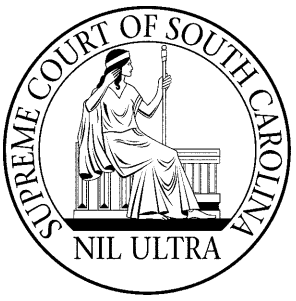

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 39
September 8, 2009
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Auto Owners Insurance Company, Inc., Appellant,

v.

Virginia T. Newman and Trinity Construction, Inc., Respondents.

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

Opinion No. 26450
Heard January 23, 2008 – Re-filed September 8, 2009

AFFIRMED IN PART; REVERSED IN PART

C. Mitchell Brown, of Nelson Mullins Riley & Scarborough, and John L. McCants, of Ellis Lawhorne & Sims, both of Columbia, for Appellant.

Frank M. Cisa, of Cisa & Dodds, of Mt. Pleasant, Joseph K. Qualey, of Qualey & Beck, of Charleston, and Michael S. Seekings and Amy E. Melvin, both of Leath Bouch & Crawford, of Charleston, for Respondents.

George E. Mullen and Daniel F. Oberklein, both of Mullen Wylie & Seekings, of Hilton Head Island, for Amicus Curiae South Carolina Community Associations Institute.

Kenneth E. Ormand, Jr., of Ormand Ashley & Gibbons, of Columbia, for Amicus Curiae National Association of Home Builders and Home Builders Association of South Carolina.

David E. Dukes and William C. Wood, Jr., both of Nelson Mullins Riley & Scarborough, of Columbia, and Laura A. Foggon and Parker J. Lavin, both of Wiley Rein, of Washington, D.C., for Amicus Curiae Complex Insurance Claims Litigation Association.

Lawrence M. Hunter, Jr., of Hunter & Foster, of Greenville, for Amicus Curiae Bituminous Casualty Corporation.

Stephen P. Groves, Sr., of Nexsen Pruet, of Charleston, for Amicus Curiae Builders Mutual Insurance Company.

C. Mitchell Brown, William C. Wood, Jr., Matthew D. Patterson, and A. Mattison Bogan, of Nelson Mullins Riley & Scarborough, of Columbia, for Amicus Curiae Harleysville Mutual Insurance Company.

CHIEF JUSTICE TOAL: The issuer of a homebuilder's commercial general liability policy sought a declaratory judgment to determine whether the policy covered a homeowner's claim for damages caused by the negligence of a construction subcontractor. The trial court determined that the homeowner's claim fell within the policy's coverage and this appeal followed. We certified the case pursuant to Rule 204(b), SCACR, and affirmed the trial court's decision. We now withdraw our prior opinion and substitute it with this opinion. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

Respondent Trinity Construction, Inc. ("Trinity") completed the construction of a home for Respondent Virginia Newman ("Homeowner") in May 1999. Shortly thereafter, the Homeowner filed a claim against Trinity for breach of contract, negligence, and breach of warranty, alleging defective construction primarily related to the installation of the stucco siding. Based on the report of an engineer hired by the Homeowner to inspect the home's construction, the Homeowner alleged that the application of the stucco did not conform to industry standards and that these nonconforming aspects of the stucco installation allowed water to seep into the home causing severe damage to the home's framing and exterior sheathing. The Homeowner and Trinity referred the action to binding arbitration in which an arbitrator issued the Homeowner an award of itemized damages due to the defective construction totaling $55,898.

At the time of construction, Trinity held a commercial general liability (CGL) policy issued by Appellant Auto-Owners Insurance Company ("Auto-Owners"). Following arbitration, Auto-Owners sought a declaratory judgment to determine its rights and obligations under the CGL policy, contending that the damages awarded by the arbitrator were not covered under the policy. The trial court determined that the policy covered the damages because they resulted from an "occurrence" and because Auto-Owners failed to show that any policy exclusions applied. Accordingly, the trial court determined that the CGL policy covered all but four items of the damages provided for in the arbitration award. Auto-Owners appealed. After certifying the case, we affirmed the trial court's ruling. *Auto-Owners Ins. Co., Inc. v. Newman*, Op. No. 1383 (S.C. Sup. Ct. filed March 10, 2008) (Shearouse Adv. Sh. No. 9 at 63).

On rehearing, we now consider the following issue for review:

> Did the trial court err in holding that the damages awarded by the arbitrator for negligent construction were covered under a CGL policy?

STANDARD OF REVIEW

A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue. *Colleton County Taxpayers Ass'n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 231, 638 S.E.2d 685, 688 (2006). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. *Auto-Owners Ins. Co. v. Haman*, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006). In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them. *Id.*

LAW/ANALYSIS

A. Negligent construction as an "occurrence" under the policy

Auto-Owners argues that the arbitrator's award for the Homeowner's property damage is not covered by the policy. Specifically, Auto-Owners argues that pursuant to this Court's opinion in *L-J v. Bituminous Fire & Marine Insurance Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), the subcontractor's defective installation of stucco did not cause an "accident" constituting an "occurrence" subject to coverage under the policy. We disagree.

The CGL policy issued by Auto-Owners in this case is the standard Insurance Services Office (ISO) CGL policy used since 1986 and is identical to that reviewed by this Court in *L-J*. The relevant policy provisions state that Auto Owners 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." The policy further explains that the insurance applies to such "bodily injury" or "property damage" only if it is caused by an "occurrence."

The CGL policy defines many of the particular terms used to outline the scope of its coverage. The policy defines "property damage" as "physical injury to tangible property, including all resulting loss of use of that property," and defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." The policy does not define the term "accident," however, and this Court has found that in the absence of a prescribed definition in the policy, the definition of "accident" is "[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." *Green v. U. Ins. Co. of America*, 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970).

We begin our analysis in this case with a review of *L-J*, which all parties, as well as the trial court, assert in support of their respective resolutions of the issue. In *L-J*, a developer hired L-J, Inc. ("L-J") as contractor for the site development and road construction in a subdivision development. 366 S.C. at 119, 621 S.E.2d at 34. L-J hired subcontractors to perform most of the work, and four years after construction was completed, the roads began to deteriorate due to negligent road design, preparation, and construction. *Id.* The developer sued L-J and the parties settled. L-J subsequently sought indemnification from Bituminous Fire and Marine Insurance Company ("Bituminous") and three other insurance companies who insured L-J under various CGL policies. *Id.* Bituminous refused to indemnify L-J and brought a declaratory judgment action to determine whether its CGL policy issued to L-J covered the damage to the roads caused by the negligent construction. *Id.* at 120, 621 S.E.2d at 34.

This Court found that although the deterioration to the roadways may have constituted property damage, the various negligent acts of the subcontractors upon which the developer based its claim did not constitute an "occurrence" for which the CGL policy provided coverage. *Id.* at 123, 621 S.E.2d at 36. Specifically, the Court found that the developer's claim alleged negligent construction causing damage only to the defective work product itself (i.e. the roadway), and that such a claim was merely one for faulty workmanship. *Id.* Reasoning that "faulty workmanship is not something that

is typically caused by an accident or by exposure to the same general harmful conditions," the Court held that the developer's claim did not allege an "occurrence" falling within the policy's scope of coverage. *Id.* *See also Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 16, 459 S.E.2d 318, 320 (Ct. App. 1994) (explaining that a claim solely for economic losses resulting from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover).

The *L-J* court went on to explain, however, that a CGL policy may provide coverage where faulty workmanship causes third party bodily injury or damage to other property besides the defective work product. *Id.* n.4. To illustrate this theory, the Court examined the case of *High Country Associates v. New Hampshire Insurance Co.*, in which a condominium homeowners' association sued the condominium builder seeking damages allegedly due to negligent construction of the condominium buildings. 648 A.2d 474, 476 (N.H. 1994). The complaint alleged that the continuous moisture intrusion resulting from a subcontractor's defective installation of siding resulted in moisture seeping into the buildings, which caused widespread decay of the interior and exterior walls and loss of structural integrity over a nine-year period. *Id.* The *High Country* court found that the complaint was not simply a claim for faulty workmanship seeking damages to repair the defective siding itself, but rather, was a claim for negligent construction resulting in damage to other property. *Id.* at 477. The court determined that the continuous exposure to moisture due to the defective installation of siding constituted an "occurrence" under the policy and that, in this way, the homeowners' association had properly "alleged negligent construction that resulted in an occurrence, rather than an occurrence of alleged negligent construction." *Id.* at 478. Accordingly, *High Country* held that the CGL policy would cover the homeowners' association's claim against the builder, if successful. *Id.*

We find *High Country* equally instructive in determining whether a CGL policy provides coverage in the instant case where an arbitrator determined that the Homeowner incurred damages as a result of the negligent application of stucco by Trinity's subcontractor. Specifically, the arbitrator

found that the defective stucco allowed for continuous moisture intrusion resulting in substantial water damage to the home's exterior sheathing and wooden framing.[1] In our view, these findings establish that there was "property damage" beyond that of the defective work product itself, and that therefore, the Homeowner's claim is not merely a claim for faulty workmanship typically excluded under a CGL policy.

Furthermore, although the subcontractor's negligent application of the stucco does not on its own constitute an "occurrence," we find that the continuous moisture intrusion resulting from the subcontractor's negligence is an "occurrence" as defined by the CGL policy. In our view, the continuous moisture intrusion into the home was "an unexpected happening or event" not intended by Trinity – in other words, an "accident" – involving "continuous or repeated exposure to substantially the same harmful conditions." *See Travelers Indem. Co. of Am. v. Moore & Assocs.*, 16 S.W.3d 302, 309 (Tenn. 2007) (holding that whether an "accident" has occurred under the terms of a CGL policy requires a court to determine whether damages would have been foreseeable if the insured had completed the work properly). Accordingly, we hold that the subcontractor's negligence resulted in an "occurrence" falling within the CGL policy's initial grant of coverage for the resulting "property damage" to the home's framing and exterior sheathing. *See also Penn. Mfrs. Assoc. Ins. Co. v. Dargan Constr. Co.*, 2006 U.S. Dist. LEXIS 53366 (D.S.C. July 13, 2006).

We note that interpreting "occurrence" as we do in this case gives effect to the subcontractor exception to the "your work" exclusion in the standard CGL policy. On this matter, a brief history of CGL policies is instructive. A CGL policy in the home construction industry is designed to cover the risks faced by homebuilders when a homeowner asserts a post-

[1] According to expert testimony from the consulting engineer hired by the Homeowner, the subcontractor's application of stucco did not meet applicable building code requirements and deviated from industry standards. The expert testified that the subcontractor did not apply the stucco to the required thickness; failed to install a weep system or flashing around doors and windows; and used improper caulking and banding methods.

construction claim against the builder for damage to the home caused by alleged construction defects. *See* Rowland H. Long, *The Law of Liability Insurance*, § 3.06(1) (2007). Several construction-specific exclusions in the standard CGL policy exclude from coverage certain types of property damage attributable to risks outside the scope of CGL recovery. *See id.* The primary exclusion is the "your work" exclusion which provides that the policy will not cover "'property damage' to 'your work.'" In 1986, the insurance industry amended the "your work" exclusion to provide that even if the property damage is to the builder's own work, the "your work" 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." *See French v. Assurance Co. of America*, 448 F.3d 693, 701 (4th Cir. 2006) (discussing the evolution of the standard CGL policy). In doing so, the insurance industry extended liability coverage for property damage to the contractor's completed work arising out of work performed by the subcontractor.[2] *Id.*

The facts of this case establish exactly the type of property damage the CGL policy was intended to cover after the 1986 amendment to the "your work" exclusion. In construing the provisions of an insurance policy, the Court must consider the policy as a whole and adopt a construction that gives effect to the whole instrument and to each of its various parts and provisions. *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976). To interpret "occurrence" as narrowly as Auto-Owners

[2] *C.D. Walters Construction Co., Inc. v. Fireman's Insurance Co.*, cited by Auto-Owners in support of its argument, is distinguishable from the instant case because it denied coverage under a CGL policy based on the "your work" policy exclusion before the 1986 modification to cover damage resulting from subcontractor negligence. 281 S.C. 593, 597-98, 316 S.E.2d 709, 712 (Ct. App. 1984).

We would also distinguish this Court's decision in *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002), because the coverage period for the policy at issue expired while the contractor was still in possession of the home.

suggests would mean that any time a subcontractor's negligence led to the damage of any part of the contractor's overall project, a CGL insurer could deny recovery on the basis that it is excluded from the policy's initial grant of coverage. This interpretation would render both the "your work" exclusion and the subcontractor's exception to the "your work" exclusion in the policy meaningless.[3] *See French*, 448 F.3d at 705-06.

For these reasons, we hold that the trial court correctly found that the negligent application of stucco resulted in an "occurrence" of water intrusion, causing "property damage" that is covered under Trinity's CGL policy.

B. Operation of policy exclusion to exclude damages awarded for replacing the substrate

Auto-Owners argues that even if the subcontractor's negligent application of stucco resulted in an "occurrence" under the CGL policy, coverage for the resulting property damage is nevertheless barred by a policy exclusion. We disagree.

An exclusion found in the standard CGL policy prohibits coverage for "'property damage' expected or intended from the standpoint of the insured."[4] Auto-Owners claims that pursuant to this exclusion, damages

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[3] In adopting this interpretation, the dissent asserts that we need not "look at the terms of a policy's exclusion in order to determine coverage." Nevertheless, in order to determine the proper meaning of the term "occurrence," we must read the policy as a whole and consider "the context and subject matter of the insurance contract." *Schulmeyer v. State Farm Fire and Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). We decline to adopt any construction of the CGL policy that renders a significant exclusion meaningless, notwithstanding the objections voiced by the dissent.

[4] We note that instead of containing an exclusion to this effect, the pre-1986 CGL policy included this language in its initial grant of coverage as part of the definition of "occurrence." *See French*, 448 F.3d at 701. Although, in our view, an analysis under our modern jurisprudence as to whether or not there was an "occurrence" essentially subsumes this particular 1986

awarded by the arbitrator related to the framing and exterior sheathing of the home are not covered under the CGL policy because a construction professional would expect substantial moisture intrusion from defective stucco to result in these types of damages. In our opinion, and in the absence of any evidence otherwise, it is unreasonable to believe that Trinity expected or intended its subcontractor to perform negligently. Therefore, Trinity could not have expected or intended the resulting property damage. *Cf. Lamar Homes v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007) ("But a deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly."). Accordingly, we hold that the property damage to the home's framing and exterior sheathing was not expected or intended by Trinity, and therefore, coverage of the Homeowner's property damage is not barred by this exclusion contained in the CGL policy.

C. Damages awarded for replacement of the defective stucco

Auto-Owners finally argues that even if an "occurrence" warrants recovery for the Homeowner's property damage, the trial court erred in determining that the CGL policy covered the arbitrator's itemized allowance for replacing and repairing the defective stucco itself as an incidental cost to repairing the damage to other property. We agree.

The standard CGL policy grants the insured broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions. Each exclusion in the policy must be read and applied independently of every other exclusion. *Engineered Products, Inc. v. Aetna Cas. & Sur. Co.*, 295 S.C. 375, 378-79, 368 S.E.2d 674, 675-76 (Ct. App. 1988) (quoting *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 795 (N.J. 1979)).

Although the subcontractor exception preserves coverage for property damage that would otherwise be excluded as "your work," another policy exclusion bars coverage for damage to the defective workmanship itself.

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amendment to the policy, we set forth an analysis of the exclusion's applicability in this case for the sake of completeness.

Specifically, the policy exclusion provides that the insurance does not cover damages "claimed for any loss, cost or expense . . . for the repair, replacement, adjustment, removal or disposal of . . . 'Your product'; . . . 'Your work'; or . . . 'Impaired property'; if such product, work or property is withdrawn . . . from use . . . because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it." These terms unambiguously prohibit recovery for the cost of removing and replacing the defective stucco – even when the replacement of the defective work may be incidental to the repair of property damage covered by the policy – and serve as one of the bases for this Court's acknowledgment that a claim solely for economic losses resulting from faulty workmanship is part of an insured's contractual liability which a CGL policy is not intended to cover. *See L-J*, 366 S.C. at 122, 621 S.E.2d at 35. Accordingly, we hold that any amount in the arbitrator's allowance allotted to the removal and replacement of the defective stucco is not covered under the CGL policy.

Nevertheless, it is not possible from the record before this Court to determine what portion of the arbitrator's itemized list of damages may be attributed to the removal and replacement of the defective stucco, and it is not the purpose of this declaratory judgment action to relitigate the issue of damages. Auto-Owners had an opportunity to raise this matter when the issue of damages was litigated before the arbitrator, who issued a final, binding award on the merits.[5] *See Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997) ("Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.").

[5] Auto-Owners represented Trinity in binding arbitration, made mandatory by the terms of the insurance contract. Auto-Owners did so with a reservation of rights and an understanding that the coverage issue would be reserved for judicial consideration in a separate proceeding. When the arbitrator determined damages, Auto-Owners did not seek review of or otherwise contest the damages award.

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision finding that the CGL policy issued by Auto-Owners to Trinity covers the damage awarded by the arbitrator to the Homeowner. Although we reverse the trial court's decision to the extent that it orders recovery under the policy for the removal and replacement of the defective stucco, there is no evidence in the record indicating which damages may be attributed to the removal and replacement of the defective stucco.

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

JUSTICE PLEICONES: I respectfully dissent. We have held that faulty workmanship by a subcontractor which results in property damage only to the work product itself is not an occurrence within the meaning of that term in a comprehensive general liability (CGL) policy. L-J, Inc. v. Bituminous Fire and Marine Ins. Co., 366 S.C. 117, 621 S.E.2d 33 (2005). Here, the general contractor's "work product" is the entire home, including the stucco, the framing, and the exterior sheathing. In my view, there is no coverage under the CGL policy because there is no occurrence, rather only faulty workmanship. L-J, Inc., *supra*.

As we explained in Century Indemnity Co. v. Golden Hills Bldrs., Inc., 348 S.C. 559, 561 S.E.2d 355 (2002):

> A comprehensive general liability policy, such as the one at issue, provides coverage "for all the risks of legal liability encountered by a business entity," with coverage excluded for certain specific risks. Rowland H. Long, L.L.M., *The Law of Liability Insurance*, § 3.06[1] (2001). This type of insurance "is not intended to insure business risks, *i.e.*, risks that are normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage." *Id*. § 10.01 [1]. Specifically, "[t]he policies do not insure [an insured's] work itself, but rather, they generally insure consequential risks that stem from that work." *Id*. *See also Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 459 S.E.2d 318 (Ct.App. 1995), *aff'd*, 321 S.C. 310, 468 S.E.2d 304 (1996) (general liability policy is intended to provide coverage for tort liability for physical damage to property of others; it is not intended to provide coverage for insured's contractual liability which causes economic losses); *Sapp v. State Farm Fire & Cas. Co.*, 226 Ga.App. 200, 486 S.E.2d 71, 75 (1997) (noting risk intended to be insured is possibility that work of insured, once completed, will cause bodily injury or *damage to property other than to completed work itself*,

> and for which insured may be found liable; coverage applicable under CGL policy is for tort liability for injury to persons and damage to *other* property and not for contractual liability of insured for economic loss because completed work is not that for which the damaged person bargained).
>
> Id. at 565-66, 561 S.E.2d at 358 (emphasis in original).

Under the relevant provisions of this CGL policy, Auto Owners is responsible for "property damage" that is caused by an "occurrence." "Occurrence" as used in the policy "means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Faulty workmanship by subcontractors which leads to deterioration or damages the work product itself is not an accident within the meaning of a CGL policy. L-J, Inc., *supra*.[6] In L-J, as the majority notes, we also explained that there may be coverage where faulty workmanship causes third party bodily injury or damage to property other than the contractor's work product. Here, we have neither bodily injury nor damage to anything other than the contractor's work product.

The majority relies on High Country Assocs. v. New Hamp. Ins. Co., 139 N.H. 39, 648 A.2d 474 (1994), and finds that damage caused to other parts of the house by the stucco subcontractor's faulty workmanship is a claim of property damage beyond that of the defective work itself, and thus covered under the policy. I disagree.

[6] In my opinion, the definition of "accident" in Travelers Indem. Co. of Am. v. Moore & Assoc., 216 S.W.3d 302 (Tenn. 2007), relied upon by the majority, is fundamentally inconsistent with the definition we adopted in L-J, Inc., *supra*. See Gen. Sec. Indem. Co. of Az. v. Mtn. States Mut. Cas. Co., 205 P.3d 529 (Colo. App. 2009) (identifying L-J, Inc. as following majority rule that construction defect claims are not accidents under a CGL policy and Moore as a minority rule decision).

As noted above, the "work product"[7] is the entire home constructed by Trinity for the Homeowners. See L-J, Inc., *supra*. While I agree that High Country appears to distinguish between the construction of the condominium units themselves (the work product) and the damage done to the structure of these units, a later New Hampshire case which cites High Country makes it clear that coverage under a CGL policy exists only where there is actual damage to property other than the insured's work product. Webster v. Acadia Ins. Co., 156 N.H. 317, 934 A.2d 567 (2007) (CGL coverage where negligent installation of new roof caused damage to preexisting rafters). As I understand High Country in light of Webster, there would be no coverage here as only Trinity's "work product" has been damaged as a result of the stucco subcontractor's faulty workmanship.

Finally, I do not believe we need look at the terms of a policy's exclusion in order to determine coverage. Under existing South Carolina law, there is no occurrence here, thus no property damage, and therefore no coverage. The "your work" exclusion applies only where there is, in fact, "property damage" to "your work." Absent that threshold showing of coverage, there is no reason to reach the exclusion, much less the subcontractor exception to the exclusion. Compare Laidlaw Enviro. Serv. (TOC) v. Aetna Cas. & Assur. Co. of Ill., 338 S.C. 43, 524 S.E.2d 847 (Ct. App. 1999) (exclusion does not create coverage but limits it).

I would reverse.

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[7] The CGL does not use this term: it is a combination of "your product" and "your work," both terms defined under the contract. Here, we are actually talking about "your work" which means:

a. work or operations performed by you or on your behalf; and
b. materials, parts or equipment furnished in connection with such work or operations.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cecil Brazell and Jackie Brazell, Petitioners,

v.

Audrey B. Windsor, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 26715
Heard June 10, 2009 – Filed September 8, 2009

REVERSED

Brian Dumas, of Peake, Fowler & Associates, of Columbia, for Petitioners.

J. Rutledge Young, Jr., Stephen L. Brown, William L. Howard, Sr., and Russell G. Hines, all of Young, Clement, Rivers, of Charleston, for Respondent.

CHIEF JUSTICE TOAL: Petitioners filed a breach of contract action against Respondent arising out of a purchase contract for the sale of a home and sought rescission of the entire contract. The trial court granted Respondent's 12(b)(6), SCRCP, motion to dismiss the remedy of rescission and the court of appeals affirmed. We granted a writ of certiorari to review that decision and now reverse.

FACTUAL/PROCEDURAL BACKGROUND

On October 20, 2004, Petitioners and Respondent entered into a sales contract for the purchase of a home located on Edisto Island. The closing took place on November 30, 2004. Although neither party was present at the closing, Petitioners executed a HUD-1 Settlement Statement and a deed to Respondent prior to the closing, and the parties submitted pre-signed closing documents at the closing. The total purchase price of the home was $550,000, and after satisfying liens on the property, Petitioners were to receive $327,818.54.

On December 3, 2004, Respondent notified Petitioners that the reverse osmosis water filtration system did not work. On December 6, 2004, the deed was recorded. Respondent's attorney forwarded a check of the net proceeds to Petitioners but withheld $2,000 from the check and noted that the amount reflected the "sellers' proceeds less $2,000 escrow for reverse osmosis system repair." The attorney sent an escrow agreement regarding how the parties would treat the $2,000. Petitioners refused to sign the escrow agreement and refused to accept the check.

Petitioners filed suit alleging breach of contract and seeking rescission of the entire contract. The trial court reviewed the complaint as well as the HUD-1 Statement and granted Respondent's motion to dismiss the remedy of

rescission. The court of appeals affirmed. *Brazell v. Windsor*, 376 S.C. 83, 655 S.E.2d 736 (Ct. App. 2007). We granted a writ of certiorari to review the following issues:

I. Did the court of appeals err in holding that the Rule 12(b)(6), SCRCP, motion was not converted into a motion for summary judgment after the trial court considered the HUD-1 Statement, which was not attached to the complaint?

II. Did the court of appeals err in holding the trial court properly granted the motion to dismiss the remedy of rescission?

STANDARD OF REVIEW

Under Rule 12(b)(6), a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Id.*

LAW/ANALYSIS

I. HUD-1 Statement

Petitioners argue that the court of appeals erred in holding that the trial court did not convert the 12(b)(6) motion into a summary judgment motion in considering the HUD-1 Statement which was not attached to the complaint. We disagree.

In the complaint, Petitioners alleged that Respondent had not paid the amount due under the sales contract "as set forth upon the HUD-1 Settlement Statement attached to and incorporated herein by reference." Although Petitioners failed to actually attach the HUD-1 Statement to the complaint, Respondent's counsel attached a copy of it to their memorandum in support of the motion to dismiss the remedy of rescission. The trial court specifically referenced the HUD-1 statement in its order and considered the document in making the ruling.

A copy of a document which is an exhibit to a pleading is a part of the pleading for all purposes if a copy is attached to such a pleading. Rule 10(c), SCRCP. In considering a 12(b)(6) motion, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint. However, on a 12(b)(6) motion, if matters outside the pleading are presented to and not excluded by a court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, SCRCP, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *See* Rule 12(b), SCRCP.

We hold that the trial court did not convert the 12(b)(6) motion into a motion for summary judgment by considering the HUD-1 Statement in making his ruling. Petitioners explicitly stated that the Statement was attached and incorporated by reference into the complaint. Thus, they brought the HUD-1 Statement to the attention of trial court and were on notice of any information contained in it. In our view, allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.

Accordingly, we hold that the trial court did not convert the 12(b)(6) motion into a motion for summary judgment by considering the HUD-1 Statement.

II. Motion to Dismiss

Petitioners argue the court of appeals erred in affirming the trial court's grant of Respondent's motion to dismiss the remedy of rescission. We agree.

A breach of contract claim warranting rescission of the contract must be so substantial and fundamental as to defeat the purpose of the contract. *Rogers v. Salisbury Brick Corp.*, 299 S.C. 141, 143, 382 S.E.2d 915, 917 (1989). Thus, a rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties. *Id.* at 143-44, 382 S.E.2d at 917. In the absence of fraud, rescission is appropriate only if both parties can be returned to the status quo prior to the contract. *King v. Oxford*, 282 S.C. 307, 313, 318 S.E.2d 125, 129 (Ct. App. 1984).

In the complaint, Petitioners alleged Respondent breached the contract:

> a. In proceeding with the closing on terms other than those as specified in the written agreement;
> b. In failing to honor the "time is of the essence" provision of the agreement;
> c. In failing initially to forward any proceeds of the sale as specified in the duly executed HUD-1 Settlement Statement to the [Petitioners] in a timely manner;
> d. In failing to subsequently forward appropriate funds as clearly specified on the HUD-1 Settlement Statement;
> e. By arbitrarily and unilaterally withholding funds from the [Petitioners]; all of the above constituting substantial and material breaches of the written agreement for sale of real estate as existing between the parties.

The trial court found that the allegation that Respondent withheld $2,000 from the contract price was a minor breach as a matter of law and that rescission would not restore either party to the status quo. Similarly, the court of appeals held that the remedy of rescission was not available because the alleged breach was not fundamental or substantial enough to defeat the purpose of the contract. However, the court of appeals declined to address whether the parties could be returned to the status quo in light of its dispositive holding that the breach was not fundamental.

We hold that the trial court erred in granting Respondent's motion to dismiss the remedy of rescission, and likewise, that the court of appeals erred in affirming this decision. In the complaint, Petitioners alleged Respondent breached several provisions in the contract by withholding $2,000 from the purchase price. While $2,000 may constitute a relatively small portion of the total purchase price, Petitioners alleged the withholding of the proceeds was a material breach, and thus, the allegations support a claim for relief.

In our view, the trial court's and court of appeals' error stems from focusing on the dollar amount withheld in determining whether Respondent's actions defeated the purpose of the contract and the objective of the contracting parties.[1] Numerous legal documents are executed in a real estate transaction and several entities involved in the transaction, including the buyer, seller, lender, mortgage company, and title insurance company, rely on the finality of the closing. Indeed, this Court has noted the importance of attorneys' compliance with the proper real estate closing standards in disciplinary matters. *See In re Barbare*, 360 S.C. 560, 573, 602 S.E.2d 382, 388 (2004) and *In re Lathan*, 360 S.C. 326, 339, 600 S.E.2d 902, 908-09 (2004) (noting the Court's trouble with "real estate transactions which have been the subject of misleading, fraudulent, and/or criminal schemes. Inaccurate HUD-1 Settlement Statements and other closing documents contribute to these deceptive activities."). For these reasons, real estate

[1] In the order, the trial court noted that Respondent paid 99.6% of the contract price and withheld only .04%. The court found that Petitioners' complaint was "over a minor .04%."

contracts are unique and courts should evaluate the purpose of the real estate contract and the materiality of a breach in light of these differences.

In the instant case, we find that the overriding purpose of the contract was not merely to receive proceeds from the sale of a home, but rather to finalize a real estate transaction and transfer title from Petitioners to Respondent. Respondent could have negotiated for provisions in the contract regarding the reverse osmosis system or could have sought relief by filing her own breach of contract action. By withholding proceeds from the purchase price, however, the transaction was not final, thereby potentially defeating the purpose of the contract.

As a final matter, we hold that the trial court erred in dismissing the remedy of rescission because the parties could not be restored to the status quo. Petitioners immediately took action after Respondent failed to act in accordance with the contract. When Respondent failed to deliver the entire amount specified in the contract, Petitioners instructed Respondent not to file the deed or take any further action regarding title to the property. Petitioners refused to accept the check or sign the escrow agreement. Nine days later, Petitioners filed the breach of contract action seeking rescission of the contract "returning the parties to the status quo." Moreover, it is feasible and practicable to transfer title in the property back to Petitioners and return any additional moneys paid to restore the parties to their original position. *See Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485, 494 (Ct. App. 2004) (noting that rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore him to the position occupied prior to the making of the contract).

We note that whether it would be fair and equitable to rescind the contract is a different issue from whether Petitioners have sufficiently alleged a material breach of contract and sufficiently alleged that rescission would allow them to be restored to the status quo. *See King*, 282 S.C. at 314-15, 318 S.E.2d at 129 (refusing to rescind the contract where the plaintiff would be materially prejudiced by rescission and where the defendant could not restore the plaintiff to his former position). Likewise, whether Petitioners

would be able to survive a motion for summary judgment is a different issue from whether Petitioners have failed to state a claim. We merely hold that because Petitioners have stated facts which, if true, would entitle them to relief, the trial court erred in granting Respondent's motion to dismiss the remedy of rescission.

CONCLUSION

For the foregoing reasons, we hold that the court of appeals correctly held that the trial court did not convert the 12(b)(6) motion into a motion for summary judgment in considering the HUD-1 Settlement Statement, but erred in affirming the grant of Respondent's motion to dismiss the remedy of rescission. Accordingly, we reverse and remand for further proceedings.

WALLER, BEATTY, JJ., and Acting Justice James E. Moore, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent and would affirm the Court of Appeals which upheld the trial court's order granting respondent's Rule 12 (b)(6), SCRCP motion. In my opinion, placing $2,000 in an escrow account pending resolution of the reverse osmosis system issue may not have been the best decision, but it was in no way "so substantial and fundamental as to defeat the purpose of the contract." Moreover, I do not agree with the majority that a special standard should apply to real estate transactions, since in my view the purpose of any sale is to transfer title from the seller to the buyer. Finally, I agree with the trial judge that rescission cannot lie here as it is impossible to return respondent to the *status quo ante* the closing.

I would affirm.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James A. Smith, Respondent,

v.

Barnwell County, Employer,
and South Carolina Association
of Counties Self Insurance
Fund, Carrier, Appellants.

Appeal from Barnwell County
Doyet A. Early, III, Circuit Court Judge

Opinion No. 26716
Heard June 10, 2009 – Filed September 8, 2009

REVERSED

Richard Kale, Jr., of Wilson, Jones, Carter & Baxley, of Greenville, for Appellants.

Andrew Nathan Safran, of Columbia, for Respondent.

Grady L. Beard and Daniel W. Hayes, both of Sowell, Gray, Stepp & Laffitte, of Columbia, for Amicus Curiae.

JUSTICE PLEICONES: This case presents the question whether an inmate injured while serving time on weekends may include his full time employment wages in addition to prison pay in determining his average weekly wage, for purposes of workers' compensation. Because we find that the legislature intended to deny inmates the right to combine wages, we find that Respondent may not do so. We therefore reverse the circuit court's decision to the contrary.

FACTS

After a conviction for driving under the influence, Appellant James A. Smith served time on weekends at the Barnwell County Detention Center, where he was directed to engage in various work activities.[1] Smith also worked during the week at Bowe Construction. While working at a landfill during his weekend sentence, Smith fell from a tractor and injured his back.

Barnwell County elected to cover its prisoners under the workers' compensation program, as allowed by S.C. Code Ann. § 42-1-500 (2005). Barnwell County accepted Smith's claim for workers' compensation and began paying him compensation based upon an average weekly wage of $40 a week, the amount provided in S.C. Code Ann. § 42-7-65 (2005) as the average weekly wage for county and municipal prisoners. Smith then filed a Form 50 with the Workers' Compensation Commission contending that the average weekly wage from his regular employment, which he claimed was $333.82, should also be included in determining his compensation.

Following a hearing, the single commissioner ruled that Smith could not include the average weekly wage from his regular employment. The full commission affirmed and the circuit court reversed the full commission. Barnwell County appealed.

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[1] Though the record is silent as to whether Smith's labor was mandatory or voluntary, he was apparently engaged in a voluntary program for labor on public works allowed by S.C. Code Ann. § 24-13-235 (2005).

ISSUES

I. Did the circuit court err in finding that Smith is an "employee" of Barnwell County?

II. Did the circuit court err in finding that Smith may combine wages from civilian employment with the statutory average weekly wage for county prisoners?

DISCUSSION

The amount of compensation awarded under the workers' compensation statutes is based on the worker's average weekly wage. S.C. Code Ann. § 42-1-40 provides the method for calculating the average weekly wage, but allows for deviation from the method "for exceptional reasons . . . ." S.C. Code Ann. § 42-1-40 (2005). This Court has held that concurrent employment is one such exceptional reason. See Foreman v. Jackson Minit Markets, Inc., 265 S.C. 164, 217 S.E.2d 214 (1975).

Barnwell County argues on appeal that Smith was not an "employee" of Barnwell County and therefore, since Smith was not working for two or more employers when the injury occurred, Smith may not recover compensation for concurrent employment. We need not reach this issue because we agree with the County that, even assuming Smith is an "employee" for workers' compensation purposes, he may not combine wages under § 42-1-40.

Originally, the average weekly wage for prisoners was addressed in § 42-1-40, which contained the "exceptional reasons" provision.[2] In 1983, after this Court's decision in Foreman, the General Assembly removed the

[2] Though § 42-1-40 only specifically addressed the average weekly wage of inmates of the State of South Carolina, S.C. Code Ann. § 42-1-500 (1977) provided for worker's compensation coverage for certain county inmates in accordance with the statutes addressing coverage for State inmates.

inmate section from § 42-1-40 and included it in the newly-created § 42-7-65, which contains no "exceptional reasons" provision. Section 42-7-65 is entitled "Average weekly wage designated for certain categories of employees"[3] and provides in part, "[t]he average weekly wage for county and municipal prisoners is forty dollars a week."

By removing inmates from § 42-1-40, designating a specific weekly wage for inmates, and not providing an "exceptional reasons" provision in § 42-7-65, we find that the General Assembly intended that inmates not be allowed to combine wages in determining their average weekly wage. Compare Boles v. Una Water District, 291 S.C. 282, 353 S.E.2d 286 (1987) (holding that volunteer firefighter may combine wages where firefighter's average weekly wage was set forth in § 42-1-40). If the General Assembly had not intended such a result, there would have been no reason to remove inmates from § 42-1-40. See Cannon v. South Carolina Dep't of Probation, Parole, and Pardon Serv., 371 S.C. 581, 430, 641 S.E.2d 429, 584 (2007), *citing* Denene, Inc. v. City of Charleston, 352 S.C. 208, 574 S.E.2d 196 (2002) (it must be presumed the Legislature did not intend a futile act, but rather intended its statutes to accomplish something).

Given the above, we find that the General Assembly intended to deny inmates the ability to combine wages in determining their average weekly wage. See State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (The cardinal rule of statutory interpretation is to ascertain the intent of the legislature.). Smith is therefore limited to the average weekly wage provided by § 42-7-65.[4]

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[3] 1983 Act No. 33, § 1; county prisoners were added in 1991 Act. No. 16, § 2.

[4] We reject Smith's argument that S.C. Code Ann. § 42-7-65 (2005), as interpreted by Appellant, is penal in nature and so, must be strictly construed against the governmental entity seeking to enforce it. "A determination of whether a statute is civil or criminal in nature is primarily a question of statutory construction, which begins by reference to the act's text and legislative history." See In re Matthews, 345 S.C. 638, 648, 550 S.E.2d 311, 316 (2001). "Where the legislature has manifested its intent that the legislation is civil in nature, the party challenging that classification must

CONCLUSION

Assuming *arguendo* that Smith is an "employee" for purposes of the workers' compensation statute, we find that Smith may not combine wages. The General Assembly did not intend for an inmate to be able to combine wages in determining his average weekly wage.

REVERSED.

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

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provide 'the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the [legislature's] intention.'" Id. In the instant case, Smith has failed to show the punitive nature of § 42-7-65, a part of the worker's compensation act.

The Supreme Court of South Carolina

Luba Lynch, Respondent,

v.

Toys "R" Us-Delaware, Inc., Petitioner.

ORDER

On May 12, 2009, this Court granted a petition for a writ of certiorari to review the Court of Appeals' decision in Lynch v. Toys "R" Us-Delaware, Inc., 375 S.C. 604, 654 S.E.2d 541 (2007). On August 17, 2009, the parties filed a joint motion to dismiss the appeal. We grant the motion to dismiss and vacate the Court of Appeals' opinion.

s/ Jean H. Toal C. J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Columbia, South Carolina
September 3, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ten Woodruff Oaks, LLC, Respondent,

v.

Point Development, LLC, BEF, REIT, Inc., Hollingsworth Funds, Inc., and Piedmont Natural Gas Company, Inc., Defendants,

of Whom Point Development, LLC is, Appellant.

Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Opinion No. 4612
Heard April 21, 2009 – Filed August 31, 2009

AFFIRMED

Jesse C. Belcher and Joel M. Bondurant, Jr., of Greenville, for Appellant.

N. Heyward Clarkson, III, and John Harjehausen, of Greenville, for Respondent.

THOMAS, J.: Ten Woodruff Oaks, LLC (TWO) brought this action seeking, among other relief, a declaration that it was the owner of an easement across property belonging to Point Development, LLC (Point). Following a hearing, the Greenville County Master-in-Equity found (1) Point's predecessor-in-title had granted an easement to TWO across the subject property; and (2) Point was bound by the grant. Point appeals the master's rulings. We affirm.

FACTS AND PROCEDURAL HISTORY

CICC Associates (CICC), which is not involved in this appeal, was the owner and developer of 270 acres of land located in Greenville County at New Woodruff Road and I-85. In 1998, Guy Kathe became president of the entity that was the general partner of CICC. Gilles Helou was a limited partner in CICC, and his architectural firm was a design consultant for the development project.

In 1964, a prior owner of the CICC property granted to Piedmont Natural Gas an easement for a gas booster station and a right of ingress and egress to the station. These conveyances were recorded in Greenville County; however, the public record does not indicate any corresponding plats were filed. The agreement on record refers to a right-of-way and easement of "ten feet (10') in width except for the site of the proposed regulator station . . . ."

Soon after CICC purchased its property, TWO purchased an adjoining parcel on which a 12,000-square-foot industrial warehouse was located. TWO's property was located at the corner of Woodruff Oaks Lane and Old Woodruff Road.

Old Woodruff Road, then a public right-of-way controlled by the State of South Carolina, traversed CICC's property, TWO's property, and property owned by Hollingsworth Funds, Inc. In conjunction with CICC's effort to develop its property, Kathe contacted TWO and Hollingsworth about closing Old Woodruff Road. On December 2, 1998, CICC and TWO entered into a "letter agreement" from CICC addressed to John Fort, a principal of TWO. Under this agreement, CICC would grant an easement allowing travel from a new boulevard, later named Market Point Drive, to the Piedmont Natural Gas booster station. In return, TWO would establish an ingress and egress easement between Woodruff Oaks Lane and the Piedmont Natural Gas booster station. The two easements were to overlap in front of the booster station. On January 14, 1999, the letter agreement was signed by Kathe on behalf of CICC and Fort on behalf of TWO.

According to the letter agreement, CICC would prepare the necessary documents for recognition of the easement and for relinquishment of public maintenance of Old Woodruff Road. On January 22, 1999, an application was made to the Greenville County Engineering Division requesting the County's relinquishment of the maintenance of Old Woodruff Road. Both Kathe and Fort signed the application on behalf of their respective principals.

CICC began construction of Market Point Drive in 1999. Soon after, the curbs and median on the road were installed. During this time, CICC had ingress and egress access over TWO's property as provided in the letter agreement. When the road was constructed, a curb cut was included for the 25-foot easement.

On April 30, 1999, CICC recorded with the Greenville County Register of Deeds Office a subdivision plat of its property showing a 25-foot non-exclusive easement for ingress and egress. According to Kathe, the filing of the plat was intended to effect the abandonment of Old Woodruff Road and to supply ingress and egress access from Woodruff Oaks Lane to Market Point Drive. Furthermore, it was Kathe's understanding that the recorded plat established the easement as described in the letter agreement. Likewise, Fort testified this plat reflected what he and Kathe had agreed to regarding the

abandonment of Old Woodruff Road in exchange for the nonexclusive easement that TWO would receive for access between Woodruff Oaks Lane to Market Point Drive.

On August 19, 1999, after CICC deeded a portion of its property to REEF Capital, a revised plat was recorded. This plat showed the same 25-foot ingress and egress easement that appeared on the plat filed on April 30, 1999. On March 15, 2001, CICC recorded another plat for "The Point, Phase I" commercial development that also showed the easement.

Neither TWO nor CICC ever followed through with preparing, signing, or recording any easement agreements or deeds of easement.; however, according to Kathe, there was never a recorded plat that did not show the easement.

In early 2003, Kathe left CICC. Thereafter, Helou, who was licensed as an architect in Europe and had advised CICC on architectural issues, took over as general partner of CICC. On March 17, 2003, CICC sold a portion of its property to Point, a limited liability company owned by Helou and two other individuals.

The deed to Point expressly incorporated the plat recorded by CICC on March 15, 2001, which included the ingress and egress easement. The reference to the plat appears in a section on the deed entitled "Less and Excepting Therefrom," which also contains the familiar disclaimer that "This conveyance is made subject to all restrictions, setback lines, zoning ordinances, utility easements and rights of way, if any, as may appear of record or on the subject property."

Shortly after the conveyance to Point, a Bob Evans restaurant was constructed on a lot in the subdivision. An easement to accommodate the restaurant sign was granted and recorded on May 11, 2004, and was accompanied by a plat showing the ingress and egress easement.

In the fall of 2005, because of increased traffic on New Woodruff Road resulting from nearby commercial development, TWO decided to pave the easement. On October 24, 2005, counsel for Point notified TWO's attorney by letter that Point was taking the position that the easement shown on the various plats "was merely to denote the access route for the gas regulator station." The attorney also warned that any attempt by TWO to make road improvements in that location would be treated as a trespass.

On November 9, 2005, TWO filed this action against Point, Piedmont Natural Gas Company, and other defendants not involved in this appeal, seeking a declaratory judgment of ownership rights to the easement. TWO also sought damages against Point for interference with property rights and injunctive relief to secure the use and enjoyment of the easement. On November 18, 2005, Point answered, generally denying the allegations in TWO's complaint. TWO later amended its complaint to add causes of action against Point for breach of contract, promissory estoppel, and abuse of process.

The matter was later bifurcated for a jury trial on TWO's claims for damages and a reference to the master to adjudicate TWO's other causes of action. On May 18, 2007, the master held a hearing on TWO's equitable claims. By order filed June 12, 2007, the master issued an order in which he concluded TWO had a non-exclusive 25-foot private easement from Woodruff Oaks Lane across the subject property and connecting with Market Point Drive. The master further found (1) the easement was an express easement by grant and was valid as to subsequent purchasers without notice because it was set forth on recorded plats; and (2) Point did not fulfill its burden to present clear and unequivocal evidence that TWO abandoned the easement. After denial of its motion to reconsider, Point filed this appeal.

ISSUES

I. Did the master err in finding the letter agreement created an express easement by grant from CICC to TWO?

II. Did the master err in finding Point had constructive notice of TWO's ownership rights in the easement?

STANDARD OF REVIEW

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998). A finding concerning notice, however, is reviewed to determine if it is supported by the preponderance of the evidence. Cf. Anderson v. Buonforte, 365 S.C. 482, 492, 617 S.E.2d 750, 755 (Ct. App. 2005) (upholding a special referee's finding concerning actual notice as "supported by the weight of the evidence within the record").

LAW/ANALYSIS

I. Creation of an Easement

In support of its position that an easement from CICC to TWO was never created, Point contends that the letter agreement that CICC and TWO signed was at best a contract evidencing the parties' intent to create an easement upon the preparation and recording of various legal documents. Point further asserts CICC and TWO failed to follow through on numerous issues that were either required or contemplated by the letter agreement, such as the preparation of reciprocal easement agreements and a specific description of the easement terms. We disagree.

"As a general rule, to constitute a grant of an easement, any words clearly showing the intention to grant an easement are sufficient." 25 Am. Jur. 2d Easements and Licenses § 15, at 512 (2004). "Whether a grant in a written instrument creates an easement and the type of easement created are to be determined by ascertaining the intention of the parties as gathered from the language of the instrument; the grant should be construed so as to carry out that intention." Smith v. Comm'rs of Pub. Works of City of Charleston, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct. App. 1994). "If the language is

uncertain or ambiguous in any respect, all the surrounding circumstances, including the construction which the parties have placed on the language, may be considered by the court, to the end that the intention of the parties may be ascertained and given effect." 25 Am. Jur. 2d Easements § 18, at 516 (2004).[1]

We recognize the letter agreement has language suggesting the agreement to establish an easement could be executory in nature; however, contrary to what Point argues, this language does not indicate the easement CICC intended to grant to TWO was contingent on the completion of the various tasks enumerated in the letter. As a practical matter, enjoyment of the interest would require physical preparation of the grounds subject to the easement, and legal work would have been necessary to ensure that the easement remained enforceable as to subsequent title holders of the estates involved.[2] Moreover, preliminary work for the easement had in fact begun, including the closing of Old Woodruff Road, construction on Market Point Drive, and the installation of the curbs and median on the road soon after. For these reasons, we reject Point's contention that the letter agreement unambiguously expressed that it did not constitute the grant or creation of an easement.

The master found "that the letter evidenced CICC's express grant of an easement across its property allowing the adjoining landowners to travel from

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[1] In Smith, this Court cited to the same principle as it appeared in an earlier edition of American Jurisprudence Second. Smith v. Comm'rs of Public Works of City of Charleston, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct. App. 1994) (citing 23 Am. Jur. 2d Easements and Licenses § 23 (1966)).

[2] In the appealed order the master noted that "[a]lthough CICC could have prepared additional documents evidencing the easement, . . . [its] failure to do so does not invalidate the express grant of the easement to Ten Woodruff Oaks." We agree that any failure by CICC to record these additional documents does not affect the validity of the easement "[a]s between the parties thereto." Epps v. McCallum Realty Co., 139 S.C. 481, 497, 138 S.E.2d 297, 302 (1927).

Woodruff Oaks Lane to Market Point Drive." In making this finding, the master noted he relied on the testimony of both Kathe and Fort, both of whom were sophisticated individuals with substantial business experience and testified to the effect that access rights over CICC's property were effective as of April 30, 1999, when CICC recorded a plat showing the easement as a 25-foot non-exclusive ingress and egress easement. Furthermore, the abandonment of Old Woodruff Road resulted in substantial benefit to CICC both in the form of more saleable land for individual lots and in the fact that negotiation of the abandonment required an agreement with only TWO rather than with a variety of property owners. In addition, construction of Market Point Drive began in 1999, and a curb cut was included for the 25-foot easement. Finally, there appears to be no dispute CICC received ingress and egress access across TWO's property as contemplated in the letter agreement and exercised this right. Thus the alleged deficiencies cited by Point are not sufficient reason to reverse the master's finding that CICC made an express grant of an easement across its property allowing travel from Woodruff Oaks Lane to Market Point Drive.

Based on the foregoing, we hold the master correctly relied on evidence outside the letter agreement in determining the effect of the agreement. We also hold this evidence supports the master's interpretation of the agreement as one creating an easement interest rather than as an expression of the intent to do so upon the satisfaction of certain terms.

II. Constructive Notice

Point next contends that even if the letter agreement is deemed sufficient to constitute the express grant of an easement from CICC to TWO, the master erred in finding the plat on record that was incorporated into Point's deed was sufficient notice of TWO's purported easement. Specifically, Point advances the following arguments: (1) the master incorrectly relied on authority concerning actual rather than constructive notice of an easement; (2) the easement granted to Piedmont Natural Gas in 1964, which was properly prepared and recorded, explained the presence of the platted ingress and egress easement referenced in Point's deed; and (3) the

master's decision is untenable from a policy standpoint because it rewards TWO for its failure to follow through on the letter agreement and punishes Point for relying on properly recorded documents. We disagree with these arguments.

"[C]onstructive notice or inquiry notice in the context of a real estate transaction often is grounded in an examination of the public record because it is the proper recording of documents asserting an interest or claim in real property which gives constructive notice to the world." Spence v. Spence, 368 S.C. 106, 119, 628 S.E.2d 869, 876 (2006). Constructive notice, however, is not limited to what is ascertainable from consulting public records. As the supreme court has explained:

> Constructive or inquiry notice in the context of a real estate transaction also may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another. The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed.

Id. at 120, 628 S.E.2d at 876 (emphases added). In making these statements, the court emphasized " 'the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him,' " noting also that " '[t]here must appear to be, in the nature of the case, such a connection between the facts disclosed and further facts to be discovered, that the former could justly be viewed as furnishing a clue to the latter.' " Id. at 120-21, 628 S.E.2d at 876 (quoting Black v. Childs, 14 S.C. 312, 321-22 (1880)) (emphasis added). Cf. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 64-65, 504 S.E.2d 117, 123 (1998) (noting that under South Carolina case law implied actual notice is classified as constructive notice because of the duty to inquire).

Point correctly notes the master never expressly found it had actual notice of the easement and that Frierson v. Watson, 371 S.C. 60, 636 S.E.2d 872 (Ct. App. 2006), one of the decisions on which the master relied in

finding the recorded plats referenced in its deed provided adequate notice, concerned actual rather than constructive notice of an easement. Whether or not Frierson supports the master's decision regarding constructive notice, the facts of this case support a finding that Point could be charged with inquiry notice of the easement notwithstanding the alleged deficiencies in the public record.

The conveyance from CICC to Point was "subject to all restrictions, setback lines, zoning ordinances, utility easements and rights of way, if any, as may appear of record or on the subject property." The deed expressly referenced a plat showing a 25-foot non-exclusive ingress and egress easement. That plat expressly indicated the easement was non-exclusive and specified its width, length, and location. The deed of conveyance itself, therefore, provided inquiry notice to Point of the encumbrance. See Carolina Land Co. v. Bland, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975) ("[W]here a deed describes land as is shown as a certain plat, such becomes a part of the deed."). Subsequent conveyances also referenced plats showing the same easement.

Because constructive notice is not necessarily confined to the public record, we disagree with Point's argument that its belief that the easement referred to in the plats was the recorded easement to Piedmont Natural Gas was reasonable because "there was no document whatsoever in the public domain that would even remotely indicate that that easement was anything other than the recorded [Piedmont Natural Gas] Ingress/Egress Easement." As noted in the appealed order, the 1964 deed referenced a 10-foot easement and the subsequent plats show a 25-foot non-exclusive ingress and egress easement. Even if we accept Point's apparent position that the discrepancy could be explained by the fact that the 1964 deed granted Piedmont Natural Gas both a pipeline easement and an access easement, this explanation is at best plausible rather than conclusive. It did not absolve Point of the responsibility to investigate whether the ingress and egress easement conveyed to Piedmont Natural Gas in 1964 was in fact the same easement as that depicted in the plat referenced in its deed.

As the master noted, not only did CICC file numerous plats including the one referenced in Point's deed depicting the easement, it made a formal application to the Greenville County Engineering Division for the relinquishment of maintenance of Old Woodruff Road and recognition of the easement. Furthermore, whether or not Helou had actual notice of the easement, we cannot ignore that he had been a limited partner in CICC since its formation in 1998 and took over the responsibilities of general partner in 2003 after Kathe's departure. According to the master, he also "executed on behalf of CICC the deed conveying title of 'The Point, Phase I' development to his newly formed company Point Development, Inc." Given Helou's relationship with both CICC and Point, the contact with authorities about matters related to the easement and the plats on record, we find it unlikely that Point would not have had at its disposal the means for ascertaining the ownership and nature of the easement at issue in this appeal.

Finally, we reject Point's argument that affirmance of the master's order would be against public policy. As we have emphasized, the determination of whether Point had constructive notice depends on more than what public records can verify. To the contrary, a resolution of this question includes consideration of "circumstances sufficient to put a party upon the inquiry." Black v. Childs, 14 S.C. 312, 321-22 (1880) (quoted in Spence, 358 S.C. at 120, 628 S.E.2d at 876). Even if we were to concede that TWO did not act promptly to perfect its easement,[3] we find no reason to believe that this failure prevented Point from ascertaining the nature and extent of the encumbrance depicted on the plat referenced in its deed. Point's decision to ignore such circumstances and rely solely on a title search cannot be viewed as reasonable. We therefore reject Point's argument that the master's decision to uphold the easement is untenable from a policy standpoint.

[3] We note Point does not appeal the master's finding that it failed to carry its burden to present clear and unequivocal evidence that TWO abandoned the easement.

CONCLUSION

We affirm the master's decision finding the letter agreement of December 2, 1998, created an access easement from CICC to TWO. We further hold that the circumstances of this case support the master's finding that Point had constructive notice of this easement.

AFFIRMED.

SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marvin Stewart, individually and in his capacity as the chairman of, and as a duly elected member of Constituent School District 20; Pam Kusmider, individually and as a duly elected member of Constituent District 20; Tara Lowry, as an individual; and Constituent District Number 20, Appellants,

v.

Charleston County School District, Respondent.

Appeal From Charleston County
Mikell R. Scarborough, Special Circuit Court Judge

Opinion No. 4613
Heard May 27, 2009 – Filed August 31, 2009

AFFIRMED

Lawrence C. Kobrovsky, of Charleston, for Appellants.

Alice F. Paylor, of Charleston, for Respondent.

KONDUROS, J.: Marvin Stewart, Pam Kusmider, Tara Lowry, and Constituent School District 20 (collectively Appellants) appeal the circuit court's ruling that the Charleston County School District Board (CCSD) has the authority to set attendance guidelines for Buist Academy, a school physically located in Constituent School District 20 (District 20), for intellectually gifted students.[1] Appellants also appeal the circuit court's finding that the hearing before the CCSD did not violate their due process rights. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The South Carolina General Assembly consolidated the eight individual school districts in Charleston County into the Unified Charleston County School District in 1967. See Act No. 340, 1967 S.C. Acts 470 (the Act). The eight individual districts, including District 20, called constituent districts, remained in existence under the umbrella of the CCSD with the authority to control certain aspects of the running of their own districts.

Buist Academy is a county-wide magnet school established by the CCSD for intellectually gifted children. The school is physically located within the confines of District 20. As of 2003, admission to Buist Academy was determined on the following basis: priority for one-fourth of available openings was given to students residing in District 20; priority for another one-fourth of openings was reserved for siblings of Buist Academy students; priority for one-fourth of openings was given to students who would otherwise attend low-performing schools; and priority for the final one-fourth of seats would be equal among students county-wide. The applications for the school have always exceeded the available openings, and a lottery is used

[1] District 20 is comprised of the peninsular area of Charleston County.

at the kindergarten level to select students who will be tested to determine if they meet the academic requirements for admission.

In January 2006, the District 20 Board adopted a motion giving priority for all seats to qualified students residing in District 20. Any remaining seats would be given to siblings of current Buist Academy students. The principal of Buist Academy, Sallie Ballard, appealed that action to the CCSD alleging the District 20 Board did not have the authority to set attendance guidelines for the school. Principal Ballard was represented by CCSD's attorney, Alice Paylor, and Paylor's services were paid for by CCSD. Additionally, Paylor had recently represented the CCSD Chairperson, Nancy Cook, in a legal matter free of charge.

On June 13, 2006, the CCSD began a hearing to consider the propriety of the District 20 Board's action, but the hearing was adjourned. The hearing was not reconvened until September 29, 2007. In the interim, Appellants filed an action seeking to require the CCSD to recognize the January 2006 motion changing the admission guidelines for Buist Academy.

When the hearing before CCSD was resumed, the CCSD voted that the January 2006 motion was null and void. Appellants appealed that outcome alleging the CCSD erred in declaring the January 2006 motion null and void and that their due process rights were violated because Paylor worked for CCSD and represented Ballard in her appeal to that body. Following a bench trial, the circuit court determined the CCSD Board had the authority to set the attendance guidelines for Buist Academy and Appellants had received due process during the hearing. This appeal followed.

STANDARD OF REVIEW

In this case, our standard of review is mixed. Whether Act 340 empowered the District 20 Board to establish attendance guidelines for Buist Academy calls for interpretation of the Act. Statutory interpretation is a question of law for the court to be made without any particular deference to the lower court. Thompson ex rel. Harvey v. Cisson Constr. Co., 377 S.C. 137, 154, 659 S.E.2d 171, 180 (Ct. App. 2008). Whether the hearing before the CCSD Board violated Appellants' due process rights was a factual

question before the circuit court. In an action at law, tried without a jury, the appellate court will not disturb the circuit court's findings of fact unless no evidence reasonably supports them. Townes Assoc. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

LAW/ANALYSIS

I. Attendance Policy

Appellants contend the District 20 Board has the authority to determine which students would attend Buist Academy pursuant to Section 7(1) of the Act. We disagree.

"In interpreting statutes, the [c]ourt looks to the plain meaning of the statute and the intent of the Legislature." State v. Dingle, 376 S.C. 643, 649, 659 S.E.2d 101, 105 (2008). "All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used." State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). In ascertaining that intent, the "court should not focus on any single section or provision but should consider the language of the statute as a whole." Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996).

Here, each party claims authority to set attendance guidelines for Buist Academy under different sections of the Act. Appellants contend the District 20 Board should set admissions guidelines at Buist Academy because it has authority to "determine the school within such constituent district in which any pupil shall enroll." Act No. 340, § 7(1), 1967 S.C. Acts 470. We interpret this language to mean a constituent district may determine what school within that district a student who resides in the district will attend. Because Buist Academy's attendance zone is county-wide, the authority given to a constituent district under section 7(1) is not really implicated in this case as it does not involve the constituent district making an assignment to a traditional neighborhood school.

On the other hand, section 5(8) of the Act states the CCSD has the authority to "provide for intellectually gifted children a program which shall

challenge their talents." Act No. 340, § 5(8), 1967 S.C. Acts 470. District 20 argues a "program" and a "school" are not the same and the legislature purposefully employed the terms to mean two different things. While the term program is not defined in the Act, we do not conclude the term program cannot be interpreted to encompass the creation of a county-wide magnet school such as Buist Academy. It could likewise, as Appellants suggest, refer to the establishment of a program within a pre-existing neighborhood school.[2]

Statutes dealing with the same subject matter are to be construed together, if possible, to produce a harmonious result. Joiner ex rel Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). The adoption of Appellants' interpretation of the Act would be inconsistent with the authority given to CCSD under section 5(8). Additionally, the constituent districts only have the powers bestowed upon them by the Act in Sections 6 and 7. See Act No. 340, § 5, 1967 S.C. Acts 470 ("In addition to the duties, powers and responsibilities now provided by law for county boards of education, and for school district trustees other than those devolved upon the constituent trustees in Sections 6 and 7 of this act, the Board of the Charleston County School District shall . . . ."). Those powers granted to the constituent districts are subject to appeal to the CCSD. See Act No. 340, § 7, 1967 S.C. Acts 470 ("The trustees in each of the constituent districts shall have the power in their respective districts, subject to the appeal to the Board of Trustees of the Charleston County School District . . . ."). Therefore, because section 7(1) does not empower the District 20 Board to set attendance guidelines at Buist Academy, that authority is vested in the CCSD.

Our adoption of Appellants' position as to the Act would not seem to reflect legislative intent. Placing all emphasis on the physical location of a school such as Buist Academy would permit a constituent school district to monopolize a county-wide magnet school to the exclusion of all other

[2] In a similar vein, the CCSD administers programs for handicapped students on an interdistrict basis based on the authority given in section 5. See Act No. 340, § 5(8), 1967 S.C. Acts 470 ("The CCSD shall [p]rovide for physically and mentally handicapped children educational programs organized and conducted in cooperation with the social or civic organizations and agencies in the county or community.").

students in the county. That interpretation of the Act leads to an absurd result unintended by the General Assembly. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) ("We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention."); Miller v. Lawrence Robinson Trucking, 333 S.C. 576, 582, 510 S.E.2d 431, 434 (Ct. App. 1998) ("The interpretation of a term set forth in a statute should support the statute and should not lead to an absurd result."); see also TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998) ("Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers."). Consequently, we cannot adopt the interpretation of this statute proposed by Appellants, and we conclude the circuit court properly found Act 340 grants the CCSD ultimate authority with respect to setting admission criteria for Buist Academy.

II. Due Process Rights

Appellants further contend the conduct of the hearing before the CCSD violated their due process rights. We disagree.

The circuit court concluded the CCSD did not waive its right to hear Ballard's appeal because of the delay in the institution of the hearing in June 2006 and its resumption in September 2007. The record reflects the CCSD charged the District 20 Board's chairman with contacting the CCSD to set up a time for reconvening the hearing. This was not done. Furthermore, the record shows the CCSD and the District 20 Board were working on a compromise to satisfy all parties during the hiatus, but those negotiations were ultimately unsuccessful. The circuit court concluded Appellants should have filed a writ of mandamus compelling the CCSD Board to act if the delay was unacceptable.[3] While a writ of mandamus may or may not have been the proper procedural step for Appellants, the record shows the delay in reconvening the hearing was at least in part due to the ongoing negotiations

[3] "The primary purpose of a writ of mandamus is to enforce an established right and to enforce a corresponding imperative duty created or imposed by law." Wilson v. Preston, 378 S.C. 348, 353, 662 S.E.2d 580, 583 (2008).

between the two school boards and the failure to pursue rescheduling the matter. In addition, the record shows all the students from District 20 who sought admission in 2007 were admitted. So any delay, regardless of cause, did not prejudice District 20 students. Under those circumstances, the record supports the circuit court's conclusion that the delay did not violate Appellants' rights.

The circuit court found Appellants presented no evidence of substantial prejudice created by Paylor's prior representation of Cook.[4] See Felder v. Charleston County Sch. Dist., 327 S.C. 21, 26, 489 S.E.2d 191, 193 (1997) ("Substantial prejudice is required to establish a violation of due process."). Likewise, the circuit court found no evidence Paylor had advised the CCSD Board while representing Ballard in the hearing before it. See Rule 1.8(l), RPC, Rule 407, SCACR ("In any adversarial proceeding, a lawyer shall not serve as both an advocate and an advisor to the hearing officer, trial judge or trier of fact."). We find the circuit court's conclusions are supported by the record.

For all of the foregoing reasons, the ruling of the circuit court is

AFFIRMED.

HEARN, C.J., and THOMAS, J., concur.

[4] While the circuit court's conclusions are supported by the record, we caution elected officials and attorneys to avoid even the appearance of impropriety in matters of public concern.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

U.S. Bank Trust National Association, f/k/a First Trust National Association, First Bank, National Association, as trustee under the Pooling Servicing Forbearance Agreement dated as of May 1, 1997, Morgan Stanley Capital, Inc. Mortgage Pass Certificates, Weighted Average Coupon Pass-Through Series 1997-pl, 180 East Fifth Street, St. Paul, MN 55101, Appellant,

v.

Clifford E. Bell, Jr., Delores Jane Bell a/k/a Delores J. Bell a/k/a Delores Jane R. Bell, Ford Consumer Financing Co., Inc., Henry I. Ziesel & Ziesel Accura Machinery Corporation, NationsBank, N.A. successor to Boatmens Bank of South Central Illinois, Pressmation, Inc., Daryl Palbiak, Phillip Dyches, South Carolina Department of Revenue, and The Department of Treasury – Internal Revenue Service, Respondents.

Appeal From York County
S. Jackson Kimball, Master-in-Equity

Opinion No. 4614
Heard April 23, 2009 – Filed August 31, 2009

REVERSED AND REMANDED

Hamilton Osborne, Jr., James Y. Becker, and Emily H. Farr, all of Columbia, for Appellant.

Herbert W. Hamilton and Tracy T. Vann, both of Rock Hill, for Respondents.

PIEPER, J.: U.S. Bank Trust National Association (Bank) appeals the decision of the master-in-equity denying Bank's request for foreclosure. Bank further appeals the order restructuring the loan given to Delores and Clifford E. Bell (the Bells). We reverse and remand.

FACTS

In 2001, Bank commenced a foreclosure action against the Bells' property, resulting in a judgment of foreclosure dated July 17, 2002. On August 2, 2002, the day before the scheduled foreclosure sale, the Bells called Chase Home Finance, LLC (Chase), the servicing agent for Bank, and spoke with Anita Gaines (now known as Anita Stokes). Stokes was a foreclosure analyst for Chase. During the telephone conversation, the Bells negotiated with Stokes to stop the foreclosure sale and to reinstate the loan by entering into a payment agreement. The parties do not dispute the existence of the reinstatement agreement; they dispute the due date of the second lump sum payment under that agreement.

Under the reinstatement agreement, the Bells agreed to pay two lump sum payments totaling $67,570.85, and also agreed to begin monthly mortgage payments of $2,134.52. Stokes testified the first payment of $30,000 was to be paid immediately upon execution of the reinstatement agreement and the remaining balance was to be paid ninety days from the entry of the reinstatement agreement, which was November 2, 2002. Stokes further testified she did not have the authority to extend the time for payment beyond ninety days. On the other hand, the Bells testified the agreement required the initial payment indicated and also required a second payment of $37,570.85 to be paid within twelve months from the entry of the reinstatement agreement.

Stokes stated she did not presently know the whereabouts of the document containing the reinstatement agreement; Bank did not produce the document at trial. Stokes claimed she placed the document containing the agreement in the Bells' file and at some point transferred the file to Joseph Bryan. According to Stokes, Bryan gave the file to his manager, who unexpectedly died, resulting in the document's misplacement.

Around the time the reinstatement agreement was reached, Stokes made a record referencing the agreement in a computerized recordkeeping database known as FORTRACS History Notes.[1] The FORTRACS notes were introduced into the record as evidence without objection. Stokes' note provided, in pertinent part:

> I spoke to [Mr. Bell] and he stated that there was an error in the e-mail that I had received. He is asking to pay thirty thousand dollars now and have the remainder of the money in ninety days. He'll be paying his regular payment of $2,134.52 for the

[1] FORTRACS History Notes is a system banks use to document the activity on an account, including payments, arrangements, conversations, or any other activity on the account. Activity supposedly is documented at the time the work is completed. Stokes testified only important conversations and arrangements were recorded.

> months of September and October. November 2, 2002[,] he will have the remainder of the reinstatement funds, attorney fees[,] and cost.

Stokes testified she reduced the agreement to writing and sent it to the Bells via e-mail. Stokes asserted she later called the Bells, whereby they allegedly agreed to the terms, signed the document, and returned it to Stokes by facsimile. The Bells testified they had no notes or other documents to support their assertion that the second lump sum payment was due in August 2003.

On August 12, 2002, the Bells made the first payment of $30,000, which Bank accepted and eventually applied to the loan. Additionally, the regular monthly payments the Bells agreed to continue making were received in September, October, and November.

On November 1, 2002, after the initial monthly payments had been made, Stokes indicated she spoke with Mr. Bell. The note of her conversation provides, "[s]poke to Mr. Bell . . . he would be sending the rest of the reinstatement funds by 11/15/2002 [totaling $39,196.31]." On November 26, 2002, Stokes noted she again spoke with Mr. Bell and he stated his check was being held up, but promised it would arrive on December 5, 2002. The note continues, "[h]e will [overnight] a check to us on 12/7/2002." Stokes testified the delay was allegedly due to the fact Mr. Bell was expecting some of his merchandise to be sold.

Stokes testified the Bells did not make the payment allegedly due by December 7, 2002. Stokes claimed she proceeded to call the Bells on two separate occasions (December 18, 2002, and January 16, 2003), leaving voice messages each time. Stokes also testified the Bells failed to make the monthly payments for December 2002 and January 2003. Stokes stated that on January 18, 2003, Mr. Bell claimed he sent in the December and January monthly payments; however, there were no records the payments were received. Moreover, the Bells never presented any documents or other evidence as to these missed monthly payments. During the same telephone conversation on January 18, 2003, Stokes also mentioned to Mr. Bell that she "would be getting all the funds posted to his account and sent out a new

referral to start a new foreclosure action unless he can reinstate his account." Notwithstanding, Stokes entered a note in FORTRACS indicating the Bells' loan was fully reinstated as of February 7, 2003; Stokes subsequently testified as to the reason for the notation.

Bank renewed its foreclosure action in May 2003. On June 30, 2003, Bank filed an amended complaint. In the amended complaint, Bank alleged the amount due and owing on the promissory note (the Note) and mortgage was $233,386.37 plus interest at a rate of nine percent per annum from July 1, 2001, plus attorney's fees and costs. The Bells denied this allegation. Additionally, the Bells testified they did not tender the second lump sum payment by August 2003 because Bank had already renewed its foreclosure action and because Bank was returning the Bells' monthly mortgage checks.

The Bells' answer to the foreclosure action asserted several defenses and two counterclaims, one for breach of contract and the other for promissory estoppel.[2] The Bells admitted they executed the Note in the original principal amount of $243,200.00 and a mortgage securing the Note, constituting a lien on the property.

Mr. Bell testified Bank started returning the monthly payments in February 2003, citing insufficient funds to cure default. Mr. Bell further testified the Bells continued to make payments every month thereafter until filing for bankruptcy protection in October 2005, despite Bank's rejection of the monthly payments.[3] While asserting he continued to make monthly payments until October 2005, Bell never tendered the second lump sum payment even by the date he contends it was due.

On October 15, 2005, Mr. Bell declared Chapter 7 bankruptcy, and notice of the bankruptcy was filed in Bank's foreclosure action against Mr.

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[2] The asserted defenses included the following: (1) failure to state a claim upon which relief could be granted; (2) waiver, estoppel, laches and/or unclean hands; (3) statute of limitations; (4) accord and satisfaction; (5) intervening acts by Bank; and (6) payment.

[3] The Bells' June 2005 monthly payment was the lone exception wherein Bank retained the funds.

Bell on December 19, 2005. On October 19, 2006, Bank and the bankruptcy trustee settled Mr. Bell's interest in the counterclaims asserted against the Bank in the state court foreclosure action.[4] After Mr. Bell's bankruptcy case was closed, the foreclosure action was restored to the active docket on March 28, 2007, pursuant to Bank's motion under Rule 40(j), SCRCP.

The master-in-equity for York County presided over the nonjury trial in the foreclosure action. In his final order, the master-in-equity refused to allow the foreclosure to proceed because Bank had failed to carry its burden of proving that the terms of the reinstatement agreement required the second lump sum payment to be made in November 2002. In support of the decision, the master-in-equity cited Bank's own annotation that the loan was fully reinstated as of February 2003. Additionally, due to Bank's alleged repudiation of the agreement and subsequent rejection of Mr. Bell's monthly payment checks, the master-in-equity determined the Bells were not required to continue making payments to Bank because they were not required to perform useless acts. Finally, the master-in-equity modified the Note by adding the accrued, but unpaid interest, and the escrow funds to the principal balance, resulting in a new balance of $394,550.99. The net effect of this remedy was to increase the outstanding principal balance. The master-in-equity allowed the Bells to repay the new principal balance with interest at the rate set forth in the Note[5] in monthly installments over the remaining term of the loan.[6]

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[4] At trial, Mrs. Bell abandoned her interest in the counterclaims asserted against Bank.

[5] Section 2 of the Note reads:

> Interest will be charged on unpaid principal until the full amount of the principal has been paid. [Mortgagor] will pay interest at a yearly rate of 9.000 [percent]. The interest rate required by this Section 2 is the rate [mortgagor] will pay both before and after any default described in . . . this Note.

[6] While we do not necessarily agree that the master-in-equity had the authority to restructure the missed payments over the term of the loan, we

The Bells filed a motion pursuant to Rule 59(e), SCRCP, wherein they asserted the following: (1) the award of accrued interest on payments which were made by the Bells and rejected by Bank was not supported by the evidence or applicable authority; (2) because Bank's rejection of the Bells' payments was wrongful, increasing the Bells' payments by $2,000 per month over the payment required by the original Note was not supported by the record; (3) the finding that Mr. Bell admitted to missing the December 2002 and the January 2003 payments was not supported by the record; and (4) the amount of the escrow balance was not supported by the record. In response, the master-in-equity entered a supplemental order.[7] In this order, the master-in-equity found Bank was not entitled to the accrued interest of $126,080.68 added to the principal balance. Notwithstanding, the master-in-equity added the second lump sum payment of $37,570.85 to the principal because the Bells did not make this payment as required by the reinstatement agreement. The net effect of these adjustments was to reduce the outstanding principal balance to $306,041.16 and to reduce the monthly payment from $3,629.79 to $2,815.52. This appeal followed.

ISSUES ON APPEAL

I. Did the master-in-equity err in ruling Bank had not proven the Bells were in default on their loan?

II. Did the master-in-equity err in restructuring the loan and modifying the terms of payment without the consent of Bank?

III. Did the master-in-equity err in ruling Bank was not entitled to collect interest accrued on the loan?

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need not reach this issue in light of our disposition herein and because this issue is not properly preserved for our review.

[7] We granted Bank's motion to supplement the Record on Appeal to include the post trial memoranda and post trial hearing transcript. We also note Bank never filed a Rule 59(e) motion.

IV. Did the master-in-equity err in ruling Bank was not entitled to recover attorney's fees incurred in attempting to collect the loan?

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). In an appeal from an action in equity, tried by a judge alone, we may find facts in accordance with our own view of the preponderance of the evidence.[8] Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008). "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." Id. at 387-88, 544 S.E.2d at 623.

Additionally, "[a] legal question in an equity case receives review as in law." Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). Because questions of law may be decided with no particular deference to the trial court, this court may correct errors of law in both legal and equitable actions. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Code Ann. § 14-8-200 (Supp. 1998)).

DISCUSSION

Bank first asserts the master-in-equity erred in ruling Bank had failed to prove the Bells were in default on their loan. We agree.

A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action.

[8] As indicated in their respective briefs, both parties agree that this case is governed by the equitable standard of review.

Lever v. Lighting Galleries, Inc., 374 S.C. 30, 33, 647 S.E.2d 214, 216 (2007). Any modification of a written contract must satisfy all fundamental elements of a valid contract in order for it to be enforceable, including a meeting of the minds between the parties with regard to all essential terms of the agreement. Player v. Chandler, 299 S.C. 101, 104-05, 382 S.E.2d 891, 893 (1989). Thus, "[w]hile a written contract can be orally modified, there must be a meeting of the minds as to the modification." First Union Mortgage Corp. v. Thomas, 317 S.C. 63, 70, 451 S.E.2d 907, 912 (Ct. App. 1994).

Here, the existence of the reinstatement agreement is undisputed; instead, the parties dispute when the second lump sum payment was due. When interpreting an oral contract, a court must give effect to the intentions of the parties. Keith v. River Consulting, Inc., 365 S.C. 500, 506, 618 S.E.2d 302, 305 (Ct. App. 2005) (citing Columbia E. Assoc. v. Bi-Lo, Inc., 299 S.C. 515, 519, 386 S.E.2d 259, 261 (1989)). The determination of the parties' intent is a question of fact. S. Atl. Fin. Servs., Inc. v. Middleton, 349 S.C. 77, 81, 562 S.E.2d 482, 485 (Ct. App. 2002). To give effect to the parties' intentions, the court will endeavor to determine the situation of the parties and their purposes at the time the contract was entered. Keith, 365 S.C. at 506, 618 S.E.2d at 305 (quoting Columbia E. Assoc., 299 S.C. at 519, 386 S.E.2d at 261). When a contract is silent as to a particular matter, parol evidence is admissible to reveal the intent of the parties. Id.

Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt.[9] Once the

[9] See, e.g., Franklin Credit Mgmt. Corp. v. Nicholas, 812 A.2d 51, 57-58 (Conn. App. Ct. 2002) ("In a mortgage foreclosure action, to make out its prima facie case, the foreclosing party had to prove by a preponderance of the evidence that it was the owner of the note and mortgage and that the [defendant] had defaulted on the note.") (internal quotations omitted) (internal citations omitted); Campaign v. Barba, 805 N.Y.S.2d 86, 86 (N.Y. App. Div. 2005) ("To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment."); In re Foreclosure of Real Prop. for 143,600.00, 577 S.E.2d 398,

debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction. See Bandy v. Bandy, 187 S.C. 410, 413, 197 S.E. 396, 397 (1938) (holding the burden was on defendant in mortgage foreclosure suit to establish her defense that mortgage and note secured thereby were without valuable consideration by preponderance of evidence).

In the present case, the master-in-equity concluded Bank failed to carry its burden of proving the second lump sum payment was due in November 2002, and also accepted the terms of the reinstatement agreement as asserted by Mr. Bell. However, taking our own view of the preponderance of the evidence, we respectfully disagree, and find that the preponderance of the evidence in the record establishes default.

Stokes testified that the reinstatement agreement between Bank and the Bells provided the following: (1) the Bells would make the first lump sum payment of $30,000 immediately (August 2002); (2) the Bells would make a second lump sum payment of $37,570.85 in ninety days (November 2002); and (3) the Bells' monthly payments on the mortgage would increase to $2,134.52 beginning in September. Stokes corroborated her testimony with several entries in the FORTRACS system, which she contemporaneously made after telephone conversations with the Bells. Furthermore, Stokes also testified that she was without authority to extend the time for repayment beyond the ninety days allegedly agreed to in the reinstatement agreement.

The master-in-equity relied on a contradictory notation in Bank's FORTRACS system indicating the loan was fully reinstated as of February 7,

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406 (N.C. Ct. App. 2003) ("In a foreclosure proceeding, the lender bears the burden of proving that there was a valid debt, default, right to foreclose under power of sale, and notice."); 55 Am. Jur. 2d Mortgages § 604 ("[T]he burden of proof of any particular issue rests upon the party asserting the affirmative of that issue under the pleadings."); cf. Paramount Fund, Inc. v. Cusaac, 282 S.C. 497, 499, 319 S.E.2d 354, 355 (Ct. App. 1984) (holding the mortgagee has the burden of proving a disputed mortgage by the preponderance of the evidence).

2003, which, upon a cursory review, corroborated Mr. Bell's testimony. Notwithstanding, Stokes explained the alleged discrepancy in her testimony:

> Back in 2002 FORTRACS was a new system that we received, and it was still in a tweaking process and back then when we wanted a file to go back to collections . . . and sent to a new foreclosure, we had to close it out of this system, and that was the only way of closing out is to put loan reinstated or loan paid off and we didn't want to put loan paid off, so we used reinstated so it can go back to the proper channels to be referred back to a foreclosure attorney.

Nothing in the record was presented to dispute this explanation. Moreover, the master-in-equity failed to consider that even the Bells were not asserting that the loan was fully reinstated as of February 2003. Under the Bells' own version, the loan would not have been current until August 2003. Stokes' explanation for the irregularity demonstrates that the entry actually conforms to Bank's position on the default. In fact, Stokes further testified that this action was the necessary entry to make in the FORTRACS system at that time for all accounts being referred to an attorney for collection.

Further, Mr. Bell agreed with several statements made by Stokes. For example, Mr. Bell acknowledged having numerous telephone conversations with Stokes over "the next couple of months" regarding the agreement and to "get the numbers together . . . ." Moreover, although Mr. Bell denied having told Stokes the full amount of the balance due would be paid in November 2002 or December 2002, he conceded he never tendered the second lump sum payment. Consequently, Bank took the positive steps necessary to foreclose on the Bells' account due to the Bells' failure to timely pay the second lump sum under the reinstatement agreement. Therefore, a finding of default based on the missed second lump sum payment is supported by the record.

Additionally, as the master-in-equity determined in his findings of fact, the Bells missed their regular monthly payments in December 2002 and

January 2003 after the reinstatement agreement was entered.[10] These missed payments each constitute a default by the Bells.[11]

The letters sent from Bank to the Bells rejecting attempted monthly payments, beginning with the February 2003 payment, support Bank's position on default. Bank never sent a rejection of payment letter prior to February 2003. Once the Bells were deemed to be in default because of the missed November 2002 lump sum payment, or by virtue of the missed December 2002 and January 2003 monthly payments, Bank was under no obligation to accept any monthly payments in February or thereafter; moreover, Bank's legal right to declare the entire balance due and right to commence a foreclosure action could not be taken away or nullified by a partial tender.[12] See Allendale Furniture Co. v. Carolina Commercial Bank,

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[10] Although the Bells' Rule 59(e) motion challenged whether Mr. Bell admitted to missing their December 2002 and January 2003 monthly payments, we note that the master-in-equity's supplemental order did not address the Bells' missed monthly payments. Instead, the supplemental order explicitly stated that the first order remained in full force and effect in all respects, except as specifically modified by the supplemental order. Moreover, while we agree the record does not indicate an admission of this fact by the Bells, the record nonetheless supports a finding that the payments were missed based on the direct testimony of Stokes on this issue.

[11] Even if our view of the preponderance of the evidence as to the due date of the second lump sum payment in November 2002 is incorrect, the missed December 2002 and January 2003 payments each independently establish a default. Once default occurs by virtue of these missed monthly payments, the reinstatement agreement conflict as to the second lump sum payment is no longer controlling as the balance owed on the note is accelerated, and Bank is entitled to foreclose based on that default.

[12] Bell testified Bank accepted one monthly payment for June 2005, and further testified to "know of two others that [were] cashed and then a bank check was sent back" to him; however, we note these acts do not constitute a waiver of Bank's rights to acceleration and foreclosure. See Caulder v. Lewis, 287 S.C. 372, 375, 338 S.E.2d 837, 839 (1986) (holding one or two late payments accepted after default do not establish waiver, and acceleration of the debt may still be exercised).

284 S.C. 76, 79, 325 S.E.2d 530, 531 (1985); Dargan v. Metro. Props., Inc., 243 S.C. 324, 325, 133 S.E.2d 821, 823 (1963); see also Ford Motor Credit Co. v. Morales, 279 S.C. 388, 390, 308 S.E.2d 102, 102 (1983) ("A payment of a debt is not considered made until it is accepted by the creditor with the intention of extinguishing the debt."). Each letter sent by Bank rejecting an attempted monthly payment shows that the sum tendered was less than the total amount due on its account to cure the default.

Notwithstanding a technical default, the Bells contend that they are excused from making payments because they tendered monthly payments and the payments were improperly rejected. The master-in-equity concluded that the Bells were absolved from tendering the second lump sum payment because such an act would be useless or futile in light of Bank's rejection of the Bells' monthly payments between February 2003 and August 2003. This conclusion was based upon his finding that the due date for the second lump sum payment was August 2003. However, because we find the second lump sum payment was due in November 2002, rather than August 2003, Bank was under no obligation to accept any payments made by the Bells short of the amount required to satisfy the debt. See Allendale Furniture Co., 284 S.C. at 79, 325 S.E.2d at 531; Dargan, 243 S.C. at 325, 133 S.E.2d at 823. Moreover, we do not find credible the Bells' assertion that the Bank's rejection of payments since February 2003 justified their failure to tender the lump sum payment in August 2003; notwithstanding this position, the Bells continued making monthly payments until October 2005. Similarly, because the Bells missed the monthly payments in December 2002 and January 2003, Bank's lawful rejection of any payments subsequent to the default arising from these missed monthly payments may not be asserted as a defense against Bank. Accordingly, we find the useless or futile act doctrine does not apply to the factual circumstances of this case, and we reverse this determination.

Bank also asserts the master-in-equity erred in ruling it was not entitled to collect interest accrued on the loan. We agree. As previously indicated, the parties agree the only term disputed regarding the reinstatement agreement was the date the second lump sum payment was due. Nowhere in the record or briefs have the parties indicated the reinstatement agreement

touched upon the issue of interest. As such, the underlying Note controls the issue of interest.

The construction of a clear and unambiguous contract presents a question of law for the court. Ward v. West Oil Co., 379 S.C. 225, 238, 665 S.E.2d 618, 625 (Ct. App. 2008); see also Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). We are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988). "A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008).

In the present case, the Note provides that interest will be charged at a yearly rate of nine percent on unpaid principal until the full amount of the principal has been paid. Moreover, "[t]he interest rate required by this Section 2 is the rate [Mortgagor] will pay both before and after any default described in . . . this Note." Thus, under the plain and unambiguous terms of the Note, Bank is entitled to interest accrued on the unpaid principal before and after the Bells defaulted. Accordingly, we reverse the order regarding interest and remand to the master-in-equity for calculation of the Bells' debt to Bank consistent with the terms of the Note.

Bank asserts the master-in-equity erred in ruling Bank was not entitled to recover attorney's fees incurred in attempting to collect the loan. Because we find the Bells were in default, we agree.

"The general rule is that attorney's fees are not recoverable unless authorized by contract or statute." Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989) (citing Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978)). "Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown." Id. (citations omitted). Here, the contract between the parties provided for reasonable attorney's fees

and costs in the event of default. Accordingly, we reverse the master-in-equity's denial of attorney's fees to Bank and remand the issue to the master-in-equity for reconsideration and an appropriate award of attorney's fees. See Sexton v. Sexton, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993) (reversing and remanding issue of attorney's fees for reconsideration when the substantive results achieved by trial counsel were reversed on appeal).

CONCLUSION

We note the increased filing of cases requesting foreclosure in this State. Many people have been affected by the economy and currently face the unfortunate specter of foreclosure. While we acknowledge the hardship our decision may create, we also recognize the court's limited role in giving effect to the contractual agreement between the parties.

Accordingly, based upon our analysis herein, we reverse and remand the case to the master-in-equity for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

HEARN, C.J., and LOCKEMY, J., concur.