Section 11-27-110(A)(6) regardless of the date the contract for the financing agreement was entered into; or (3) millage imposed for any other agreement which is in substance a financing agreement for capital improvements?

ANSWER:

The reimbursements under S.C. Code Ann. Section 11-11-156 (Supp. 2007) for school operating purposes do not include (1) millage imposed for general obligation debt; (2) millage imposed for financing agreements as defined in Section 11-27-110(A)(6) regardless of the date the contract for the financing agreement was entered into; or (3) millage imposed for any other agreement which is in substance a financing agreement for capital improvements.

DISCUSSION:

In 2006, the Legislature enacted the Property Tax Reform Act (Act), 2006 Act No. 388. This Act substantially changed the way local school districts are funded. Under the Act, a portion of the funding previously provided by property taxes on legal residences has been shifted to the State using a 1% increase in sales tax. The mechanism for the State to reimburse school districts for the loss of

property tax revenues as a result of this change is provided in Section 11-11-156. Section 11-11-156(A) provides State reimbursement for fiscal year 2007-2008 in three tiers as follows:

> (1) The tier one reimbursement is based on the amount received by the district pursuant to Section 12-37-251 ($100,000 exemption for legal residences) as applied for fiscal year 2006-2007. The tier one reimbursement is fixed at the fiscal year 2006-2007 amount and continues into succeeding fiscal years at this fixed amount.
>
> (2) The tier two reimbursement is the amount to be received by the district pursuant to the provisions of Section 12-37-270 for fiscal year 2006-2007 for the school operating millage portion of the reimbursement for the homestead exemption allowed pursuant to Section 12-37-250 ($50,000 homestead exemption for residents 65 or older and individuals who are permanently disabled or legally blind). The tier two reimbursement is fixed at this fiscal year 2006-2007 amount and continues into succeeding fiscal years at this fixed amount.
>
> (3) The tier three reimbursement consists of "an amount equal dollar for dollar to the revenue that would be collected by the district from property tax for school operating expenses imposed by the district on owner-occupied residential property for that fiscal year as if no reimbursed exemptions applied, plus an amount that a district may have received in its fiscal year 2006-2007 reimbursements pursuant to Section 12-37-251 in excess of the computed amount of that exemption from school operating millage for that year, reduced by the total of the district's tier one and tier two reimbursements."

The question before the Department is whether "property tax for school operating purposes" includes the millage associated with financing agreements, such as lease purchase agreements for capital improvements.

The term "property tax for school operating purposes" is not defined in Section 11-11-156 nor is it defined in the rest of the South Carolina Code of Laws. This term, however, does have a generally accepted meaning within the local government and legislative community. The term refers to amounts required for the general day-to-day operations of the school. It does not include amounts for capital improvements financed either through debt obligations such as bonds or through other financing mechanisms such as lease purchase agreements. The Legislature did not intend the term "operating" to be ignored. If the Legislature were referring to all property taxes used to finance schools, they would have used the terms "school purposes" or "all school purposes."

Prior to the enactment of the Property Tax Reform Act, S.C. Code Ann. Section 12-37-251(A) (2000), provided the property tax exemption and State reimbursement for $100,000 of the fair market value of legal residences. That exemption and reimbursement did not include bonded indebtedness or lease purchase agreements for capital construction. There is no reason to believe that the Legislature intended to expand the exemption and State reimbursement in Section 11-11-156 to include these items.

This interpretation is supported by S.C. Code Ann. Section 6-1-320 (Supp. 2007). Section 6-1-320 provides limitations on operating millage increases. Section 6-1-320(D) provides that the restrictions on operating millage increases do not "affect millage that is levied to pay bonded indebtedness or payments for real property purchased using

a lease-purchase agreement or used to maintain a reserve account." In other words, millage for these items are not considered for "operating purposes" and school districts are still able to raise the millage to pay bonded indebtedness and lease purchase agreements for real property. As a result, reimbursement by the State is not necessary. Property taxes from all taxpayers, including property taxes for legal residences, continue to pay for capital improvements.

Finally, in S.C. Code Ann. Section 11-27-110 (Supp. 2007) the Legislature expressed its interest in treating financing agreements, including lease purchase agreements, in the same manner as debt from bonds. Both bonds and lease purchase agreements are methods of financing capital improvements. Reimbursing districts that used lease purchase agreements to finance capital improvements and not reimbursing districts that used bonds to finance capital improvements is contrary to the legislative decision to treat these methods of financing in the same manner.

Based on the foregoing, the reimbursements provided in Section 11-11-156 do not include (1) the millage imposed for general obligation debt; (2) millage imposed for financing agreements as defined in Section 11-27-110(A)(6) regardless of the date the contract for the financing agreement was entered into; or (3) any other agreement which is in substance a financing agreement for capital improvements.

II.

Plaintiffs challenge the Department of Revenue's statutory construction in this action. If payments pursuant to the lease/installment-purchase agreements are considered school operating expenses, Plaintiffs are entitled to tier three reimbursements. Conversely, if payments pursuant to the lease/installment-purchase

agreements are not considered school operating expenses, owner-occupied residential property may be taxed for such purpose, and the school districts are not entitled to tier three reimbursements. A majority of the Court agrees with Plaintiffs. I do not. I believe the phrase "school operating purposes" creates no genuine ambiguity and means what it says—operational expenses, not capital improvements.

Plaintiffs, in their brief, assert section 12-37-220(B)(47) creates an exemption for owner-occupied homeowners for "all school property taxes." Plaintiffs' brief is misleading, for the statute says no such thing. The section 12-37-220(B)(47)(a) statutory exemption is limited to property taxes for "school operating purposes," an unambiguous term excluding capital construction projects.[15]

The Court today accepts Plaintiffs' premise of an ambiguity, and construes the "school operating purposes" exemption so broadly that we must conclude the Legislature intended no bounds. The settled principle that a tax exemption must be strictly construed against the claimed exemption is ignored today. *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) ("The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption.").

The Court takes the statutory term and exemption for "operating purposes" and instructs that "a school would not be operational without an infrastructure which necessarily includes school buildings." We learn, therefore, that the Legislature intended the acquisition of property through capital improvements (clothed as lease/installment-purchase agreements) to be included as operating expenses, and thus subject to tier three reimbursements.

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[15] The South Carolina General Assembly knows how to write an unqualified property exemption. *See* S.C. Code Ann. § 12-37-250 (Supp. 2008) (providing an unqualified homestead tax exemption for taxpayers sixty-five and older, among others). Section 12-37-220(B)(47)(a) is a qualified statutory exemption.

I see no reason to depart from the common understanding of "operating purposes." Moreover, I see no reason to reject the statutory construction of the Department of Revenue. *See Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.") (citation omitted).

In my judgment, the Legislature has given no indication of an intent to broaden "school operating purposes" to include expenditures for capital construction under lease/installment-purchase agreements. I believe the Legislature intends the very opposite. For example, section 6-1-320 imposes limitations on a local governing body's authority to raise property tax millage rates for "general operating purposes," but the statute expressly relieves the local government from such restrictions for tax millage for lease/installment-purchase agreements: "The restriction contained in this section does not affect millage that is levied to pay bonded indebtedness or payments for real property purchased using a lease-purchase agreement . . . ." S.C. Code Ann. § 6-1-320(D) (Supp. 2008). I find it incongruous to suggest that the Legislature expressly lifted restrictions on increasing tax millage for payments on lease-purchase agreements if real property is not taxable for this purpose at all.

It is manifest in my judgment that the Legislature has authorized local governing bodies to levy taxes on real property for the payment of capital construction under lease/installment-purchase agreements. I thus believe the Department of Revenue's statutory construction is buttressed by a review of the taxing statutory scheme as a whole. In any event, were I to accept the premise of ambiguity in the phrase "school operating purposes," I see no compelling reason to depart from the construction assigned by the Department of Revenue. *Brown*, 348 S.C. at 515, 560 S.E.2d at 414.

And finally, I observe that two of the school district plaintiffs also agree with the Department of Revenue and believe that lease-

purchase agreements are not school operating expenses, and consequently are not included in the exemption. Plaintiffs Lexington County School Districts No. 1 and No. 4 levied taxes on owner-occupied residential property to make payments on lease-purchase agreements for capital construction.[16] I believe Lexington County School Districts No. 1 and No. 4 acted lawfully in taxing owner-occupied residential property to make payments on their respective lease-purchase agreements. The conduct of these school districts juxtaposed to their position in this lawsuit is troubling, at least to me.

TOAL, C.J., concurs.

[16] Lexington County School District No. 1 levied and collected the taxes. Lexington County School District No. 4 levied, but did not collect, the taxes because its collection of sales tax revenue under the Lexington County School District Property Tax Relief Act, Act No. 378, 2004 S.C. Acts 3142, was sufficient to make the lease-purchase payments.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

The State, Respondent,

v.

Jonothan C. Vick, Appellant,

Appeal From Spartanburg County

J. Derham Cole, Circuit Court Judge

Opinion No. 4573

Heard March 17, 2009 – Filed June 25, 2009

AFFIRMED IN PART AND VACATED IN PART

Robert M. Dudek, Deputy Chief Appellate Defender for Capital Appeals , of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Melody J. Brown, all of Columbia; and Solicitor Harold W Gowdy, III, of Spartanburg, for Respondent.

HUFF, J.: Appellant Jonothan C. Vick was indicted for and convicted of murder, first-degree criminal sexual conduct (CSC), and kidnapping. The trial judge sentenced Vick to life imprisonment for murder and thirty years each for CSC and kidnapping. Vick appeals, arguing (1) the trial court erred in allowing hearsay testimony from a witness regarding a telephone conversation between the victim and appellant's mother and (2) his kidnapping sentence should be vacated pursuant to South Carolina Code Ann. § 16-3-910. We affirm in part and vacate in part.

FACTUAL/PROCEDURAL HISTORY

This case involves the murder of Dana (hereinafter Victim), a twenty-seven year old mother of two who was found brutally beaten and strangled on July 31, 1995 inside the beauty salon she owned. Patty Taylor testified she arrived at Victim's salon at 6:30 in the evening on July 31, 1995 for a hair appointment. After she arrived, a woman selling a cleaning product made a demonstration to her and Victim, and Victim purchased a bottle of the item from the woman. Thereafter, Victim began working on Taylor's hair a little before 7:00 and finished around 8:00. During this time, Victim also swept and cleaned her shop. After Taylor paid her, Victim walked Taylor to the door. Victim told Taylor she had some clothes in the dryer, and when Taylor offered to stay with her until she locked up the shop, Victim declined, stating

she would be right behind her as she only had five minutes left for the clothes. Taylor estimated she left the shop at 8:10 or 8:15.

Witness Diane Harris, who lived in Charlotte, was in the area of the beauty salon on the day of Victim's death, selling an all purpose cleaning product door-to-door. Harris went to Victim's salon around 6:30 or 6:40 and, after giving Victim a demonstration of her product, completed a sale with Victim around 6:50. Harris was scheduled to meet back at a designated spot at 8:30 and was to be the last salesperson picked up before travelling back to Charlotte. After leaving Victim's shop, Harris walked around the area making calls on different houses. Around 8:10, she walked back through the parking lot of Victim's salon at which time she saw Victim through the window of the salon and spoke to Victim. Victim appeared to be cleaning and waved at Harris. Harris continued on her quest to sell her product and headed back to her pick-up spot at 8:30. As she reached the parking lot of the salon, she noticed the lights were on in the salon, but the window blinds were now down. At that time, she heard thumping sounds. When she looked around, she observed a man coming out of the salon window. Startled, Harris ran, leaving all her belongings behind. As she ran around the building in one direction, the man ran in the other, and the two came face to face on the other side of the building. Harris then ran out to the street and screamed. She ran into a home, locked the door, and told the residents to call 9-1-1, screaming that Victim needed help. Harris testified the man she saw coming out of the window and again at the back of the building "was white and looked crazy." He was wearing a gray or white t-shirt and a pair of blue jeans, and appeared to be between twenty and thirty years-old.

Another witness observed a woman and man in the area of the salon fitting the description of Harris and the man Harris described encountering that night. Around 8:30 in the evening on July 31, 1995, Michael Crook was driving towards Spartanburg when he observed a black woman walking and then saw a white male, who was bent down and was looking back toward

Victim's salon. The man was wearing "grayish colored blue jeans and a grayish colored t-shirt."

Additionally, witness Jerry Mills testified he was familiar with Victim's salon, which was located in the same area as his place of employment. Mills stated that he drove by the area around 5:00 or 5:30 on the afternoon of July 31, 1995 and did not notice anything out of the ordinary. However, just before dusk as he drove back through, he observed a Ford Bronco parked in a place where his employer did not allow parking. None of Mills' co-employees drove a vehicle like that. Mills pulled up closer to the car to investigate further but found no one around the vehicle. He described the Bronco as a late 1980's car, blue with a white or light cream colored top, and with "nice rims" on the tires that did not look like factory rims, and may have been called razor rims.

Spartanburg County Sheriff's Deputy John Todd Burnett received a call reporting a breaking and entering on July 31, 1995 at approximately 8:45 or 8:50 p.m., and arrived on the scene at Roebuck Beauty and Tanning Salon shortly before 9:00. Deputy Burnett found the only door to the establishment partially cracked and a screen from a window on the ground, with the window open. Inside, the deputy discovered the body of a twenty-seven year-old female in a bathroom/washroom. Victim was hanging from a strap around her neck which was connected to a hot water heater. She had blood in her hair and on her face, she had cuts and bruises on her face, and her tongue appeared to protrude from her mouth. A white t-shirt on the top of her body was covered with blood, and she was nude from the top portion of her waist down, with her pants on her left ankle.

Investigation of the scene revealed all of the blood was contained to the bathroom area where Victim was found. This room showed evidence a struggle had taken place therein. Victim's pocketbook, wallet, and checkbook

were discovered in the salon, as well as the business cashbox and checkbook. The wallet and cashbox together contained over $200 in cash.

The pathologist who performed an autopsy on Victim noted she had a deep abrasion on her forehead as well as other superficial abrasions and numerous contusions about her head, neck, upper chest, elbows, arm, wrist, knees, and ankle. Victim's hyoid bone appeared fractured, indicating considerable pressure had been applied. This usually occurs from manual strangulation but could have been caused by a ligature. The pathologist believed Victim was probably strangled manually, as well as with the use of a ligature. Examination of Victim's brain also revealed extensive hemorrhaging caused by blunt force trauma.

David Michael Pace testified that he became a friend of appellant Vick in 1994 when they were in high school. Pace worked at a bowling alley and Vick would come by the place of business about twice a month, usually on Friday or Saturday nights. The last time Vick visited Pace at the bowling alley was on a Monday evening at the end of July in 1995. At that time, Vick was wearing blue jeans and a light colored shirt. Vick talked to Pace about a lady named Dana, and the fact that he was going to ask her out that night. Vick had previously spoken about Dana to Pace on a couple of occasions, telling Pace that Dana was a hairdresser who cut his hair and complimenting Dana's looks. On that Monday night at the end of July, Vick told Pace that Dana was having problems with her husband and he was going to ask Dana out and hoped she would agree to date him. Pace laughed at the idea because Dana was an older woman and he thought Vick was too young for her. Vick then became defensive and angry at Pace's reaction, stating he believed he had a chance with her. Vick stated that he hoped Dana would say yes to his date proposal, and graphically described to Pace how he would "bend her over her barber chair" and perform sexual acts on her. He further stated other sexual conduct he would like to have take place with Dana.

After talking for close to an hour, Vick agreed to give Pace a ride home. During the drive, Vick, who was very serious about his intentions with Dana, "kept defending himself" and was upset that Pace had laughed at him. Vick dropped Pace off around 6:45 or 7:00 p.m. As Pace exited the vehicle, Vick told him he was going to get his hair cut. When Pace asked who would cut his hair that late at night, Vick responded that Dana kept her salon open late at night and she knew he was coming. Pace described the vehicle Vick drove that night as a blue and white Ford Bronco with distinctive saw blade wheels.

The next time Pace saw Vick was a few days later at a pool hall. Pace stated Vick walked up and "bumped into [him] in a serious manner." Vick then told Pace "if I tell anybody he would kill me." When Pace asked what he was talking about, Vick said that Pace knew, or he would find out. A couple of days to weeks after the incident at the pool hall, Pace realized what Vick did not want him to discuss when he saw a report on the news that described a vehicle similar to Vick's and showed a sketch that closely resembled Vick.[1] Approximately three months after the murder, Pace anonymously provided authorities the name of a possible suspect. Pace contacted law enforcement a second time after the murder was featured on a television program, again remaining anonymous. On a third occasion, during an unrelated incident at the bowling alley, Pace informed an officer he might know who was responsible for Victim's murder and gave the officer a name, but he still did not give the officer his own name. Finally, in 2005 Pace had someone again contact law enforcement on his behalf. Eventually he came forward and informed the authorities of the information he relayed to the jury.

[1] Pace stated that after watching the news report, he knew it was July 31 when he had talked with Vick at the bowling alley.

SLED Agent Lilly Gallman, an expert in the area of DNA and serology, testified she processed the crime scene for body fluids. When she examined Victim's body with an illumilight she noted it fluoresced, indicating possible semen in Victim's pubic hairs. Remembering what she had observed at the time she processed the scene, Agent Gallman later tested evidence from Victim's rape kit, which contained pubic hair combings, hoping to find semen. The sample tested positive for semen, and Gallman was later able to develop a profile from it. Agent Gallman received a sample of Vick's DNA in 2005 and found his DNA profile matched the DNA profile developed from the semen. She testified the probability of randomly selecting an unrelated individual having a DNA profile matching the semen was approximately one in 900 million.

The State also presented evidence that in 1996, Aaron Popkin purchased a 1988 blue and white Ford Bronco with saw blade wheels owned by Vick's family. Popkin testified he met with Vick at his place of employment after seeing an ad for the car. When Popkin offered to loan Vick one of his cars while his mechanic kept the Bronco for inspection, Vick indicated to Popkin that he was suspicious Popkin may actually be a police officer. The two then worked out an alternate arrangement for inspection of the car.

The State further presented the testimony of one of Vick's cellmates at the local county detention center. Steve Vaughn was housed in a cell with Vick for approximately eight or nine weeks starting in February 2006. Vaughn testified that he and Vick discussed their pending charges during this time. On one particular night, Vaughn recalled he had a "bad phone call" from his wife and was upset. In discussing the call with Vick, Vaughn asked him whether there was anything in his life or a day in his life he would take back if he could. Vick responded it would be the day he went over to Victim's shop. Vick told Vaughn he drove his vehicle over there, but parked across the road because Victim was married and he did not want her husband

to see him or his vehicle. He further indicated he exited the building through the window because he was scared. Vick indicated he recalled having a conversation with Victim, but he "blacked out" and did not recall anything else while in the shop.

The jury found Vick guilty of murder, kidnapping, and first-degree CSC. The court sentenced Vick to life imprisonment for murder, thirty years for the CSC charge, and thirty years for kidnapping. This appeal follows.

ISSUES

1. Did the trial court err by allowing the testimony from a witness that while Victim was doing her hair at the salon Vick's mother telephoned Victim and asked Victim to fix Vick's hair, Victim related to the witness her exasperation about the situation, and Victim told the witness she would not accommodate Vick, as the testimony amounted to prejudicial hearsay since the State's theory was that Vick sexually assaulted and killed Victim at the beauty shop at some time not far removed from the phone call?

2. Should Vick's thirty year sentence for kidnapping be vacated pursuant to S.C. Code Ann. § 16-3-910 since he was also sentenced for murder?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal

cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted).

LAW/ANALYSIS

Vick first contends the trial court committed reversible error in allowing the testimony of Darlene Reeves regarding a telephone conversation she heard between Vick's mother and Victim almost one week prior to Victim's murder. We disagree.

The record reveals the State called Reeves to the stand and questioned her about a telephone conversation she overheard between Victim and Vick's mother, and the related conversation between Victim and Reeves after the call ended. Reeves testified that she was a customer and a friend of Victim, and that she was in Victim's salon around Tuesday, July 25, 1995 to have her hair cut. While Reeves was in the chair, Victim received a call from Vick's mother, Mary Ann. Reeves, who was acquainted with Mary Ann Vick and had talked to her on the telephone before, knew it was Mary Ann on the phone because Victim was behind Reeves when the phone call came, and she recognized Mary Ann's voice. When Reeves was asked why Mary Ann was calling, defense counsel objected on the basis of speculation and hearsay. The trial court overruled the objection and Reeves then testified as follows:

> She wanted [Victim] to look at [Vick's] hair that, you know, I don't know if he put something on it or had someone. But she told her that it wouldn't take but about ten minutes of her time. And Mary Ann could not, excuse me, [Victim] could not do it that day and had stated to Mary Ann that she was not able to do it but if she would call her back, you know, it's been a timeframe, so I don't know if she said come by there the next day or call her back.

Counsel again objected, asserting anything Victim said in the phone conversation was hearsay. The court again overruled the objection, but instructed the witness to testify only to matters that she remembered. When asked what she remembered about the conversation, Reeves stated "[t]he conversation was to call back and she would take a look at it but she could not do it that day." Reeves went on to state, "I just heard the voice. And when [Victim] hung up she - - obviously Mary Ann hung up on her because there was no good-bye. And Victim turned around to me and she just, she took a breath and she said Mary Ann Vick." Counsel again objected on the basis of hearsay, at which time a bench conference was held off the record. The Solicitor then asked Reeves what Victim told Reeves after the phone call ended. Reeves stated that Victim told her that it was Mary Ann Vick, at which point Reeves told Victim she knew because she recognized the voice. When Victim asked if Reeves knew them, Reeves told her that she did. Reeves then testified as follows:

> [Victim] said to me, she said, well, I won't do that anymore. She said that the last time that he was here that was the case, that ten minutes of your time and it took her an hour and a half. She did not have time to do it that day.

Defense counsel objected "to that last statement," but was overruled without comment.

Vick maintains this testimony related in detail the substance of what Victim told Reeves about the conversation and the situation with Vick. He argues the purpose of the testimony elicited by the State was to impart to the jury that Victim's past dealings with Vick were unpleasant, she was unhappy with Vick and his mother, and that she was not looking forward to dealing with Vick again. Accordingly, Vick argues Reeves' testimony, coupled with Pace's testimony of Vick's anger when Pace mocked him about his intention to date Victim, led to the inference of a strong rebuff by Victim of any

advance by Vick and a resulting angry response by Vick. He contends this testimony was hearsay and it was highly prejudicial.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The rule against hearsay prohibits the admission of evidence of an out of court statement by someone other than the person testifying which is used to prove the truth of the matter asserted. Watson v. State, 370 S.C. 68, 71, 634 S.E.2d 642, 644 (2006); Rhodes v. State, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002). It is well settled that evidence is not hearsay unless offered to prove the truth of the matter asserted. State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994); State v. Smith, 309 S.C. 442, 447, 424 S.E.2d 496, 499 (1992); State v. Sims, 304 S.C. 409, 420, 405 S.E.2d 377, 383 (1991); State v. Green, 318 S.C. 426, 429, 458 S.E.2d 73, 75 (Ct.. App. 1995).

Further, the improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. State v. Weston, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006); State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 150-51 (1985). Error is harmless when it could not reasonably have affected the result of the trial. Mitchell, 286 S.C. at 573, 336 S.E.2d at 151. Appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). An insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Additionally, the admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence. State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006).

Here, the evidence objected to by Vick obviously was not offered for the truth of the matter asserted and therefore, by definition, is not hearsay.

As noted by the State, the conversation simply related that Victim did not have time to fix Vick's hair at the request of Vick's mother. Clearly, this evidence was not offered for the truth of the matter asserted, i.e. that Victim did not have time to work on Vick's hair that day. If the evidence was elicited, as Vick contends, to show that Victim's past dealings with Vick were unpleasant, she was unhappy with Vick and his mother, and that she was not looking forward to dealing with Vick again, it was not then elicited to show the truth of the matter asserted, that Victim did not have time to fix Vick's hair on that particular day.

Further, even if the evidence was improperly admitted hearsay, Vick has failed to demonstrate reversible error. If the logical relevance of the evidence is, as submitted by the State, to show Victim knew Vick and he was one of her customers, Reeves' testimony was merely cumulative to other un-objected to testimony that Vick was a customer. More importantly, however, a review of the record shows the jury's verdict was based on an abundance of competent evidence from which Vicks' guilt was conclusively proven such that any error in admission of the evidence would be harmless. Testimony submitted at trial shows: (1) Vick had a sexual desire to be with Victim and intended to visit her at the salon on the night of her murder, and Vick threatened to kill the witness who could provide this information, (2) a person matching the description of Vick was seen exiting Victim's salon just before Victim's brutally beaten, semi-nude body was discovered in the salon, (3) a car very similar to Vick's in make, model, color and with distinctive rims was seen parked in the area around the time of the murder, (4) Vick confided in a cellmate that he wished he could take back the day he went over to Victim's shop, that he drove his vehicle over there, parking across the road so as not to be seen, and though he blacked out while inside the salon, he recalled exiting the building through the window because he was scared, and (5) Vick's DNA matched the semen left on Victim's body and the probability of randomly selecting an unrelated individual having a DNA profile matching the semen was approximately one in 900 million. Accordingly, the admission of

Reeves' testimony was insubstantial and could not have affected the result of the trial and therefore, if in error, was harmless.

Vick next contends his thirty-year kidnapping sentence should be vacated inasmuch as he was sentenced for murder and the kidnapping sentence was therefore improper pursuant to S.C. Code Ann. § 16-3-910. We agree.

The State acknowledges it is error to sentence a defendant for the kidnapping of a victim whom he is also convicted of murdering, and that when a defendant is convicted of murder, any sentence for kidnapping of the victim should be vacated. However, the State maintains Vick failed to object to the sentence when imposed, and the law requires a challenge to sentencing must be raised at trial in order to be preserved for appellate review. Accordingly, the State maintains, though the kidnapping sentence was error and likely will be addressed in a separate proceeding, the issue is procedurally barred from review and may not be addressed in a direct appeal before this court.

Section 16-3-910 of the South Carolina Code provides as follows:

> Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years unless sentenced for murder as provided in Section 16-3-20.

S.C. Code Ann. § 16-3-910 (2003) (emphasis added). Our courts have long held, where an appellant has been sentenced for murder of a victim, this code section precludes a sentence for kidnapping of that victim, and any such sentence should be vacated. Owens v. State, 331 S.C. 582, 584-85, 503

S.E.2d 462, 463 (1998); State v. McCall, 304 S.C. 465, 470, 405 S.E.2d 414, 416-17 (Ct. App. 1991), overruled on other grounds by Brightman v. State, 336 S.C. 348, 352, 520 S.E.2d 614, 616 (1999); State v. Livingston, 282 S.C. 1, 8, 317 S.E.2d 129, 133 (1984); State v. Perry, 278 S.C. 490, 495, 299 S.E.2d 324, 327 (1983); State v. Copeland, 278 S.C. 572, 597, 300 S.E.2d 63, 77-78 (1982).

The State correctly notes that our courts have held a challenge to sentencing must be raised at trial to be preserved for appellate review. See State v. Johnston, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) (noting our supreme court "has consistently held that a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review"). However, the State concedes that it is error to sentence a defendant for the kidnapping of a victim whom he is also convicted of murdering, and any such sentence for kidnapping should be vacated. The State further recognizes that the issue, if determined to be unreviewable on direct appeal, will in all likelihood be addressed in a post-conviction relief proceeding. In Johnston, the court noted that case presented an exceptional circumstance wherein the State conceded that the trial court committed error by imposing an excessive sentence. The State nevertheless maintained that appellant's appropriate remedy was through the Post Conviction Relief Act. The Johnston court recognized that if it unyieldingly enforced PCR as the only avenue of relief, there was a real threat that appellant would remain incarcerated beyond the legal sentence due to the additional time it would take to pursue such a remedy. Accordingly, the court determined that exceptional circumstances warranted a remand for resentencing. Id. at 463-64, 510 S.E.2d at 425.

While the case at hand does not present a threat that Vick will remain incarcerated beyond the legal sentence as in Johnston, our courts have, in the past, "summarily vacated" sentences for kidnapping where such sentences were precluded by § 16-3-910 because the defendant received a concurrent sentence under the murder statute. See Owens, 331 S.C. at 585, 503 S.E.2d

at 463; McCall, 304 S.C. at 470, 405 S.E.2d at 417 (noting the appellate courts have "summarily vacated" sentences for kidnapping when the defendant received a concurrent sentence under the murder statute). Additionally, our courts have at times considered an issue in the interest of judicial economy. See S. Bell Tel. & Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (holding, where a party argued that the trial court erred in rendering judgment on a constitutional issue inasmuch as such an analysis was "purely advisory," because the issue would be raised to the court at some future time and since both parties had fully briefed the issue, it was proper for the appellate court to decide the matter in the interest of judicial economy); Jeter v. S.C. Dep't of Transp., 369 S.C. 433, 441 n.6, 633 S.E.2d 143, 147 n.6 (2006) (holding, regardless of any preservation problems, the appellate court would address an issue in the interest of judicial economy).

CONCLUSION

We find the testimony from Reeves was not hearsay and, even if the testimony did constitute inadmissible hearsay, its admission was harmless in light of the overwhelming evidence of Vick's guilt. Accordingly, we affirm Vick's convictions. However, because the State concedes the kidnapping sentence was erroneously imposed, and in light of the fact our courts recognize there may be exceptional circumstances allowing the appellate court to consider an improper sentence even though no challenge was made to the sentence at trial and have further summarily vacated in matters such as the one at hand, in the interest of judicial economy we vacate the clearly erroneous kidnapping sentence.

AFFIRMED IN PART AND VACATED IN PART.

PIEPER and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jamey Allen Reid Appellant.

Appeal From Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4574
Heard May 12, 2009 – Filed June 25, 2009

AFFIRMED

Appellate Defender Katherine H. Hudgins, of Columbia, for Appellant.

Attorney General Henry D. 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 Christina T. Adams, of Anderson, for Respondent.

PIEPER, J.: Jamey Allen Reid appeals his convictions for attempted criminal sexual conduct (CSC) with a minor second degree and criminal solicitation of a minor. Reid contends the trial court erred in failing to grant a directed verdict of acquittal, arguing the State failed to prove Reid committed an overt act in furtherance of attempted CSC. Reid also claims the trial court erred in refusing to charge criminal solicitation of a minor as a lesser included offense of attempted CSC with a minor second degree. We affirm.

FACTS

On the night of January 9, 2006, Mark Patterson, a police officer for the Westminster Police Department and the Internet Crimes Against Children Task Force, conducted an undercover investigation on the internet. As part of the operation, Patterson entered a Yahoo chat room under the guise of a fourteen year old female, using the screen name "Skatergurl." Once logged in to the chat room, Patterson waited for requests to chat or to communicate via instant messenger from other individuals in the chat room. Software incorporated into Patterson's computer recorded the communications in real time.

At some point that night, Skatergurl received a message from a person with the screen name "Fine_Ass_Seminoles_Fan," (FASF) asking her where she lived. Skatergurl responded Oconee County. FASF then inquired of Skatergurl as to her name and age. Skatergurl responded with "Karen" and "fourteen." FASF said his name was Jamey. Thereafter, the following discussion occurred:

> [FASF]: Well, what you looking for? . . . Sex, Love, Relationships, Friends, What?
>
> [Skatergurl]: Laugh out loud. What's everybody looking for?
>
> [FASF]: I asked. You tell me.
>
> [Skatergurl]: I don't know. Fun stuff.

[FASF]: Sex? Love?

[Skatergurl]: L.O.L., Laugh out loud.

[FASF]: Honestly.

[Skatergurl]: What are you looking for?

[FASF]: Good Girl.

. . . .

[FASF]: You need some loving? I'm asking?

[Skatergurl]: I don't know. Laugh out loud.

[FASF]: I do.

[Skatergurl]: Kewl.

The conversation turned to arranging a meeting place. FASF asked when and where they could meet. Skatergurl replied they could only meet at night and suggested Westminster Middle School. Skatergurl subsequently asked:

[Skatergurl]: Whatcha wanna do?

[FASF]: Go back to my apt. – I assume. Okay?

[Skatergurl]: Do what?

[FASF]: What you want to do. Tell me.

[Skatergurl]: I don't know.

[FASF]: Watch movie, I dunno, talk. Make love.

[Skatergurl]: Make love?

[FASF]: Yes. Wanna [] don't mean you have to.

[Skatergurl]: You don't care I am 14?

[FASF]: No. You?

FASF suggested meeting between 2:00 and 2:15 a.m. at the middle school that night. He told Skatergurl he would arrive in a black truck or a red car and he confirmed what Skatergurl would be wearing. Just before signing out of the chat room, FASF said, "we come here and make love, okay, snuggle, kiss, whatever, okay?" He then asked, "you wanna have sex, honestly," and Skatergurl responded, "I can try."

Officer Patterson called another Westminster police officer and they stationed their vehicles near the middle school. At approximately 2:30 a.m., a red Toyota Celica pulled into the parking lot. The officers stopped the car and arrested the driver, Jamey Allen Reid.

On February 7, 2006, an Oconee County grand jury indicted Reid for attempted CSC with a minor second degree and for criminal solicitation of a minor. A jury trial was held on March 7, 2007. At the close of the State's case, Reid's counsel moved for a directed verdict of acquittal. The court denied the motion. The jury convicted Reid on both charges. The trial court sentenced Reid to twenty years for the attempted CSC with a minor second degree conviction, which was suspended upon the service of ten years with five years probation. Reid was sentenced to ten years for the criminal solicitation of a minor, which was to run concurrently. This appeal followed.

ISSUES

I. Did the trial court err in refusing to direct a verdict of acquittal when the State failed to produce sufficient evidence for the charge of attempted CSC with a minor second degree?

II. Did the trial court err in refusing to find criminal solicitation of a minor was a lesser included offense of attempted CSC with a minor second degree?

STANDARD OF REVIEW

In criminal cases, appellate courts review errors of law only and are bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006).

DISCUSSION

Reid first argues the trial court erred in refusing to direct a verdict of acquittal because the State failed to demonstrate Reid committed an overt act as required to prove guilt for attempted CSC with a minor second degree. We disagree.

In ruling on a motion for a directed verdict, a trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Wetson, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. McCombs, 368 S.C. 489, 493, 629 S.E.2d 361, 362-63 (2006). "On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State." State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004).

A person is guilty of CSC with a minor in the second degree if the actor engages in sexual battery with a victim who is fourteen years or less but who is at least eleven years of age. S.C. Code Ann. § 16-3-655(B) (Supp. 2005).[1] "A person who commits the common law offense of attempt is punishable as

[1] The statute, as amended, became effective June 1, 2005. Reid was arrested in January 2006.

for the principal offense." State v. Sutton, 340 S.C. 393, 396 n.3, 532 S.E.2d 283, 285 n.3 (2000); see also, S.C. Code Ann. § 16-1-80 (2003). Thus, the elements of attempted CSC with a minor in the second degree are: (1) an attempt; (2) to engage in a sexual battery; (3) with a victim; (4) who is fourteen years of age or less; (5) but who is at least eleven years of age. See S.C. Code Ann. § 16-3-655(B) (Supp. 2005) (statutory elements of the object crime).

Generally, the mens rea of an attempt crime is one of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime. Sutton, 340 S.C. at 397, 532 S.E.2d at 285. "In the context of an attempt crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense." State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) (internal quotes omitted). The State must prove the defendant's specific intent was accompanied by some overt act, beyond mere preparation, in furtherance of the intent. Id.; see also, State v. Sosbee, 371 S.C. 104, 109, 637 S.E.2d 571, 573 (Ct. App. 2006) (defining attempt, in a case categorizing criminal sexual conduct with a minor as a "most serious offense," as "an overt act that is done with the intent to commit a crime but that falls short of completing the crime.") (quoting Black's Law Dictionary 123 (7th ed. 1999)).

Courts have struggled to determine the point at which conduct moves beyond the preparatory stage to the perpetration stage. A competition amongst policy considerations exists in this realm of the law. On the one hand, there exists a policy not to punish or convict innocent persons for evil or criminal thoughts alone;[2] on the other hand, a countervailing policy exists to allow law enforcement to prevent criminal conduct before it reaches the point of completion. South Carolina jurisprudence in the area of attempt law is sparse. Cases in South Carolina do not clearly establish any absolute guiding test for our trial courts to employ in resolution of this issue although

[2] See State v. Evans, 216 S.C. 328, 333, 57 S.E.2d 756, 758 (1950) ("The law does not concern itself with mere guilty intention, unconnected with any overt act.") (citing State v. Kelly 114 S.C. 336, 338, 103 S.E. 511, 512 (1920)). This statement simply reflects that generally a crime includes both an actus reus component and a mens rea component.

Nesbitt utilizes the overt act discussion in State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942), a case not dealing specifically with attempt.

Other state and federal courts have employed a variety of tests, some of which have been used in part or interchangeably by various courts demonstrating the difficulty in defining a universal test. These tests generally are either directed to how much has been done, or instead, how much remains to be done in furtherance of the object crime. Notwithstanding, one rule which does appear consistent throughout the country is the sequence of events need not reach the last proximate act necessary to completion, an original common law test. Wayne R. Lafave, 2 Subst. Crim. L. § 11.4 (2d ed. 2008).

Case law additionally suggests varying proximity tests. One test credited to Justice Oliver Wendell Holmes, the common law "dangerous proximity" test, focuses on whether the act comes so close or near to the object crime that the danger of success is very great. Id.; see Joshua Dressler, Understanding Criminal Law 339 (5th ed. 2009). Essentially, this test focuses upon how much remains to be done before the defendant would have succeeded in his goals; often, factors such as the nearness of danger, the substantiality of harm and the apprehension felt are considered. Dressler at 339 (referencing Commonwealth v. Kennedy, 48 N.E. 770 (Mass. 1897). Further, the more severe the object crime, the less close the actor must come to completing it in order to be convicted of attempt. See Joshua Dressler, Cases and Materials on Criminal Law 762-63 (4th ed. 2007); see also People v. Burger, 280 P.2d 136, 138 (Cal. Ct. App. 1955) (the more clearly the intent to commit the offense is proven, the less proximate the acts need to be to completion); Van Bell v. State, 775 P.2d 1273, 1275 (Nev. 1989) ("[I]n our review of an 'attempt' offense, we emphasize the inverse relationship which exists between the defendant's intent to commit the crime and the performance of an overt act toward the commission of the crime.").

Similarly, the "physical proximity" test focuses upon whether the defendant's acts "may be said to be physically proximate to the intended crime." Lafave, 2 Subst. Crim. L. § 11.4. This test has been further described as focusing upon an act which amounts to the commencement of the consummation of the object crime or stands "either as the first or some

subsequent step in direct movement towards the commission of the offense after preparations are made." State v. Dowd, 28 N.C. App. 32, 37, 220 S.E.2d 393, 396 (1975); see United States v. Mandujano, 499 F.2d 370, 374 (5th Cir. 1974); Dressler, Understanding Criminal Law at 398.

Another test, the "substantial step" test, derives from the Model Penal Code and focuses upon whether the defendant has taken a substantial step that strongly corroborates his intent to commit the object crime. Model Penal Code §5.01. Here, the court looks to what has been done as opposed to what remains to be done. Thus, the drafters of the model code noted that the scope of attempt liability would be broadened consistent with the policy of restraining dangerous persons where the firmness of criminal purpose is shown. Lafave, 2 Subst. Crim. L. § 11.4.[3]

The Mandujano court, relying upon the Model Penal Code references to other formulations of various tests, indicated the following additional tests:

> (c) The indispensable element test- a variation of the proximity tests which emphasizes any indispensable aspect of the criminal endeavor over which the actor has not yet acquired control.
> (d) The probable desistance test- the conduct constitutes an attempt if, in the ordinary and natural course of events, without interruption from an outside source, it will result in the crime intended.
> (e) The abnormal step approach- an attempt is a step toward crime which goes beyond the point where the normal citizen would think better of his conduct and desist.

[3] The United States Fourth Circuit Court of Appeals utilizes the substantial step test. United States v. Pratt, 351 F.3d 131, 135-36 (4th Cir. 2003). According to Professor Dressler's research, at least 25 states have codified the "substantial step" standard. Dressler, Understanding Criminal Law at 413 n.190).

> (f) The res ipsa loquitur or unequivocality test- an attempt is committed when the actor's conduct manifests an intent to commit a crime.

499 F.2d at 373 n.5. Some of these tests bear different labels but are essentially consistent with the above-mentioned discussion. One final test, at least in name, an overt act test, simply suggests any overt or positive act in furtherance of the attempted crime may be sufficient. See Sosbee, 371 S.C. at 109, 637 S.E.2d at 573 (dicta); see also State v. Rallo, 304 S.C. 258, 269, 403 S.E.2d 653, 659 (1991) (Toal, J., dissenting) ("In order to constitute an attempt to commit a crime, it is essential that, coupled with the intent to commit the offense, there be some overt act, beyond mere preparation, in furtherance of the intent, and there must be an actual or present ability to complete the crime."); David Crump et al., Criminal Law: Cases, Statutes, and Lawyering Strategies 537 (2005) (classifying the overt act approach as an actus reus test wherein "any positive act in furtherance of the attempt is sufficient (a minimal requirement).").

As indicated, we have not found any case in South Carolina specifically indicating how far a person must go before that person may be convicted of attempt to commit a crime. However, our state supreme court has provided some guidance, albeit dicta, in Quick, a case not involving the crime of attempt, but subsequently utilized by the court of appeals in Nesbitt. Nesbitt, 346 S.C. at 231, 550 S.E.2d at 866-67 (quoting Quick, 199 S.C. at 259-60, 19 S.E.2d at 102-03). Although the crime of attempt was not at issue in Quick, the court nonetheless discussed the distinction between preparations and overt acts, making reference in part to an "attempt to commit." Quick, 199 S.C. at 260, 19 S.E.2d at 103. The court indicated "preparation consists in devising or arranging the means or measures necessary for the commission of the crime; the attempt or overt act is the direct movement toward the commission, after the preparations are made." Id. at 260, 19 S.E.2d at 103. The court went on to articulate "'the act' is to be liberally construed, and in numerous cases it is said to be sufficient that the act go far enough toward accomplishment of the crime to amount to the commencement of its consummation." Id. at 259, 19 S.E.2d at 102. Further, the court explained, "the act need not be the last proximate step leading to the consummation of the offense." Id.

Our sister state, North Carolina, has employed a similar test as that suggested in Quick. Dowd, 220 S.E.2d at 396. In describing the law of attempt, North Carolina courts have indicated "it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof." Id. Thus, "the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation." Id. The court further elaborated "while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made." Id.

Reviewing the facts herein, Reid asked a person whom he thought was a fourteen year old girl if she would meet him within the hour in order to "make love . . . snuggle, kiss, whatever." Moreover, the last question Reid asked Skatergurl was, "you wanna have sex, honestly?" This evidence constituted evidence of Reid's specific intent to accomplish CSC with a minor. Having found evidence of the specific intent to commit the underlying offense, we must determine whether the State offered sufficient evidence demonstrating Reid committed some act toward the commission of the crime beyond any act or acts of preparation.

As noted in Quick, no definite rule as to what constitutes an overt act for attempt purposes can safely be laid down and each case is dependent upon its particular facts and the inferences which the jury may reasonably draw therefrom, "subject to general principles applied as nearly as can be, with a view to working substantial justice." Quick, 199 S.C. at 259, 19 S.E.2d at 102. Moreover, as indicated in Mandujano, "it seems equally clear that the semantical distinction between preparation and attempt is one incapable of being formulated in a hard and fast rule." 499 F.2d at 373. As an example, the court noted that "[t]he procuring of the instrument of the crime might be preparation in one factual situation and not in another." Id.; see United States v. Neal, 78 F.3d 901, 906 (4th Cir. 1996) (suggesting the line between mere preparation and attempt is fact intensive and must be determined on a case by

case basis). Thus, once we have determined whether there exists some act separate from an act of preparation, we must also determine whether that act is sufficient to justify an attempt conviction.[4]

We have not found any precedent within our State addressing this specific type of factual situation. However, a significant number of other jurisdictions confronted with this issue have concluded that the act of a defendant who travels to a prearranged location with the purpose of having sex with an individual whom he believes is a child is a sufficient act in furtherance of an attempted sex crime. See, e.g., United States v. Farner, 251 F.3d 510, 513 (5th Cir. 2001) (substantial step test); State v. Glass, 87 P.3d 302, 307 (Idaho Ct. App. 2003) (applying the "dangerous proximity" test, while using "substantial step" cases in analysis); People v. Patterson, 734 N.E.2d 462, 470 (Ill. Ct. App. 2000) (using term "overt act" to determine whether a "substantial step" had been made for attempt); Cook v. State, 256 S.W.3d 846, 849 (Tex. Ct. App. 2008) ("[A]ll the State was required to allege and prove . . . was that [defendant] had the intent to commit aggravated sexual assault of a child, and did an act amounting to more than mere preparation, that tended but failed to effect the actual commission of the offense intended."); State v. Townsend, 57 P.3d 255, 262 (Wash. 2002) (en banc) ("[I]t makes no difference that [defendant] could not have completed the crime because 'Amber' did not exist. He is guilty if he intended to have sexual intercourse with her.") (emphasis in original).[5]

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[4] We note, however, there is some authority for the proposition that some acts of preparation may be sufficient for attempt purposes. As Justice Holmes stated, "preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree." Commonwealth v. Peaslee, 59 N.E. 55, 56 (Mass. 1901). We need not resolve this issue because we agree with Mandujano that this question is merely semantic in nature. 499 F.2d at 373. Notwithstanding, we further note some states have abandoned the "mere preparation" distinction. See State v. Reeves, 916 S.W.2d 909 (Tenn. 1996).

[5] Additional cases and jurisdictions addressing the matter include the following: United States v. Root, 296 F.3d 1222, 1227 (11th Cir. 2002) (substantial step test); State v. Sorabella, 891 A.2d 897, 915 (Conn. 2006) (substantial step test); Dennard v. State, 534 S.E.2d 182, 188 (Ga. Ct. App. 2000) (substantial step test); State v. Risinger, 194 P.3d 52, 54 (Kan. Ct. App.

However, other jurisdictions have held merely arriving at an arranged location is insufficient to constitute a sufficient act in furtherance of a planned sex crime. See, e.g., State v. Duke, 709 So.2d 580, 582 (Fla. Ct. App. 1998) (holding the State failed to establish an overt act leading to the commission of a sexual battery where the defendant discussed sexual acts with a person the defendant believed to have been a minor, planned an occasion when he could carry out those acts, and arrived at the prearranged meeting point); State v. Kemp, 753 N.E.2d 47, 50-51 (Ind. Ct. App. 2001) (finding circumstances of defendant's conduct alleged in the State's information did not reach the level of an overt act showing defendant committed a substantial step toward the offense beyond mere preparation), superseded in part by statute, Ind. Code § 35-42-4-6 (West 2004), as recognized in Alpin v. State, 889 N.E.2d 882, 885 n.5 (Ind. Ct. App. 2008); People v. Walter, 810 N.E.2d 626 (Ill. Ct. App. 2004) (finding circumstances of defendant's conduct fell short of demonstrating either actual intent to have sex or a substantial step beyond mere preparation).

Here, based on the evidence presented, Reid completed a requisite act in furtherance of the offense of attempted CSC with a minor second degree. Reid, in preparation, arranged a time and meeting location with a person whom he thought to be a minor. Reid described the type of car he would be driving and he confirmed the description of Skatergurl's clothing. Further, Reid left the location where he was communicating with Skatergurl and committed an act beyond mere preparation in driving to and physically arriving at the prearranged location within fifteen minutes of the agreed upon

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2008) ("To be convicted of an attempt crime, a defendant must intentionally take a first step towards committing that crime. Our courts call that step 'performing an overt act.'"); Commonwealth v. Bell, 853 N.E.2d 563, 569-70 (Mass. Ct. App. 2006) (using overt act language while applying proximity analysis); State v. Tarbay, 810 N.E.2d 979, 984 (Ohio Ct. App. 2004) (substantial step test); see also United States v. Bailey, 228 F.3d 637, 640 (6th Cir. 2000) ("The prosecution must have presented evidence of objective, overt acts that would allow a reasonable jury to find [the defendant] had taken a substantial step. . . .").

time.[6] See Quick, 199 S.C. at 259, 19 S.E.2d at 102 (noting courts should liberally construe whether an act rose to the level of an overt act in furtherance of crime). Reid's act, for purposes of directed verdict, constituted evidence of the first or some subsequent step in a direct movement towards the commission of the offense after any act or acts of preparation.[7]

Moreover, we give weight to the policy goal of stopping dangerous persons through earlier intervention by law enforcement by punishing the attempted conduct as a crime, especially in any cybermolester type cases where the conduct also clearly manifests or strongly corroborates the intent to commit such a dangerous object crime. Accordingly, the trial court did not err because the evidence was sufficient to withstand Reid's motion for a directed verdict and warranted submission of the case to the jury. See Cherry, 361 S.C. at 593-94, 606 S.E.2d at 478 (providing an appellate court must find a case was properly submitted to a jury, if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused).

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[6] Reid arguably would have been closer to committing the attempted crime had a minor been present upon Reid's arrival. However, this court has previously stressed "[i]t should not be necessary to subject victims to a face-to-face confrontation with a lethal weapon in order to find the essential element of an overt act." Nesbitt, 346 S.C. at 234, 550 S.E.2d at 868 (finding sufficient evidence of an overt act warranting the trial court to charge the jury with attempted robbery). Further, while there is no evidence a lethal weapon was present, this type of situation is just as dangerous or potentially injurious to a minor. Therefore, consistent with our state's public policy to protect minors from harm, a minor need not be present in order to prove an act in furtherance of the commission of an attempted sex crime. Early intervention is appropriate in light of the serious nature of this crime.

[7] We recognize the significant number of jurisdictions adopting the substantial step test. Many of these states have done so by legislative enactment and this may be a matter worthy of legislative attention. Notwithstanding, even if the South Carolina Supreme Court were to adopt a substantial step test, we find the case herein would meet that test as demonstrated by the case law cited herein.

Reid also contends the trial court erred in ruling criminal solicitation of a minor was not a lesser included offense of attempted CSC with a minor second degree. We disagree.

"The test for determining whether a crime is a lesser included offense of the crime charged is whether the greater of the two offenses includes all the elements of the lesser offense." State v. Northcutt, 372 S.C. 207, 215, 641 S.E.2d 873, 877 (2007). Absent some special exception, if the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater. Id.

As previously indicated, the elements of attempted CSC with a minor in the second degree are: (1) an attempt; (2) to engage in a sexual battery; (3) with a victim; (4) who is fourteen years of age or less; (5) but who is at least eleven years of age. See S.C. Code Ann. § 16-3-655(B) (Supp. 2005) (statutory elements of the object crime).

The elements of criminal solicitation of a minor include: (1) the defendant is eighteen years of age or older; (2) he or she knowingly contacts or communicates with, or attempts to contact or communicate with; (3) a person who is under the age of eighteen, or a person reasonably believed to be under the age of eighteen; (4) for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity as defined in Section 16-15-375(5) or a violent crime as defined in Section 16-1-60; or (5) with the intent to perform a sexual activity in the presence of the person under the age of eighteen, or person reasonably believed to be under the age of eighteen. S.C. Code Ann. § 16-15-342(A) (Supp. 2005).

Here, the trial court did not err in charging separate crimes because the greater offense, attempted CSC with a minor second degree, did not include an element of the lesser offense, which was contacting or attempting to contact an underage person or a person thought to be underage. Given the greater of the two offenses did not include all the elements of the lesser offense, the trial court did not err in refusing to charge criminal solicitation of

a minor as a lesser included offense.[8] See State v. Fristoe, 658 P.2d 825, 831 (Ariz. Ct. App. 1983) (Stating solicitation is not a lesser included offense of attempt. "[T]here are many instances in which oral sexual contact with a minor could be attempted without involving any request or solicitation for the minor to engage in the contact."); see also State v. Bland, 318 S.C. 315, 317-18, 457 S.E.2d 611, 613 (1995) (holding where the greater offense did not contain all the elements of the lesser, the court of appeals properly found two separate crimes); State v. Kirby, 325 S.C. 390, 399, 481 S.E.2d 150, 154 (Ct. App. 1996).

CONCLUSION

Based on the foregoing the convictions are

AFFIRMED.[9]

HUFF and GEATHERS, JJ., concur.

[8] Reid also alleges because an attempt crime requires the State to prove an overt act in furtherance of the principal crime, the additional element of the lesser offense, in this instance communicating with the victim, was an element of attempted CSC with a minor second degree. This argument has no merit. One may attempt to commit CSC with a minor without any communication at all. See Fristoe, 658 P.2d at 831. Regardless of whether the act of communication is an act of preparation or an act in furtherance of the crime, it is not dispositive of a lesser included offense analysis. Thus, the trial court properly charged the jury with the two separate offenses.

[9] No issues were raised herein as to merger, impossibility, or entrapment and we need not address those doctrines or their applicability.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Peter S. Santoro and Mary Santoro, Respondents,

v.

Warren H. Schulthess, Appellant.

Appeal From Orangeburg County
Olin D. Burgdorf, Master-in-Equity

Opinion No. 4575
Heard March 18, 2009 – Filed July 1, 2009

REVERSED

Glenn Walters and R. Bentz Kirby, of Orangeburg, for Appellant.

William T. Toal, of Columbia, for Respondents.

GEATHERS, J.: Appellant Warren Schulthess seeks review of an order requiring him to pay damages to Respondents Peter Santoro and Mary

Santoro for trespass and for intentional interference with prospective contractual relations. Schulthess also appeals the requirements that he lower the level of his pond and remove a motor home from his property. We reverse.

FACTS/PROCEDURAL HISTORY

In March 2002, Schulthess, a Columbia resident, purchased a pond (North Lake) and an adjoining triangular, unimproved parcel in Orangeburg County. At that time, the level of the pond was very low because its spillway had been leaking. Whenever he visited the pond to perform maintenance or make repairs to the spillway, Schulthess took his motor home and parked it on his adjoining triangular lot.

North Lake is surrounded by several residential lots in the Country Oaks subdivision, including three lots owned by the Santoros since 1993 (lots 1 through 3 in block "K" of the subdivision).[1] The Santoros' home is located on the middle lot (lot 2). The deed to Schulthess's pond describes the pond as being bound on the south by lots 1 through 4 in block "K" of the subdivision, which includes the Santoros' three lots. The deed to lots 1 and 3 describes them as being bound on the north and northeast, respectively, by a ten-foot strip reserved by the developer to separate the lots from North Lake. In contrast, the deed for lot 2 describes its northeast boundary as simply North Lake.

In June 2002, the Santoros placed their home and the three lots on the market so they could move to Arizona. The Santoros' realtor, Century 21/The Moore Group (Century 21), listed their house and three lots for $319,000. When Schulthess discovered the realtor's sign on the Santoros' property, he visited a former colleague who worked for Century 21 to inquire about the Santoros' asking price. When he saw a copy of the real estate listing, he noticed that it represented the Santoros' property as extending ten feet into

[1] The subdivision's original name was "Oakmont Subdivision" but later changed to "Country Oaks."

North Lake. In late June 2002, Schulthess wrote a letter to the Santoros' agent at Century 21 and copied the Santoros with the letter.

Schulthess's letter expressed disagreement with the representation that the Santoros' property extended ten feet into his pond and stated that the property line between the pond and many of the abutting properties was determined by the pond's high water level. The letter also stated that Schulthess had given permission to abutting owners to use the pond, but expressed concern about any prospective purchasers of the Santoros' property being given the wrong impression that the Santoros could convey any formal littoral rights to them.[2] Schulthess requested the agent to revise the listing so that the Santoros' property was not being advertised as "waterfront." Schulthess also stated that there was a structure on one of the Santoros' lots that encroached upon the pond.

As a result of Schulthess's letter, the Santoros' realtor revised the advertisement to delete the reference to the property extending ten feet into the water and suggested to the Santoros that they have their property resurveyed. According to the realtor's broker-in-charge, the claims made in Schulthess's letter had to be revealed to any prospective buyers of the Santoros' property. According to Schulthess, the Santoros never complained to him about the letter he wrote to Century 21.

The Santoros later engaged the Tatum Company to list their property for $298,500. On July 15, 2003, Schulthess wrote a letter to the Santoros' agent at the Tatum Company advising her that he owned the pond, that the Santoros' property only extended to the pond's edge, and that he had a five-foot easement around the pond's edge. Schulthess further stated that he understood that littoral rights applied only to natural waterways and not to private impoundments such as his pond. He suggested that the agent "legally

[2] Littoral rights are special rights allowing owners of land abutting oceans, seas, or lakes to make "reasonable use" of the body of water for any lawful purpose. White's Mill Colony, Inc. v. Williams, 363 S.C. 117, 129, 609 S.E.2d 811, 817-18 (Ct. App. 2005) (dicta).

qualify this matter" before offering fishing rights or access to the pond. He stated that he believed that those rights could only be conveyed by him. According to Mary Santoro, when the real estate agent showed the property to prospective buyers, "[W]e had to tell them that we could not pass the water rights on, [and] that they would have to get permission from [Schulthess]."

Sometime during the latter half of 2003, Schulthess placed a temporary stopper in the pond's leaking spillway. On November 24, 2003, South Carolina Department of Health and Environmental Control (DHEC) sent a letter to Schulthess after receiving complaints from the Santoros about the pond flooding their land. DHEC instructed Schulthess to return the spillway to normal operation within thirty days. DHEC also indicated that it was unsafe to rely on the emergency spillway to be the only spillway on the North Lake dam. The letter also stated that replacing the flashboards on the spillway would not require a permit from DHEC. Schulthess noted that in a telephone call about the letter, a DHEC representative instructed him to remove the temporary stopper in its entirety, which Schulthess removed three days after receiving DHEC's letter.

By January 2004, the Santoros still had not sold their property. They then filed a complaint against Schulthess, asserting a claim for trespass due to the flooding of their property and a claim for interference with prospective contractual relations based on Schulthess's letters to their realtors. The complaint also asserted that Schulthess violated the restrictive covenants for the Country Oaks subdivision by parking his motor home on his triangular lot.

In Spring 2004, Schulthess repaired the spillway. According to Mary Santoro, she saw Schulthess adding concrete to the spillway and she believed that the concrete addition raised the spillway's height. However, according to another abutting owner and Schulthess, the spillway was never raised and the concrete addition merely closed up a hole in the spillway.

Mary Santoro telephoned some contractors to obtain verbal estimates on the cost of supplies for filling in eroded land, building a retaining wall to prevent further erosion, and adding new topsoil and sod. Based on those phone calls, she understood the cost to be approximately $25,000.

After a trial on the Santoros' claims, the master issued an order concluding that a deed in Schulthess's chain of title made his triangular lot subject to a provision of the subdivision's restrictive covenants prohibiting house trailers and other temporary structures.[3] The master also concluded that Schulthess was liable to the Santoros on all of their claims. The master ordered Schulthess to pay damages to the Santoros in the amount of $108,000,[4] to lower the level of the pond, and to remove his motor home from his triangular lot. This appeal followed.

ISSUES ON APPEAL

1. Did the evidence support the Santoros' cause of action for intentional interference with prospective contractual relations?

2. Did the evidence support the Santoros' cause of action for trespass?

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[3] The original restrictive covenants were created in 1974. In 1990, the document was amended to allow for an increase in the allowable square footage of homes in the subdivision. In his order, the master conceded that the restrictive covenants as originally filed did not apply to Schulthess's triangular lot because it was not one of the specifically enumerated lots listed as being covered by the covenants. Nevertheless, the master found that certain language in a deed conveying the triangular lot to Schulthess's predecessor-in-title subjected the lot to the subdivision's restrictive covenants.

[4] The master awarded $25,000 to the Santoros for the alleged trespass and $78,000 for the Santoros' claim for intentional interference with prospective contractual relations.

3. Did the master err in concluding that Schulthess's triangular lot was subject to the restrictive covenants of the Country Oaks subdivision?

STANDARD OF REVIEW

On direct appeal from a final judgment of a master-in-equity, the scope of review is the same as that for review of a case heard by a circuit court without a jury. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

> When legal and equitable causes of action are maintained in one suit, the court is presented with a divided scope of review. On appeal from an action at law that was tried without a jury, the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings. In an equitable action tried without a jury, the appellate court can correct errors of law and may find facts in accordance with its own view of the preponderance of the evidence.

Blackmon v. Weaver, 366 S.C. 245, 248-49, 621 S.E.2d 42, 43-44 (Ct. App. 2005) (internal citations omitted); see also Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008) (holding that the appellate court reviews questions of law de novo).

A tort action for damages is an action at law. Longshore v. Saber Sec. Servs., Inc., 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005). Therefore, the Santoros' tort cause of action seeking damages for interference with prospective contractual relations is a legal cause of action, and this Court may not disturb the master's factual findings relating to this claim unless they lack evidentiary support. Blackmon, 366 S.C. at 248-49, 621 S.E.2d at 43-44.

As to the Santoros' trespass claim, they seek both damages and injunctive relief. Therefore, we must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of relief sought to determine whether the claim is legal or equitable. See Gordon v. Drews, 358 S.C. 598, 604, 595 S.E.2d 864, 867 (Ct. App. 2004) (holding that to determine whether an action is legal or equitable, this Court must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of relief sought); cf. Cedar Cove Homeowners Ass'n, Inc. v. DiPietro, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006) (holding that while a trespass action is generally an action at law, the trespass action at hand was equitable because the plaintiff withdrew its claim for damages and sought only an injunction).

The pleadings and evidence indicate that the Santoros' primary purpose in asserting their trespass claim was to require Schulthess to remove the pond's waters from the disputed location to enable them to fill in the eroded land and to add a retaining wall, topsoil, and sod. Because their primary purpose in asserting the trespass claim was to obtain injunctive relief, the claim is equitable in nature.[5] Therefore, this Court must apply an equitable

[5]We recognize that the ownership of the land on which the claimed trespass occurred was in dispute and that prior appellate opinions characterize actions involving trespass claims as legal when the defendant challenges the plaintiff's ownership of the land. See Mountain Lake Colony v. McJunkin, 308 S.C. 202, 204, 417 S.E.2d 578, 579 (1992) (holding that because the defendant's answer raised an issue of paramount title to land, the plaintiff's action for damages for conversion of timber and trespass, for an injunction against entry of land, and for a declaratory judgment concerning the land's title was an action at law); Corley v. Looper, 287 S.C. 618, 620-21, 340 S.E.2d 556, 557 (Ct. App. 1986) (holding that an action for damages and injunctive relief preventing defendants from crossing a tract of land was in the nature of a trespass action to try title because a review of the evidence showed that the plaintiffs' primary purpose in bringing the action was to determine title to the disputed tract). However, these cases reveal that the plaintiffs' main purpose in bringing the action was the determination of title

standard of review to the master's factual findings relating to this claim and may make findings according to its own view of the preponderance of the evidence. Blackmon, 366 S.C. at 248-49, 621 S.E.2d at 43-44. Nonetheless, this broad scope of review does not require this Court to disregard the findings at trial or ignore the fact that the master was in a better position to assess the credibility of the witnesses. Laughon v. O'Braitis, 360 S.C. 520, 524-25, 602 S.E.2d 108, 110 (Ct. App. 2004).

The Santoros' remaining claim seeks an injunction to enforce their subdivision's restrictive covenants. Thus, this claim also sounds in equity. See S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (holding that an action to enforce restrictive covenants by injunction is in equity); Cedar Cove, 368 S.C. at 258, 628 S.E.2d at 286 ("Because the [plaintiff's] action is one to enforce restrictive covenants by injunction, it is in equity, and we may find facts in accordance with our own view of the evidence.") (citation omitted). Therefore, this Court may make findings related to this claim according to its own view of the preponderance of the evidence. Blackmon, 366 S.C. at 248-49, 621 S.E.2d at 43-44.

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to the disputed tract. Thus, the Mountain Lake Court implicitly recognized that the main purpose in bringing the action is the overriding consideration in determining whether a claim is legal or equitable, and the Corley Court explicitly recognized the main purpose in bringing the action as the controlling consideration. In contrast to the Santoros' complaint, the complaint in Mountain Lake included a request for a declaratory judgment concerning the land's title. In Corley, this Court expressly concluded that the evidence revealed the plaintiff's primary purpose as the determination of title to the disputed tract. The Corley Court also noted that while the plaintiffs' complaint sought injunctive relief, the trial judge granted none and the plaintiffs did not object to his failure to grant the relief. Here, the Santoros' main purpose in bringing their action was simply to restore their surrounding environment to the condition it was in prior to Schulthess's work on the pond's spillway. The first step in that restoration was obtaining an injunction requiring Schulthess to lower the level of the pond.

LAW/ANALYSIS

I. Intentional Interference with Prospective Contractual Relations

Schulthess argues that the Santoros failed to present sufficient evidence to establish their cause of action for intentional interference with prospective contractual relations and that the master erred in concluding otherwise. We agree.

To recover on a cause of action for intentional interference with prospective contractual relations, the plaintiff must prove that the defendant intentionally interfered with the plaintiff's potential contractual relations for an improper purpose or by improper methods and that the interference caused injury to the plaintiff. Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990). If a defendant acts for more than one purpose, his improper purpose must predominate in order to create liability. Id. As an alternative to establishing an improper purpose, the plaintiff may prove that the defendant's method of interference was improper under the circumstances. Id.

1. Interference

First, Schulthess is not a stranger to any relationship that the Santoros would have with a prospective buyer because any littoral rights or privileges that the prospective buyer could expect would depend on Schulthess's rights as the pond owner.[6] Schulthess would play an essential role in the designation of any rights or privileges that future abutting owners have in the

[6] See White's Mill Colony, Inc., 363 S.C. at 130-35, 609 S.E.2d at 818-20 (holding that the owners of all or part of the bed of a private, manmade, nonnavigable pond have the right to exclude others from accessing or using the surface waters and noting that abutting landowners are free to bargain with the owner of the pond bed for the conveyance of an easement or some other right of access to the pond's waters).

pond. Therefore, it is doubtful that the actions of Schulthess could conceptually fall within the scope of the term "interference." Cf. Renden, Inc. v. Liberty Real Estate Ltd. P'ship III, 444 S.E.2d 814, 818 (Ga. App. 1994) (holding that to sustain a claim for intentional interference with business relations, the tortfeasor must be a "stranger" to the business relationship at issue).[7]

2. Prospective Contractual Relations

Schulthess argues that the Santoros failed to establish any prospective contractual relations because they did not present evidence of any specific prospective buyer who was "chilled" by Schulthess's letters or who would have purchased the Santoros' property but for Schulthess's claims. We agree.

This Court explained the phrase "prospective contractual relations" in United Educ. Distrib., LLC v. Educ. Testing Serv., 350 S.C. 7, 14-18, 564 S.E.2d 324, 328-30 (Ct. App. 2002). In that case, United Educational Distributors (UED), which sold study aids to military personnel, asserted an intentional interference claim against a nonprofit corporation that administered and prepared materials for college admission tests, Educational Testing Service (ETS). Id. at 10, 564 S.E.2d at 326. UED claimed that the response to their mail advertising diminished after ETS made a concerted effort to prevent UED from obtaining new business. Id. at 11-12, 564 S.E.2d at 326-27. The Court noted that (1) UED had not alleged that it had a reasonable probability of entering into a specific contract **but for** the interference with ETS; and (2) UED had no way of knowing who did not

[7] In Renden, the Georgia Court of Appeals explained that under appropriate circumstances, a party can be a nonsigner of a particular contract and yet not be a stranger to the contract itself or to the underlying business relationship. Id. The court concluded that the defendant in that case was not a stranger to the business relationship at issue, but rather, as a lessor, was an essential entity in a prospective lessor/lessee/sublessee relationship. Id. Here, Schulthess would be an essential player in the designation of any rights or privileges that abutting owners would have in the pond.

respond to their mail ads and why they did not respond. Id. at 18, 564 S.E.2d at 330 (emphasis added).

This Court stated that a cause of action for intentional interference with prospective contractual relations "generally stands following the loss of an identifiable contract or expectation." Id. at 14, 564 S.E.2d at 328. We held that the plaintiff must demonstrate that he had a truly prospective or potential contract with a third party; that the agreement was a close certainty; and that the contract was not speculative. Id. at 15, 17, 564 S.E.2d at 329-30.

Here, Mary Santoro testified that a few people looked at their property. However, she did not testify as to any specific prospective purchaser who would have made an offer on the property but for the existence of the claims that Schulthess asserted in his letters to the realtors. Rather, she spoke in generalities:

> Q. Did you ever have to reveal to anyone the contentions made by Mr. Schulthess?
>
> A. Yes. When Tatum showed the house on the second contract that I had a year later, they showed the property to a person who was interested in the property. When they look at our house, they always ask questions about the water, if they have water rights, all that type of thing, how much—what kind of fish are in it, what kind of boat they can put on it, and that kind of thing. So at that point, we had to tell them that we could not pass the water rights on, that they would have to get permission from the new owner.
>
> . . .
>
> Q. Did you ever have any buyer come forward and sign a contract and say they want to buy the property?

> A. No. Because when they asked the question about the lake and I can't give them water rights, people who want the lake are not going to make the contract. It discourages them because they want—they come to look at the house because it's on the lake, generally.

This testimony points to no identifiable prospective buyer who considered the perceived lack of water rights to be the sole deal-breaker, and, therefore, the Santoros presented insufficient evidence that an identifiable third party was influenced by Schulthess's communications with the Santoros' realtors. See Walker v. Sloan, 529 S.E.2d 236, 242 (N.C. Ct. App. 2000) (holding that to state a claim for wrongful interference with prospective advantage, the plaintiffs must allege facts to show that the defendants acted without justification in inducing a third party to refrain from entering into a contract with them and that the contract would have ensued but for the interference); cf. Bocook Outdoor Media, Inc. v. Summey Outdoor Adver., Inc., 294 S.C. 169, 178, 363 S.E.2d 390, 394 (Ct. App. 1987) (holding that to maintain a cause of action for interference with a contract that is terminable at will, the plaintiff must show that, but for the interference, the contractual relationship would have continued), overruled on other grounds by O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993).

Furthermore, the master concluded that it was "more likely than not" that the Santoros' property would have been sold within six months at the listing price had they not been required to disclose the claims in Schulthess's letters. The master based this finding, at least in part, on the testimony of the broker-in-charge at Century 21, Jeannine Keys. Ms. Keys stated that she hoped all of the properties her agency listed would sell within ten percent of the listing price and within the listing period. Mary Santoro also testified that she hoped to sell the property within six months to a year. The testimony of these witnesses does not reasonably support the master's finding that the property "more likely than not" would be sold within six months. Based on

the foregoing, the evidence of a prospective contractual relation was purely speculative and therefore did not support a claim for intentional interference with prospective contractual relations.

3. Improper Purpose or Method

Schulthess argues that he could not be found liable for intentional interference because he was merely asserting his property rights. We agree.

We find no evidence in the record to suggest any purpose or motive by Schulthess other than the pursuit of his own legal rights. "Generally, there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of [his or her] own contractual rights with a third party." Eldeco, Inc. v. Charleston County Sch. Dist., 372 S.C. 470, 482, 642 S.E.2d 726, 732 (2007) (quoting S. Contracting, Inc. v. H.C. Brown Constr. Co., 317 S.C. 95, 102, 450 S.E.2d 602, 606 (Ct. App. 1994)).

Here, Schulthess had a bona fide right to express concern about the statements in the realtor listings. There is insufficient evidence in the record that the abutting owners had any legal rights in the pond as opposed to revocable permission informally given by Schulthess and previous owners of the pond.[8] The Santoros introduced only a 1976 letter authored by the son of the developer's principal that described abutting owners' "rights to th[e] lake." There is no reliable evidence in the record to indicate that the abutting owners were in fact granted littoral rights in this private pond. Rather, the record indicates that the developer and subsequent pond owners, including Schulthess, had given merely revocable permission to the abutting owners and their guests to use the pond.

[8] See White's Mill Colony, Inc., 363 S.C. at 134-35, 609 S.E.2d at 820 (noting that owners of land abutting a private, manmade, nonnavigable pond are free to bargain with the owner of the pond bed for the conveyance of an easement or some other right of access to the pond's waters).

Moreover, even if some of the legal claims in Schulthess's letters were inaccurate, there is no evidence to support the master's implicit finding that Schulthess knew that the claims were inaccurate when he made them.[9] Additionally, the master made no conclusion that Schulthess should have known of any inaccuracies or should have consulted with legal counsel before sending the letters.

There is no evidence in the record to suggest any purpose or motive by Schulthess other than the pursuit of his own legal rights. Additionally, nothing in the record supports the master's conclusion that Schulthess used an improper method to pursue his rights.[10] The fact that the Santoros' realtor was obligated to reveal to prospective buyers the claims in Schulthess's letters did not make it improper for Schulthess to send the letters to the realtors.

Based on the foregoing, the master erred in concluding that Schulthess intentionally interfered with any potential contractual relations of the Santoros for an improper purpose or by an improper method. See Eldeco, Inc., 372 S.C. at 482, 642 S.E.2d at 732; see also Brown v. Stewart, 348 S.C.

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[9] The master found that Schulthess "intentionally sent false claims to the realtor, knowing that the claim [sic] would have to be revealed."

[10] See Love v. Gamble, 316 S.C. 203, 215, 448 S.E.2d 876, 883 (Ct. App. 1994) (explaining that methods of improper interference include: (1) those means that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common law rules; (2) violence; (3) threats or intimidation; (4) bribery; (5) unfounded litigation; (6) fraud, misrepresentation, or deceit; (7) defamation; (8) duress; (9) undue influence; (10) misuse of inside or confidential information; (11) breach of a fiduciary relationship; (12) violation of established standard of a trade or a profession; (13) unethical conduct; or (14) sharp dealing, overreaching, or unfair competition). While this list is not necessarily exhaustive, it provides a reliable standard of comparison for determining whether a method is improper.

33, 55-56, 557 S.E.2d 676, 688 (Ct. App. 2001) (affirming the circuit court's grant of a directed verdict motion on a claim for intentional interference with prospective contractual relations on the basis that the exercise of a legal right does not constitute an improper motive or improper purpose and stating that there was no evidence to suggest any purpose or motive by the defendant other than the protection of his rights); S. Contracting, Inc., 317 S.C. at 102, 450 S.E.2d at 606 (affirming summary judgment on a claim for intentional interference with prospective contractual relations on the ground that there was no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its contract rights with the codefendant).

4. Damages

Schulthess argues that there was insufficient evidence of damages resulting from his letters to the Santoros' realtors to sustain a claim for intentional interference with prospective contractual relations. We agree.

"The trial judge has considerable discretion regarding the amount of damages, both actual or punitive." Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 310-311, 594 S.E.2d 867, 873 (Ct. App. 2004). Because of this discretion, this Court's review on appeal is limited to the correction of errors of law. Id. This Court's task in reviewing a damages award is not to weigh the evidence, but to decide if any evidence exists to support the damages award. Id.

Here, the master found that Mary Santoro's testimony on the increase in mortgage rates sufficiently supported the Santoros' claim for damages:

> I find that the mortgage rate increase and damages flowing from that increase are not speculative. The Plaintiff testified that the mortgage interest rate was up [two percent] and that over the life of a loan for thirty (30) years the additional costs will be $78,000. Both of these are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be

> questioned. See S. C. R. Evid. 201 C. [sic] I find that the damages from the intentional interference which [sic] prospective contracted [sic] relations are $78,000.00.

Mary Santoro's testimony regarding the rise in interest rates is insufficient evidence of damages because it is based on the speculative assumptions that (1) the Santoros could have found a suitable new home immediately after selling their property in Country Oaks; (2) they could have immediately obtained a suitable mortgage loan; and (3) Mary Santoro had sufficient personal knowledge of the interest rate that an unknown lender would charge them based on their particular circumstances. Therefore, there is insufficient evidence to support the damages award on the intentional interference claim. See Whisenant v. James Island Corp., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981) (holding that in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount with reasonable certainty or accuracy and that neither the existence, causation, nor amount of damages can be left to conjecture, guess, or speculation).

II. Trespass

Schulthess argues that the evidence does not support the Santoros' trespass cause of action and that the master erred in awarding damages and ordering an injunction for this claim. We agree.

For a trespass action to lie, the act must be affirmative, the invasion of the land must be intentional, and the claimed harm must be the direct result of that invasion. Hawkins v. City of Greenville, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004).

Here, the Santoros claim that Schulthess's actions of temporarily stopping up the pond's spillway and subsequently permanently repairing the spillway resulted in an invasion of their land causing permanent damage. We find insufficient evidence in the record to support this claim. The Santoros

presented no reliable evidence of permanent damage **directly resulting** from the three days of flooding caused by the placement of the temporary stopper in the spillway. As to Schulthess's permanent repair of the spillway, there was insufficient evidence of a resulting invasion of the Santoros' land as is required to grant relief for trespass.

Regarding the placement of the temporary stopper in the spillway, counsel for Schulthess conceded that the stopper temporarily raised the spillway from its original level for the three days that it was in place. And Schulthess does not claim that his pond bed extends past the water level that would result from the proper functioning of the spillway at its original level. Rather, he argues that the boundary between his pond bed and lot 2 is North Lake at "full pool," which he characterizes as the point at which the water begins to fall over a properly functioning spillway.[11] Hence, Schulthess's concession that the temporary stopper raised the spillway beyond its original level compels the conclusion that the resulting water level extended past the original pond bed to invade lot 2 for a three-day period.

However, the master's award of injunctive relief as well as $25,000 in damages for this fleeting trespass is not supported by the evidence. The Santoros failed to present reliable evidence that any permanent damage directly resulted from the three days of flooding. Although counsel for Schulthess questioned Mary Santoro about the allegation in her complaint that the value of her land had diminished, she did not give any opinion as to any amount of diminution in the property's value. In fact, she indicated that there was no significant change in the value of her land from 2002 to the date of trial. Further, the evidence shows that the Santoros contributed to the erosion of which they complained by neglecting to control the effect of rainfall on the downward slope of their land and by cutting down several trees and burning vegetation. Therefore, we find no evidence of permanent damage directly resulting from Schulthess's temporary trespass.

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[11] The Santoros' deed to lot 2 corroborates Schulthess's assertion that the northeast boundary for lot 2 is North Lake itself. Lot 2 does not have a ten-foot buffer separating it from the pond as do lots 1 and 3.

As to Schulthess's permanent repair of the spillway, we find no resulting invasion of the Santoros' land, which is required to grant relief for trespass. See Hawkins, 358 S.C. at 297, 594 S.E.2d at 566 (requiring an invasion of land to establish trespass). The probative value of the Santoros' evidence of the boundary between their property and the pond is questionable, especially in light of the discrepancies between the plats commissioned by the Santoros and the original subdivision plat.[12] Further, Mary Santoro conceded that the spillway was leaking when she and her husband purchased their property and that the resulting level of the pond was below its original level until Schulthess purchased the pond and began working on the spillway. Moreover, her claim that Schulthess raised the level of the spillway **above its original level** when he made **permanent** repairs was not supported by probative evidence. Therefore, we find that the Santoros did not carry their burden of showing that the water level resulting from the spillway's repair invaded their land.

In any event, the evidence of damages that the Santoros claim resulted from the spillway's repair was not reliable because the contractors from whom Mary Santoro obtained supply cost estimates did not view the property in question, and they were not available at trial for questioning. See Whisenant, 277 S.C. at 13, 281 S.E.2d at 796 (holding that in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount with reasonable certainty or accuracy and that neither the existence, causation, nor amount of damages can be left to conjecture, guess, or speculation).

Based on the foregoing, the master erred in awarding injunctive relief and damages to the Santoros on their trespass claim.

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[12] As there is no evidence in the record to the contrary, we presume that the original subdivision plat was prepared when the pond's spillway was functioning properly and the water level was at "full pool."

III. Restrictive Covenants

As to the Santoros' cause of action to enforce their subdivision's restrictive covenants, Schulthess argues that his triangular lot is not subject to the restrictive covenants, which prohibits house trailers and other temporary structures. We agree.

The master conceded that the subdivision's restrictive covenants as originally filed did not apply to Schulthess's triangular lot because it was not one of the specifically enumerated lots listed as being covered by the covenants. However, the master concluded that the language in a deed in Schulthess's chain of title made his triangular lot subject to the restrictive covenants. Schulthess asserts that the deed's language does not make his lot subject to the restrictive covenants. Thus, we must determine the meaning of the language in question.

> In construing a deed, "the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." "The intention of the grantor must be found within the four corners of the deed."

Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 582-83 (2009) (internal citations omitted). As to restrictive covenants, the paramount rule of construction is to give effect to the intent of the parties as determined from the whole document. McClellanville, 345 S.C. at 622, 550 S.E.2d at 302.

> The court may not limit a restriction in a deed, **nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its**

> **terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written**. It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and **all doubts resolved in favor of free use of the property,** subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property. A **restriction on the use of property must be created in express terms or by plain and unmistakable implication,** and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.

Id. (emphasis in original) (quoting Taylor v. Lindsey, 332 S.C. 1, 4-5, 498 S.E.2d 862, 863-64 (1998)).

The determination of the grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court. Hunt v. Forestry Comm'n, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct. App. 2004). Likewise, the determination of whether the language of a restriction in a deed is ambiguous is a question of law.[13] See McClellanville, 345 S.C. at 623, 550 S.E.2d at 302-03 (applying rules of contract construction to a restrictive covenant in a deed). This Court reviews questions of law de novo. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court. Hunt, 358 S.C. at 569, 595 S.E.2d at 848-49.

[13] "A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." McClellanville, 345 S.C. at 623, 550 S.E.2d at 302.

If this Court decides that the language in a deed is ambiguous, the determination of the grantor's intent then becomes a question of fact. See McClellanville, 345 S.C. at 623, 550 S.E.2d at 303 (applying rules of contract construction to a restrictive covenant in a deed). As to this claim to enforce the subdivision's restrictive covenants, we may find facts in accordance with our own view of the preponderance of the evidence. See McClellanville, 345 S.C. at 622, 550 S.E.2d at 302 (holding that an action to enforce restrictive covenants by injunction is in equity); Cedar Cove, 368 S.C. at 258, 628 S.E.2d at 286 ("Because the [plaintiff's] action is one to enforce restrictive covenants by injunction, it is in equity, and we may find facts in accordance with our own view of the evidence.") (citation omitted). Regardless, whether we view the determination of the grantor's intent as a question of law or as a question of fact, we conclude that the grantor did not intend to subject the triangular lot to the subdivision's restrictive covenants.

The deed in question evidences four separate conveyances of property to W.M. Harvey, IV. A clause immediately following the **third** listed property description (for Lot 23 in Block "S" in the subdivision) states,

> **This conveyance** is made subject to restrictive covenants and conditions as are contained in an Agreement dated April 22, 1974 of record in the office of the REM for Orangeburg County in Deed Book 395, at Page 573.
>
> TMS# 0137-00-10-016

(emphasis added). In stark contrast, the other three property descriptions in the deed, including the description of Schulthess's triangular lot, did not have any similar language following them; each description was merely followed by a tax map number.

Contrary to the master's implicit interpretation of the deed, the plain meaning of the term "conveyance"—the way it is most commonly used and

understood— is the actual **transfer** of the property itself rather than the deed evidencing the transfer. See Black's Law Dictionary 357-58 (8th ed. 2004) (defining "conveyance" in the following **descending** order: "1. The voluntary transfer of a right or of property . . . 2. The transfer of a property right that does not pass by delivery of a thing or merely by agreement. 3. The transfer of an interest in real property from one living person to another, by means of an instrument such as a deed. 4. The document ([usually] a deed) by which such a transfer occurs."). Hence, a deed evidencing the transfer of multiple parcels does not constitute a single "conveyance" as that term is commonly used and understood.

Therefore, the plain meaning of the deed's language regarding restrictive covenants is that the transfer of the property described in the immediately preceding paragraph (i.e., "Lot #23, Block "S", on a plat of Oakmont Subdivision"), rather than all four parcels described in the deed, was subject to the restrictive covenants. If the grantor had intended to make the remaining parcels subject to the restrictive covenants, the plural form of the term "conveyance" would have been used and either the restrictive language would have followed the deed's final property description or similar restrictive language would have immediately followed the property description of each parcel so that the application of the restrictive covenants to all four parcels would have been unmistakable. See McClellanville, 345 S.C. at 622, 550 S.E.2d at 302 (requiring restrictions to be created in express terms or **by unmistakable implication** and doubts to be resolved in favor of free use of property) (emphasis added); Windham, 381 S.C. at 201, 672 S.E.2d at 582-83 (requiring determination of grantor's intent in deed from whole document).

Our conclusion that the grantor did not intend to subject Schulthess's triangular lot to the restrictive covenants is consistent with the geography of the various parcels described in the deed. Only one of the four property descriptions was for a typical residential subdivision lot (Lot #23, Block "S"), and that description logically preceded the deed's language regarding restrictive covenants. In contrast, two of the deed's four property descriptions

were for parcels that were not part of the subdivision—a parcel on Wannamaker Street in the City of Orangeburg and Schulthess's triangular parcel. Moreover, another property description was for North Lake itself. Clearly, the geography of the North Lake parcel and the parcels located outside the subdivision make it highly improbable that the grantor intended to subject them to the subdivision's restrictive covenants.

In sum, the language of the deed in question makes only one of its four conveyances subject to the subdivision's restrictive covenants—that conveyance immediately preceding the language concerning the restrictive covenants (Lot 23 of Block "S" in Oakmont). Therefore, the master erred in concluding that the restrictive covenants applied to Schulthess's triangular parcel and in requiring him to remove his motor home from the property.

CONCLUSION

Accordingly, the master's order is

REVERSED.

SHORT and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gerald Bass, Appellant,

v.

Gopal, Inc. and Super 8 Motels, Inc., Respondents.

Appeal From Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 4576
Heard April 21, 2009 – Filed July 1, 2009

AFFIRMED

Glenn Walters and R. Bentz Kirby, of Orangeburg, for Appellant.

Andrew F. Lindemann, of Columbia, for Respondents Gopal, Inc. and Super 8 Motels, Inc.; Edward R. Spalty and Darren K. Sharp, of Kansas City, Missouri, for Respondent Super 8 Motels, Inc.

GEATHERS, J.: Appellant Gerald Bass brought this negligence action against Respondents Gopal, Inc. (Gopal) and Super 8 Motels, Inc. (SMI). The circuit court issued an order granting summary judgment to Gopal and SMI, and Bass seeks review of that order. We affirm.

FACTS/PROCEDURAL HISTORY

In summer 1999, Bass and several co-workers began staying at a Super 8 motel in Orangeburg while they were in the area performing refrigeration work at a local Bi-Lo grocery store. Almost three months after Bass began staying at the motel, a stranger showed up at Bass' room on the night of September 28, 1999, and knocked on the door at approximately 10:00 p.m. Neither Bass nor his roommate, Wayne Kinlaw, answered the door. A few minutes later, there was a second knock. Bass and Kinlaw looked through the window beside the door. They saw a man whom Bass recognized as the man who stood near him at a convenience store earlier in the evening. They asked him what he wanted, and he began mumbling something unintelligible. Bass and Kinlaw did not open the door. Approximately ten to fifteen minutes later, there was a third knock. Kinlaw then opened the door, and both Kinlaw and Bass stepped outside. Kinlaw went back into the room while Bass stayed outside and asked the stranger to stop knocking on their door. The stranger demanded money from Bass; however, Bass refused. The stranger then shot Bass in his leg with a small-caliber weapon.

Bass filed this negligence action against Gopal, the motel's owner, and SMI, the franchisor. In his complaint, Bass asserted that Gopal and SMI were negligent in failing to provide adequate security at the motel. Both Gopal and SMI filed motions for summary judgment.

In opposition to the summary judgment motions, Bass submitted the affidavit of his expert witness, Harold Gillens. Gillens, who was in the business of examining buildings to assess security needs, stated that the motel where Bass was shot was located in a "high crime" area and the motel's

security was inadequate. However, the statistics on which Gillens relied related to the time period between the years 2000 and 2004, which post-dated Bass' injury at the motel.

Gillens also stated in his affidavit he obtained a CRIMECAST Site Report, which measures the risk of criminal activity at a particular site and rates the site in comparison to a national average, a state average, and a county average for various categories of crimes. This report is attached to Gillens' preliminary report. Gillens noted that the CRIMECAST report shows the site of the motel had a predicted crime risk of 3.69 times the national average for the year 1999. However, the predicted crime risk represents the overall risk of crime; there are other indicators for the risk of crimes against persons (versus crimes against property) and for the risk of specific crimes, for example, robbery. Notably, the motel site rates below the county average for aggravated assault and for all crimes against persons for 1999.

In support of their summary judgment motions, Gopal and SMI presented testimony from the depositions of Bass, Gillens, and Gopal's principal, Hitesh Patel. Patel testified that Gopal had owned the motel since January 1998 and he was not aware of any criminal activity at the motel prior to the night Bass was shot. He also testified that he was not aware of any criminal complaints filed by anyone in the general area. Additionally, Bass testified that he had been staying at the motel for a few months prior to the shooting and he had not noticed any criminal activity at the motel during this time period.

Gillens admitted that if no significant criminal activity had occurred at the motel for a period of time prior to Bass' shooting, then the motel's management would have no reason to expect the shooting to occur or to spend money to enhance security. Gillens also admitted that (1) the motel's perimeter lighting was appropriate; (2) the motel's room doors were appropriate and met statutory requirements;[1] (3) Bass would have stayed safe

[1] See S.C. Code Ann. § 45-1-90(A) (Supp. 2008) (requiring rooms to be

in his motel room; (4) he should have stayed in his motel room; and (5) he should have telephoned for assistance.

On the day of the motions hearing, SMI filed an affidavit of its Senior Director of Franchise Administration setting forth SMI's lack of involvement in the day-to-day operations of Gopal's motel.[2] Bass submitted a motion to strike the affidavit on the ground it was not timely filed or served. The circuit court denied the motion to strike and granted the motions for summary judgment. The circuit court concluded that neither Gopal nor SMI had a duty to protect Bass because they did not know or have reason to know the shooting would occur. The circuit court also concluded that Bass' negligence exceeded any negligence on the part of Gopal or SMI. Additionally, the circuit court found there was no evidence SMI owned or operated the motel and therefore SMI could not be held legally responsible for the motel's operation on the date of the shooting.

Bass later filed a motion to alter or amend the judgment pursuant to Rule 59, SCRCP, on the ground he had newly-obtained evidence of local crime statistics for a time period preceding the date of the shooting. Attached to the motion was the affidavit of Bass' new expert witness, Danny McDaniel. McDaniel, a private investigator, stated he attempted to obtain crime statistics for the City of Orangeburg for the two years prior to the date of Bass' injury. He further stated that the City had lost their records for crime statistics prior to the year 2000 due to a change in software vendors. McDaniel obtained from the South Carolina Law Enforcement Division crime statistics for Orangeburg County for the two years prior to the shooting, but he was unable to present statistics for the specific area where the motel was located. The circuit court denied Bass' Rule 59 motion. This appeal followed.

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equipped with a lock system and a viewing device such as a peephole or side window).

[2] SMI served the affidavit on counsel for Bass a few days before the motions hearing.

ISSUES ON APPEAL

1. Did the circuit court err in ruling that Gopal and SMI owed no duty of care to Bass?
2. Did the circuit court err in concluding as a matter of law that Bass' negligence exceeded any negligence on the part of Gopal or SMI?
3. Did the circuit court err in finding that there was no evidence that SMI owned or operated the motel in question?

STANDARD OF REVIEW

On appeal from the grant of a summary judgment motion, this Court applies the same standard as that required for the circuit court under Rule 56(c), SCRCP. Brockbank v. Best Capital Corp., 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Adamson v. Richland County Sch. Dist. One, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998). To determine if any genuine issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

LAW/ANALYSIS

I. Duty of care

Bass argues that the circuit court erred in concluding Gopal and SMI owed no duty to protect Bass once he left his motel room to confront the assailant. We disagree.

An innkeeper's acts or omissions may be negligent if the innkeeper realized or should have realized its conduct involved unreasonable risks of harm through the conduct of a third person, even though such conduct of the

third person is criminal. Daniel v. Days Inn of Am., Inc., 292 S.C. 291, 296, 356 S.E.2d 129, 132 (Ct. App. 1987) (citing Courtney v. Remler, 566 F. Supp. 1225, 1232 (D.S.C. 1983)). "[A]n innkeeper is under a duty to its guests to take reasonable action to protect them against unreasonable risk of physical harm." Allen v. Greenville Hotel Partners, Inc., 405 F. Supp. 2d 653, 659 (D.S.C. 2005) (quoting Courtney, 566 F. Supp. at 1231).

While an innkeeper is not the insurer of safety for his guests, he owes to his guests the duty of exercising reasonable care to maintain in a reasonably safe condition those parts of his premises which a guest may be expected to use. Courtney, 566 F. Supp. at 1233 (applying South Carolina law). In the final analysis, the issue is whether, under all the circumstances, the innkeeper provided for its guests reasonable protection against injuries from criminal acts. Id.

The analysis in the Courtney opinion is instructive. In this case, the United States District Court for the District of South Carolina applied South Carolina law to a negligence claim against an innkeeper and analyzed the amount of protection an innkeeper must afford its guests in the context of the amount and types of criminal activity that had previously occurred on the premises. The court noted that although criminal activity on the defendant's premises was foreseeable, only minor vandalism had occurred in the past, and there had been no criminal acts committed against a person. The court stated "[t]his fact is important when considering the amount of protection the [innkeeper] must afford its guests." Id.

Bass contends that the circuit court should not have relied on the analysis in Miletic v. Wal-Mart Stores, Inc., 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000) in concluding that Gopal and SMI owed no duty to protect Bass once he left his motel room. In Miletic, this Court held that a merchant is not charged with the duty of protecting its customer against criminal acts of third parties when it did not know or have reason to know such acts were occurring or about to occur. Id. at 330, 529 S.E.2d at 69. Bass argues a different analysis applies to innkeepers.

While Bass correctly notes the distinction between innkeepers and merchants in general, the answer to whether a defendant has breached any duty remains the same under either analysis. Therefore, the circuit court's reliance on Miletic was harmless.[3] Both analyses depend on the defendants' knowledge of past or impending crimes on the premises; the innkeeper analysis uses this factor to determine the appropriate standard of care; and the merchant analysis uses this factor to determine whether there exists any duty of care in the first instance.[4]

Here, under either analysis, Gopal and SMI did not breach a duty of care to Bass. Bass failed to present any probative evidence of prior criminal activity at the motel or the surrounding area.[5] Further, although Gillens

[3] See Jensen v. Conrad, 292 S.C. 169, 172, 355 S.E.2d 291, 293 (Ct. App. 1987) (holding that a judgment will not be reversed for insubstantial errors not affecting the result).

[4] South Carolina case law imposes a duty on innkeepers to provide to its guests reasonable protection against injuries from criminal acts, and the actual amount of protection required depends on amount and types of criminal activity that have previously occurred on the premises. See Daniel, 292 S.C. at 296, 356 S.E.2d at 132 (holding that an innkeeper's acts or omissions may be negligent if the innkeeper realized or should have realized that its conduct involved unreasonable risks of harm through the conduct of a third person, even though such conduct of the third person was criminal); Courtney, 566 F. Supp. at 1233 (applying South Carolina law and analyzing the amount of protection an innkeeper must afford its guests in the context of the amount and types of criminal activity that had previously occurred on the premises). As to merchants in general, the duty to protect customers against criminal acts of third parties is qualified by actual or constructive knowledge that a crime is occurring or is about to occur. See Miletic, 339 S.C. at 330, 529 S.E.2d at 69.

[5] Bass also asserts the circuit court erred in denying his motion to alter or amend because his inability to obtain from the City of Orangeburg crime statistics pre-dating his injury injects into his case a novel issue precluding

stated that a security survey and a crime analysis should have been conducted to determine the vulnerability of the premises, there is no South Carolina law that imposes such a duty on business owners. Gillens admitted such an analysis is not routinely performed by hotels and motels. Therefore, we conclude that Patel should not have been expected to know about the contents of the CRIMECAST report.

Moreover, Gillens admitted that if no significant criminal activity had occurred at the motel for a period of time prior to Bass' shooting, then the motel's management would have no reason to expect the shooting to occur or to spend money to enhance security. Gillens also admitted Bass would have stayed safe in his motel room.

Based on the foregoing, there was no **genuine** issue of material fact preventing summary judgment. All of the evidence with any probative value indicates that the security measures that Gopal already had in place were adequate.[6] Bass' own expert witness admitted that the motel's perimeter

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summary judgment. However, even if the Court considers the new evidence presented in Bass' motion to alter or amend (the affidavit of Bass' second expert witness), that new evidence is not probative of the crime history of the specific location of the motel. The affidavit presents county statistics that do not raise a fact issue with respect to the specific location of the motel, especially when considered in light of Hitesh Patel's testimony that he was not aware of any criminal activity at the motel prior to the night that Bass was shot.

[6] In Hancock v. Mid-South Mgmt., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), our Supreme Court stated that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. However, in footnote 3 of the opinion, the Court was careful to point out that its pronouncement concerning a mere scintilla of evidence was not necessary for its determination of the outcome in the Hancock case. In any event, we must assume any evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the

lighting was appropriate; the motel's room doors were appropriate and met statutory requirements; and Bass would have stayed safe in his motel room. Under all the circumstances, Gopal provided reasonable protection for its guests against injuries from criminal acts.

II. Comparative Negligence

Bass asserts that the circuit court erred in concluding, as a matter of law, that Bass' negligence exceeded any negligence on the part of Gopal or SMI. We disagree.

If the sole reasonable inference that may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent, the circuit court may determine judgment as a matter of law in favor of the defendant. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000).

Here, Bass' own expert witness admitted that Bass would have stayed safe in his room and he should have stayed in his room and telephoned for assistance. Bass' expert also admitted the motel's lighting and room doors were appropriate and the doors met statutory requirements. In contrast, there was no probative evidence Gopal or SMI breached any duty of care to Bass. Based on the foregoing, the only reasonable inference that may be drawn from the evidence is that Bass' negligence in stepping outside of his room and confronting the assailant exceeded any possible innkeeper negligence. Therefore, Bass' comparative negligence was a proper ground on which to grant summary judgment to Gopal and SMI.

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prerequisite of being probative. See McDowell v. Stilley Plywood Co., 210 S.C. 173, 179, 41 S.E.2d 872, 874-75 (1947) (holding that although there was a scintilla of testimony that could be used to support the claimants' position, when the entire testimony of the witnesses was viewed as a whole, it was obvious the testimony in support of claimants' position rested on speculation and thus had no probative value). In the instant case, we cannot find even a scintilla of probative evidence to withstand Gopal's and SMI's summary judgment motions.

III. SMI's Liability

Bass contends that the circuit court erred in ruling that there was no evidence that SMI operated the motel. We disagree.

For the Court to find that SMI operated the motel, there must be evidence it asserted sufficient control over the motel's daily operations. Cf. Allen v. Greenville Hotel Partners, Inc., 409 F. Supp. 2d 672, 679 (D.S.C. 2006) (stating that in determining whether a franchisee could be an agent of the franchisor for the purpose of a negligence action arising from a hotel fire, the court must consider whether the franchisor exerted sufficient control over the daily operations or hotel security).

Bass argues that the following evidence shows that SMI operated the motel: (1) SMI inspects the motel every three months to determine how the property is run; (2) during the inspection, SMI checks the components of nine rooms, including the bed, television, lock systems, peep holes, and tubs; (3) SMI provides a checklist of changes to be made; and (4) SMI requires owners to attend training. However, these facts do not establish SMI asserted sufficient control over the motel's daily operations for a reasonable fact finder to say SMI operated the motel. Cf. Allen, 409 F. Supp. 2d at 677 (stating that the clear trend in the case law in other jurisdictions is that the quality standards, operational standards, and inspection rights contained in a franchise agreement do not establish a franchisor's control or right of control over the franchisee sufficient to ground a claim for vicarious liability as a general matter).

A comparison of the relationship between SMI and Gopal to the franchise relationship in Allen is instructive. In Allen, the franchise agreement and the franchisor's Rules and Regulations set forth that the franchisees (1) owned the building, land, and hotel equipment; (2) held the operating licenses and permits; (3) hired, fired, supervised, and disciplined the franchisee's employees; (4) determined employee wages and room rates;

(5) provided daily training for employees; and (6) provided insurance for the hotel. Allen, 409 F. Supp. 2d at 677. The franchisor's Rules and Regulations required the franchisees to have life safety systems and an emergency evacuation plan. Id. The Rules and Regulations also recommended an emergency power generator and sprinkler system. Id.

The court in Allen noted that neither the franchise agreement nor the franchisor's Rules and Regulations established the franchisor operated the hotel or controlled its life safety systems. The court found that the **franchisees** operated the hotel **under** the franchisor's Rules and Regulations. Id. (emphasis added). The court also found the franchisor did not control the hotel's daily operations or hotel security and life safety systems and through the franchise agreement and the Rules and Regulations, the franchisor merely maintained uniform service and public good will. Allen, 409 F. Supp. 2d at 679. The court thus concluded the franchisor could not be liable on an agency theory. Id.

Here, according to the testimony of Hitesh Patel, Gopal entered into a franchise agreement with SMI, and the agreement required Gopal to (1) handle the daily management of the motel's operations; (2) obtain liability insurance; (3) allow the franchisor to inspect the premises every three months; (4) attend a training seminar; and (5) pay to the franchisor eight percent of the profits from the motel's operation. Bass presented no probative evidence showing SMI controlled the motel's daily operations or its security. Rather, the evidence shows SMI set in place certain standards for Gopal to follow to protect SMI's good will and that Gopal controlled the daily operation of the motel to implement SMI's standards.

Bass also argues that the circuit court should have stricken the affidavit of SMI's Senior Director of Franchise Administration due to its late service and filing. The affidavit set forth SMI's lack of involvement in the day-to-day operations of Gopal's motel. Assuming, arguendo, that the circuit court should not have considered the affidavit,[7] any such error does not affect the

[7] Bass' counsel does not cite any authority in his brief to support the argument

result of this case and therefore is not reversible. See Jensen v. Conrad, 292 S.C. 169, 172, 355 S.E.2d 291, 293 (Ct. App. 1987) (holding that a judgment will not be reversed for insubstantial errors not affecting the result). Patel testified that he handled the motel's daily operations, and Bass presented no probative evidence in opposition. Therefore, there was no genuine fact issue as to the operation of the motel that would prevent summary judgment in SMI's favor. See Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994) (holding that an adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial).

CONCLUSION

Accordingly, the circuit court's order granting summary judgment to Gopal and SMI is

AFFIRMED.

SHORT and THOMAS, JJ., concur.

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that the affidavit should have been stricken. Therefore, he has actually abandoned this argument. See Rule 208(b)(1)(D), SCACR (requiring the citation of authority in the argument portion of an appellant's brief); Hunt v. Forestry Comm'n, 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) (holding that issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal).

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Cole Vision Corporation and Sears Roebuck & Company, Inc. — Plaintiffs,

Of Whom Cole Vision Corporation is the — Respondent,

v.

Steven C. Hobbs, O.O. and NCMIC Insurance Company, — Defendants,

Of Whom Steven C. Hobbs is the — Appellant.

Appeal From Sumter County
Clifton Newman, Circuit Court Judge

Opinion No. 4578
Submitted May 1, 2009 – Filed July 1, 2009

REVERSED

Hardwick Stuart, Jr., of Columbia, for Appellant.

E. Raymond Moore, III, and Adam J. Neil, both of Columbia, for Respondent.

LOCKEMY, J.: Dr. Steven C. Hobbs argues the trial court erred in granting Cole Vision Corporation's (Cole) Rule 12(b)(6), SCRCP, motion to dismiss. Specifically, Hobbs maintains he pled facts sufficient to constitute a negligence cause of action, while the trial court found spoliation of evidence an evidentiary matter which cannot serve as the basis for an independent cause of action under South Carolina law. We reverse.

FACTS

Hobbs is a licensed optometrist who subleased a space from Cole. Cole leased the space from Sears Roebuck and Company (Sears). Pursuant to the sublease between Cole and Hobbs, Hobbs agreed to indemnify Cole and Sears for any liability they might incur on account of his negligence. Additionally, Hobbs procured insurance for Cole and Sears' benefit pursuant to the sublease from an insurance company both parties refer to as NCMIC.

While Hobbs was operating his optometry business out of his subleased space from Cole, he treated Mary Lewis as a patient in 2002. After Hobbs treated her she was later diagnosed with glaucoma by another doctor. In 2004, Mary Lewis and her husband, John, sued Cole, Sears, and Hobbs alleging Hobbs was negligent in failing to properly diagnose and treat her. Mary Lewis maintained the glaucoma went unnoticed and untreated due to Hobbs's negligent treatment. She is now blind in both eyes, allegedly because of the undiagnosed glaucoma.

Pursuant to the sublease's indemnification provision, Cole and Sears maintained they were entitled to insurance coverage from NCMIC and requested NCMIC provide their defense in the Lewis suit. When NCMIC refused to defend and indemnify Cole and Sears, they brought a declaratory judgment action against Hobbs and NCMIC. In their declaratory judgment action against Hobbs and NCMIC, Cole and Sears asked the trial court to find that Hobbs contractually agreed to hold harmless and to indemnify Cole and Sears in the event they were sued. Further, Cole and Sears asked the trial court to find that NCMIC was obligated to provide coverage and indemnify Cole and Sears under its professional liability coverage with Hobbs. Additionally, Cole and Sears requested attorney's fees and costs.

In his answer and counterclaim, Hobbs asserted Cole had a duty to preserve patient history profiles kept in its custody. Hobbs alleged Cole lost Mary Lewis's patient history profile and breached a duty to him to preserve this evidence. Hobbs requested the trial court declare Cole liable for any liability Hobbs may have to the Lewises and Sears. Furthermore, Hobbs asked the trial court to find he had no duty to Cole and that Cole is obligated to reimburse him for attorney's fees and costs.

Cole filed a motion to dismiss Hobbs's counterclaim pursuant to Rule 12(b)(6), SCRCP, on the ground that South Carolina law does not recognize a cause of action for spoliation of evidence. The trial court granted Cole's motion to dismiss finding the alleged spoliation of evidence was an evidentiary matter for the trial court and could not serve as a basis for an independent cause of action under South Carolina law. Hobbs appeals the trial court's finding.

STANDARD OF REVIEW

"Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action." Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The appellate court applies the same standard of review as the trial court in reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the

complaint." Id. A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. Id. "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Id. The court should not dismiss a complaint merely because the court doubts the plaintiff will prevail in the action. Id.

LAW/ANALYSIS

I. Spoliation of Evidence

Hobbs argues he sufficiently pled a negligence cause of action rather than a spoliation of evidence cause of action in his answer and counterclaim. Accordingly, he maintains the trial court erred in dismissing his counterclaim pursuant to Rule 12(b)(6), SCRCP.[1] We agree.

In his counterclaim, Hobbs alleged Cole required he turn over his patients' profiles and records for Cole to maintain custody and control. Additionally, Hobbs alleged Cole had a duty to preserve these profiles and records based on this requirement and assumption of control. Hobbs alleged Cole breached its duty by losing Mary Lewis's patient profile, a key piece of evidence with regard to her examination and his liability. As a result of this breach, Hobbs contends his ability to defend Mary Lewis's claim has been impaired, and he has incurred defense expenses. Consequently, Hobbs argues his counterclaim alleged facts sufficient to constitute a negligence cause of action against Cole. Cole argues Hobbs is attempting to circumvent South

[1] Cole asserts Hobbs's negligence claim was not addressed in the trial court's order granting the motion to dismiss and because Hobbs did not file a Rule 59(e) motion, the issue of whether South Carolina would allow recovery for "negligent spoliation" is not preserved for review. Hobbs contends the issue was raised to the trial judge and ruled upon at the motion hearing. At the hearing, the trial judge found: "[t]hough it may have some reference to negligence, I believe it is an evidentiary matter that is dealt with through other means and it does not constitute an independent cause of action." We find this is a sufficient ruling on the negligence issue, and therefore, the issue is preserved for our review.

Carolina's lack of recognition of a spoliation of evidence cause of action by alleging the spoliation was done negligently.

"In a negligence action, a plaintiff must show that the (1) defendant owed a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages." Dorrell v. S.C. Dept. of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004). "The existence of a duty owed is a question of law for the courts." Washington v. Lexington County Jail, 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct. App. 1999).

We find Hobbs pled facts sufficient to overcome a Rule 12(b)(6), SCRCP, dismissal based on a negligence cause of action. In his answer and counterclaim, Hobbs argued Cole lost Mary Lewis's patient history profile and "breached its duty to [Hobbs] to preserve this evidence and Cole's spoliation of this evidence is negligence." We believe Hobbs should have the opportunity to prove Cole assumed a duty to maintain patient records on Hobbs's behalf through either contract, relationship, or some other special circumstance. Hubbard v. Taylor, 339 S.C. 582, 589, 529 S.E.2d 549, 552 (Ct. App. 2000) ("[A]n affirmative legal duty to act may be created by statute, contract, relationship, status, property interest, or some other special circumstance."). Furthermore, we find Hobbs sufficiently pled that Cole breached its duty to Hobbs by losing Mary Lewis's patient history profile which affected his ability to defend himself and subsequently caused him to suffer damages. Accordingly, we find that viewed in the light most favorable to Hobbs, the facts alleged in his counterclaim constitute a negligence cause of action, and we reverse the trial court's dismissal of Hobbs's counterclaim pursuant to Rule 12(b)(6), SCRCP.

II. Tort of Negligent Spoliation and Novelty Issues

Based upon our finding as to the negligence issue, we need not address the remaining issues on appeal. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

We find Hobbs pled facts sufficient to constitute a negligence cause of action and thus the trial court's dismissal of Hobbs's counterclaim pursuant to Rule 12(b)(6), SCRCP is

REVERSED.

SHORT and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Stacy Walter Howard, Appellant.

Appeal From Georgetown County
J. Michael Baxley, Circuit Court Judge

Opinion No. 4579
Heard March 4, 2009 – Filed July 1, 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, Asst. Deputy Atty. Gen. Christina J. Catoe, all of Columbia; and Solicitor John G. Hembree, of Conway, for Respondent.

LOCKEMY, J.: Stacy Howard appeals his conviction for assault and battery of a high and aggravated nature (ABHAN). Howard argues the trial court erred in: 1) declining to grant his motion for a mistrial; 2) refusing to recuse himself and interfering with Howard's presentation of a defense by wrongfully removing relevant testimony; 3) admitting irrelevant evidence; 4) admitting Howard's prior convictions into evidence; and 5) holding a probation revocation hearing and revoking Howard's probation without a warrant. We affirm in part, reverse in part, and remand.

FACTS

A Georgetown County grand jury indicted Stacy Howard for ABHAN. During trial, Howard's former girlfriend testified he struck her during an argument in his truck. The victim's nose was broken in three places, and she underwent surgery for her injury. The victim initially lied to the hospital staff and to the police about how she was injured. She told the emergency room doctor she hit the dashboard when Howard slammed on the brakes. Howard was arrested after the victim felt safe enough to tell the police what really occurred the night of the incident. She testified Howard struck her twice with his fists. Howard testified the victim was out of control, and he unintentionally hit her while attempting to get a clear view of the road. He stated he was unsure whether his blow broke her nose or whether she hit the dashboard. Howard testified he and the victim had been drinking the day of the incident.

Howard was impeached with three prior ABHAN convictions. The trial court ruled Howard's convictions for ABHAN from November 1995, April 2004, and December 2004 were within the ten year rule and the probative value of their admission outweighed the prejudicial effect to Howard. Howard objected to the admission of his prior convictions on the ground the prejudicial nature of the convictions outweighed the probative value.

At the conclusion of trial, the jury found Howard guilty of ABHAN and the trial court sentenced Howard to eight years imprisonment. The trial court also found Howard's ABHAN conviction violated the terms of two probationary sentences. Howard consented to have the two probation revocation hearings held at the same time immediately following the ABHAN sentencing. There, the trial court revoked Howard's first probation case consecutively for eight years and his second probation case consecutively for four and a half years. This appeal follows.

STANDARD OF REVIEW

"A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned." State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct. App. 2002). "Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Id. "It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias." Id. "Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature." Id.

"The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an abuse of discretion." State v. Swafford, 375 S.C. 637, 640, 654 S.E.2d 297, 299 (Ct. App. 2007) (citation omitted). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." State v. Rice, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct. App. 2007). "To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice." State v. Douglas, 367 S.C. 498, 508, 626 S.E.2d 59, 64 (Ct. App. 2006).

LAW/ANALYSIS

I. Motion for mistrial

Howard argues the trial court erred in declining to grant his motion for a mistrial. We find this issue abandoned on appeal. An issue is deemed

abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. Glasscock, Inc. v. U.S. Fidelity & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). Howard failed to cite any authority in support of his assertion that the trial court erred in denying his motion for a mistrial. Therefore, Howard abandoned this issue on appeal, and we decline to consider the argument.

II. Trial judge's failure to recuse himself

Howard argues the trial judge erred in failing to recuse himself. We disagree.

"A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned." State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 624 (Ct. App. 2002). "Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Id. "It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias." Id. "Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature." Id. In addition, "a judge is not disqualified in a criminal action because of an adverse decision in a former case involving entirely different and unrelated criminal charges against the same party." State v. Cabiness, 273 S.C. 56, 57, 254 S.E.2d 291, 292 (1979).

The alleged bias in this case stems from a previous trial where the trial judge found Howard in contempt and gave him a six month sentence. The trial judge indicated he had no animosity toward Howard and was not aware Howard had filed a complaint with the clerk of court. Moreover, the trial judge noted the incident in question occurred three years earlier and that he had not seen or heard from Howard since that time. There is no evidence the trial judge had any personal bias toward Howard. The alleged bias in this case stems from a previous judicial proceeding where the trial judge was obligated to handle Howard's contempt. Accordingly, the trial judge had no proper basis to recuse himself and did not abuse his discretion in declining to recuse himself from the trial.

III. Interference with the presentation of a defense

Howard argues the trial court erred in interfering with his presentation of a defense. We believe this issue is not properly preserved for review.

During Howard's testimony, the State asked "how much had [the victim] had as it relates to drinking anything non-alcoholic or alcoholic, what was that?" In response, Howard testified the victim used cocaine the night before the incident. The State objected on the ground the testimony was non-responsive and asked that the testimony be stricken from the record. The trial court asked the jury to disregard Howard's testimony. The State again objected when Howard testified the victim used Oxycontin in response to the State's question as to whether or not the victim had consumed beer or alcohol the day of the injury. The trial court sustained the objection and asked the jurors to "disregard the comments that you just heard that refer to illegal drug use on the part of anyone else in this case."

Howard made no objection to the trial court's instruction that any testimony regarding illegal drug use was not to be considered. Therefore, Howard's argument that the trial court interfered with his presentation of a defense is not preserved for review.[1] See State v. Lee, 350 S.C. 125, 130, 564 S.E.2d 372, 375 (Ct. App. 2002) ("An issue must be raised to and ruled upon by the trial judge to be preserved for appellate review.").

IV. Admission of stun gun and pepper spray

Howard argues the trial court erred in admitting evidence of the stun gun and pepper spray found in his pockets when he was arrested. However, Howard failed to contemporaneously object to the testimony regarding these items. Therefore, we find this issue is not properly preserved for review. See State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001) ("[M]aking a motion in limine to exclude evidence at the beginning of trial does not

[1] We note the jury heard testimony that the victim had been drinking for seven hours on the day in question. Therefore, Howard's defense that the victim was intoxicated was before the jury even without the illegal drug use testimony.

preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.").

At the start of trial, defense counsel made a motion in limine to exclude the admission of the stun gun and pepper spray, arguing those items were not relevant. The trial court reminded defense counsel to make a contemporaneous objection and asked the State to inform defense counsel in advance when the testimony concerning the stun gun and pepper spray would be offered. The State informed defense counsel it planned to illicit testimony regarding the stun gun and pepper spray from arresting officer Ron Crabtree. Officer Crabtree later testified that at the time he placed Howard under arrest a check of his pockets revealed a stun gun and a can of pepper spray. Defense counsel made no objections during Officer Crabtree's testimony and waited until after the testimony of the next witness to place his objection to the admission of the stun gun and pepper spray on the record. The trial court noted the objection was not contemporaneous and explained that the testimony was permitted because it was relevant and probative on the issue of the victim's fear of Howard.

Although defense counsel made an in limine motion to suppress the introduction of the stun gun and pepper spray into evidence, counsel did not renew his objection at trial when the testimony regarding these items was entered into evidence. Because no objection was renewed at the time the evidence was offered, the matter is not preserved for appeal. See id.

V. Admission of prior convictions

Howard argues the trial court erred in admitting his prior ABHAN convictions. We find the trial court erred by not conducting an on-the-record balancing test weighing the probative value of Howard's prior convictions against their prejudicial effect. Accordingly, we reverse the trial court's admission of Howard's prior ABHAN convictions and we remand this issue to the trial court for a proper balancing test.

"The admission or exclusion of evidence is left to the sound discretion of the trial [court], whose decision will not be reversed on appeal absent an

abuse of discretion." State v. Swafford, 375 S.C. 637, 640, 654 S.E.2d 297, 299 (Ct. App. 2007) (citation omitted). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." State v. Rice, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct. App. 2007). "To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice." State v. Douglas, 367 S.C. 498, 508, 626 S.E.2d 59, 64 (Ct. App. 2006).

According to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year imprisonment are admissible for impeaching the credibility of a defendant who testifies when "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Our Supreme Court has approved the five-factor analysis generally employed by the federal courts for weighing the probative value for impeachment of prior convictions against the prejudice to the accused. State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). The following factors, along with any other relevant factors, should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Id.

In State v. Martin, this court noted a preference for an on-the-record Colf balancing test by the trial court:

> While Colf involved the admission of prior convictions more than ten years old under Rule 609(b), SCRE, this court has implicitly recognized the value of these factors in making such a determination under Rule 609(a)(1), and urged the trial bench to not only articulate its ruling, but also provide the basis for it, thereby clearly and easily informing the appellate courts that a meaningful balancing of the probative value and the prejudicial effect has taken place as required by Rule 609(a)(1).

347 S.C. 522, 530, 556 S.E.2d 706, 710 (Ct. App. 2001) (citations omitted). An on-the-record balancing test is particularly important for prior similar convictions under Rule 609(a)(1) because the "similarity of a prior crime to the crime charged heightens the prejudicial value of the crime." State v. Elmore, 368 S.C. 230, 239, 628 S.E.2d 271, 275 (Ct. App. 2006).

The trial court ruled Howard's convictions for ABHAN from November 1995, April 2004, and December 2004 were within the ten-year rule and the probative value of their admission outweighed the prejudicial effect to Howard. While the trial court found this case was one of credibility, the court further found Howard's previous ABHANs were probative on the issue of whether he was capable of committing such an act. The trial court ruled it would limit the prejudicial effect by not allowing testimony that the victims in two of the prior ABHANs were Howard's mother and the victim in this case. The trial court also noted that a contemporaneous instruction would be given to the jurors advising them that Howard's prior convictions were not to be used to determine his guilt or innocence. During Howard's testimony regarding the convictions and during final jury instructions, the trial court informed the jury that Howard's prior convictions could be used to weigh Howard's credibility but not his propensity to commit the offense.

Howard argues that while the trial court indicated his prior convictions were admitted for the purpose of determining his credibility, the trial court further stated the convictions were admitted because they were probative of whether he was capable of committing the ABHAN. He argues the trial court's basis for admitting the prior convictions constituted an error as a matter of law. However, Howard did not object to the trial court's basis for admitting his prior convictions, therefore we find this issue is not properly preserved for review. See State v. Lee, 350 S.C. 125, 130, 564 S.E.2d 372, 375 (Ct. App. 2002) ("An issue must be raised to and ruled upon by the trial judge to be preserved for appellate review.").

Howard also argues the prejudicial effect of admitting his prior convictions outweighs the probative value. We remand this issue to the trial court for an on the record balancing test weighing the probative value of Howard's prior convictions against their prejudicial effect.

Given the similarity between the prior convictions and the crime charged we cannot conclude Howard was not prejudiced by the admission of his prior convictions. Although evidence of the prior convictions may be probative of Howard's credibility, they were highly prejudicial because they involved the same conduct for which Howard was on trial. See State v. Bryant, 369 S.C. 511, 517-18, 633 S.E.2d 152, 156 (2006) (holding that when a prior offense is similar to the charged offense the "danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission."); State v. Scriven, 339 S.C. 333, 343, 529 S.E.2d 71, 76 (Ct. App. 2000) (holding that when prior convictions are "similar or identical to charged offenses . . . the likelihood of a high degree of prejudice to the accused is inescapable."). While the trial court articulated that Howard's prior convictions were probative of his credibility, the trial court provided no analysis of the prejudicial impact of admitting these prior convictions. Therefore, we find the trial court erred by not conducting the proper on-the-record balancing test when weighing the probative value and prejudicial impact of Howard's prior convictions and we remand this issue to the trial court.

On remand the trial court should conduct a hearing on the admissibility of Howard's prior convictions and carefully weigh the probative value of the prior convictions for impeachment purposes against their prejudicial effect. See Colf, 337 S.C. at 629, 525 S.E.2d at 249; Scriven, 339 S.C. at 344, 529 S.E.2d at 77 (finding the appellate court should not undertake a Rule 609 balancing test, but should remand the issue to the trial court). If upon remand the trial court determines the prejudicial impact to Howard outweighs the probative value of impeachment, the court should order a new trial. See Scriven, 339 S.C. at 344, 529 S.E.2d at 77. Otherwise, the conviction and sentence should be affirmed subject to appellate review. Id. Therefore, we reverse the trial court's admission of Howard's prior convictions, and we remand this issue to the trial court for an on-the-record Colf balancing test.

VI. Probation revocation

Howard argues the trial court erred in holding a probation revocation hearing and revoking his probation without a probation violation warrant. We disagree.

During sentencing after Howard's ABHAN trial, the court heard from Agent Brown, Howard's probation officer. Agent Brown informed the court Howard had pending warrants in two probation cases for failure to report, failure to notify of arrest, and failure to follow instructions of probation agent. Defense counsel conceded his client's ABHAN conviction constituted a violation of his probation cases, and indicated he had no objection to the "jurisdiction or venue of this court today to hear these probation violation hearings." Additionally, defense counsel suggested the court only consider Howard's ABHAN conviction as the violation. In response, the Department of Probation agreed to withdraw the prior two warrants and "issue a new citation charging [Howard] only with the new conviction, and disregard the other charges." The court asked defense counsel if he had any objection to this procedure and he indicated that he had "none whatsoever."

Pursuant to section 24-21-450 of the South Carolina Code (2007) a warrant must be issued and the probationer must be served with the warrant before probation can be revoked. However, section 24-21-300 of the South Carolina Code (2007) permits the use of a citation and affidavit in lieu of a warrant. The probation citation in the record indicates Howard was served with the citation during sentencing following his ABHAN conviction. Accordingly, because Howard was served with the citation the trial court did not err in holding a probation revocation hearing and revoking Howard's probation. Therefore, the ruling of the circuit court is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HEARN, C.J., and PIEPER, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lanier Construction Company, Inc., Plaintiff,

v.

Bailey & Yobs, Inc., Mike Cupp and Tami Cupp, Defendants,

of whom Lanier Construction Company, Inc. and Bailey & Yobs, Inc. are the Appellants,

and Mike Cupp and Tami Cupp are the Respondents.

Appeal From Lexington County
R. Knox McMahan, Circuit Court Judge

Opinion No. 4580
Submitted April 22, 2009 – Filed July 1, 2009

AFFIRMED

Robert J. Thomas, of Columbia, for Appellants.

Damon C. Wlodarczyk, of Columbia, for Respondents.

SHORT, J.: Lanier Construction Company, Inc. (Lanier), a subcontractor, sued its general contractor Bailey & Yobs, Inc. (B&Y) and the homeowners, Mike and Tami Cupp (the Cupps), after its cement truck fell into the Cupps' septic tank while making a cement delivery ordered by B&Y. Lanier and B&Y appeal the circuit court's grant of the Cupps' summary judgment motion. The Appellants argue summary judgment was improper because: (1) the court improperly determined the Cupps did not owe Lanier a duty of care; and (2) evidence supports a finding that the Cupps voluntarily assumed the duty to make the premises safe by marking the septic tank location. Additionally, the Appellants argue the trial court failed to address whether the Cupps assumed a duty of care by agreeing to mark the septic tank location, even after Lanier's Rule 59 motion to alter or amend the judgment. We affirm.

FACTS

The Cupps hired B&Y as the general contractor to renovate their home. Larry S. Yobs, of B&Y, stated in his deposition that he and Mike Cupp discussed the location of his septic tank, and Mike Cupp offered to mark the location. While the septic tank was never marked, it is undisputed that B&Y knew its location and worked around the septic tank for three months. This work included receiving a concrete delivery without incident.

Three months after Mike Cupp's and Yobs's conversation, B&Y hired Lanier to deliver concrete. B&Y instructed another subcontractor on the site, who B&Y claimed was aware of the septic tank location, to receive the concrete delivery from Lanier. However, the subcontractor on duty denied B&Y ever informed him of the tank location. Lanier's concrete truck driver stated the subcontractor informed him the septic tank was in the front yard, not in the back yard where he was delivering the concrete. As a result of the confusion, Lanier's concrete truck fell through the Cupps' septic tank, resulting in substantial damage to the truck.

Lanier sued B&Y and the Cupps to recover their damages. The trial court granted the Cupps' motion for summary judgment, finding the Cupps were not liable. Citing Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000), and Sides v. Greenville Hospital System, 362 S.C. 250, 607 S.E.2d 362 (Ct. App. 2004), the trial court stated: "Moreover, under South Carolina law, a general contractor 'generally equates to an invitor and assumes the same duties that the landowner has, including the duty to warn of dangers or defects known to him but unknown to others.'" Additionally, the trial court held:

> Since [Lanier] in this case was a business invitee of [B&Y], it was [B&Y] who owed the duty to warn of the condition. . . . Here, it is not disputed that the general contractor, [B&Y], invited [Lanier] to the premises and was to supervise the delivery of the concrete. It is not disputed that the Cupps did not know that the delivery was being made and had no supervisory role in the construction being conducted. In addition, it is not disputed that [B&Y] was informed of the septic tank and shown its location. Any breach of duty, if any, in this instance falls on the shoulders of the general contractor and not the owner of the land.

Both Lanier and B&Y filed motions to reconsider, and both were denied. This appeal followed.

STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the trial court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). 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. 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). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." David, 367 S.C. at 250, 626 S.E.2d at 5. "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." S.C. Prop. & Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001).

LAW/ANALYSIS

I. Cupps' Duty of Care to Lanier

Lanier argues the trial court erred in granting the Cupps' motion for summary judgment on the basis that the duty of care was exclusively that of B&Y, and by finding the Cupps did not voluntarily assume the duty to make the premises safe by marking the septic tank. Similarly, B&Y contends the trial court erred in ruling the Cupps as landowners owed no duty of care to Lanier as a matter of law, and granting summary judgment when the evidence supports a finding that the Cupps assumed a duty of care by agreeing to mark the septic tank before the construction began and then breached that duty of care by failing to mark the septic tank. We disagree.

The case of Sides v. Greenville Hospital System, 362 S.C. 250, 607 S.E.2d 362 (Ct. App. 2004), discusses a general contractor's and an owner's premises liability. Dorothy Sides was injured when she fell while visiting her husband at the hospital. Id. at 253, 607 S.E.2d at 363. The hospital was undergoing a construction project which included demolition of their current parking lot and pouring new concrete. Id. "Sides fell when she suddenly stepped off a curb that she could not see in the darkness." Id. After the accident, a hospital employee contacted Sides and informed her that the hospital had problems with the lighting in the parking lot, and they had been meaning to fix the lights. Id. Subsequently, Sides sued the hospital, the

general contractor, and the subcontractor responsible for site preparation and construction. Id. at 253-54, 607 S.E.2d 363-64. All three defendants moved for summary judgment. Id. at 254, 607 S.E.2d at 364. The trial court denied the hospital's motion, but granted the general contractor's and subcontractor's motion. Id. Additionally, the trial court denied Sides's motion to reconsider. Id. In discussing the contractors' responsibilities, this court stated:

> A property owner owes an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety and is liable for injuries resulting from any breach of such duty. The property owner has a duty to warn an invitee only of latent or hidden dangers of which the property owner has or should have knowledge. A property owner generally does not have a duty to warn others of open and obvious conditions, but a landowner may be liable if the landowner should have anticipated the resulting harm.
>
> "Under a premises liability theory, a contractor generally equates to an invitor and assumes the same duties that the landowner has, including the duty to warn of dangers or defects known to him but unknown to others." No contractor liability exists, however, for injuries resulting from dangers that were obvious or that should have been observed in the exercise of reasonable care. "The entire basis of an invitor's liability rests upon his superior knowledge of the danger that causes the invitee's injuries." "If that superior knowledge is lacking, as when the danger is obvious, the invitor cannot be held liable."
>
> Because a contractor's potential liability is based on the notion that it has superior knowledge, finding the contractor did not have such superior knowledge

> extinguishes its liability. In this case, [the general contractor] did not have superior knowledge of the lighting as the hospital admitted it was responsible for the lighting on the premises. According to Mr. McMillan, the hospital's Engineering and Security divisions maintained the lights. Thus, based on the absence of evidence suggesting [the general contractor] had any superior knowledge, the trial court did not err in granting summary judgment to [the general contractor].
>
> Moreover, the hospital, with superior knowledge, may have owed a duty to invitees that [the general contractor] did not owe; consequently, the trial court acted properly in separately considering the duties owed by the respective parties in ruling on the motions for summary judgment. The fact that the trial court denied the hospital's motion for summary judgment did not automatically require the court to deny the [general contractor's motion].

Id. at 256-57, 607 S.E.2d at 365 (internal citations omitted).

Likewise, another construction premises liability decision from this court is Larimore v. Carolina Power & Light, 340 S.C. 438, 531 S.E.2d 535 (Ct. App. 2000). In Larimore, Thad Williams hired H.P. Larimore to install vinyl siding on his home. Id. at 441, 531 S.E.2d at 537. On the day Larimore was to begin the installation, Carolina Power & Light (CP&L) arrived at Williams's home to install underground utility lines. Id. at 442, 521 S.E.2d at 537. CP&L dug a trench to bury the utility lines, and Larimore was present and aware of the trench. Id. CP&L filled the trench with dirt, and after rainfall, the trench settled several inches. Id. Four days after CP&L's installation, Larimore stepped onto the dirt covering the trench, the trench caved in, and Larimore fractured his hip. Id. Larimore sued Williams and CP&L. Id. At trial, Williams moved for directed verdict, arguing "he was not responsible for warning Larimore of an open and obvious condition." Id.

at 442-43, 521 S.E.2d at 537. The trial court granted Williams's directed verdict motion. Id. at 443, 521 S.E.2d at 537. Larimore appealed. Id. at 444, 521 S.E.2d 538. In discussing Williams's liability, this court opined:

> Williams, as the property owner, owes a duty to those on his property commensurate with their status. South Carolina recognizes four classes of persons present on the property of another: adult trespassers, invitees, licensees, and children. The level of care owed is dependent upon the class of the person present. Because Larimore was a business visitor invited to enter or remain on the property for a purpose directly or indirectly connected with Williams, Larimore was an invitee.
>
> "The owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for his safety, and is liable for injuries resulting from the breach of such duty." The landowner has a duty to warn an invitee only of latent or hidden dangers of which the landowner has knowledge or should have knowledge. THE DEGREE OF CARE required is commensurate with the particular circumstances involved, including the age and capacity of the invitee.
>
> . . . .
>
> Under a premises liability theory, a contractor generally equates to an invitor and assumes the same duties that the landowner has, including the duty to warn of dangers or defects known to him but unknown to others. A general contractor, however, is not liable to an invitee for an injury resulting from a danger that was obvious or that should have been observed in the exercise of reasonable care. The entire basis of an invitor's liability rests upon his

> superior knowledge of the danger that causes the invitee's injuries. If that superior knowledge is lacking, as when the danger is obvious, the invitor cannot be held liable.
>
> Accordingly, Williams, in both his role as landowner and general contractor, owed no duty to warn Larimore of the open and obvious defect.

Id. at 444-48, 531 S.E.2d at 538-40 (internal footnotes omitted).

Here, we believe the trial court properly granted the Cupps' summary judgment motion. The disputed fact of whether Mike Cupp informed Yobs he would mark the septic tank location is not a material fact when determining the Cupps' liability. The location of the septic tank was a latent danger, and B&Y was the Cupps' invitee; therefore, the Cupps had a duty to warn B&Y. Likewise, B&Y owed the same duty to Lanier, its invitee. We find the Cupps discharged their duty to warn their invitee when Mike Cupp and Yobs discussed the septic tank location. Lanier suffered injury because its invitor, B&Y, failed to perform its duty to warn Lanier of the septic tank location. The Cupps, as the landowners in this particular factual scenario who informed their general contractor of the latent danger posed by the septic tank, did not owe Lanier a duty to warn. Accordingly, in this situation, summary judgment was properly granted as a matter of law because no genuine issue of material fact exists.

II. Rule 59 Motion

B&Y argues the trial court erred in failing to address whether the evidence supports a finding that the Cupps assumed a duty of care by agreeing to mark the septic tank before the construction began and then breached their duty by failing to mark the septic tank. Similarly, while not a stated issue, Lanier argues this was error in their appellate brief. We disagree.

Recently, our supreme court held "that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, ___, 673 S.E.2d 801, 803 (2009). Here, viewing the evidence in the light most favorable to B&Y and Lanier, there is not a scintilla of evidence to suggest the Cupps permanently assumed B&Y's duty to warn Lanier of the latent danger. Assuming Mike Cupp initially assumed B&Y's duty to warn the subcontractors of the septic tank location, B&Y reassumed the duty during the next three months before Lanier's accident. It is undisputed that the Cupps did not mark the septic tank location, and that B&Y received other subcontractors on the construction site, including a concrete delivery, and directed them around the septic tank. Thus, while the Cupps' initial assumption of B&Y's duty to warn its invitees of latent dangers is questionable, the undisputed evidence proves B&Y reassumed the duty to warn its subcontractors by its actions during the three months between Yobs's conversation with Mike Cupp and Lanier's accident. Accordingly, summary judgment was properly granted in this case because there is no evidence that at the time of Lanier's accident the Cupps assumed B&Y's duty to warn its invitor.

CONCLUSION

Accordingly, the trial court is

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Scott Trowell, Appellant,

v.

South Carolina Department of Public Safety, Respondent.

Appeal From Richland County
Joseph M. Strickland, Acting Circuit Court Judge

Opinion No. 4581
Heard April 22, 2009 – Filed July 1, 2009

REVERSED and REMANDED

John A. O'Leary, of Columbia, for Appellant.

Charles H Sheppard, Jr., Rachel D. Erwin, both of Blythewood, for Respondent.

HEARN, C.J.: Scott Trowell appeals the circuit court's order affirming the decision of the State Human Resources Director that his appeal of an internal grievance matter was untimely. Trowell asserts the circuit

court erred in finding service was perfected upon the Department of Public Safety's facsimile of its final agency decision, thereby initiating the time frame in which Trowell had to appeal. We reverse and remand.

FACTS

Trowell, a South Carolina Highway Patrolman, was suspended without pay for 40 hours and reassigned to a different patrol troop and location. An internal investigation revealed Trowell had provided false and inaccurate information to a fellow officer during an investigation, and had also directed insolent and abusive language towards a superior officer amounting to insubordination and improper conduct. Pursuant to his rights under the State Employee Grievance Procedure Act and the employee grievance procedure established by Public Safety,[1] Trowell notified Public Safety of his request to have a Step I Grievance Hearing regarding his suspension and relocation. Following consideration of the appeal, Trowell's suspension was upheld.

Trowell thereafter gave written notice of his desire to have a Step II Grievance Hearing. Following a second hearing, counsel for Public Safety requested additional time to pursue a settlement with Trowell; however, those pursuits were unsuccessful, and Public Safety notified Trowell his suspension would be upheld. Notice of Public Safety's decision regarding Trowell's Step II Grievance was initially sent to Trowell's attorney via facsimile on February 2, 2005, and the cover sheet contained a notation explaining the original letter would be sent by certified mail. The certified letter advising Trowell of the

[1] Public Safety's employee grievance procedure provides an employee with a three-step appeal process: (1) upon written notice from an aggrieved, Step I allows the employee and an Agency member to participate in a voluntary mediation, or proceed directly to a meeting at which the employee is allowed to present his or her position; (2) if the employee is not satisfied with the resulting decision, he or she may request a Step II hearing, at which time they are permitted to present their side once more, and the Director may conduct a fact finding investigation to aid in making his decision; and (3) if the employee is still not satisfied with the decision, he or she may appeal to the State Director of Human Resources.

decision was received and signed for on February 7. On February 15, Trowell's attorney faxed the State Appeal Form to the Human Resource Management Division of the South Carolina Budget and Control Board (Human Resources) indicating his desire to appeal the agency's final decision to the Human Resources Director (Director). In the appeal, Trowell stated he received the final decision of the agency on February 7, 2005.

On March 4, 2005, the Director notified Trowell, via letter, that his appeal was untimely because Trowell had failed to file it within ten calendar days of receipt of Public Safety's February 2 facsimile, pursuant to section 8-17-330 of the South Carolina Code (Supp. 2008). The Director's letter also noted that Trowell's notice of appeal was filed outside of the alternative fifty-five calendar days allowed from the date of Trowell's initial Step I Grievance filing. See S.C. Code Ann. § 8-17-330 (Supp. 2008). Thereafter, Trowell filed a written request for reconsideration of the Director's denial of his appeal, which was denied. Trowell then petitioned the circuit court for review. Trowell appeals from the circuit court's affirmance of the agency's decision.

LAW/ANALYSIS[2]

Trowell contends the circuit court erred in finding service of Public Safety's letter upholding his Step II Grievance was perfected upon facsimile of its final agency decision, thereby initiating the time frame in which Trowell had to appeal. We agree.

[2] Trowell initially asserts it was error for the circuit court to make findings of fact, when the facts of the case were not properly before the court. Although the circuit court did not delineate the facts included in its order as findings of fact, we nevertheless note the circuit court's recitation of the factual summary should in no way limit the State Employee Grievance Committee's ability to make its own findings of fact on remand, in accordance with section 8-17-340 of the South Carolina Code (Supp. 2008).

The scope of judicial review in Administrative Procedures Act (APA)[3] cases arising from the final decision of state agencies is governed by section 1-23-380 of the South Carolina Code (Supp. 2008), which provides:

> A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review . . .
>
> > (5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> >
> > > (a) in violation of constitutional or statutory provisions;
> > >
> > > (b) in excess of the statutory authority of the agency;
> > >
> > > (c) made upon unlawful procedure;
> > >
> > > (d) affected by other error of law;
> > >
> > > (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

[3] S.C. Code Ann. § 1-23-310 et seq. (2005 & Supp. 2008).

> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Section 8-17-330 of the South Carolina Code (Supp. 2008) requires that an agency must establish an approved employee grievance procedure, and make it available to covered employees. As noted above, Public Safety complied with the requirement of section 8-17-330. Step III of the employee grievance process, discussed in section VIII of Public Safety's adopted procedures, provides an employee may appeal the final decision of the agency, and that such an appeal "must be in writing and submitted to the State Human Resources Director within ten (10) calendar days of receipt of the Final Agency Decision . . . ." (emphasis added). When an appeal is received pursuant to Step III, the Director is tasked with assembling the record from the previous grievance hearings, but must first make a determination if the procedures and policies of employee grievance process have been appropriately followed to that point. S.C. Code Ann. § 8-17-350 (Supp. 2008).

Upon receipt of Trowell's appeal from Public Safety's Step II Grievance Hearing, the Director determined Trowell's appeal had been filed outside of the requisite ten calendar days from his receipt of the faxed order on February 2.[4] In his letter denying Trowell's subsequent motion for reconsideration, the Director noted the State Employee Grievance Procedure Act is not specific as to how the final agency decision must be delivered; therefore, in reliance on that silence, the Director determined receipt of the decision could be accomplished through hand delivery, facsimile, or mail. Public Safety thus contends that, because Trowell's attorney acknowledged receipt of the facsimile on February 2, notice was accomplished on that day and not the date the decision was received by certified mail.

[4] Trowell did not appeal the Director's determination that his appeal was filed outside of the fifty-five calendar days from his initial agency grievance; therefore, Trowell's compliance with the ten day period is the only issue before us on appeal.

Ordinarily, significant deference is given to the agency's construction and interpretation of its employee grievance procedure. Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (citing Brown v. South Carolina Dep't of Health and Envtl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002)) (recognizing courts generally give deference to an administrative agency's interpretation of an applicable statute or its own regulation). However, the agency's interpretation of its grievance procedure in this case created a rule which it had, admittedly, never before employed or sought to enforce. Moreover, the rule that the time for an appeal began to toll upon service by facsimile is not included in any written materials or guidelines available to the public or the bar. Trowell's counsel admits the facsimile was received by his office on February 2; however, because facsimiles are not ordinarily used to accomplish notice of a decision by any department, agency, or court,[5] counsel maintains he did not look at or consider the fax until the certified copy of the letter was received by his office on February 7, at which time he began the next step of the appeals process.

We find the agency's interpretation of its service rules was overly harsh in this situation. Given the general rule that service cannot be accomplished via facsimile, the agency's decision here arbitrarily created a trap for the unwary petitioner. As a result, we believe the substantial rights of Trowell were prejudiced due to the arbitrary and capricious nature of the agency's interpretation of its grievance procedure. Trowell is entitled to a full and fair hearing before the State Human Resources Director.[6] Accordingly, the decision of the circuit court is

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[5] See Rule 5(b)(1), SCRCP ("Service . . . shall be made by delivering a copy to him or by mailing it to him at his last known address . . . ."); Rule 5, SCALJR ("Service shall be made by delivery, or by mail to the last known address."); S.C. Code Ann. § 1-23-350 (2005) (providing that under the Administrative Procedures Act, final decisions or orders adverse to a party in a contested case must be made in writing, and must be delivered either personally or by mail).

[6] Trowell also contends the circuit court erred in failing to find either the South Carolina Rules of Civil Procedure, the South Carolina Administrative Law Judge Rules, or the rules provided in section 1-23-350 of the

REVERSED and REMANDED.

PIEPER, J., and LOCKEMY, J., concur.

Administrative Procedures Act, should apply to every stage of the appellate process under the State Employee Grievance Procedure Act, in order to ensure consistent applicability of the rules and fairness throughout the process. Given our disposition above, we need not address these additional contentions. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carl Stecker, Respondent,

v.

TALX Corporation, Appellant.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4582
Heard February 18, 2009 – Filed July 1, 2009

REVERSED

Michael J. Giese, of Greenville, for Appellant.

Curtis W. Stodghill and Larry L. Plumblee, both of Greenville, for Respondent.

LOCKEMY, J.: TALX Corporation (TALX) appeals the trial court's grant of Carl Stecker's motion for a preliminary injunction. TALX argues the trial court erred in: (1) finding Stecker's declaratory judgment action was an

action for damages or injunctive and other equitable relief within the meaning of section 10.9(g) of the parties' agreement; (2) finding the parties' agreement prohibited TALX from pursuing its counterclaims in arbitration; and (3) failing to give binding effect to two decisions of the arbitration panel.

FACTS

In October 2004, TALX purchased Net Profit, Inc., a solely owned South Carolina company, from Stecker pursuant to an acquisition agreement. TALX's acquisition agreement with Stecker contained an Alternative Dispute Resolution provision under which the parties agreed to resolve disputes through arbitration. The agreement contained one exception to the arbitration provision regarding claims for indemnification. The exception provided that any party could seek damages or injunctive and other equitable relief for any dispute related to indemnification either in court or in arbitration.

Net Profit provided consulting services to businesses and assisted them in obtaining federal tax credits. After TALX purchased Net Profit, a number of clients sought refunds from Net Profit for tax credits the IRS had disallowed. TALX sought indemnification from Stecker for the claims it paid to these clients. These indemnification claims became the basis for Stecker's declaratory judgment action and TALX's counterclaims in arbitration.

In November 2006, Stecker filed a demand for arbitration in Missouri seeking amounts due on the purchase price. In December 2006, Stecker filed this declaratory judgment action in Greenville pursuant to sections 15-53-10 to 40 of the South Carolina Code (2005). In his action, Stecker asked the trial court to determine whether TALX was entitled to indemnification in accordance with Article IX of the agreement for claims made against TALX by third parties. TALX filed counterclaims in the Missouri arbitration in January 2007. These counterclaims consisted of the same indemnification claims that formed the basis for the declaratory judgment action filed by Stecker.

In July 2007, Stecker filed a motion asking the trial court to enjoin TALX from pursuing its defenses and counterclaims in the arbitration. The

trial court ordered the counterclaims stayed and, in the alternative, granted a temporary injunction prohibiting the arbitrators from hearing the indemnification claims. This appeal arises from the trial court's order finding TALX's counterclaims in arbitration were stayed.[1]

STANDARD OF REVIEW

"Actions for injunctive relief are equitable in nature." Doe v. Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001). "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence." Id. The appellate court is "not required to disregard findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." Satcher v. Satcher, 351 S.C. 477, 482, 570 S.E.2d 535, 538 (Ct. App. 2002).

LAW/ANALYSIS

I. Stecker's declaratory judgment action

TALX argues the trial court erred in finding Stecker's declaratory judgment action was an action for damages. TALX argues section 10.9(g) does not apply to Stecker's declaratory judgment action because Stecker's complaint does not seek damages, an injunction, or any other equitable relief. TALX contends Stecker's declaratory judgment action is an action for construction of a contract and is therefore a legal rather than equitable action. We agree.

Here, the trial court allowed Stecker's declaratory judgment action based on the contract language. Specifically, the trial court determined Stecker's declaratory judgment action was a damages action and found that because Stecker sought to prevent TALX from recovering damages rather than seeking to recover damages from TALX, his claim was not excluded from the provisions of Article 10.9(g).

[1] The trial court has yet to issue a final ruling on Stecker's declaratory judgment action.

We find the trial court erred in determining Stecker's declaratory judgment action was a damages action. The parties' agreement contains a mandatory arbitration clause in section 10.9. However, section 10.9(g) of the agreement provides an exception to mandatory arbitration when either party has a damages claim. Specifically, 10.9(g) states:

> Notwithstanding any other provision in this Agreement, any Party may seek and obtain damages and injunctive and other equitable relief from a court of competent jurisdiction without resorting to negotiations or arbitration for any Dispute related to [the indemnification provisions] of this agreement.

(emphasis added)

We agree with TALX's assertion that Stecker's declaratory judgment action is an action for construction of a contract and is therefore a legal rather than an equitable action. This court has found "[a] suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Query v. Burgess, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006). "To make this determination we look to the main purpose of the action as determined by the complaint." Id.

In his complaint, Stecker sought a declaration from the trial court that he was not liable for damages on TALX's indemnification claims. Specifically, Stecker asked the trial court to find TALX was not entitled to indemnification because under the terms of the agreement there had been no event giving rise to the duty of indemnification. Additionally, Stecker based his claim on TALX's failure to give proper notice to Stecker under the terms of the agreement before paying the claims for which indemnification was sought.

In the present action, Stecker is not seeking damages. Rather, he is asking the trial court to interpret the parties' agreement, which is a question of law. See Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 590, 658 S.E.2d 539, 541 (Ct. App. 2008) (providing the interpretation of a contract is

an action at law). Accordingly, Stecker's filing of a preemptory declaratory judgment action did not convert his legal claim into an equitable claim. See Jacobs v. Serv. Merchandise Co., 297 S.C. 123, 127, 375 S.E.2d 1, 3 (Ct. App. 1988) ("An action which is essentially one at law is not converted into an equitable action because it is brought pursuant to the Declaratory Judgment Act").

It appears Stecker is trying to preclude TALX's right to bring its indemnification claims in the forum of its choice. However, Stecker was bound by the provisions of his agreement with TALX, which required the parties to arbitrate all disputes unless the party sought damages or equitable relief. Because Stecker did not seek damages or equitable relief in his complaint, his declaratory judgment action did not trigger section 10.9(g). Accordingly, the trial court erred in finding Stecker's declaratory judgment action was an action for damages within the meaning of section 10.9(g) of the parties' agreement.

II. TALX's counterclaims in arbitration

TALX argues the trial court erred in interpreting section 10.9(g) of the parties' agreement to mean TALX is prohibited from pursuing its indemnification claims against Stecker in arbitration. Based on our ruling above, we agree.

A. Ambiguity in trial court's ruling

There are ambiguities in the trial court's order. On one hand, the trial court seems to suggest TALX could pursue indemnification through arbitration. Specifically, the trial court found TALX would not be harmed if its indemnification counterclaims were stayed pending the outcome of the declaratory judgment action. Moreover, the trial court determined TALX agreed indemnification provisions could be arbitrated or litigated. The trial court further found that "a denial of a stay or injunction would rob [Stecker] of [his] bargained-for rights under the Acquisition Agreement."

However, other language suggests TALX could not pursue indemnification through arbitration. The trial court found the parties had

"carved out indemnification claims" and that TALX wanted to ignore the contract and create a situation where "indemnification claims could be subject to two identical adjudications before two separate tribunals." Furthermore, the trial court found section 10.9(g) was "nonsensical" and subjected the parties to a "multiplicity of identical claims." Because the practical effect of the trial court's ruling prohibited TALX from pursuing indemnification through arbitration, we specifically address TALX's indemnification remedies below.

B. Indemnification through arbitration

We find TALX can pursue its indemnification claims against Stecker in the current arbitration in Missouri based on our interpretation of the contract. See Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) ("When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense."); see also Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) ("The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully."). Based on the clear language of section 10.9(g), TALX could either bring an indemnification claim in arbitration or in court. Accordingly, we believe the trial court erred in finding section 10.9(g) of the parties' agreement prohibited TALX from pursuing its counterclaims in arbitration.

C. Arbitration panel decisions

TALX argues the trial court erred in failing to give binding effect to the arbitration panel's rulings that TALX could assert its indemnification claims in arbitration. Based on our finding that TALX can pursue its indemnification claims against Stecker in arbitration, we need not address whether the trial court erred in failing to defer to the arbitration panel's rulings. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal); see also Dwyer v. Tom Jenkins Realty, 289 S.C. 118, 120, 344 S.E.2d 886, 888 (Ct. App. 1986) ("Where a decision is based on two grounds,

either of which, independent of the other, is sufficient to support it, it will not be reversed on appeal because one of those grounds is erroneous.").

CONCLUSION

We find Stecker's declaratory judgment action was not an action for damages within the meaning of section 10.9(g) of the parties' agreement, and that TALX can pursue its indemnification claims in arbitration. Consequently, the trial court erred in staying TALX's counterclaims and granting Stecker's motion for preliminary injunction. Accordingly, the trial court's order is

REVERSED.

HEARN, C.J., and PIEPER, J., concur.