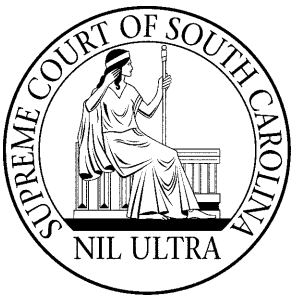

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31

August 9, 2004

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

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

PETITIONS - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

PETITIONS FOR REHEARING

3808-Wynn v. Wynn	Pending
3809-State v. Belviso	Pending
3810-Bowers v. SCDOT	Pending
3813-Bursey v. SCDHEC & SCE&G	Pending
3814-Beckman Concrete v. United Fire	Pending
3820-Camden v. Hilton	Pending
3821-Venture Engineering v. Tishman	Pending
3822-Rowell v. Whisnant	Pending
3825-Messer v. Messer	Pending
3830-State v. Robinson	Pending
3831-Charleston SC Registry v. Young Clement Rivers & Tisdale	Pending
3832-Carter v. USC	Pending
3833-Ellison v. Frigidaire Home Products	Pending
3835-State v. Bowie	Pending
3836-State v. Gillian	Pending
3839-QHG of Lake City v. McCutcheon	Pending
3841-Stone v. Traylor Brothers	Pending
3842-State v. Gonzales	Pending
3843-Therrell v. Jerry's Inc.	Pending
3847-Sponar v. SCDPS	Pending

3848-Steffenson v. Olsen	Pending
3849-Clear Channel Outdoor v. City of Myrtle Beach	Pending
2003-UP-292-Classic Stair v. Ellison	Pending
2003-UP-642-State v. Moyers	Pending
2004-UP-118-State v. Watkins	Pending
2004-UP-219-State v. Brewer	Pending
2004-UP-344-Dunham v. Coffey	Pending
2004-UP-345-Huggins v. Ericson et al.	Pending
2004-UP-346-State v. Brinson	Pending
2004-UP-348-Centura Bank v. Cox	Pending
2004-UP-354-Weldon v. Tiger Town RV	Pending
2004-UP-356-Century 21 v. Benford	Pending
2004-UP-359-State v. Hart	Pending
2004-UP-362-Goldman v. RBC, Inc.	Pending
2004-UP-365-Agnew v. Spartanburg Co. School District	Pending
2004-UP-366-Armstrong v. Food Lion	Pending
2004-UP-368-Brown v. Harper	Pending
2004-UP-369-City of Myrtle Beach v. Miss Kitty's	Pending
2004-UP-370-Thigpen v. Baker Homes	Pending
2004-UP-371-Landmark et al. v. Pierce et al.	Pending
2004-UP-394-State v. Daniels	Pending

2004-UP-397-Foster v. Greenville Memorial	Pending
2004-UP-401-State v. Smith	Pending
2004-UP-406-State v. Watkins	Pending
2004-UP-407-Small v. Piper	Pending
2004-UP-409-State v. Moyers	Pending
2004-UP-410-State v. White	Pending
2004-UP-411-Shuler v. SCDPS	Pending
2004-UP-421-CMI Contracting v. Little River	Pending
2004-UP-422-State v. Durant	Pending
2004-UP-425-State v. Dalrymple	Pending
2004-UP-430-Johnson v. S.C. Dep't of Probation	Pending
2004-UP-435-Saxon v. SCDOT	Pending

PETITIONS - SOUTH CAROLINA SUPREME COURT

3602-State v. Al-Amin	Pending
3635-State v. Davis	Pending
3653-State v. Baum	Pending
3655-Daves v. Cleary	Denied 7/22/04
3656-State v. Gill	Pending
3661-Neely v. Thomasson	Pending
3663-State v. Rudd	Denied 7/22/04
3667-Overcash v. SCE&G	Pending

3674-Auto-Owners v. Horne et al.	Denied 8/04/04
3676-Avant v. Willowglen Academy	Pending
3677-The Housing Authority v. Cornerstone	Denied 8/04/04
3678-Coon v. Coon	Pending
3679-The Vestry v. Orkin Exterminating	Pending
3680-Townsend v. Townsend	Pending
3681-Yates v. Yates	Pending
3683-Cox v. BellSouth	Pending
3684-State v. Sanders	Pending
3686-Slack v. James	Pending
3690-State v. Bryant	Pending
3691-Perry v. Heirs of Charles Gadsden	Pending
3693-Evening Post v. City of N. Charleston	Pending
3703-Sims v. Hall	Pending
3706-Thornton v. Trident Medical	Pending
3707-Williamsburg Rural v. Williamsburg Cty.	Pending
3708-State v. Blalock	Pending
3709-Kirkman v. First Union	Pending
3710-Barnes v. Cohen Dry Wall	Pending
3711-G & P Trucking v. Parks Auto Sales	Pending
3712-United Services Auto Ass'n v. Litchfield	Pending

3714-State v. Burgess	Pending
3716-Smith v. Doe	Pending
3718-McDowell v. Travelers Property	Pending
3717-Palmetto Homes v. Bradley et al.	Pending
3719-Schmidt v. Courtney (Kemper Sports)	Pending
3720-Quigley et al. v. Rider et al.	Pending
3721-State v. Abdullah	Pending
3722-Hinton v. SCDPPPS	Pending
3728-State v. Rayfield	Pending
3729-Vogt v. Murraywood Swim	Pending
3730-State v. Anderson	Pending
3733-Smith v. Rucker	Pending
3737-West et al. v. Newberry Electric	Pending
3739-Trivelas v. SCDOT	Pending
3740-Tillotson v. Keith Smith Builders	Pending
3743-Kennedy v. Griffin	Pending
3744-Angus v. Burroughs & Chapin	Pending
3745-Henson v. International (H. Hunt)	Pending
3747-RIM Associates v. Blackwell	Pending
3749-Goldston v. State Farm	Pending
3750-Martin v. Companion Health	Pending

3751-State v. Barnett	Pending
3753-Deloitte & Touche, LLP v. Unisys Corp.	Pending
3755-Hatfield v. Van Epps	Pending
3757-All Saints v. Protestant Episcopal Church	Pending
3758-Walsh v. Woods	Pending
3759-QZO, Inc. v. Moyer	Pending
3762-Jeter v. SCDOT	Pending
3765-InMed Diagnostic v. MedQuest Assoc.	Pending
3766-Craig v. Craig	Pending
3767-Hunt v. S.C. Forestry Comm.	Pending
3772-State v. Douglas	Pending
3775-Gordon v. Drews	Pending
3776-Boyd v. Southern Bell	Pending
3777-State v. Childers	Pending
3778-Hunting v. Elders	Pending
3779-Home Port v. Moore	Pending
3784-State v. Miller	Pending
3787-State v. Horton	Pending
3789-Upchurch v. Upchurch	Pending
3790-State v. Reese	Pending
3794-State v. Pipkin	Pending

3795-State v. Hill	Pending
3800-Ex parte Beard: Watkins v. Newsome	Pending
3802-Roberson v. Roberson	Pending
2003-UP-060-State v. Goins	Pending
2003-UP-316-State v. Nickel	Pending
2003-UP-360-Market at Shaw v. Hoge	Pending
2003-UP-396-Coaxum v. Washington et al.	Denied 7/22/04
2003-UP-444-State v. Roberts	Pending
2003-UP-462-State v. Green	Pending
2003-UP-468-Jones v. Providence Hospital	Denied 7/22/04
2003-UP-470-BIFS Technologies Corp. v. Knabb	Pending
2003-UP-475-In the matter of Newsome	Pending
2003-UP-478-DeBordieu Colony Assoc. v. Wingate	Denied 8/04/04
2003-UP-480-Smalls v. Fuji Photo Film	Pending
2003-UP-483-Lamar Advertising v. Li'l Cricket	Pending
2003-UP-488-Mellon Mortgage v. Kershner	Pending
2003-UP-489-Willis v. City of Aiken	Granted 7/22/04
2003-UP-490-Town of Olanta v. Epps	Pending
2003-UP-491-Springob v. Springob	Pending
2003-UP-494-McGee v. Sovran Const. Co.	Pending
2003-UP-515-State v. Glenn	Pending

2003-UP-521-Green v. Frigidaire	Pending
2003-UP-522-Canty v. Richland Sch. Dt.2	Pending
2003-UP-527-McNair v. SCLEOA	Pending
2003-UP-533-Buist v. Huggins et al.	Pending
2003-UP-539-Boozer v. Meetze	Pending
2003-UP-549-State v. Stukins	Pending
2003-UP-550-Collins Ent. v. Gardner	Pending
2003-UP-556-Thomas v. Orrel	Pending
2003-UP-565-Lancaster v. Benn	Pending
2003-UP-566-Lancaster v. Benn	Pending
2003-UP-588-State v. Brooks	Pending
2003-UP-592-Gamble v. Parker	Pending
2003-UP-593-State v. Holston	Pending
2003-UP-633-State v. Means	Pending
2003-UP-635-Yates v. Yates	Pending
2003-UP-638-Dawsey v. New South Inc.	Pending
2003-UP-640-State v. Brown #1	Pending
2003-UP-659-Smith v. City of Columbia	Pending
2003-UP-662-Zimmerman v. Marsh	Pending
2003-UP-669-State v. Owens	Pending
2003-UP-672-Addy v. Attorney General	Pending

2003-UP-678-SCDSS v. Jones	Pending
2003-UP-688-Johnston v. SCDLLR	Pending
2003-UP-689-Burrows v. Poston's Auto Service	Pending
2003-UP-703-Beaufort County v. Town of Port Royal	Pending
2003-UP-705-State v. Floyd	Pending
2003-UP-706-Brown v. Taylor	Pending
2003-UP-711-Cincinnati Ins. Co. v. Allstate Ins.	Pending
2003-UP-715-Antia-Obong v. Tivener	Pending
2003-UP-716-State v. Perkins	Pending
2003-UP-718-Sellers v. C.D. Walters	Pending
2003-UP-719-SCDSS v. Holden	Pending
2003-UP-723-Derrick v. Holiday Kamper et al.	Pending
2003-UP-735-Svetlik Construction v. Zimmerman	Pending
2003-UP-736-State v. Ward	Pending
2003-UP-751-Samuel v. Brown	Pending
2003-UP-755-Abbott Sign Co. v. SCDOT #2	Pending
2003-UP-757-State v. Johnson	Pending
2003-UP-758-Ward v. Ward	Pending
2003-UP-766-Hitachi Electronic v. Platinum Tech.	Pending
2004-UP-001-Shuman v. Charleston Lincoln Mercury	Pending
2004-UP-011-Baird Pacific West v. Blue Water	Pending

2004-UP-012-Meredith v. Stoudemayer et al.	Pending
2004-UP-019-Real Estate Unlimited v. Rainbow Living	Pending
2004-UP-029-City of Myrtle Beach v. SCDOT	Pending
2004-UP-038-State v. Toney	Pending
2004-UP-050-Lindsey v. Spartan Roofing	Pending
2004-UP-055-Spartanburg Cty. v. Lancaster	Pending
2004-UP-061-SCDHEC v. Paris Mt.(Hiller)	Pending
2004-UP-098-Smoak v. McCullough	Pending
2004-UP-100-Westbury v. Dorchester Co. et al.	Pending
2004-UP-110-Page v. Page	Pending
2004-UP-119-Williams v. Pioneer Machinery	Pending
2004-UP-142-State v. Morman	Pending
2004-UP-147-KCI Management v. Post	Pending
2004-UP-148-Lawson v. Irby	Pending
2004-UP-149-Hook v. Bishop	Pending
2004-UP-153-Walters v.Walters	Pending
2004-UP-200-Krenn v. State Farm	Pending
2004-UP-215-State v. Jones	Pending
2004-UP-216-Arthurs v. Brown	Pending
2004-UP-221-Grate v. Bone	Pending
2004-UP-229-State v. Scott	Pending

2004-UP-237-In the interest of B., Justin	Pending
2004-UP-238-Loadholt v. Cribb et al.	Pending
2004-UP-241-Richie v. Ingle	Pending
2004-UP-247-Carolina Power v. Lynches River Electric	Pending
2004-UP-271-Hilton Head v. Bergman	Pending
2004-UP-289-E. Hathaway Const. v. Eli	Pending
2004-UP-306-State v. Lopez	Pending
2004-UP-319-Bennett v. State of S. C. et al.	Pending
2004-UP-336-Clayton v. Lands Inn, Inc.	Pending

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Phillip W. White, individually, and Little General Food Stores, Inc., Petitioners,

v.

J.M. Brown Amusement Co., Inc., Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Anderson County
James W. Johnson, Jr., Circuit Court Judge

Opinion No. 25849
Heard June 22, 2004 - Filed August 9, 2004

REVERSED

Daniel L. Draisen, Krause & Moorhead, PA, of Anderson, for Petitioners.

Amy G. Richmond, of Love, Thornton, Arnold & Thomason, V. Clark Price, and Dana M. Lahey, both of Roe Cassidy Coates & Price, PA, all of Greenville, and Wade S. Weatherford, III, of Gaffney, for Respondent.

CHIEF JUSTICE TOAL: The court of appeals reversed the trial court's grant of summary judgment to Phillip W. White and Little General Food Stores, Inc. (collectively "White"). *White v. J.M. Brown Amusement Co.*, Op. No. 2003-UP-161 (S.C. Ct. App. filed February 27, 2003). We granted White's petition for a writ of certiorari to review that decision and now reverse.

FACTUAL / PROCEDURAL BACKGROUND

In 1992, White and J.M. Brown Amusement Co. ("Brown") entered into a contract giving Brown exclusive rights to place "certain coin-operated amusement machines" in thirteen of White's stores—which Brown did—all located in Anderson and Oconee counties. The contract was for a term of fifteen years. Under the contract, White agreed "not to allow other machines on the premises without the express written consent of [Brown]."

In 1993, the Legislature enacted a local option law as part of the Video Game Machines Act, permitting counties to hold an individual referendum to determine whether cash payouts for video gaming should remain legal. Act No. 164, Part II, § 19G, 1993 S.C. Acts 1138-1139, formerly codified at S.C. Code Ann. §§ 12-21-2806 and -2808 (repealed effective July 1, 2000). As a result of local referenda held in November 1994, twelve counties, including Oconee and Anderson, voted to ban cash payouts. The South Carolina Department of Revenue revoked the licenses required to operate the machines Brown had placed in White's stores, effective July 1, 1995, as required by the Act. Consequently, Brown removed the video poker machines from White's stores. Brown did not replace the machines with any other coin-operated amusement machines.

In November 1996, this Court struck down the local option law contained in the Act as unconstitutional special legislation. *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996). Given this Court's ruling, Brown planned to return the video poker machines to White's store, but White informed Brown that the contract was no longer valid. White then initiated the underlying action, seeking to have the contract declared void and unenforceable so that he would be free to sign a contract with another

provider of legal video and amusement machines. White also alleged that Brown breached the contract by removing the machines from White's stores and failing to replace them with appropriate machines.

Approximately one month after filing suit, White entered into an agreement with Hughes Entertainment, Inc. ("Hughes"), giving Hughes exclusive rights to place "all video game terminals and all coin operated music and amusement machines" in twelve of the same stores listed in the Brown contract.

In its answer to the complaint, Brown denied breaching the contract, arguing that the machines were removed from White's stores "in response to Court and legislative proceedings which cast doubt upon the legality of certain coin operated machines such as those supplied by [Brown] to [White] under the terms of the contract." In addition, Brown asserted counterclaims for breach of contract and breach of contract accompanied by a fraudulent act because White contracted with Hughes for placement of machines in White's stores.

A representative of Brown testified in deposition that the subject matter of the contract was the outlawed video poker machines—the only type of machines Brown handled. White testified in deposition that he expected Brown to install other types of legal video games after the video poker machines were outlawed, even though White also testified that the contract involved video poker machines, and he never asked Brown (from July 1995 to November 1996) to place other types of machines in his stores.

White moved for summary judgment on Brown's counterclaims. The trial court granted White's motion, finding that the contract involved the placement and operation of outlawed video poker machines.[1] The trial court

[1] The parties debate the meaning of the contractual term "certain coin-operated amusement machines." We conclude that the trial court correctly relied on the deposition testimonies of White and the Brown representative to determine that this was a typical contract involving video poker machines at

continued . . .

concluded that as a matter of law, the contract between White and Brown "became void and unenforceable as of July 1, 1995, when video poker machines first became illegal in Anderson and Oconee counties." The trial court subsequently denied Brown's motion to reconsider.

Brown appealed and the court of appeals reversed. The court of appeals reasoned that because this Court had struck down the local option law and referenda as unconstitutional, the validity of the contract must be analyzed as if the local option law had never been enacted, the referenda never held, the county ordinances banning video poker payouts never passed, and the machine licenses never revoked by the Department of Revenue.

We granted certiorari to resolve the following question:[2]

> Did the court of appeals err in reversing the trial court's grant of summary judgment to White, where the trial court found that the contract was void and unenforceable as of July 1, 1995, due to local referenda banning the type of video poker machine that formed the subject matter of the contract?

---

convenience stores, a type of contract common in South Carolina at the time. The parties debate whether the judge's finding was the unappealed law of the case, or whether the contract also contemplated Pac-Man video games or the like. Again, we find that it was a contract for video poker machines.

[2] White's two questions actually present only one question. We also note that this case does not raise any issue under the Contract Clause contained in the state or federal constitutions, which prohibits the state from passing laws which impair the obligation of contracts. We have rejected such a claim in connection with legislative control of video poker gambling. *Rick's Amusement, Inc. v. State*, 351 S.C. 352, 570 S.E.2d 155 (2001); *Mibbs, Inc. v. S.C. Dept. of Revenue*, 337 S.C. 601, 524 S.E.2d 626 (1999).

LAW/ ANALYSIS

Standard of Review

When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP; *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988).

Discussion

White asserts the court of appeals erred because the trial court correctly held that as a matter of law, the parties' contract became void and unenforceable as of July 1, 1995, the date it became illegal to operate the video poker machines. White also contends that the contract was not revived when the local option law was held unconstitutional. We agree.

The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions. *Berkebile v. Outen*, 311 S.C. 50, 53-54, 426 S.E.2d 760, 762 (1993) (stating "[a]n illegal contract has always been unenforceable"); *Batchelor v. American Health Ins. Co*., 234 S.C. 103, 107 S.E.2d 36 (1959) (noting that contracts violating public policy as expressed in constitutional provisions, statutes, or judicial decisions are void).

When a contract is originally legal, but performance becomes illegal due to a change in the law, any subsequent performance is against public

policy and the party who has agreed to perform is excused from doing so. Some courts analyze such a situation in terms of impossibility of performance, although performance is not literally "impossible" because it could be done if it were legal. Other courts simply conclude that the duty to perform is excused or discharged because performance would violate public policy as expressed in constitutional provisions, statutes, or judicial decisions. 8 *Williston on Contracts* § 19:35 (4th ed. 1998); 14 *Corbin on Contracts* § 76.1 (2001); *see also Restatement (Second) of Contracts* § 264 (1981) ("if the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made"); *Restatement (First) of Contracts* § 458 (1932) (contractual duty is discharged where performance is subsequently prevented or prohibited by constitutional provision, statute, ordinance, judicial decision, or administrative order); Annot., *Modern Status of the Rules Regarding Impossibility of Performance as Defense in Action for Breach of Contract*, 84 A.L.R.2d 12, § 7 (1962).

In the present case, both parties were performing as required under the contract until performance of the contract became legally impossible for two reasons. First, the subject matter of the contract—certain video poker machines—became illegal as of July 1, 1995, under the local option law and the resulting local referenda. Second, as mandated by the local option law, the Department of Revenue revoked the licenses required to legally possess and use the machines. Consequently, both parties' duty to perform under the contract was discharged, and after that point, White and Brown were free to enter a new contract involving legal machines or seek other contractual relationships.

Moreover, because the subject matter of the contract became illegal, the contract itself was invalidated or rendered "dead." Therefore, the next issue we must address is whether the "dead" contract was revived when this Court deemed the local option law—which permitted counties to hold an individual referendum to determine whether cash payouts for video gaming should remain legal—unconstitutional.

The court of appeals implicitly concluded that the formerly "dead" contract was indeed revived by the "death" of the invalid law, when the court stated "[i]t is as if the law had never been passed and the referenda never held." In support of its conclusion, the court of appeals relied solely on *Atkinson v. Southern Express Co*., 94 S.C. 444, 78 S.E. 516 (1913). In that case, the Court stated the following:

> When a statute is adjudged to be unconstitutional, it is as if it never had been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it; and no one can be punished for having refused obedience to it before the decision was made.

Id. at 453, 78 S.E. at 519 (citations and internal quotation marks omitted). Based on this precedent, the court of appeals concluded that "the ordinance purporting to ban the video poker machines had no legal force" and therefore did not have a legal effect on the parties' contract.

Given the court of appeals' decision, Brown asserts that the invalidation of the local option law somehow revived the dead contract for the remainder of its fifteen-year term. Brown essentially is asking us to reshape the course of events and impact those events had on the parties' contractual relationship by pretending that the unconstitutional statute and the local referenda never existed.

We reject Brown's argument and hold the contract was not revived by the subsequent invalidation of the local option law. This holding allows parties to conduct business and plan their affairs with some degree of certainty. Life goes on while judicial or legislative processes run their course. In the meantime, parties must arrange and conduct their business affairs under the law as it presently exists, regardless of a belief or hope the law will later be changed or invalidated.

We find this result to be consistent with precedent, including the recently decided case of *Bergstrom v. Palmetto Health Alliance*, 358 S.C.

388, 596 S.E.2d 42 (2004). In *Bergstrom*, we held that a 1977 statute, which modified charitable immunity as it applied to hospitals, was void *ab initio* when it was declared unconstitutional in 1992. As a result, the unconstitutional 1977 statute did not impact a suit brought against a hospital in 1998, given that the plaintiff's cause of action accrued in 1979 and must be based on the law as it existed. This result was proper because there were no rights and relationships that already had been determined and settled by past events and transactions.

> When a statute is found unconstitutional, we have recognized the general rule that an adjudication of [the] unconstitutionality of a statute ordinarily reaches back to the date of the act itself. . . . However, we also have recognized the necessity of upholding the validity of transactions or events that occurred before a statute was declared unconstitutional. . . . A close reading of the few South Carolina cases discussing the general rule indicates it is followed **except in special or unusual circumstances**, such as when doing so would create widespread havoc involving a great number of people or transactions, spawn unnecessary litigation, or result in flagrant injustice.

Bergstrom, 358 S.C. at 399-400, 596 S.E.2d at 47-48 (citations and quotes omitted) (emphasis added).

In *Bergstrom*, we relied in part on the broad principles set forth in *Atkinson* regarding the impact of a finding that a statute is unconstitutional. The issue in *Atkinson* was whether a recently enacted federal statute revived certain state alcohol statutes, which previously had been deemed unconstitutional because they violated federal interstate commerce principles. In explaining why the state statutes were not revived or validated by the new federal act, the Court recited several principles emphasizing the void nature of an unconstitutional statute. *Id.* at 453, 78 S.E. at 519.

The *Atkinson* Court was faced with the issue of whether to grant an injunction to the plaintiff because the unconstitutional statutes were of no import, i.e., the Court had to evaluate the parties' *present* rights and duties in

light of the void statutes. In contrast, the present case requires us to examine *past* events and transactions in determining, first, the impact a presumptively valid statute had on the parties' then-existing contractual rights and duties, and second, the impact a later finding of unconstitutionality had on the then-existing rights and duties. We recognize that the general principles expressed in *Atkinson*—though inadequate to resolve the issues in this case—are appropriate in other settings, and therefore we decline to overrule that decision.

In sum, this case presents a special or unusual circumstance in which we must uphold the validity of transactions or events that occurred before a statute was declared unconstitutional. The contract for video poker machines became void and unenforceable by either party as of July 1, 1995, due to referenda under the local option law and the revocation of the machine licenses by the Department of Revenue. Moreover, our finding that the local option law was unconstitutional—sixteen months after the parties' duty to perform under the contract was discharged according to a long-established principle of contract law—did not breathe life back into the contract.

CONCLUSION

For the foregoing reasons, we REVERSE the court of appeals' decision and remand for entry of summary judgment in favor of White on Brown's breach of contract counterclaim. The trial court correctly ruled that the sole subject matter of the contract was the outlawed video poker machines. Neither party breached the contract, and therefore neither party is entitled to damages.

MOORE, WALLER, PLEICONES, JJ., and Acting Justice Aphrodite K.. Konduros, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Larry Eugene Hall, Petitioner,

v.

William D. Catoe, Director,
South Carolina Department of
Corrections, Respondent.

ON WRIT OF CERTIORARI

Appeal From Pickens County
C. Victor Pyle, Jr., Trial Judge
Larry R. Patterson, Post-Conviction Judge

Opinion No. 25850
Submitted March 17, 2004 - Filed August 9, 2004

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Teresa L. Norris and Jerome H. Nickerson, of the Center of Capital Litigation, both of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: We granted certiorari to determine whether the post-conviction relief (PCR) court erred by denying inmate Larry Hall ("Hall") relief on the death sentence he received as a result of a murder conviction. We remand Hall's case for a new sentencing proceeding.

FACTUAL/PROCEDURAL BACKGROUND

In July 1991, Hall committed a series of crimes in an Easley Wal-Mart parking lot. To begin, Hall robbed and sexually assaulted his first victim at gunpoint. Hall then ordered her to walk to the back parking lot with him. A Wal-Mart employee noticed Hall's strange behavior and drove a truck through Hall and the victim's path. Hall allowed her to escape and then walked into the woods behind the store waving his gun in the air.

A half hour later, Hall approached two teenage girls, who were sisters, in the back parking lot. In front of numerous witnesses and without provocation, Hall shot and killed the two girls. When the police arrived and finally cornered Hall, he challenged the police with a piece of wood and dared the police to shoot him.

Hall has both mental and physical disabilities. He currently takes, and was taking during trial, Dilantin and Phenobarbital to prevent epileptic seizures. Dilantin has a sedative effect similar to the effects of alcohol. At the time of his arraignment, Hall had twice the amount of Dilantin in his bloodstream than the normal therapeutic amount.[1] Hall's sister, mother, and former employer all testified that Hall's seizures and medications make it very difficult for him to complete simple everyday tasks and that he is often in a "daze" or "in the fog." Hall has a "grossly abnormal" EEG,[2] as the result of his having epilepsy.

---

[1] Dr. James Brice, Hall's family physician, saw Hall shortly after the court hearing. Dr. Brice ordered blood tests, which revealed that Hall's Dilantin level was 39. The normal therapeutic range is 10-20.

[2] An EEG (electroencephalograph) monitors the electric impulses of the brain, allowing doctors to detect and diagnose brain dysfunction.

Hall has been diagnosed with "sensory dysfunction," deficient language abilities, and deficient organizational abilities. He suffers from both organic personality disorder—which may cause uncontrollable mood shifts and outbursts of aggression—and schizoid personality, which makes Hall indifferent to praise or punishment. Hall is also borderline mentally retarded, having an IQ of 72.

In August 1991, six months before Hall's trial, a group of doctors at the Hall Institute in Columbia evaluated Hall and found him competent to stand trial. One doctor, however, testified that Hall's competency was "borderline" and a "touch and go" issue. Hall was not evaluated again before his trial.

During closing argument, the solicitor directed the jury to weigh the worth of Hall's life against the lives of Hall's victims: "[w]hat are the lives of these two girls worth? Are they worth at least the life of a man, the psychopath, this killer who stabs and stabs and kills and rapes and kidnaps?" Hall was then convicted of murder, kidnapping, first-degree criminal sexual conduct, armed robbery, and resisting arrest and was sentenced to death.

Hall subsequently applied for PCR, and the PCR judge denied relief directing the state to draft an order, which the trial judge adopted in full, without alterations. This Court granted certiorari to review the following issues:

I. Did the PCR judge err in applying a heightened burden of proof to determine whether Hall was competent to stand trial?

II. Was Hall's trial counsel ineffective for failing to object to the solicitor's closing argument, which compared the worth of Hall's life to the victims' lives?

III. Did the PCR judge err in adopting the state's proposed order in its entirety?

LAW/ANALYSIS

Standard of Review

This Court must determine whether any probative evidence exists to support the denial of post-conviction relief. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1980). If any probative evidence exists, the PCR judge's ruling should be upheld. *Id.*

I. COMPETENCY TO STAND TRIAL

A. Burden of Proof

Hall argues that the PCR judge applied the wrong standard of proof in deciding whether Hall was competent to stand trial. We disagree.

A defendant must prove that he is incompetent to stand trial by a "preponderance of the evidence." *State v. Reed*, 332 S.C. 35, 39, 503 S.E.2d 747, 749 (1998). Holding a criminal defendant to a "clear and convincing" burden to prove incompetence is a violation of due process. *Cooper v. Oklahoma*, 517 U.S. 348, 350, 116 S. Ct. 1373, 1375, 134 L. Ed. 2d 498 (1996).

In his order, the PCR judge stated that Hall failed to establish "with credible and convincing evidence" that he was incompetent to stand trial. Hall argues that "credible and convincing" evidence is synonymous with "clear and convincing" evidence, which is not the appropriate standard of proof for determining a defendant's competency to stand trial. However, after reviewing the order in its entirety, we find that the trial judge used the correct burden of proof – a preponderance of the evidence. In fact, the PCR judge noted several times that Hall must prove his incompetence by a "preponderance of the evidence."

First, in his order, the PCR judge stated that "[i]n a state post-conviction relief hearing, the Applicant also bears the burden of proof and he is required to show by a preponderance of the evidence that he is entitled to

relief. Rule 71.1(e), SCRCP. This Court finds that he has failed this burden."

Second, in finding that Hall was not prejudiced by ineffective assistance of counsel, the PCR judge stated, "Hall has a burden of proof at trial to show by a preponderance of the evidence that he was incompetent. This Court finds, to a reasonable probability, he has failed in his burden."

We note that the PCR judge's order should have been amended to exclude the "credible and convincing" language, alleviating any doubt concerning which standard the PCR judge applied. Nevertheless, after reviewing the order in its entirety, we find that the judge applied the proper standard—preponderance of the evidence—to determine whether Hall was competent to stand trial.

B. Evidence of Petitioner's Competency to Stand Trial

On July 16, 1991, three days after Hall's arrest, the trial court ordered Hall to be evaluated for his competency to stand trial. A group of doctors at the Hall Institute found Hall to be competent to stand trial, with one doctor reporting that Hall's mental state was a "close call" and a "touch and go" issue. Since the 1991 evaluations, the parties have accumulated a mass of evidence and engaged in a "battle of the experts" as to Hall's competency to stand trial. Hall argues that, although he was found competent in August 1991, he was not competent during his trial, which took place in January 1992. We find a sufficient amount of evidence supporting the PCR judge's conclusion that Hall was competent to stand trial.

Conviction of a criminal defendant who is not competent to stand trial violates the due process clause of the fourteenth amendment. *Pate v. Robinson*, 383 U.S. 375 (1966). This Court has held that to be competent to stand trial or continue trial, a defendant must have "a rational, as well as factual, understanding of the proceedings against him" and the "ability to consult with his lawyer with a reasonable degree of rational understanding." *State v. Bell*, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987) (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

If there is "any evidence of probative value to support the post conviction judge's factual findings," we must affirm. *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626. Nevertheless, if the PCR judge makes an error of law, then this Court must reverse. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000). In addition, the PCR judge has the duty to weigh the credibility of the doctors who have testified as to Hall's competency to stand trial. If the testimony supports the PCR judge's findings, then the findings should be upheld. *Solomon v. State*, 313 S.C. 526, 443 S.E.2d 540 (1994); *Wade v. State,* 308 S.C. 552, 419 S.E.2d 781 (1992) (a finding that testimony in support of allegations was unconvincing, without credibility, and untruthful will be upheld on appeal).

This Court has held that the PCR judge erred in granting relief on the basis that the defendant was not competent to stand trial when (1) counsel testified at the PCR hearing that he had no trouble communicating with the defendant; (2) the trial transcript showed that the defendant clearly understood the questions asked and responded in an appropriate manner; and (3) a forensic psychiatrist evaluated the defendant prior to trial and found the defendant's medical conditions did not affect his mental state. *McLaughlin v. State*, 352 S.C. 476, 575 S.E.2d 841 (2002).

Hall presents several arguments that he was incompetent to stand trial: (1) he has been diagnosed with an antisocial disorder; (2) his trial counsel testified that he believed that Hall was not competent during trial; (3) Hall suffered from a seizure the night before sentencing, indicating that he could have experienced periods of incompetency; (4) during trial, he had taken abnormal doses of Dilantin causing him to be groggy and sedated; and (5) his low IQ indicates he has the intelligence of an average eleven-year-old.

Conversely, the state presents a sufficient amount of probative evidence that Hall was competent to stand trial: (1) in August 1991, several psychologists conducted an extensive evaluation of Hall and found him to be competent to stand trial; (2) Dr. McKee, who evaluated Hall from July 23, 1991 to August 8, 1991, found that "his answers to his questions were well associated, goal directed and relevant; there was no evidence of delusional

thinking" and that he was capable of "understanding and participating in his defense and is capable of understanding the charges against him"; (3) one of Hall's defense counsel, Dallas Ball, testified in a May 29, 1997 deposition that "[i]n the discussions with Mr. Hall throughout the case…[Hall] understood what he was facing, and he listened to the testimony each day as to what was said against him, and he understood what was going on"; (4) during the PCR hearing, defense counsel, Christopher Olson (Olson), testified that Hall told him that he shot the other girl because she was an eyewitness to the first shooting, indicating that Hall knew the consequences of his actions; and (5) Olson also testified that none of the doctors indicated any need to reevaluate Hall before trial.

We find that a sufficient amount of probative evidence exists to support the PCR judge's ruling that Hall was competent to stand trial. Moreover, given that the PCR applied the correct burden of proof, we hold that the PCR judge correctly determined that Hall was competent to stand trial.

II. CLOSING ARGUMENT

Hall argues that trial counsel was ineffective because counsel failed to object when the solicitor made the following statement in his closing argument:

> I am talking about values, because a jury verdict is a statement of values. And I am not talking about dollars and cents as far as what the [lives of the two girls were] worth, but nevertheless it is a question of values. What are the lives of these two girls worth? Are they worth the life of this man, the psychopath, this killer who stabs and stabs and kills, and rapes and kidnaps.

Hall argues that his trial counsel's failure to object allowed the solicitor to charge the jury with an arbitrary, misconceived sentencing analysis, violating Hall's right to due process. We agree.

A criminal defendant is constitutionally entitled to effective representation. *Rogers v. State*, 261 S.C. 288, 199 S.E.2d 761 (1973). In

order to find trial counsel ineffective, this Court must find that counsel's conduct was deficient and that the deficiency prejudiced the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984).

In the past, the United States Supreme Court (USSC) did not explicitly recognize the state's right to offer victim impact evidence in a criminal trial. In *Booth v. Maryland*, the USSC "left open the possibility that the kind of information contained in victim impact statements could be admissible if it 'related directly to the circumstances of the crime.'" 482 U.S. 496, 507 (1987)). Additionally, in *South Carolina v. Gathers*, the USSC affirmed this Court's ruling that "victim impact statements in capital sentencing proceeds violate [the] principle that a sentence of death must be related to the moral culpability of the defendant." 490 U.S. 805, 810 (1989).

But in 1991, the USSC overruled *Gathers* and *Booth*, holding:

> if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than any other relevant evidence is treated.

Payne v. Tennessee, 501 U.S. 808, 827 (1991).

In other words, "[v]ictim impact evidence, as any other relevant evidence, is admissible so long as it is not so unduly prejudicial that it renders the trial fundamentally unfair…." *Id.* However, "[a]s a general matter, … **victim impact evidence is not offered to encourage comparative judgments** of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not." *Id.* at 823, 111 S. Ct. at 2607 (emphasis added). Under a similar line of reasoning, this Court held that a criminal defendant's

reprehensibility was not mitigated by the fact that the victim was a murderer himself. *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985).

At first glance, our decision in *Humphries v. State* appears to allow a solicitor to compare the lives of a criminal defendant with that of the defendant's victim. 351 S.C. 362, 376, 570 S.E.2d 160, 168 (2002). Nonetheless, we do not extend *Humphries* to permit the state to encourage the jury to compare the worth of a defendant's life with that of his victims. In *Humphries*, we upheld Humphries's death sentence and held that the solicitor's comparison of the lives of Humphries and his victim was within the realm of permissible victim impact evidence. In *Humphries*, defense counsel, attempting to mitigate the effects of the state's evidence concerning the brutality of the murder, elicited testimony that Humphries was a victim of parental abuse, substance abuse, and poverty as a child.[3]

In his closing argument, the solicitor responded by comparing the lives of Humphries and his victim. Although both Humphries and his victim were reared in impoverished conditions, Humphries was in and out of jail while the victim maintained an ordinary, crime-free life. We held that the solicitor's argument was permissible victim impact evidence. [4]

---

[3] Humphries presented thirteen witnesses who testified as to his cruel childhood.

[4] We recognize that the Fourth Circuit recently granted Humphries federal habeas corpus, finding that the state (1) compared the **worth** of Humphries's life with that of his victim and (2) did so for the primary purpose of "exhort[ing] the jury to return a death sentence on the basis of the [defendant's] relative lack of worth." *Humphries v. Ozmint*, 2004 WL 937266 at 4 (4th Cir. May 3, 2004). We also take notice that the Fourth Circuit granted the state's petition for rehearing *en banc* and will rehear the case in October 2004. Nevertheless, we disagree that the victim-defendant comparison found in our account of *Humphries* is as prejudicial as the comparison in the present case. We continue to distinguish the facts of *Humphries* with that of the present case and maintain that these factual differences yield a different result as a matter of law. Our interpretation of

Again, the solicitor's argument in Hall's trial is distinguishable from the solicitor's argument in *Humphries*.

In *Humphries* we recognized that it is more prejudicial for the state to compare the worth of the life of the defendant with that of his victim than it is to compare their lives based on the evidence presented. *Id.* at 374, 570 S.E.2d at 167-168. In the present case, the solicitor not only suggested that Hall's life was worth less than his victims', he developed an arbitrary formula whereby if the jury finds Hall's life worth less than his victims', then the jury could reach no other conclusion than that the death penalty is justified.

---

the law coincides most congruently with Chief Judge Hamilton's dissent in the Fourth Circuit's recent account of *Humphries*:

> [A]llowing the introduction of victim-impact evidence does not, and should not, open the door to evidence/argument ultimately allowing the jury to make a comparative inquiry between the victim and other victims in society, as the court in *Payne* apparently recognized.
> …
> Put simply, clearly established Supreme Court precedent does not prohibit victim-to-defendant comparisons; they are inevitable in any capital case in which the jury is asked to assess the persuasive force of the defendant's mitigating evidence and the victim-impact evidence.

Id. at 18.

We recognize that those victim-to-defendant comparisons that render a trial fundamentally unfair and those victim-to-defendant comparisons that are permissible are not always clearly distinguishable. A comparison that constitutes permissible victim-impact evidence is not as prejudicial to a defendant as a comparison that imposes, what in effect is, an arbitrary, unfounded jury charge.

Further, while **the solicitor** in *Humphries* compared the histories of Humphries's and his victim's lives, the solicitor in *Hall* asked **the jury** to compare the **worth** of Hall's life with that of his victims'.

We hold that the solicitor impermissibly compared Hall's life to the victims' lives. We find that the solicitor's comparison (1) was so emotionally inflammatory that it became a material part of the jury's deliberation process; (2) unquestionably directed the jurors to conduct an arbitrary balancing of worth, which required that Hall be sentenced to death if the jury found Hall's life was worth less than the lives of his victims; (3) is totally unrelated to the circumstances of the crime; and (4) is distinguishable from traditional impact evidence in that it was not actually offered to show the impact of the crime on the victims or the victims' family.

For these reasons, we hold that Hall was denied his constitutional right to effective assistance of counsel when his trial counsel failed to object to the solicitor's comparison between the worth of Hall's life and the lives of the victims.

III. ADOPTION OF THE STATE'S PROPOSED ORDER IN FULL

Hall argues that the PCR judge erred in adopting the state's proposed order because the order did not resolve issues of fact, indicating that the judge did not render an independent judicial judgment. We disagree.

The commentary to South Carolina Appellate Court Rule 501, Canon 3 B(7)(e) provides that "[a] judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions." Further, in *Pruitt v. State*, this Court directed that:

> [c]ounsel preparing a proposed order should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it.

> Moreover, after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by § 17-27-80 and Rule 52(a), SCRCP….

310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992).

On November 12, 1999, after receiving a request from the PCR judge to do so, the state submitted a proposed order to both the judge and opposing counsel. On November 14, 1999, the PCR judge told the parties that he would "carefully review the proposed order and insure that the facts and conclusions of law are as I find them to be."

Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it. Further, Hall waived his right to make this challenge when he failed to file a motion to alter or amend the order. *Id.*

CONCLUSION

We REVERSE the PCR court on the basis that Hall's counsel was ineffective for not objecting to the solicitor's closing argument, which included an instruction to the jury to compare the worth of Hall's life with the lives of his victims. Accordingly, we REMAND for a new sentencing proceeding. Finally, we affirm the PCR judge's ruling on the remaining issues.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Collins Holding Corporation, Respondent,

v.

Scott Landrum and Landrum Incorporated, Inc., Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 25851
Heard June 22, 2004 - Filed August 9, 2004

AFFIRMED

Robin B. Stilwell, of Greenville, for Appellant.

John S. Nichols, of Bluestein & Nichols, LLC, of Columbia, and Ralph Lee Gleaton, II, of Pfeiffer & Gantt, PA, of Greenville, for Respondent.

JUSTICE PLEICONES: Collins Holding Corporation (Collins) filed a breach of contract action against Landrum Inc. and Scott Landrum

(collectively Appellant).[1] After a bench trial, the judge awarded Collins $244,450.56 in damages. Both Collins and Appellant moved to alter or amend the order. The judge denied the motions. Appellant appealed. This appeal was certified from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm.

FACTS

On December 21, 2000, Appellant and Collins signed a contract that gave Collins "the exclusive right for six years to install and maintain all coin and/or currency operated Flipper Machines, and Pinball Machines, upon the entire premises of [three convenience stores owned by Appellant]." The contract also stated that Appellant had the right to have the machines removed with 10 days written notice to Collins. The revenue was to be divided 40% to Appellant and 60% to Collins. The contract stated "[d]uring the term and any continuation thereof, no other person, firm, corporation or entity of any kind whatsoever shall have the right to operate any [] coin and/or currency operated flipper machines and pinball machines, upon said premises." Finally, the contract also stated "[a]ny prior statements, offers, representations or understandings are deemed matters of negotiation only and are merged into this Agreement which is a complete integration of the Agreement and contains only the Agreement between the parties regarding the subject matter described herein. [Appellant] further certifies that there are no contracts or agreements with any other party regarding the subject matter herein. This Agreement may only be modified by a written instrument signed by all the parties hereto." Both parties, as well as two witnesses, signed the agreement.

The judge found that Appellant became dissatisfied with the 60/40 split of revenues and demanded a 50/50 split, which Collins refused. After the refusal, Appellant disconnected Collins' machines and installed his own machines, as well as machines owned by Sonco Amusements, Inc. (Sonco). Sonco split the revenues 50/50 with Appellant. The judge found that Appellant breached the contract with Collins and awarded Collins $244,450.56 in damages as well as the costs of the action.

[1] Scott Landrum was dismissed from the case.

ISSUES

1. Did the trial court err in awarding Collins damages for breach of contract because the damages were too speculative?

2. Did the trial court err in not awarding Appellant damages for breach of contract?

ANALYSIS

1. Speculative Damages

Appellant argues that the trial judge erred in awarding Collins damages because any damages are speculative. We disagree. The trial judge based his award of damages on the testimony of Jerry Alex Saad (Saad), a Certified Public Accountant, who had previously been the Chief Financial Officer for Collins Entertainment for 8 years. Saad testified that the damages suffered by Collins in this case were $244,450.56. Saad reached this figure by taking the actual weekly revenues received from each location owned by Appellant for the period of time that the machines were in Appellant's stores. He took a weekly average using that figure and multiplied that average by the number of weeks remaining in the term of that location's contract.

Appellant argues that the damages are speculative. He argues that because he exercised the contract provision that allowed the machines to be removed after 10 days written notice, there would be no revenue, and therefore no damages. Although Appellant is correct that the contract allowed the machines to be removed with 10 days written notice, he is incorrect in his assertion that this clause affects the damages. The breach of contract occurred when Appellant placed "foreign" machines, which were not owned by Collins, in the stores. According to the contract, Collins had the exclusive right to provide flipper machines in the stores for 6 years.

In a breach of contract action, the "measure of damages is the loss actually suffered by the contractee as the result of the breach. And profits that have been prevented or lost as the natural consequence of a breach of contract are recoverable as an item of damages in an action for such breach." South

Carolina Finance Corp. of Anderson v. West Side Finance Comp., 236 S.C. 109, 114, 113 S.E.2d 329, 335-36 (1960). Saad testified about the formula used to calculate the estimated damages, and the formula is reasonable. "The law does not require absolute certainty of data upon which lost profits are to be estimated, but all that is required is such reasonable certainty that damages may not be based wholly upon speculation or conjecture, and it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated and determined with a fair degree of accuracy." 113 S.E.2d at 336. We affirm the trial court's award of $244,450.56 for Appellant's breach of contract.

2. Appellant's Damages

Appellant alleges that the machines were not removed 10 days after he gave Collins written notice, and therefore Collins breached the contract. Appellant contends the trial court erred in not awarding him damages. We disagree.

Appellant testified he notified Collins that he wanted the machines removed but Collins did not remove the machines until 6 months after notification. Appellant testified that he was forced to store the machines for this period and that he could have used the area for storage. Appellant figured his damages at $10 a day for 6 months, which is $3,600. The judge found that Appellant failed to prove his claim by the greater weight of the evidence and did not award Appellant damages. We affirm the trial judge. Appellant was unable to locate a copy of the letter that he sent to Collins. Further, Appellant did not offer any evidence to prove damages, except that he "could have had merchandise there overstocked." The trial court's decision is

AFFIRMED.

MOORE and WALLER., JJ., concur. TOAL, C.J., concurring in part and dissenting in part in a separate opinion in which Acting Justice Aphrodite K. Konduros, concurs.

CHIEF JUSTICE TOAL: I agree with the majority's holding that the damage award in favor of Collins was not speculative, but I disagree with the majority's conclusion that the Appellant did not satisfy his burden of proving that Collins breached the contract causing Appellant to suffer damages. Therefore, I respectfully dissent in part.

The contract between Appellant and Collins provided that the Appellant had "the right to have said machines removed within (10) ten days written notice to" Collins. While Appellant may have been unable to include in the record the letters he sent to Collins giving the ten day notice,[2] Collins testified about the contents of two notice letters on cross-examination:

> Appellant: Mr. Collins, I want to show you two letters … [y]ou are welcome to read them into the record, should you elect to, sir.
>
> Collins: This is July the 31st, 2001. And it's a letter from [Appellant's attorney] to [Collins' attorney].
>
> "Dear [Collins' attorney], I've had the opportunity to review your July 24th, 2001, correspondence regarding the above-referenced store and related contract. Pursuant to the specific terms of the contract, [Appellant] would respectfully request that [Collins] remove its machines from all relevant locations within 10 days of the date of this letter."
>
> …
>
> Appellant: Now under the terms of this contract, does that count as notice --
>
> Collins: That would be notice, yes, sir.
>
> …

[2] The letters, admitted into evidence as Defendant's Exhibit No. 2, were lost by the Greenville County Clerk of Court.

> Appellant: All right sir. And the second one, does it essentially ask for the --
>
> Collins: This is August the 31st, 2001.
>
> …
>
> "Dear [Collins' attorney], I received your recent letter regarding the above-referenced matter. To date, your client has not removed the machines as contemplated under the contract. Please be advised that your client has 10 days from the date of this letter to remove the machines or they will simply be placed at curbside for appropriate removal."
>
> …
>
> Appellant: So you did get notice; right?
>
> Collins: My lawyer did, yes, sir. And essentially, I got the notice because he was representing me.

In my view, this testimony on cross-examination clearly indicates that Collins received the requisite notice of Appellant's contractual right to have the machines removed. That evidence, combined with Appellant's testimony of his inventory carrying cost -- a normal business expense -- clearly satisfies Appellant's burden to prove both breach and damages.

Accordingly, I would find that the trial judge erred in not awarding Appellant damages in the amount of $3,600[3] resulting from Collins' failure to remove the machines.

Acting Justice Aphrodite K. Konduros, concurs.

[3] This amount was not disputed by Collins.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ex Parte: South Carolina Department of Health and Human Services, Appellant,

IN RE: State Farm Mutual Automobile Insurance Company, Plaintiff,

v.

Justin Jackson, a minor under the age of fourteen (14) years; Paul M. Jackson, III, a minor under the age of fourteen(14) years; Tesa K. Jackson, a minor under the age of fourteen(14) years; Joseph Rakes, a minor under the age of fourteen(14) years; and Nikkia Rakes, a minor under the age of fourteen (14) years, Respondents.

Appeal From Anderson County
Joseph J. Watson , Circuit Court Judge

Opinion No. 25852
Heard June 24, 2003 - Filed August 9, 2004

AFFIRMED

Assistant General Counsel George R. Burnett, of the South Carolina Department of Health and Human Services, of Columbia, for Appellant.

Patricia Logan Harrison, of Columbia, for Respondents.

CHIEF JUSTICE TOAL: The South Carolina Department of Health and Human Services ("Medicaid") appeals the trial judge's finding that it will not be immediately reimbursed for Medicaid expenses resulting from an automobile accident involving minors. Although for different reasons than set forth in the trial judge's order, we affirm the insurance proceeds distribution imposed by the trial court.

FACTUAL/PROCEDURAL BACKGROUND

Five fourteen year-old children, Justin Jackson, Paul Jackson, Tesa Jackson, Joseph Rakes, and Nikkia Rakes, were injured in a single car automobile accident in 1999. The children were treated for their injuries, which were minor for Paul Jackson, Joseph Rakes and Tesa Jackson but extensive for Justin Jackson ("Justin") and Nikkia Rakes ("Nikkia").[1] Medicaid paid $92,494 out of Justin's $183,000 medical bill, and it paid $28,911 out of Nikkia's $105,000 medical bill.

State Farm Insurance Company ("Insurer") filed an interpleader action, so that the proceeds of its insurance policy could be distributed among the five children. In the action, Insurer specifically denied liability and simply asked the trial court to allocate the "allegedly available insurance proceeds." The policy that covered the driver of the vehicle consisted of a $50,000 liability policy and two $50,000 underinsured motorist policies. A hearing

---

[1] Justin's primary injury was a closed-head injury, which resulted in major brain damage. He is confined to a wheelchair. Nikkia suffered a spinal injury and will never walk again.

was held, Medicaid appeared and asserted its claim to an alleged prioritized portion of the proceeds that would reimburse it for the medical services that it provided.[2]

The trial judge ruled that pursuant to 42 U.S.C § 1396p (Supp. 2002), the insurance proceeds to be distributed to Justin and Nikkia would be deposited into a Special Needs Trust for the benefit of the children during their lifetime. Medicaid would have a right to the proceeds of the trusts upon the two children's death. The trial judge awarded Medicaid $6,000 representing 1/3 of the liability insurance proceeds given to the other three children.[3] Medicaid appeals the trial judge's determination of the settlement distribution and raises the following issue:

> Did the trial judge err in placing the insurance into a Special Needs Trust before satisfying Medicaid's claim to the proceeds?

LAW/ANALYSIS

Medicaid asserts that the trial judge erred in finding that the proceeds from the *tortfeasor's* liability insurance proceeds were not subject to its lien but rather could become the corpus of a Special Needs Trust for Justin and Nikkia. However, the real issue in this case is whether Medicaid has any claim to the proceeds of the insurance that Insurer has interpleaded into court when no judgment has been entered against a tortfeasor or a tortfeasor has even been alleged to exist.

---

[2] In the initial hearing, Medicaid initially asserted that it should be paid first before any other distribution to the children, and then it stated that it would be willing to accept $75,000. In a subsequent communication, it reduced its demand to $50,000, or 1/3 of the insurance proceeds.

[3] No issue has been raised regarding the proceeds given to the other three children.

Other states that have addressed the issue of Medicaid's claim to reimbursement under 42 U.S.C. § 1396k(a)(1)(A)(Supp. 2002)[4] have done so in the context of a judgment against a tortfeasor or a settlement with an alleged tortfeasor after an action has been filed. These cases have relied on an analysis that considers the proceeds of the judgment or settlement to belong to the third party tortfeasor. Thus, it is the tortfeasor who is responsible for paying Medicaid, and the judgment or settlement does not belong to the victim until after Medicaid has been paid. *See Cricchio v. Pennisi*, 683 N.E.2d 301, 303 (N.Y. 1997)(victim brought suit against alleged tortfeasor and the matter was settled, the settlement proceeds remained the property of the tortfeasor until Medicaid was paid); *Houghton v. Department of Health*, 57 P.3d. 1067 (Utah 2002)(same).

In this case, however, there is no alleged tortfeasor, let alone a judgment against a tortfeasor. We find that without a third party tortfeasor, the Special Needs Trust[5] set up for Justin and Nikkia was proper and, as required by 42 U.S.C § 1396p, Medicaid will receive any monies remaining in the trusts upon the death of Justin and Nikkia.

In *Martin v. City of Rochester*, 642 N.W.2d 1 (Minn. 2002), the court held that when a medical assistance recipient has a cause or causes of action against potentially liable third parties, the medical assistance assignment statute grants the state an assignment right to all claims for medical care. Unlike *Martin*, there is no evidence in the Record that Justin and Nikkia had a cause of action against a potentially liable third party. *See* 42 U.S.C. § 1396a(a)(25)(H)(directing the states to recover the cost of case from *potentially liable third parties*)(emphasis added); *see also Sullivan v. Suffolk County Department of Social Services*, 174 F.3d 282 (2nd Cir. 1999)(DSS may place lien on Medicaid recipient's personal injury claims against a

[4] This section provides that a person who is eligible for medical support under a State Medicaid plan must assign to Medicaid any right to recovery from a third part.

[5] The Special Needs Trust's "purpose, broadly stated, is to shield recovery or settlement from heavy ongoing medical expenses for individuals under the age of 65." Robert Kruger, *Paying a Medicaid Lien After Cricchio v. Pennisi*, 69 N.Y. St. B.J. 58 (December, 1997).

tortfeasor to recover expenses); *Norwest Bank of North Dakota, N.A. v. Doth*, 159 F.3d. 328 (8th Cir. 1998)(Medicaid has a lien on any and all causes of action which accrue to the person to whom care was furnished).

However, the State was not without a remedy in this case. It had the right to sue the driver of the vehicle that was involved in the accident to attempt to establish liability. *See* 42 U.S.C. § 1396a(a)(25)(A)(States administering the state plan must "take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services under the plan); S.C. Code Ann. § 43-7-440(A)(2)(Supp. 2003)(state "may commence and prosecute legal proceedings against any third party or private insurer who may be liable to any applicant or recipient . . . "). That it chose not to attempt to identify a responsible tortfeasor should not be held against the child victims in this case.

Furthermore, it appears that Medicaid has authority to compromise a claim and in this case requested only reimbursement of $50,000, the full amount the trial judge found should be placed in the Special Needs Trust for Justin and Nikkia. Respondents' brief,[6] sets forth "cost effectiveness principals" [sic] which are considered by the agency in determining how much to claim. These include:

1. Total amount of insurance offer;
2. Whether there are liable third parties and other funds forthcoming;
3. Policy limits;
4. Outstanding medical bills;
5. Reduction of costs by medical providers;
6. Documentation of permanent impairment;
7. Prognosis;
8. Reduction in legal fees; and
9. Plaintiff's offer to Medicaid and disbursements of funds.

Because there is no evidence in the Record regarding how Medicaid weighed these criteria, nor was there a hearing to determine how they should be made,

[6] The record contains a Draft of these Cost Effectiveness Criteria.

the decision to accept $50,000 is not entitled to the deference to which an Agency decision would normally be entitled. Rather, similar to settlements in the Workers Compensation arena, where the Commission determines what if any reduction there should be on the lien the carrier has on settlement proceeds,[7] the trial judge was free to determine whether the criteria were properly applied.

CONCLUSION

Because the Record contains no evidence that a third party was liable for the injuries to the children and Insurer specifically disclaimed liability, we find that the trial judge's decision to place Nikkia and Justin's settlement proceeds in a Special Needs Trust comports both legally and equitably with the law. Accordingly, we **AFFIRM** the trial judge's settlement distribution scheme.

MOORE and WALLER, JJ., concur. PLEICONES, J., dissenting in a separate opinion in which BURNETT, J., concurs.

[7] *See Breeden v. TWC, Inc./Tennessee Express*, ___ S.C. ___, 584 S.E.2d 379 (2003).

JUSTICE PLEICONES: I respectfully dissent. In my opinion, the proceeds that Nikkia and Justin received clearly fall within the ambit of assignable proceeds that should be reimbursed to Medicaid. See S.C. Code Ann. § 43-7-430 (B) (Supp. 2003)(the recipient must reimburse Medicaid "from proceeds or payments received by the recipient from any third party or private insurer"); see also 42 U.S.C.A. § 1396k(a)(1)(A). The Insurer filed an interpleader action because the Insurer "may be liable" for the medical costs of the children. The insurance proceeds received fall directly within the statute. Therefore, I would reverse the trial court's decision and satisfy Medicaid's claim to the proceeds before placing any remaining proceeds in a Special Needs Trust.

BURNETT, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

BB&T of South Carolina, Petitioner,

v.

Lottie Fleming and Frederick Fleming, Respondents.

ON WRIT OF CERTIORARI

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

Opinion No. 25853
Submitted April 21, 2004 - Filed August 9, 2004

REVERSED

John William Ray, of Greenville, for Petitioner.

Lottie Fleming and Frederick Fleming, of Greenville, pro se.

CHIEF JUSTICE TOAL: We granted certiorari to determine whether the court of appeals erred in affirming judgment for Lottie Fleming and Fredrick Fleming (Flemings), holding that a verified statement of account

(VSA) included in a request for default judgment cannot be signed by the attorney of record. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

In 1994, John William Ray (Ray) began representing petitioner BB&T in its collection matters on a large scale. Regardless of whether BB&T sues a defaulted obligor, the obligor's file remains in Ray's custody throughout the collection process. Upon initiating litigation against a defaulted obligor, Ray has developed a practice of attaching a self-signed VSA, among other associated documents, to complaints. In addition, Ray has made practice of attaching a self-signed affidavit of the liquidated sum certain along with interest and costs pursuant to Rule 55(b), SCRCP.

From 1994 until 2000, Ray's practice of signing the VSAs himself went unchallenged but in early 2000, in Greenville County, BB&T's requests for default judgment began to be denied. At that same time, the trial judge[1] wrote Ray and explained that the requests were being denied because VSAs "should be signed by [the] plaintiff," not counsel. In addition, the trial judge's law clerk wrote Ray a letter, explaining that Ray should not sign the VSAs because by signing the VSAs, Ray was attesting "as a fact witness—which runs counter to Rule 3.7."[2]

In response, Ray wrote the trial judge on two separate occasions explaining that he was in the best position to sign the VSAs because he was

---

[1] Judge Patterson was the trial judge in the majority of the suits involved in this appeal. He was the first judge to deny Ray's requests for default on the ground that the VSAs were "defective." As Chief Administrative Judge of the thirteenth circuit, Judge Patterson also instructed the other thirteenth circuit judges to deny all of Ray's requests for judgment that included "defective" VSAs.

[2] Rule 3.7 of the Rules of Professional Conduct, Rule 407, SCACR provides that an attorney may not participate in a case if that attorney is likely to be a "necessary witness."

essentially the records custodian for BB&T. The trial judge replied to one of Ray's letters by writing:

> Everyday I sign orders for numerous collection attorneys from around the state—None of those sign verifying the amount due. You cannot do that as an attorney in this case. You are the only lawyer attempting to do that—I'm sure that this is improper. It is contrary to the law. You cannot be a witness in the case. You present evidence.

The trial judge also wrote a letter to the Greenville County Clerk of Court, which intercepted a letter that Ray wrote to the clerk stating: "Mr. Ray refuses to handle his collection the way other attorneys do. He cannot be a witness and certify damages. If he has the bank certify the amount due I will sign the order. If another Judge wants to sign it, fine."

Subsequently, Ray wrote a letter to Judge Kittredge's law clerk to check the status of several proposed default orders that Ray had sent for Judge Kittredge's approval. Judge Patterson responded to the letter:

> I am sorry that I am late in responding to your letter to Judge Kittredge, but, as you know, I have relayed to you my opinion on this matter.
>
> Rule 11 permits signing of pleadings by attorneys. Specifically, SCRCP 9(i) provides for verification of account. The Rule specifically states that the pleader shall attach a verified copy of the account to the pleading. It was added to the South Carolina Rules to preserve prior practice. These rules never intended for an attorney to verify pleadings or accounts. Further, there is case law to the effect that an account based on information and belief does not constitute proof sufficient to enter judgment for liquidated damages. Rule 11(c) provides that when a corporation is a party the verification may be made by any officer or agent thereof.

> I have signed several hundred default judgments this year. You are the only attorney who does not have an officer or agent verify the amount of the loan, the amount paid, and the balance due.
>
> Your files are becoming dormant, and in fairness, I shall set them before me for a hearing, make a record, and permit you to appeal my ruling.

The letter was carbon-copied to Judges Few, Floyd, Kittredge, Watson, Cole, and Non-jury Coordinator, Carole C. Hopkins.

Nearly a year later, the trial judge—before conducting a hearing—issued an order addressing five collection actions filed by Ray, including the Flemings' case. In his order, the trial judge (1) refused to enter default judgment in all cases where Ray signed the VSA and (2) imposed a proactive $100 fine *sua sponte* against Ray for every future VSA that he signed and submitted to the court.

The court of appeals affirmed, holding that (1) the issue of whether Ray's self-signed VSAs were legitimate was not preserved for review, and (2) the issue concerning the trial judge's proactive fines was not ripe for review. BB&T raises the following issues for review:

I. Did the court of appeals err in holding that the issue of whether the trial judge properly refused to enter a default judgment was not preserved for review?

II. Did the court of appeals err in holding that the issue concerning proactive sanctions was not ripe for review?

LAW/ANALYSIS

I. Refusal to Enter Default Judgment

The court of appeals held that BB&T did not properly preserve the issue of whether the trial judge erred in refusing to enter a default judgment

because the issue was "not raised to the circuit court and [is] not addressed in the order." *BB&T of South Carolina v. Lottie Fleming and Fredrick Fleming*, Op. No. 03-UP-255 (S.C. Ct. App. filed April 8, 2003). BB&T argues that the court of appeals erred in ruling that the issue was not properly preserved for review. BB&T further argues that the court of appeals should have reversed the trial judge's ruling denying BB&T default judgment. We agree.

In early October 2000, the trial judge wrote Ray a letter explaining that he intended to conduct a hearing and create a record so that the VSA issue would be preserved for review, but a hearing never took place. In addition, the record reveals that BB&T offered to prepare a record and an order to the trial court's specification. Nevertheless, the trial judge rejected BB&T's proposals and failed to address the VSA issue in the order despite BB&T's efforts to have the issue placed on the record. As a result, BB&T could not create a record and preserve the issue for review. Given that BB&T took the proper steps to preserve the issue, and was unsuccessful only because of the trial court's lack of cooperation, we hold that the VSA issue is properly preserved for appellate review and will address the issue accordingly.

Two rules apply to the VSA issue presented in this case: Rule 9(i), SCRCP, Verification of Account and Rule 11(c), SCRCP, Affidavits and Verifications.

Rule 9(i), SCRCP, provides:

> **Verification of Account**. In an action on an account the pleader shall attach a verified copy of the account to the pleading, or if the items of the account are set forth in the pleading, it must be verified.

Rule 11(c), SCRCP, provides:

> **Affidavits and Verifications**. Affidavits or verifications authorized or permitted under these Rules shall be written statements or declarations by a party **or his attorney of record** or of a witness, sworn to or affirmed before an officer authorized

> to administer oaths, that the affiant knows the facts stated to be true of his own knowledge, except as to those matters stated on information and belief and as to those matters that he believes them to be true. When a corporation is a party the verifications may be made by any officer **or agent thereof**….

(emphasis added).

In the present case, Ray is the attorney of record, and as such, he is also an agent of BB&T. Ray has also shown that he is in the best position to sign VSAs for BB&T because he is the custodian of BB&T's obligor files. Accordingly, we hold that Rule 11(c) allows an attorney of record to sign VSAs in connection with debt collection proceedings. Further, we find that the trial judge's grounds for denying judgment were based upon a misinterpretation of the law and that default judgment should have been entered as requested.

We find that the court of appeals erred in holding that BB&T did not properly preserve the issue of whether BB&T's counsel may sign a VSA. In addition, according to the plain meaning of Rule 11(c), default judgment should have been entered in favor of BB&T in its suit against the Flemings.

II. SANCTIONS

BB&T argues that the court of appeals erred in affirming the $100 proactive fine imposed by the trial judge. Because the grounds for the fines were based upon a misinterpretation of law, we hold that the sanctions are void.

Conclusion

We reverse the court of appeals ruling, which upholds the trial court's denial of entry of judgment based upon a misinterpretation of Rule 11(c), SCRCP. We also vacate the order as to sanctions against Ray and instruct the trial court to enter judgment in favor of BB&T.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

L-J, Inc. and Eagle Creek Construction Co., Inc., Transcontinental Insurance Company, The Home Indemnity Company and The Maryland Commercial Insurance Group, Plaintiffs,

Of Whom The Home Indemnity Company is Respondent,

v.

Bituminous Fire and Marine Insurance Company, Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Charleston County
Thomas J. Wills, Special Master, Circuit Court Judge

Opinion No. 25854
Heard April 21, 2004 - Filed August 9, 2004

REVERSED

Charles E. Carpenter, Jr., Francis M. Mack, and S. Elizabeth Brosnan, all of Richardson, Plowden, Carpenter & Robinson, P.A.,

of Columbia, and John J. Piegore, of Sanchez & Daniels, of Chicago, Ill., for Petitioner.

I. Keith McCarty and Amanda R. Maybank, both of Pratt-Thomas, Epting & Walker, of Charleston, for Respondent.

George E. Mullen and Allison Burke Thompson, both of Mullen, Wylie & Seekings, of Charleston, for Amicus Curiae

---

CHIEF JUSTICE TOAL: In this declaratory judgment action, this Court is asked to determine whether damage caused by the faulty workmanship of L-J, Inc. (Contractor) and its subcontractors on a road construction project at the Dunes West subdivision in Mt. Pleasant is covered under the commercial general liability (CGL) policy issued by Bituminous Fire and Marine Insurance Company (Bituminous). We hold that the damage was not caused by an "occurrence" as defined under the CGL policy, and therefore the damage is not covered.

FACTUAL/PROCEDURAL BACKGROUND

In 1989, Dunes West Joint Venture (Developer) hired the Contractor to perform site development work and construct roads for the Dunes West subdivision. The Contractor completed the work in 1990,[1] and by 1994, the roads had deteriorated such that the Developer sued the Contractor for breach of contract, breach of warranty, and negligence.

During the period from 1989 to 1996, various CGL insurance providers issued policies to the Contractor.[2] Bituminous underwrote a policy covering the period from 1990 to 1992.

---

[1] Most of the construction was performed by subcontractors.

[2] The other insurers who issued CGL policies during this time period are Transcontinental Insurance Company, The Home Indemnity Company, and

In 1997, the Contractor and the Developer settled the 1994 lawsuit, whereby the Contractor agreed to pay the Developer $750,000. The Contractor sought indemnification from Bituminous and the other three insurers that issued CGL policies for the road construction project. Bituminous refused to indemnify the Contractor, while the other three issuers contributed $362,500 to the settlement amount.

Because Bituminous refused to pay, the Contractor and the three respondent insurers brought a declaratory judgment action seeking a contribution from Bituminous to the settlement amount, coupled with an indemnification for all defense costs. The circuit court referred the action, with finality, to a special master, who found that the damage to the roadway system was covered under the Bituminous policy. More specifically, the special master found that the damage constituted an occurrence under the Bituminous policy, and the "expected or intended" and "your work" exclusions did not apply to work performed on the Contractor's behalf by the subcontractor. Finally, the special master found that the CGL "policy years" ran from 1989 to 1996, and because Bituminous's policy covered the two-year period from 1990 to 1992, it owed the other carriers a two-year contribution valued at $103,571.42.

Bituminous appealed, raising the issues of whether there was an "occurrence" and whether the policy exclusions were triggered. The court of appeals, in a 2-1 decision, affirmed the special master, finding that the property damage was an "occurrence" and that the policy exclusions did not apply. *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 350 S.C. 549, 567 S.E.2d 489 (Ct. App. 2002).

This Court granted Bituminous's petition for certiorari to review the following issues:

The Maryland Commercial Insurance Group. These three companies are the respondents in this matter.

I. Did the court of appeals err in finding that the premature road deterioration constituted an "occurrence" as defined by the CGL insurance policy?

II. Did the court of appeals err in finding that the premature road deterioration was neither expected nor intended from the standpoint of the Contractor?

III. Did the court of appeals err in finding that the "your work" exclusion restored coverage because the exclusion did not apply to work accomplished by a subcontractor?

STANDARD OF REVIEW

This is an action at law, and in an action at law tried before a judge, the findings of fact will not be disturbed unless no reasonable evidence supports the judge's conclusions. *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

I. "Occurrence"

Bituminous asserts that the court of appeals erred in determining that the property damage resulting from the faulty grading and construction of the roads at Dunes West constituted an "occurrence" under its CGL policy with the Contractor. We agree.

Only four years after the Contractor finished construction of the Dunes West road system, the roads began to deteriorate, showing many signs of alligator cracking -- a form of cracking that looks like alligator skin. Two witnesses testified in deposition as to the cause of the alligator cracking. The first deponent, Kenneth Humphries, testified that approximately 50% of the cracking was caused by insufficient road subgrade preparation due to the Contractor (1) failing to remove tree stumps from the subgrade and (2) insufficiently compacting the soft, wet clay in the subgrade. The remaining

50% cause of the cracking, in Humphries' opinion, came from an insufficiently thick road course, improper drainage, and excessive traffic.

The second deponent, L.G. Lewis, testified that moisture damage resulting from the Contractor's failure to provide an adequate drainage system was the primary cause of the road deterioration. The other causes, according to Lewis, included an inadequate "edge of curb detail and the increased frequency of heavy wheel loads on the pavement."

Bituminous's CGL policy, subject to certain exclusions, covers the following:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies….
>
> This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"

The policy defines "occurrence" as follows:

> 9. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The policy defines "property damage" as follows:

> 12. "Property damage" means:
>
> (a) Physical injury to tangible property …

While the alligator cracking may have constituted property damage, we find that no "occurrence" took place as defined by the CGL contract. According to the deposition testimony, the only "occurrences" were various

negligent acts by the Contractor during road design, preparation, and construction that led to the premature deterioration of the roads. Those negligent acts included: (1) a failure to prepare the subgrade by both failing to remove the tree stumps and failing to remove or compact the wet clay in the subgrade; (2) an improperly designed drainage system; (3) a thin road course, ill-prepared to handle heavy wheel loads; and (4) an improperly designed curb edge detail. We find that all of these contributing factors are examples of faulty workmanship causing damage *to the roadway system only*, which does not fall within the contractual definition of "occurrence" under Bituminous's CGL policy.

This finding is consistent with the court of appeals' decision in *C.D. Walters Construction Co., Inc. v. Fireman's Ins. Co. of Newark, NJ*, 281 S.C. 593, 596-597, 316 S.E.2d 709, 711-712 (Ct. App. 1984), in which the court found that a CGL insurance provider is not liable for an economic loss resulting from faulty workmanship alone. The court stated:

> [T]he accidental injury to property or persons substantially caused by his unworkmanlike performance exposes the contractor to almost limitless liabilities. While it may be true that the same neglectful craftsmanship can be the cause of both a business expense of repair and a loss represented by damage to persons and property, the two consequences are vastly different in relation to sharing the cost of such risks as a matter of insurance underwriting.
>
> In this regard Dean Henderson has remarked:
>
> The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage **to property other than to the product or completed work itself, and for which the insured may be found liable.** The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the

> deficient product or work. **This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.**

(citing Henderson, *Insurance Protection for Products Liability and Completed Operations--What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971) (emphasis added)).

Likewise, in the present case, the Contractor should not be able to recover, under a CGL contract, for the economic loss suffered by the Developer due to the Contractor's failure to sufficiently design, compact, and pave the roadway system. The Contractor may not shift this economic loss to its CGL providers. Rather, the Contractor must bear the loss as a consequence of the business risk it assumed upon submitting its bid to construct the roadway system. This business risk includes the probability that the Contractor might negligently construct the roads.

We agree that the CGL policy may provide coverage in cases where faulty workmanship causes bodily injury or property damage to another. For instance, if a bicyclist rode through Dunes West, caught his front wheel in an alligator crack, and suffered an injury, the damages resulting from his successful negligence cause of action would likely be covered under a CGL policy. In our view, this example represents the type of insurable loss contemplated by a CGL policy definition of "occurrence" because it was an accident causing bodily injury and property damage to *another*, rather than damage to the road itself.

We disagree with the court of appeals that the contractual definition of "occurrence" -- "an accident, including continuous or repeated exposure to substantially the same general harmful conditions" -- includes the road damage caused by continuous exposure to surface water runoff. *Bituminous*, 350 S.C. at 555, 567 S.E.2d at 492. In our view, the sole cause of the deterioration was the Contractor's faulty workmanship in designing and constructing the road system. That the roads were subject to surface water

damage was not an "accident" as the court of appeals held. Rather, the damage was caused by the Contractor's negligently designed drainage system to handle the water runoff and failure to properly compact the road's subgrade.

II. "Intended or Expected" Exclusion

Bituminous asserts that even if the Court determines there was an "occurrence," the premature road damage falls under the "intended or expected" exclusion in the CGL policy, and therefore the Contractor's faulty workmanship is not insurable under the contract. Since we find that there was no "occurrence," the CGL policy does not cover the cost of the road damage, and there is no need to address the policy exclusions.

III. "Your Work" Exclusion

Bituminous argues that the court of appeals erred in finding that the exception to the "your work" exclusion "restored" coverage and reestablished Bituminous's liability under the contract. Since there was no "occurrence," the Contractor has no insurable interest in the road damage, and there is no need to address whether the damage falls under the "your work" exclusion. Nevertheless, we write further to reverse the court of appeals' determination that an exception to an exclusion "restores" coverage. *Bituminous*, 350 S.C. at 558, 567 S.E.2d at 494.

Bituminous's CGL policy contains an exclusion that provides:

> This insurance does not apply to:
>
> (*l*) "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard". (sic)

The exception to the exclusion provides:

> This exclusion does not apply if **the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.**

(emphasis added). The policy defines "products-completed operations hazard" as:

> "Products-completed operations hazard" includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned.

This "your work" exclusion is rendered inapplicable because of its exception, quoted above, which states that the exclusion does not apply to work performed by the Contractor's subcontractors. Since the Contractor admitted that its subcontractors performed the road construction work, the exception to the exclusion applies, rendering the exclusion inapplicable.

In stating that the exception to the exclusion "restores" coverage, the court of appeals overlooks existing law, which states that "an exclusion does not provide coverage but limits coverage." *Engineered Products, Inc. v. Aetna Casualty & Sur. Co.*, 295 S.C. 375, 378-379, 368 S.E.2d 674, 675-76 (Ct. App. 1988) (citation omitted). Therefore, we conclude that that the exception renders the "your work" exclusion inapplicable.

CONCLUSION

Based on the reasoning above, we **REVERSE** the court of appeals and find that there was no "occurrence" as defined by the CGL policy because there was no accident causing injury. Therefore, the damage to the Dunes West roadway system is not covered under Bituminous's CGL policy.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Thomas E. Ruffin, Jr., Respondent.

ORDER

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

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

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

this appointment.

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

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

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

IT IS SO ORDERED.

s/James E. Moore A.C.J.

FOR THE COURT

Columbia, South Carolina
July 28, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Clear Channel Outdoor, f/k/a
Eller Media, Respondent,

v.

The City of Myrtle Beach, and
The City of Myrtle Beach Board
of Zoning Appeals, Appellants.

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

Opinion No. 3849
Heard May 13, 2004 – July 19, 2004

REVERSED

Frances I. Cantwell and William B. Regan, both of Charleston, for Appellants.

Douglas M. Zayicek and Howell V. Bellamy, Jr., both of Myrtle Beach, for Respondent.

BEATTY, J.: Myrtle Beach appeals from a circuit court order reversing a billboard permit denial by the Myrtle Beach Board of Zoning Appeals. Myrtle Beach asserts the circuit court improperly characterized the Board's scope of review and misapplied the city's zoning ordinance. We reverse.

FACTS

On July 6, 2001, a tornado struck Myrtle Beach, destroying a billboard owned and operated by Respondent Clear Channel Outdoor. The tornado's winds fractured the billboard's structural support beams in excess of their yield points and caused the billboard to fall over and across an adjacent parking lot. For reasons of safety, Clear Channel removed the entire sign structure from the site, preserving evidence of the damage by photographs. When the City of Myrtle Beach (the "City") studied the site to complete a storm damage assessment, the City discovered that Clear Channel's billboard, which was previously thought to be a single billboard, had actually been two separate billboards: one supported by 4 I-beams and the other supported by 3 I-beams.

After an initial inquiry with the City's zoning staff regarding replacing the downed billboards with a single pole structure, Clear Channel's real estate manager was advised that a permit to replace the signs would not be issued because section 902.9.1 of Myrtle Beach's zoning ordinance prohibited the construction of new billboards within the city. On July 23, 2001, Clear Channel formally applied for a permit to replace the fallen billboards with a new monopole structure. By letter dated July 30, 2001, the City's zoning administrator denied the permit on the same grounds that had been previously stated.

Following the zoning administrator's decision, Clear Channel appealed to the Board of Zoning Appeals. The Board found that Clear Channel's closely spaced billboards did not conform to the requirement in section 902.7.2.c.2 that a distance of 750 feet separate billboards. The Board concluded that section 902.8.3.d prohibited the re-establishment of the nonconforming billboards because the damage was such that the structural

supports had fractured or exceeded their yield points.[1] Additionally, the Board concluded that Clear Channel was not proposing to restore the billboards, but to construct a completely new one, and to issue such a permit would contravene the prohibition of new billboards after February 10, 1998 in section 902.9.1 of the ordinance.

On December 3, 2001, Clear Channel appealed to the circuit court, which first upheld the Board's decision, but then vacated the first order and reversed the Board's decision following a motion to reconsider filed by Clear Channel. The circuit court's second order specifically found: 1) the order prepared by the City contained incorrect and unintended findings and conclusions; 2) the City misconstrued and misapplied its ordinances; and 3) Clear Channel did not lose its rights based on an act of God. This appeal follows.

STANDARD OF REVIEW

A zoning board's findings of fact are final and conclusive on appeal and should be treated in the same manner as a finding of fact by a jury and the court may not take additional evidence. S.C. Code Ann. § 6-29-840(A) (Supp. 2003). Appeal to the circuit court is only for a determination of whether the board's decision is correct as a matter of law. On appeal from the circuit court, the Zoning Board's decision should not be interfered with unless it is arbitrary or clearly erroneous. Heilker v. Zoning Bd. of Appeals, 346 S.C. 401, 406, 552 S.E.2d 42, 44 (Ct. App. 2001); Rest. Row Assocs. v. Horry County, 327 S.C. 383, 389, 489 S.E.2d 641, 644 (Ct. App. 1997).

[1] Myrtle Beach's Code section 902.8.3.d states, in pertinent part, "[t]he right to maintain any nonconforming sign shall terminate and shall cease to exist whenever the sign structure is destroyed, or is damaged as described in subsection 902.4.6.e . . . ." Section 902.4.6.e states that a sign is damaged when the structural support has failed either by fracture or by exceeding its yield point.

ISSUES

1. Did the trial court err in holding that the Board of Zoning Appeals was precluded from considering provisions of the sign ordinance other than Section 902.9.1 in its deliberations?

2. Did the trial court err in its application of the sign provisions of the Myrtle Beach Zoning Ordinance to the facts of this case?

3. Did the trial court err in holding that Clear Channel had a vested right to construct a new billboard, despite the level of damage that had been sustained by the old billboard?

LAW/ANALYSIS

In reversing the Board's decision, the circuit court held "[t]he record showed Section 902.9.1 was the sole basis for the Zoning Administrator's denial of the permit, and no other issue was properly before the Board of Zoning Appeals." Appellant contends this was in error because the Board was not restricted to consideration of section 902.9.1 of the zoning ordinance in assessing the denial. We agree.

The Board of Zoning Appeals exercises substantial power in its review of Zoning Administrators' decisions. Few restrictions encumber the scope of the Board's authority:

> [T]he board of appeals may . . . reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination, and to that end, has all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit.

S.C. Code Ann. § 6-29-800 (E) (Supp. 2003).[2]

[2] Amendments enacted in 2003 changed the designation of this portion of the statute from (D) to (E); no substantive changes were made.

Section 504.1 of Myrtle Beach's zoning ordinance further empowers the Board to "make such order, requirement, decision or determination as ought to be made." Rather than binding the Board to the conclusion or reasoning of the zoning administrator, the forgoing statute and ordinance authorizes the Board to review the basis of the zoning administrator's decision, consider the basis of the appeal, and apply the appropriate provisions of the zoning ordinance as dictated by the facts before it. Accordingly, the circuit court erred in limiting the Zoning Board's review to one section of the City's zoning ordinance.

Appellant next contends that the circuit court erred in determining that the Board misconstrued provisions of the zoning ordinance. We agree.

Courts are bound to afford substantial deference to the decisions of those charged with interpreting and applying local zoning ordinances. Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) ("[T]his construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason therefore."). "The circuit court should not disturb the findings of the board unless the board has acted arbitrarily or in an obvious abuse of discretion, or unless the board has acted illegally or in excess of its lawfully delegated authority." Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). As a consequence, a court must "refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." Peterson Outdoor Adver. v. City of Myrtle Beach, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997). To this end, a court will uphold the decisions of a reviewing body if there is any evidence in the record to support its decision. See Historic Charleston Found. v. Krawcheck, 313 S.C. 500, 505-06, 443 S.E.2d 401, 405 (Ct. App. 1994) (stating an appellate court should not reverse the circuit court's affirmance of a Board unless the Board's findings of fact have no evidentiary support or the Board commits an error of law).

As with statutes, the lawmakers' intent embodied in an ordinance "must prevail if it can be reasonably discovered in the language used." Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d

841, 843 (1995). We review a zoning ordinance to give it a "practical, reasonable and fair interpretation consonant with the purposes, design, and policy of the lawmakers." Id. at 68, 459 S.E.2d at 843.

In this case, the purpose behind the ordinance's treatment of nonconforming signs was explicitly codified in section 902.8.1 as follows:

> Signs which were in existence prior to August 7, 1979, which do not conform to the provisions of this ordinance are declared nonconforming signs. It is the intent of this section to recognize that the eventual elimination, as expeditiously and fairly as possible, of nonconforming signs is as much a subject of health, safety and welfare as is the prohibit[i]on of new signs that would violate the provisions of the ordinance.

Thus, not only was the ordinance drafted to prevent the erection of new nonconforming signs, it also contemplates the elimination of then-existing nonconforming signs. In keeping with this intent, the ordinance states: "[T]he right to maintain any nonconforming sign shall terminate and shall cease to exist whenever the sign is destroyed." Because the zoning ordinance's spacing requirement rendered the billboards "nonconforming" and a tornado rendered them "destroyed," ample evidence in the record supports the Board's conclusion that Clear Channel did not have a right to erect a new billboard where the others had been. This conclusion is only reinforced by the ordinance's prohibition on new billboards in section 902.9.1. With the "any evidence" standard satisfied, rather than substituting its judgment for that of the Board, the circuit court was bound to uphold the Board's decision. Krawcheck, 313 S.C. at 505, 443 S.E.2d at 405.

Finally, Respondent asserts that a use, whether conforming or nonconforming, is not lost when the cause of the loss is beyond the property owner's control. We disagree and find that Respondent did not have a vested right to reconstruct a sign. "[T]he intention of all zoning laws, as regards a nonconforming use of property, is to restrict and gradually eliminate the nonconforming use." Christy v. Harleston, 266 S.C. 439, 443, 223 S.E.2d 861, 863 (1976). Legislative bodies of cities and incorporated towns may, by

ordinance, regulate and restrict the location and use of buildings, structures and land for trade, industry, residence or other purposes. Gurganious v. City of Beaufort, 317 S.C. 481, 489, 454 S.E.2d 912, 917 (Ct. App. 1995) (quoting S.C. Code Ann. § 5-23-10).

The City's legislative body enacted section 902.8.3.d to eliminate nonconforming signs after the signs were destroyed or damaged to the extent of exceeding their yield points. Before any damage occurred, the signs' spacing rendered them nonconforming. There is no question that Clear Channel's signs were damaged beyond their yield points, as is evidenced by the need to remove the signs' debris. The extent of damage from the tornado created a need for new signs. Section 902.9.1 states that no new signs shall be constructed at any location within the city. "While a property owner has a constitutionally protected right to continue the use following enactment of a zoning ordinance, provisions terminating the nonconforming use upon destruction of a specified portion of the premises . . . are proper, so long as the maximum amount of destruction permitted . . . is reasonable." Id. at 490, 454 S.E.2d at 918. We conclude that the maximum amount of damage permitted by Myrtle Beach's zoning ordinance prohibiting the re-establishment of damaged or destroyed signs is reasonable. Construing Section 902.8.3.d with Section 902.9.1, we find Respondent did not have a vested right to re-establish the destroyed billboard.

CONCLUSION

For the foregoing reasons, the decision of the trial court is

REVERSED.

HEARN, C.J., and ANDERSON, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

South Carolina Uninsured Employer's Fund,	Respondent,
v.	
Roy R. House,	Claimant,
and Jack Clark and Vaughn Homes, Inc. and/or Jack Clark Constructions and Travelers/Zurich,	Defendants,
of whom Roy R. House is	Respondent.
and Vaughn Homes, Inc. is	Appellant.

Appeal From Charleston County
A. Victor Rawl, Circuit Court Judge

Opinion No. 3850
Heard April 8, 2004 – Filed August 2, 2004

REVERSED

Kirsten Leslie Barr, of Mt. Pleasant, for Appellant.

Edgar W. Dickson, of Orangeburg, for Respondent.

STILWELL, J.: In this workers' compensation case, Vaughn Homes, Inc. appeals the circuit court's order reversing the full commission and concluding Vaughn was liable for injuries sustained by an employee of its subcontractor. We reverse.

FACTS

Vaughn Homes, a housing contractor, subcontracted with Jack Clark Constructions for framing work. Roy House, an employee of Clark, filed a workers' compensation claim after he was injured in the course and scope of his employment with Clark. At the time of House's accident, Clark did not have workers' compensation coverage.

When he was initially engaged to perform the work, Clark presented Vaughn with a certificate indicating he had workers' compensation coverage from June 5, 1997, to June 5, 1998. Upon the expiration of the original term, Clark provided a certificate indicating continued coverage until June 7, 1999. The history of the policy indicates several instances of cancellation and reinstatement, all based on nonpayment of premiums, until, in March 1999, Clark received notification from his agent that the policy was due to expire in June. A notice of cancellation was served on Clark prior to the date of expiration, but Clark failed to pay the renewal premium.

Clark applied for a new policy with another insurance agency on July 1, 1999, but coverage was declined. Clark continued to perform work for Vaughn, but admitted he neither notified Vaughn that his coverage had lapsed for nonpayment nor advised Vaughn that his application for other coverage was declined. Clark, however, continued to verbally advise Vaughn that he did have coverage.

Following hearings on House's workers' compensation claim, the single commissioner transferred Vaughn's liability to the South Carolina

Uninsured Employer's Fund, concluding Clark committed fraud by failing to notify its higher-tier contractor of a lapse in coverage pursuant to South Carolina Code section 42-1-415(C) (Supp. 2003). The full commission affirmed but the circuit court reversed, finding Vaughn had notice of the expiration of Clark's policy and failed to require proof of coverage after the policy expired.

SCOPE OF REVIEW

When reviewing an appeal from the workers' compensation commission, the circuit and appellate courts are proscribed from weighing the evidence or substituting their judgment for that of the full commission on questions of fact. However, the reviewing court may reverse when a decision is predicated on an error of law. Pratt v. Morris Roofing, Inc., 353 S.C. 339, 344-45, 577 S.E.2d 475, 477-78 (Ct. App. 2003), aff'd as modified, 357 S.C. 619, 594 S.E.2d 272 (2004). Statutory interpretation is a question of law. Stewart v. Richland Mem'l Hosp., 350 S.C. 589, 593, 567 S.E.2d 510, 512 (Ct. App. 2002).

LAW/ANALYSIS

Vaughn argues it may transfer liability for House's injuries to the fund pursuant to South Carolina Code Ann. section 42-1-415 (Supp. 2003). Vaughn contends the circuit court erred by interpreting section 42-1-415 to require a higher-tier contractor to continue to collect proof of insurance coverage from its subcontractor after originally collecting documentation at the time of hire. We agree.

The full commission affirmed the single commissioner's decision to relieve Vaughn of liability based on the finding Clark committed fraud pursuant to section 42-1-415(C) (Supp. 2003). In reversing, the circuit court concluded Vaughn had notice that Clark's policy would expire, and reasoned the burden fell upon Vaughn to require appropriate evidence of continued coverage. The court further determined the commission erred as a matter of law in finding Clark committed fraud, based essentially on two premises. The first premise was that Clark never represented to Vaughn that he had

insurance coverage for any period of time subsequent to June 7, 1999, and therefore could not be guilty of fraudulently representing that he did. As a second premise, the circuit court concluded the expiration of a policy at the end of its term was not the type of "lapse" contemplated by the provisions of section 42-1-415.

However, neither the commission's finding of fraud nor the circuit court's focus on notice is determinative of whether liability may be transferred under section 42-1-415. Under subsection 42-1-415(A), a statutory employer, such as Vaughn, may transfer liability to the fund when a subcontractor's employee is injured if the statutory employer submits documentation to the fund that the subcontractor has represented himself as having workers' compensation coverage "at the time the . . . subcontractor was engaged to perform work." S.C. Code Ann. § 42-1-415(A) (Supp. 2003); see also Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 330, 523 S.E.2d 766, 774-75 (1999) (noting that pursuant to section § 42-1-415(A), "a statutory employer is no longer directly liable for workers' compensation payments whenever documentation is presented to the commission that a contractor or subcontractor represented himself to the statutory employer as having workers' compensation insurance"). Subsection (B) permits a higher-tier contractor to qualify for reimbursement of benefits paid if it collects documentation of insurance coverage "at the time the . . . subcontractor is engaged to perform work." S. C. Code Ann. § 42-1-415 (B).

When the language of a statute is plain, unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are unnecessary and the court may not impose another meaning. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Under these circumstances, the court will not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. Paschal v. State Election Comm'n, 317 S.C. 434, 436-37, 454 S.E.2d 890, 892 (1995).

Subsections (A) and (B) of section 42-1-415 set out the procedure the higher-tier contractor must follow in order to relieve itself of responsibility for workplace injuries to the employees of its subcontractors. Vaughn complied fully with the mandate of subsections (A) and (B) when it collected

documentation of insurance at the time Clark "was engaged to perform work." The statute does not require a prime contractor to continue collecting proof of its subcontractor's insurance coverage after the subcontractor is engaged to perform the work. We are loath to read such a requirement into a statute that otherwise contains such straightforward language.

Subsection (C) of section 42-1-415 is directed toward the subcontractor, places upon it the duty to notify the higher-tier contractor of any lapse in coverage, and sets forth the consequences of the subcontractor's failure to do so when it provides, in relevant part:

> Knowing and wilful failure to notify, by certified mail, the higher tier . . . contractor . . . who originally was provided documentation of workers' compensation coverage of a lapse in coverage within five days after the lapse is considered fraud and subjects the . . . subcontractor who represented himself as having workers' compensation insurance to the penalties for fraud provided by law.

S.C. Code Ann. § 42-1-415(C).

The use in subsection (C) of the word "originally" lends support to the reasoning that the information given at the inception of the engagement is the controlling factor, negating any statutory requirement on the part of the higher-tier contractor to continue collecting proof of insurance.

> Statutes which are part of the same legislative scheme should be construed together. In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction.

State v. Gordon, 356 S.C. 143, 152, 588 S.E.2d 105, 110 (2003) (internal citation omitted).

We hold that because Vaughn complied with the provisions of section 42-1-415(A) and (B), it is entitled to shift the burden of paying workers' compensation benefits to the fund. The order of the circuit court is, therefore,

REVERSED.

HUFF, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shapemasters Golf Course Builders, Inc., James Michael Harbin, Joseph Cagle and Benton Marc Burger, Respondents,

v.

Shapemasters, Inc., Jeffrey Stein and Lilly Jayawant a/k/a Lilly Stein, Appellants.

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

Opinion No. 3851
Submitted April 6, 2004 – Filed August 2, 2004

AFFIRMED IN PART; DISMISSED IN PART; AND REMANDED

Adam Fisher, Jr., of Greenville; Charles Craig Young, of Florence; and Jonathan P. Kresken, of North Myrtle Beach, for Appellants.

Michael R. Daniel and M. Anthony Stith, Jr., both of Mt. Pleasant, for Respondents.

BEATTY, J.: Shapemasters, Inc., Jeffrey Stein and Lilly Jayawant, a/k/a Lilly Stein ("Appellants") appeal various aspects of the trial court's order in favor of Shapemasters Golf Course Builders, Inc., James Michael Harbin, Joseph Cagle, and Benton Burger ("Respondents"), in this shareholder derivative action. We affirm.

FACTS

In 1993, Respondents James Harbin and Joseph Cagle, together with Appellant Jeffrey Stein, established Shapemasters, Inc. ("S.C. Corp."), a South Carolina corporation engaged in the business of golf course construction. In 2001, the same parties established Shapemasters Golf Course Builders, Inc. ("N.C. Corp."), a North Carolina corporation for the same purpose.

Respondents Cagle and Harbin ceased active involvement in S.C. Corp., and only remained associated with the company as shareholders. At that point, Appellant Jeffrey Stein operated S.C. Corp. and Respondents Harbin, Cagle, and Burger operated N.C. Corp. Appellants claim Stein, Harbin, and Cagle own S.C. Corp., and Harbin, Cagle, Burger, and Stein own N.C. Corp.[1]

In December 2001, Respondents commenced this action against Appellants asserting several causes of action. Appellants answered and counterclaimed seeking, in part, an accounting, stock buy out, and a temporary restraining order.

Both parties filed motions for the appointment of a custodian to protect the assets of the various companies while the case was being litigated. Respondents agreed to the appointment of a custodian for N.C. Corp., but Appellants objected to a custodian being appointed for

[1]Respondents aver that prior to the establishment of N.C. Corp., Burger became a 25% shareholder in S.C. Corp. Accordingly, Respondents assert the four partners own equal 25% interests in both companies.

S.C. Corp. on grounds that such an appointment would be unduly costly and burdensome.

The trial court found that Respondents successfully made a prima facie case to justify the appointment of a custodian to oversee S.C. Corp. The court granted Respondents' request for an appointment in an order dated July 15, 2002. The court's order delineated the responsibility of the custodian, including that he or she should assemble and review both of the companies' financial statements, seek to maximize profits, and serve bi-monthly income and expenditure reports on attorneys for each party.

Appellants filed a motion to alter or amend the July 15, 2002 order. In addition, Appellants filed supplemental motions seeking the withdrawal of the court's July 15, 2002 order, referral to a master-in-equity, the termination of discovery, elimination of a custodian for S.C. Corp., restraining orders preventing anyone from competing with the two companies or obtaining employment with a competitor, restraining order preventing Respondents from using the name or logo "Shapemasters" in their business dealings, eliminating any commingling of assets between the two companies, and the designation of a CPA to audit the companies.

In response to these motions the trial court issued a second order dated December 21, 2002. This order vacated the court's July 15, 2002 order. The court ordered mediation and referred the case to a master-in-equity with the reservation that the master should report any jury matters. The court also ordered an audit going back to 1996, denied Appellants' request to eliminate the need for a custodian, appointed Richard E. Heath as the custodian, denied Appellants' request to end discovery, and denied Appellants' requests that Respondents be restrained from working for competitors. As to the use of the name and logo "Shapemasters," the trial court specifically reserved ruling on the issue, stating that the master should address it in his final order. This appeal followed.

ISSUES[2]

I. Is the denial of a restraining order immediately appealable?

II. Did the trial court err in refusing to grant Appellants' motion for a restraining order?

III. Is the appointment of a custodian immediately appealable?

IV. Did the trial court err in appointing a custodian to oversee operations?

LAW/ANALYSIS

I. Restraining Order

Appellants first assert the trial court erred in refusing to grant Appellants' motion for a restraining order with regards to the use of the "Shapemasters" name and logo and regarding Cagle's, a Respondent in this matter, employment with a direct competitor. We disagree.

Appellants correctly argue that the refusal to grant a restraining order is immediately appealable. "An order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction is immediately appealable." S.C. Code Ann. § 14-3-330(4); see also Appeal of Paslay, 230 S.C. 55, 64, 94 S.E.2d 57, 61 (1956) (appeal lay from the restraining order or temporary injunction). However, we must first determine whether the issue is preserved for appellate review.

[2]Appellants state a total of seven issues on appeal. However, we feel that most of the issues may be condensed into four issues for our consideration. Appellants' remaining issues are unsupported by authority and are deemed abandoned.

Appellants further argue the trial court erred in refusing to grant an injunction regarding the use of the name Shapemasters as the company logo and name. Appellants argue that Cagle and other Respondents in this matter are not only using the company name, but also working with a direct competitor.

The trial judge did not rule on the use of the Shapemasters name and logo issue. Further, Appellants failed to pursue a Rule 59 motion on the December 2002 order; therefore, the issue is not preserved for review.[3] Moreover, we believe Appellants' arguments are without merit. Appellants consented to the use of the name and logo when they established N.C. Corp. N.C. Corp. has been conducting business under the Shapemasters name since its formation in 2001. To require N.C. Corp to cease the use of the name and logo during the pendency of this action would disrupt business and have an unduly negative impact on N.C. Corp. Appellants and Respondents are shareholders in N.C. Corp. and will share any profits generated by N.C. Corp.

Additionally, Appellants have failed to show irreparable harm with regards to Appellants' employees working for competitors. See FOC Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 416, 574 S.E.2d 228, 232 (Ct. App. 2002) ("Generally, to obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law."). The fact that Appellants' employees occasionally work for direct competitors is not unduly

[3] See I'On v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating parties should raise all necessary issues and arguments to trial court and attempt to obtain a ruling); Townsend v. City of Dillon, 326 S.C. 244, 486 S.E.2d 95 (1997) (holding issues not ruled upon by the trial judge are not preserved for appellate review); Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991) (ruling issue was not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e) motion to alter or amend the judgment).

harmful to Appellants as there is no evidence in the record that the employees acquired, or attempted to acquire, any business for the competitor. In fact, the record reflects that the employees' function for competitors is one of providing labor as heavy machine operators. Accordingly, we find no error in the trial court's ruling.

II. Appointment of Custodian

Appellants next assert that the appointment of a custodian is immediately appealable and that the trial court erred in appointing a custodian to manage the daily operations of the company's affairs. Appellants assert that the appointment of a custodian has the same effect as the appointment of a receiver. See S.C. Code Ann. § 14-3-330(4) (stating an appellate court has jurisdiction to review an interlocutory order refusing the appointment of a receiver). We disagree.

Receivers and custodians are distinguishable. A receiver's duty is to wind up and liquidate the business and affairs of a corporation, while custodians manage the affairs of the corporation. See S.C. Code Ann. 33-14-320 (Supp. 2003). A receiver, in performing its duties, may:

> [D]ispose of all or any part of the assets of the corporation wherever located, at a public or private sale, if authorized by the court; and (ii) may sue and defend in his own name as receiver of the corporation in all courts of this State.

However, a custodian may:

> [E]xercise all of the powers of the corporation, through or in place of its board of directors or officers, to the extent necessary to manage the affairs of the corporation in the best interests of its shareholders and creditors.

S.C. Code Ann. § 33-14-320(c)(2).

"One of the purposes of a receivership is that the assets shall be held in impartial hands, that the proceeds may be administered according to the priorities of the claims thereto." National Cash Register Co. v. Burns, 217 S.C. 310, 316, 60 S.E.2d 615, 618 (1950). The refusal of a trial court to appoint a receiver should be immediately appealable because of the potential harm in not having an unbiased party to protect a corporation's assets. We do not believe the same level of harm attends an order to appoint a custodian. The custodian in this matter was appointed specifically for the purposes of "overseeing ongoing projects and to allocate man and machinery among the proposed projects to maximize profits." The trial court did not commit error in appointing a custodian and assigning him with the aforementioned duties. Additionally, we do not believe the term receiver, as set forth in section 14-3-320(4) has the same effect as the term custodian. Therefore the court's order to appoint a custodian is interlocutory and not immediately appealable. [4]

CONCLUSION

The lower court did not err in refusing to grant a restraining order regarding the use of the Shapemasters' name and logo. Further, the appointment of a custodian is interlocutory in nature and does not fall into a delineated exception. As such, the trial court's rulings are

AFFIRMED IN PART; DISMISSED IN PART; AND REMANDED.

HEARN, C.J., and ANDERSON, J., concur.

---

[4]It is not necessary for this court to address Appellants' remaining issues because Appellants fail to provide legal authority to support their arguments. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (holding when a party fails to provide arguments or supporting authority for his assertion, the party is deemed to have abandoned the issue). Moreover, Appellant's remaining issues are without merit.