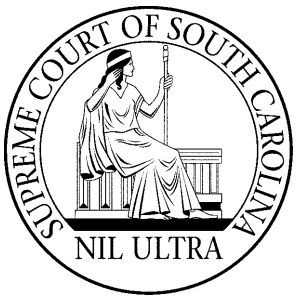

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 43

November 1, 2004

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Bobby Lee Holmes, Appellant.

Appeal From York County
John C. Hayes, III, Circuit Court Judge

Opinion No. 25886
Heard February 19, 2004 – Filed November 1, 2004

AFFIRMED

Senior Assistant Appellate Defender Wanda Haile, of Columbia, for appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Donald J. Zelenka, all of Columbia; and Thomas E. Pope, of York, for respondent.

JUSTICE MOORE: Appellant was convicted[1] of murder, first degree burglary, first degree criminal sexual conduct (CSC), and robbery. He received a death sentence for the murder, the jury having found three statutory aggravating circumstances,[2] and received three concurrent sentences for the other offenses.[3] Appellant alleges errors occurred in both the guilt phase and the sentencing phase of his trial. We affirm appellant's convictions and sentences.

FACTS

At approximately 6:15 a.m. on December 31, 1989, the eighty-six-year-old victim opened her door in response to someone's knocking. A black male forced his way into her apartment, beat her about the chest and head, and demanded money. The man forced the victim into her bedroom where he ripped off her nightgown and anally raped her. He took $40 from her purse and left the apartment after ripping the living room phone from the wall.

At 7:45 a.m., the victim's friend (Mrs. Thrasher) phoned to check on the victim. After six or seven rings, the victim answered and told Mrs. Thrasher she had been beaten, anally raped, and robbed. Mrs. Thrasher called another friend, Mrs. Byers, who had an automobile and a key to the victim's apartment. Mrs. Byers went to the apartment, noticed it was messy, spoke with the victim who told her the assailant was "big and dark," and then

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[1]This was appellant's second capital trial. His direct appeal from the first trial was affirmed, State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995), *cert. denied*, 517 U.S. 1248 (1996); appellant was subsequently granted a new trial on post-conviction relief.

[2]The aggravating circumstances were murder during the commission of burglary, murder during the commission of CSC, and physical torture.

[3]The imprisonment terms were life for burglary; thirty years for CSC; and fifteen years for robbery.

drove to the police department since the living room phone had been pulled off the wall.[4]

The first officer on the scene was Dale Edwards. The victim told him that around 6 or 6:30 a.m. she heard knocking at her front door and that when she opened the door, a black male forced his way in. She had taken a shower before the police arrived. Officer Edwards removed the sheets and pillowcase from the bed for use as evidence, and placed the items in a paper grocery bag taken from the victim's kitchen. Lt. Barnett arrived and assisted in the evidence collection. A pink nightgown, a housecoat, and a rag were removed from the bathroom and placed in another grocery bag. The victim gave Officer Edwards a pink paper towel with blood on it that he placed in a manila envelope brought to the scene by Captain Mobley, the third officer on the scene.

While the three police officers were there, two paramedics arrived to transport the victim to a local hospital emergency room. Blood samples were taken, but a rape kit was not processed because the victim was complaining of hip pain and medical personnel were awaiting X-rays before performing the exam. The blood testing kit used to take samples from the victim had "expired" several months earlier.[5] Before the victim's mental state began to deteriorate, she described her attacker to an emergency room nurse as a black male in his late twenties. On February 19, 1990, the victim was transferred to a nursing home where she died in March. The cause of death was pneumonia, which developed as the consequence of her severe brain injury.

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[4]The victim apparently answered Mrs. Thrasher's call using her bedroom phone.

[5]Appellant includes the use of an expired kit in his argument that the forensic evidence was compromised. There was evidence, however, that the expiration date is a manufacturer's "guess" as to how long the vacuum in the blood collection vials will remain good, and that the kit can be used after that date if the vacuum remains effective.

Captain Mobley testified he arrived at the victim's apartment as the EMS personnel were transporting her out the door. He took custody of the evidentiary items from Officer Edwards and Lt. Barnett. He sent Officer Edwards door to door in the neighborhood and instructed Lt. Barnett to go to the hospital and speak with the victim.

Lt. Barnett recorded the victim's statement at the hospital emergency room before she became confused. She described her attacker's clothing: "a dark jacket, must have been blue or black, must have been black;" "a pair of those funny looking pants . . . not the old pant, but something that's kind of mixed up you know;" his hair: "kind of long. Not too long, but a little longer than you usually wear it;" she then said: "he was middle aged. He was young. He was not too young. And he, as I remember, his hair was not short or not too long." The victim described her attacker as dark skinned, "not too heavy. Not too slim."

Later that day, Officer Edwards talked to several of the victim's neighbors. Ms. Boyd told him she heard knocking at her door about 3 a.m.; Mr. Lynn, who lived next door to the victim, reported knocking between 5:30 a.m. and 6:30 a.m.; and Ms. Diggs, who lived on the other side of the victim, heard someone knocking on her door around 6 or 6:30 a.m.

Officer Grady Harper testified he was dispatched to an apartment complex near the victim's residence at about 4:43 a.m. on December 31, 1989. A number of people, including appellant, were making a disturbance, and Officer Harper told them to quiet down and move on. Appellant was unruly, and Officer Harper called for back-up to assist in arresting appellant. When the additional officers arrived, appellant ran. Officer Harper saw appellant get into a car; Officer Harper gave chase in his patrol car. The driver stopped the car and appellant ran from it. The last time Officer Harper saw appellant was about 5:30 a.m. and the other officers were chasing appellant. One of the "chasing" officers testified he lost sight of appellant at about 5:20 a.m. Appellant was wearing a black sweater with a hood and blue jeans.

Captain Mobley testified that after Officer Edwards and Lt. Barnett left the victim's apartment; he locked the front door and began processing the scene. He seized one more paper towel, the telephone touched by the assailant, and the victim's purse. He then dusted the apartment for fingerprints. On the interior side of the front door he photographed and lifted a palm print located slightly above the doorknob. Captain Mobley also photographed and lifted a print from the outside of the front door. The inside palm print was later identified as that of appellant.

Appellant was arrested on the afternoon of December 31, 1989, at his father's home in York, and denied ever having been inside the victim's apartment. When the police arrived, appellant was wearing a black hooded sweatshirt, underwear, and socks. He dressed in jeans before being transported by the police. While he was dressing, Officer Boot Smith noticed a tank top that appeared to have blood on it and asked if the police officers could take it. Appellant consented and stated the blood came from a fight he had been involved in the night before at a bar.

Forensic evidence linked appellant to the crime scene. In addition to the palm print found on the victim's door, the State introduced evidence that:

> (1) fibers consistent with a black sweatshirt owned by appellant were found on the victim's bed sheets;
>
> (2) a blue acrylic fiber was found on the victim's pink nightgown, and another on appellant's blue jeans: they "could have come from the same common source or it could have come from different sources, but indeed they do . . . match each other;"
>
> (3) microscopically consistent fibers were found on the pink nightgown and, in the form of a "fiber pill," on appellant's underwear;
>
> (4) appellant's underwear contained a mixture of DNA from two individuals and 99.99% of the

> population other than appellant and the victim were excluded as contributors to that mixture; and
>
> (5) appellant's tank top was found to contain a mixture of his blood and the victim's blood.

The defense theory was two-fold. First, it sought to discredit the forensic evidence by showing the evidence was mishandled and by demonstrating the many opportunities for contamination because of unprofessional errors. The defense also sought to suggest that the alleged contamination was not merely the result of simple negligence, but part of a plot on the part of certain law enforcement officers to see that appellant was convicted of these crimes. In connection with this prong of the defense strategy, appellant sought to introduce evidence of third party guilt.

ISSUE

> Whether the circuit court erred by refusing to admit evidence of third party guilt?

DISCUSSION

At a pretrial hearing, appellant proffered evidence of third party guilt. Specifically, he sought to introduce evidence at trial that the crimes were actually committed by Jimmy McCaw White (Jimmy).

1. Pre-trial testimony

Like appellant, Jimmy is a black male. At the time of the victim's murder, he was twenty-two years old; appellant was eighteen. Jimmy's hair was longer than appellant's and Jimmy had lighter skin than appellant.

Several witnesses placed Jimmy in the victim's neighborhood near 6 a.m. on December 31, 1989. Frenetta Johnson testified she saw Jimmy going toward the apartments where the victim lived between 4:30 and 5:30 a.m. Later in her testimony, she narrowed the time to "from four-thirty to

something to five." Meshelley Gilmore testified she observed Jimmy in an apartment parking lot as she drove away from her home at about 3:30 or 4 a.m., and that he was still there when she returned at 4:30-4:45 a.m. These apartments were near the victim's complex. Mrs. Gilmore was awakened by a police officer knocking on her door at 7:30 a.m. She told him she had seen Jimmy hanging around the parking lot earlier that morning.

Deloris Brown testified she saw Jimmy walking down the victim's street in the direction of the victim's apartment between 4 and 5 a.m. on December 31, 1989. Eighty-seven-year-old Anna Boyd, a resident of the same apartment complex as the victim, testified that someone knocked on her door during the night of December 30-December 31. The knocker said, "Open the door, my man, this is Jimmy, open the door." These are appellant's "proximity" witnesses.

Appellant also presented several witnesses who testified that Jimmy had acknowledged that appellant was "innocent" or to whom Jimmy had admitted his guilt. Thomas Murray testified that Jimmy said he knew appellant was innocent, and that he (Jimmy) could not be brought to court for it. Ken Rhodes testified he asked Jimmy whether the word on the street, that Jimmy was the victim's murderer, was true and that Jimmy "put his head down and he raised his head back up and he said well, you know, I like older women. . . . and he never called the lady's name but you know he say that he liked old women and that yeah he did what they say he did and you know that somebody else was locked up for it. And you know it's like he didn't have no regrets about it at all." Rhodes went on to testify that "[Jimmy] didn't say exactly what he done, he just told me that she had some good stuff . . . He said that he didn't kill the lady. The lady was alive when he left . . . ."

Mattie Mae Scott testified that in October 1997 she was at her son's house when Jimmy came to visit. Jimmy was "partially intoxicated," and when the others began talking about the 'old lady in York' that Jimmy had raped and murdered, Jimmy said, "Yes, I did it but [appellant] is going to fry for it."

The defense's "star witness" was Stephen Westbrook.[6] He testified that in 1990 and again in 1994 Jimmy told him he had broken into the victim's house and raped her. Jimmy told Westbrook that Officer Boot Smith[7] had told Jimmy to keep quiet about his guilt. Westbrook further testified that Officer Smith and Investigator Potts came to see Westbrook before appellant's first trial and offered to get him out of jail if he would testify that appellant had confessed to him. Westbrook testified that in June 2000, about two months before this pretrial hearing, he was brought to Rock Hill from Kirkland Correctional Institute. In Rock Hill, he was confronted by several employees of the solicitor's office who sought to convince him to testify against appellant in the upcoming second trial. Westbrook stated that the solicitor's office employees acknowledged to him that they had manufactured underwear evidence incriminating appellant. Westbrook also testified that Jimmy told him that Officer Smith was out to "frame" appellant, and that even appellant's former attorney had urged him to testify against appellant. Finally, Westbrook testified an employee of the solicitor's office stated that, in addition to the manufactured underwear evidence, they had lifted one of appellant's palm prints from the county jail door to use against him at trial. These are appellant's "confession" witnesses.

Further, the defense called a witness who testified that when asked why he would not confess, Jimmy told him "it's all over and done with and [appellant] is going to do the time for it."

The former receptionist at the York Public Defender's Office testified that Jimmy brought up the crime in conversation with her one day, and remarked that he did not believe appellant was guilty, that maybe Jimmy knew who did it, and that everybody on the street knew.

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[6]Westbrook's credibility was called into question by cross-examination and by impeachment.

[7]Boot Smith was deceased at the time of this trial.

Finally, the defense called Jimmy to testify at the pretrial hearing. The trial judge instructed Jimmy he had the right to remain silent and the right to an attorney, and warned Jimmy that anything he chose to say could be used against him. Jimmy declined the offer of an attorney and opted to testify. Jimmy testified he left York and was home in Sharon by 2 a.m. on December 31, 1989. He claimed to have ridden with Junior Lytle. Lytle, however, testified at the pretrial hearing and denied driving Jimmy home to Sharon that night. Jimmy denied telling Stephen Westbrook that he had raped and killed the victim and denied confessing in the presence of Thomas Murray or John Dixon or telling the York Public Defender's receptionist that he knew who killed the victim.

2. Standard for admitting third party guilt

We have held that a defendant seeking to present evidence of third party guilt must meet this standard:

> [T]he evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941) (citing 16 C.J. 560).

The Gregory court went on to cite from 20 Am. Jur. 254:

> But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for

> such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

Id., 198 S.C. at 104-105, 16 S.E.2d at 535. Further, in State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), we held that where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence.

Appellant fails to meet the standard set out in Gregory and Gay due to the strong evidence of his guilt. He simply cannot overcome the forensic evidence against him to raise a reasonable inference of his own innocence. This evidence included: (1) appellant's palm print was found just above the door knob on the interior side of the front door of the victim's house; (2) fibers consistent with a black sweatshirt owned by appellant were found on the victim's bed sheets; (3) matching blue fibers were found on the victim's pink nightgown and on appellant's blue jeans; (4) microscopically consistent fibers were found on the pink nightgown and on appellant's underwear; (5) appellant's underwear contained a mixture of DNA from two individuals, and 99.99% of the population other than appellant and the victim were excluded as contributors to that mixture; and (6) appellant's tank top was found to contain a mixture of appellant's blood and the victim's blood.[8]

[8]Although appellant claims the forensic evidence was mishandled and therefore was inadmissible, the fact the forensic evidence may have been compromised by the unprofessional manner in which the evidence was collected goes to the weight of the evidence, not to its admissibility. *See* State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001) (weak links in chain of custody go to weight, not admissibility); State v. Smith, 326 S.C. 39, 482 S.E.2d 777 (1997) (storage of blood sample in police officer's home goes to weight of evidence not its admissibility). In any event, appellant's claims do

Further, besides the forensic evidence, there was evidence that appellant matched the description of the perpetrator given by the victim and there was evidence that appellant was fleeing from police officers and was in the area of the victim's house prior to the time she was attacked.

Regarding appellant's claim that he should have been allowed to present evidence that Jimmy White may have been the perpetrator of the crimes, the State proffered the testimony of a Federal Bureau of Investigations forensic examiner. This examiner testified that, after testing Jimmy White's specimen, *i.e.* a dried bloodstain, and comparing the specimen to the clothing items that were tested as part of the investigation, White was excluded.

Given the overwhelming evidence of appellant's guilt, the circuit court did not err by excluding the evidence of third party guilt.

CONCLUSION

Appellant's remaining issues are without merit and we dispose of them pursuant to Rule 220(b), SCACR. *See* Issue I: State v. Council, 335 S.C. 1, 515 S.E.2d 508, *cert. denied*, 528 U.S. 1050 (1999) (whether juror is qualified to serve on death penalty case is within discretion of trial court and is not reviewable on appeal unless wholly unsupported by the evidence; responses of challenged jurors must be examined in light of entire voir dire); Issue IV: State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, *cert. denied*, 531 U.S. 840 (2000) (appellate court will not disturb trial court's ruling concerning scope of cross-examination of a witness to test his or her credibility absent manifest abuse of discretion); *see also* State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (trial court erred by not admitting

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not eviscerate all of the forensic evidence. For example, appellant's claims do not eliminate the fact that consistent fibers were found on both his clothing and the victim's clothing and sheets or the fact that 99.99% of the population other than appellant and the victim were excluded as contributors to the mixture found in appellant's underwear.

impeachment evidence after officer denied he had investigated two suspects different from the defendant; however, error found to be harmless); Issue VI: State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert. denied*, 520 U.S. 1268 (1997) (contemporaneous objection required to preserve issue for appellate review); Issues VII and VIII: State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999), *cert. denied*, 529 U.S. 1025 (2000) (capital defendant may present as mitigating evidence (1) any aspect of defendant's character or record and (2) any circumstances of the crime that may serve as a basis for a sentence less than death); State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994), *cert. denied*, 513 U.S. 1166 (1995)[9] (residual doubts are not a mitigating factor in sentencing); Issue IX: Ohio v. Roberts, 448 U.S. 56 (1980), *overruled on other grounds by* Crawford v. Washington, __ U.S. __, 124 S.Ct. 1354 (2004) (properly administered the business and public records exceptions are among the safest against a Confrontation Clause challenge of the hearsay exceptions); Rule 1006, SCRE (contents of voluminous records may be presented in form of a summary provided underlying data are admissible into evidence); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683, *cert. denied*, 519 U.S. 1045 (1996) (prison disciplinary records admissible under Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510 (1985); Issue XI: Payne v. Tennessee, 501 U.S. 808 (1991) (victim impact evidence is admissible in a capital sentencing proceeding); Neill v. Gibson, 278 F.3d 1044 (10th Cir. 2001), *cert. denied*, 537 U.S. 835 (2002) (no *ex post facto* violation in allowing victim impact evidence when crime occurred in 1984); Issue XII: State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1996), *cert. denied*, 520 U.S. 1268 (1997) (contemporaneous objection required to preserve issue for appellate review); Issue XIII: State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984) (party cannot complain of error which his own conduct has induced); Issue XV: State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2002), *cert. denied*, 539 U.S. 930 (2003) (issues cannot be raised for the first time on appeal); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240

[9]*Overruled on other grounds by* State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995).

(2001) (admission of evidence is in trial court's discretion and will not be disturbed on appeal absent an abuse of discretion).[10]

Proportionality Review

Under State law, S.C. Code Ann. § 16-3-25(C)(3) (1985) requires this Court to determine in a death case "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." There is no requirement the sentence be proportional to any particular case; however, death sentences have been imposed in similar cases. *See* State v. Simmons, __ S.C. __, 599 S.E.2d 448 (2004); State v. Terry, 339 S.C. 352, 529 S.E.2d 274, *cert. denied*, 531 U.S. 882 (2000); State v. Council, 335 S.C. 1, 515 S.E.2d 508, *cert. denied*, 528 U.S. 1050 (1999); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683, *cert denied*, 519 U.S. 1045 (1996). Accordingly, appellant's sentence is not disproportionate under State law. The judgment of the circuit court is

AFFIRMED.

[10]As for Issue XIV, appellant's argument is based upon a factual error. Appellant argues the trial court erred by permitting the State to cross-examine a social worker using records from his stay in Gilliam Psychiatric Hospital in 2000. However, the trial court in fact denied the State's request to cross-examine the social worker and the State did not ask any questions regarding the 2000 Gilliam records. Because the Record on Appeal does not support appellant's assertion, we do not address his argument. *See* State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981) (where appellant obtained only relief he sought, this court has no issue to decide).

TOAL, C.J., WALLER, J., and Acting Justice John W. Kittredge, concur. PLEICONES, J., dissenting in a separate opinion.

JUSTICE PLEICONES: I respectfully dissent, and would find the circuit court erred in refusing to allow appellant to introduce evidence of third party guilt in the guilt phase of the trial. I would therefore reverse and remand for a new trial.

The majority and I agree on the third party guilt evidence proffered by appellant. In my view, the proffer met the standard established by State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). The majority, relying on State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001), concludes that the third party guilt evidence was properly excluded. I find Gay distinguishable.

In Gay, the Court affirmed the exclusion of evidence of third party guilt because the State's case, particularly the forensic evidence, was so strong that it admitted of no "reasonable inference" regarding the defendant's innocence. The present case is distinguishable from Gay in several important particulars. First, the validity of the forensic evidence was not called into question in Gay. Here, appellant presented evidence of mishandling, for example the collection of evidence at the scene using grocery bags from the victim's kitchen, the mislabeling of samples at the lab, and the loss of all blood samples collected from the victim. Further, appellant proffered evidence that representatives of the State had admitted manufacturing blood and palm print evidence against him. Finally, unlike the defendant in Gay, appellant proffered both "proximity" witnesses and "confession" witnesses. Considering the record as a whole, the State's evidence was not sufficient to negate the "reasonable inference" of appellant's innocence arising from appellant's proffer.

I would reverse and remand for a new trial.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Gary R. Slezak, Appellant,

v.

South Carolina Department of Corrections, Respondent.

Appeal From Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 25887
Heard October 7, 2003 – Filed November 1, 2004

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Appellant.

David M. Tatarsky, Mary Davenport Anderson, and Kelli Gregg Maddox, all of Columbia, for Respondent.

PER CURIAM: This is an appeal from two circuit court orders upholding an administrative law judge's (ALJ's) determination that he lacked jurisdiction over six grievances filed by inmate Gary Slezak (appellant). We affirm as to one grievance, affirm as modified as to

four, and reverse and remand one for reconsideration in light of our decision in Sullivan v. South Carolina Dep't of Corrections, 355 S.C. 437, 586 S.E.2d 124 (2003). Further, we clarify the jurisdiction of the Administrative Law Judge Division (ALJD) in inmate grievance matters.

In Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000), the Court held that inmates could pursue appellate review in the ALJD of certain grievance decisions made by the Department of Corrections (DOC). The ALJD responded to Al-Shabazz in an *en banc* order issued September 5, 2001. McNeil v. South Carolina Dep't of Corrections. In McNeil, the ALJD purported to limit its appellate jurisdiction in inmate appeals to grievances where:

> 1) the contention is that the inmate's sentence, sentence-related credits or custody status have been erroneously calculated, or
>
> 2) the inmate's created liberty interest has been taken as punishment in a major disciplinary hearing.

In footnote 5 of Sullivan, this Court substantially modified McNeil and held:

> ….the ALJD and the circuit court are instructed to look to this opinion, not *McNeil*, for guidance in future cases. Although much of *McNeil's* analysis is accurate, we believe *Wolff* [*v. McDonnell*, 418 U.S. 539 (1974)] requires minimal due process when for [sic] state-created liberty interests, which are not necessarily limited to sentence credit issues and major disciplinary decisions.

See also Wicker v. South Carolina Dep't of Corrections, Op. No. 25859 (S.C. Sup. Ct. filed August 23, 2004) (recognizing another limited ALJD jurisdictional exception where inmate claims deprivation of property interest).

We now clarify that the ALJD has subject matter jurisdiction to hear appeals from the final decision of the DOC in a non-collateral or administrative matter. Al-Shabazz, *supra*. Subject matter jurisdiction refers to the ALJD's "power to hear and determine cases of the general class to which the proceedings in question belong." Cf. Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994) (definition of judicial subject matter jurisdiction). Further, the ALJD has appellate jurisdiction over any matter where the procedural prerequisites for perfecting such an appeal have been met. Great Games, Inc. v. South Carolina Dep't of Rev., 339 S.C. 79, 529 S.E.2d 6 (2000) (appellate jurisdiction exists where procedural requirements met).

While the ALJD has jurisdiction over all inmate grievance appeals that have been properly filed, we emphasize that the Division is not required to hold a hearing in every matter. Summary dismissal may be appropriate where the inmate's grievance does not implicate a state-created liberty or property interest. See Sandin v. Conner, 515 U.S. 472 (1995) (due process clause offended only when inmate subjected to atypical and significant hardships in relation to ordinary incidents of prison life).

Appellant's appeals to the ALJD and to the circuit court were decided prior to our opinions in Sullivan and Wicker, and were dismissed as beyond the ALJD's jurisdiction pursuant to the McNeil order. In the interest of judicial economy, we will address this appeal on its merits.

ISSUE

Whether the circuit court erred in dismissing appellant's grievances?

ANALYSIS

We address each of appellant's six grievances below.

Appellant first complained that DOC seized certain educational cassette tapes in appellant's possession. The record reveals that the DOC policy denies inmates possession of cassette tapes other than tapes of the inmate's parole hearing(s) or religious tapes obtained from the chaplain. We find no protected liberty or property interest implicated in the DOC's decision to declare cassette tapes contraband, and to seize appellant's tapes pursuant to this policy.

Appellant also complains about a DOC policy that provides for the loss of "good time" credits in certain circumstances. The record establishes that appellant is not eligible to receive such credits, and accordingly lacks standing to challenge the DOC policy.

Appellant's third complaint relates to a DOC policy limiting the amount of legal material he could keep in his cell while in administrative segregation. The DOC determined that the retention of large amounts of paper in these cells created a fire hazard, and therefore permitted an inmate to retain a limited amount in his cell with the remainder available upon request. Appellant concedes his materials were returned upon his release from administrative segregation to the general population. We find this grievance is moot, and that, in any case, the decision to limit papers for fire safety reasons does not implicate a protected liberty or property interest.

Appellant also complained because DOC confiscated a book sent to him through the mail. Under DOC policy, inmates may receive only books mailed to them directly from the publisher for security reasons. Appellant's grievance does not involve a state-created liberty or property interest.

Appellant also challenged S.C. Code Ann. § 23-2-620 (Supp. 2004), which requires inmates convicted of certain crimes to submit a DNA sample, and § 23-3-670, requiring the person providing the DNA sample to pay a $250 processing fee. Appellant's counsel acknowledged at oral argument that appellant was challenging the constitutionality of these statutes, and that such a challenge was properly brought as a declaratory judgment action in circuit court rather

than through the administrative grievance process. See e.g. Great Games, *supra*; Video Gaming Consultants, Inc. v. South Carolina Dep't of Rev., 342 S.C. 34, 535 S.E.2d 642 (2000). This grievance was properly dismissed for lack of jurisdiction.[1]

Appellant's sixth grievance asserted that the practice of "triple celling" at McCormick Correctional Institute constituted both a security hazard and a health hazard to inmates. We find this grievance adequately states a violation of appellant's liberty interest so as to entitle him to a hearing before an ALJ. Accordingly, we remand this grievance appeal to the ALJD for further proceedings.

CONCLUSION

We hold that the ALJD has jurisdiction over all properly perfected inmate appeals, but clarify that it may summarily decide those appeals that do not implicate an inmate's state-created liberty or property interest. We affirm as modified the orders upholding the dismissal of five of appellant's complaints, and reverse and remand the triple celling complaint to the ALJD.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

TOAL, C.J., WALLER, BURNETT, PLEICONES, JJ., and Acting Justice Doyet A. Early, III, concur.

[1] Our disposition of this grievance is without prejudice to appellant's right to pursue a declaratory judgment action in circuit court.

The Supreme Court of South Carolina

In the Matter of Robert L. Gailliard, Respondent.

ORDER

On August 25, 2004, respondent was convicted of assault and battery of a high and aggravated nature. The Office of Disciplinary Counsel has now filed a petition asking this Court to place respondent on interim suspension pursuant to Rule 17(a), RLDE, Rule 413, SCACR, and seeking the appointment of an attorney to protect respondent's clients' interests pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent opposes the petition.

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

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

account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

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

Columbia, South Carolina

October 27, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Herman Lingard,	**Plaintiff,**
v.	
Carolina By-Products and Valley Proteins Company,	**Defendants,**
_____	
Randell Williams,	**Plaintiff,**
v.	
Carolina By-Products and Valley Proteins Company,	**Defendants,**
Of Whom Herman Lingard and Randell Williams are,	**Appellants,**
and Carolina By-Products is,	**Respondent.**

_____

Appeal From Orangeburg County
James C. Williams, Jr., Circuit Court Judge

_____

Opinion No. 3880
Heard October 13, 2004 – Filed October 25, 2004

_____

AFFIRMED

_____

Chalmers C. Johnson, of Charleston, for Appellants.

G. Dana Sinkler, of Charleston, for Respondent.

ANDERSON, J.: Two truck drivers, Herman Lingard and Randell Williams, were terminated after they were discovered at home rather than on their routes. Lingard and Williams brought suit against their employer on the basis of the progressive disciplinary policy found in their employee handbook. The circuit court determined the handbook did not constitute a contract, and even if it did, the employer fulfilled its obligations to the employees. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Herman Lingard and Randell Williams worked as truck drivers at the Branchville facility of Carolina By-Products, which is a division of Valley Proteins Company.

During their employment, Lingard and Williams received an employee handbook. They signed a written "Receipt of 'Employee Handbook,'" which stated:

> I . . . understand that I may terminate my employment at any time, with or without cause, and that the Company may terminate me at any time, with or without cause and without liability. I know my employment here does not constitute a contract of employment between the Company and myself and that this manual is not a contract of employment.

The handbook addressed company rules and created a progressive disciplinary procedure. Different classes of behavior would result in different responses from management. The most serious, Group I, could result in immediate discharge.

Lingard and Williams drove grease trap trucks that went to various restaurant locations in the lowcountry and off-loaded the used grease. This was a difficult and dirty position that frequently required fifteen-hour workdays. At the start of the day, the drivers were required to go to the Branchville facility where their trucks were located. Once there, they clocked in. Next, if the grease on their truck had not been off-loaded the night before, they had to off-load the grease. Then, the drivers performed a pre-trip procedure. This involved checking the truck to see if it was in good mechanical condition and inspecting the hoses on the truck. Finally, they scaled out, or weighed their truck, and left to begin their route. When the drivers scaled out, a ticket with a scale out time was generated. When the drivers returned after a day of work, they weighed their truck, which again generated a ticket with a time of weighing.

During the course of the day, Lingard and Williams were allowed a total of one hour in breaks — designed to be taken as a thirty minute lunch break and two fifteen minute breaks. However, the drivers were not required to clock-out during these breaks or otherwise keep a record of the breaks taken.

Carolina By-Products was purchased by Valley Proteins. Subsequent to this sale, Richard Frank Miller became the general plant manager of the facility where Lingard and Williams worked. Melvin Mitchell served under Miller as Lingard and Williams' route supervisor. Because of a lack of productivity, a series of changes was made. These changes, including some impacting the drivers, did not lead to the desired increase in productivity.

Acting on a workplace rumor, Mitchell drove to the houses of Lingard and Williams during the morning on July 6, 2000. At approximately 6:45 a.m., the work trucks of both Lingard and Williams were parked in front of their houses. On this day, Lingard and Williams had weighed their trucks and left the Branchville location at 4:04 a.m. and 3:57 a.m., respectively. Mitchell did not immediately take action as he determined "[a]nything can happen once," and he wanted to give Lingard and Williams the benefit of the doubt.

On July 12, 2000, Mitchell and Miller drove to the houses of Lingard and Williams and again witnessed the work trucks parked at the employees' homes. Lingard and Williams had both clocked into work at 3:42 a.m. and weighed their trucks before leaving at 3:53 a.m. and 3:52 a.m., respectively. Mitchell and Miller photographed the trucks located in front of the houses of Lingard and Williams at 6:57 a.m. and 6:51 a.m., respectively. Mitchell testified he felt the power steering fluid reservoir on Williams' truck to determine how long it had been sitting there and, based on his experience with diesel trucks, determined because the reservoir was cool to the touch the truck had not been driven in an hour and forty minutes. He did not perform the same test on Lingard's truck because it was parked on Lingard's property and inaccessible.

On the afternoon of July 12, 2000, Lingard and Williams completed their routes and returned their trucks to the facility. Miller met with each separately and presented them with a notice of discharge. The notices were virtually identical, stating: "You are hereby discharged from Carolina By Products due to not following company rules Group I." The notices further explain, "[o]ur investigation showed the following: on two occassion [sic] Carolinas By Product Truck . . . was sitting at your home. Not being at prescribe[d] location at time of incident. Giving false information." Neither Lingard nor Williams attempted to explain why they were at their houses rather than on their routes.

After their termination, both Lingard and Williams brought suit against Carolina By-Products and Valley Proteins Company for wrongful termination. The theory of the action was that the employee handbook created an employment contract, the employment contract included a progressive disciplinary policy, and their terminations violated that progressive disciplinary policy. The case went to trial. At the close of evidence, the circuit court granted a directed verdict. The directed verdict was based on the court's determination there was no employment contract, and even if a contract existed, the employer made a good faith decision it had grounds for termination.

STANDARD OF REVIEW

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." Jinks v. Richland County, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003). "The trial court can only be reversed by this Court when there is no evidence to support the ruling below." Id.

LAW/ANALYSIS

Lingard and Williams present two arguments on appeal. First, the circuit court erred in concluding the employee handbook did not represent an employment contract. Second, the circuit court erred in concluding their termination did not violate the promises of a progressive disciplinary policy. We agree enough evidence was presented to normally require the existence of a contract to be a jury question. However, in this case, the circuit court correctly determined there was a reasonable good faith belief that sufficient cause existed for termination.

South Carolina recognizes the doctrine of at-will employment. Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002). This doctrine provides that a contract for permanent employment is terminable at the pleasure of either party when unsupported by consideration other than the employer's duty to provide compensation in exchange for the employee's duty to perform a service or obligation. Id. However, in Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987), our supreme court recognized that statements in employee handbooks could be strictly enforced against employers as contractual obligations. Id. at 485, 357 S.E.2d at 454-55. A contract of employment created by an employee handbook is a unilateral contract. See generally Miller v. Schmid Lab., Inc., 307 S.C. 140, 414 S.E.2d 126 (1992).

The Small decision seemed to suggest that a conspicuous disclaimer would prevent an alteration of the at-will employment status. Small, 292

S.C. at 485, 357 S.E.2d at 455. Yet, Fleming v. Borden, Inc., 316 S.C. 452, 450 S.E.2d 589 (1994), involved a handbook that contained a disclaimer and a claim that it was inconspicuous. Id. at 460, 450 S.E.2d at 594. In Fleming, the supreme court did not simply determine the conspicuousness of the disclaimer, but stated:

> "[T]he disclaimer is merely one factor to consider in ascertaining whether the handbook as a whole conveys credible promises that should be enforced. . . . [T]he entire handbook, including any disclaimer, should be considered in determining whether the handbook gives rise to a promise, an expectation and a benefit."

Id. at 463-64, 450 S.E.2d at 596 (quoting Stephen F. Befort, Employee Handbooks and the Legal Effect of Disclaimers, 13 Industrial Relations L. J. 326, 375-76 (1991-92)).

When looking at the handbook to determine to what degree it gives rise to a promise, an expectation, and a benefit, the court must focus on the actual language of the employee handbook. The court should consider whether the promises are couched in permissive or mandatory language. See Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002); see also Jones v. General Elec. Co., 331 S.C. 351, 503 S.E.2d 173 (Ct. App. 1998) (concerning a handbook containing both mandatory and permissive language, thus creating a jury issue); see generally Note, Conner v. City of Forest Acres: The End of the At-will Employment Era?, 54 S.C. L. Rev. 1113, 1128 (2003).

Examples of mandatory language from Conner include: "(1) violations of the Code of Conduct '**will be** disciplined,' (2) 'discipline **shall be** of an increasingly progressive nature,' and (3) 'all employees **shall be** treated fairly and consistently in all matters related to their employment.'" Conner, 348 S.C. at 464 n.4, 560 S.E.2d at 611 n.4 (emphasis in original). Horton v. Darby Elec. Co., 360 S.C. 58, 599 S.E.2d 456 (2004), is the most recent supreme court case to treat an employee handbook. Examples of permissive language in Horton are:

> (1) the disciplinary procedure "is to be viewed as the **guiding policy** insofar as taking disciplinary action . . . ;" (2) "supervisors are **not required** to go through the entire three steps involved in this disciplinary procedure;" (3) "[d]iscipline **may** begin at any step in the procedure depending on the seriousness of the offense committed;" and (4) "supervisor **may** repeat any of the first two steps of this procedure when he feels it is necessary, so long as the discipline is commensurate with the offense committed."

Id. at 67 n.7, 599 S.E.2d at 461 n.7 (emphasis in original).

This evolution involving the effectiveness of disclaimers and the balancing of them against the actual language contained in the handbook was recently addressed by the General Assembly. On March 15, 2004, section 41-1-110 of the South Carolina Code was signed into law. This section states that a handbook shall not create an employment contract if it is conspicuously disclaimed.[1] However, this statute is inapplicable to the case at hand as it only applies to handbooks issued after June 30, 2004, and this employee handbook was issued to Lingard and Williams on January 21, 1999.

While Lingard and Williams signed papers acknowledging receipt of the handbooks, and that the handbooks do not constitute an employment contract, the handbook creates a progressive disciplinary policy that is couched in mandatory terms. The "Company Rules" section discusses four groups of behavior that can lead to varying degrees of punishment. The handbook states a violation of each group rule "will subject" the employee to certain levels of disciplinary action. For instance, a Group I violation "will subject an employee to disciplinary action ranging from a written reprimand

[1] Section 41-1-110 reads in full: "It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law."

to immediate discharge without any previous warning." "A violation of Group II rules will subject an employee to:

Written Warning	Failure to Earn Attendance/Performance Bonus
Second Offense	Up to and including Termination."

"A violation of Group III rules will subject an employee to:

Written Warning	Failure to earn Attendance/Performance Bonus
Second Offense	Suspension (2 working days)
Third Offense	Up to and including Termination."

"A violation of Group IV rules will subject an employee to:

First Three Offenses	Written warning and failure to earn attendance/performance bonus
Fourth Offense	Final written warning and suspension (2 working days)
Fifth Offense	Up to and including Termination."

The instant case is factually similar to this court's decision in Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002). In Baril, a handbook purported not to change the at-will employment status while simultaneously containing a progressive disciplinary policy couched in mandatory terms. Id. at 282, 573 S.E.2d at 837. Under those facts, this court determined the existence of an employment contract is a jury decision. While South Carolina jurisprudence has continued to grapple with the existence of employment contracts, this essential holding from Baril remains extant. When our courts have found progressive disciplinary policies did not create a contract, those policies were couched in permissive rather than mandatory terms. For example, the Horton court articulated:

> The disciplinary policy in the manual provides:
>
> . . . .

> The following is to be viewed as the guiding policy insofar as taking disciplinary action for infractions of company rules and misconduct is concerned.
>
> > 1. At first offense, if not in itself serious enough to warrant suspension or discharge, give warning and advise that another offense will result in suspension for 3 days without pay as a disciplinary measure.
> > 2. At second offense, if not in itself serious enough to warrant discharge, give 3 days' suspension without pay and warn that another offense may result in discharge.
> > 3. At third offense, discharge, and point out to employee that he brought the action on himself and left the supervisor without any alternative.
> >
> > . . . .
>
> It should be emphasized again that supervisors are not required to go through the entire three steps involved in this disciplinary procedure. Discipline may begin at any step in the procedure depending on the seriousness of the offense committed.
>
> . . . .
>
> Respondent's manual exemplifies the appropriate manner in which to give employees a guide regarding their employment without altering the at-will employment relationship. The manual contained conspicuous disclaimers and appellant understood those disclaimers. Further, the disciplinary procedure contained permissive language and did not provide for mandatory progressive discipline. Appellant, who himself had the responsibility of interpreting the manual, stated he interpreted the manual as not limiting his ability to terminate employees. Accordingly, the policy manual did not alter the employment at-will relationship between appellant and respondent.

Horton, 360 S.C at 61-68, 599 S.E.2d at 457-61 (footnote omitted).

In the present case, the circuit court ruled that even if there was an employment contract, the employer did not violate the progressive disciplinary policy when it terminated Lingard and Williams. Lingard and

Williams were terminated after an investigation revealed they had, on at least two occasions, spent time for which they were being compensated by the company at their homes rather than working their routes. Lingard and Williams attempt to argue the final incident was short in duration. However, the facts suggest otherwise. Their weigh-out tickets, which signify when they left the facility, were at 3:52 a.m. and 3:53 a.m. Both men testified they were at the facility longer because they had to prepare their trucks for the routes. Yet, this assertion is in direct contrast to the weigh-out tickets. Both men testified it took approximately thirty minutes to travel from the facility to their houses and they had traveled home to perform quick tasks before beginning their day's route. Lingard declared he stopped to make sandwiches to eat on the road. Williams averred he stopped to shower after performing the long and dirty task of cleaning his truck, an assertion that is debased by the fact that the time between which he clocked in and weighed out was thirty minutes. The testimony regarding a short stop is undercut by testimony and pictures of their trucks in front of their houses at 6:51 a.m. and 6:57 a.m. This leaves nearly three unaccounted hours.

While the mere testimony of the men regarding their departure times and quick stops, which could be accounted for by their permissible one hour breaks, would typically raise a jury issue, South Carolina law does not allow judges and juries to peer unchecked into employment decisions. In Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002), the supreme court focused on whether there was a reasonable good faith belief that sufficient cause existed for terminating Conner. The city terminated Conner, a grievance committee reinstated her, and the city council overturned the reinstatement. The court found reasonable minds could differ as to whether just cause existed to support Conner's termination and the circuit court should not have granted summary judgment.

Recently, in Horton v. Darby Electric Co., 360 S.C. 58, 599 S.E.2d 456 (2004), the supreme court found, unlike Conner, reasonable minds could not differ as to whether just cause existed in support of Horton's termination and, therefore, summary judgment was appropriate. The Horton court explained that even if the handbook was interpreted as altering the at-will status, Horton's behavior and the evidence demonstrated a reasonable good faith

belief that sufficient cause existed for termination. Id. at 68, 599 S.E.2d at 461.

While Group I behavior does not specifically list stealing from the employer by spending company time at home, it does enumerate theft, falsifying time cards, and giving false information to management. Time spent at home performing personal tasks is not time spent working. However, Lingard and Williams expected to be paid for this time. Lingard and Williams did not affirmatively report time at home to supervisors, instead letting their time cards stand uncorrected. Knowing that they were paid based on the times reported on their time cards, this was not only theft but also falsification of time cards. Furthermore, Lingard and Williams provided false information to management by representing themselves as working when they were not.

The discovery by Mitchell and Miller that Lingard and Williams were at home when they were supposed to be on their routes constitutes a good faith belief that the behavior of Lingard and Williams justified termination. Although Lingard and Williams attempt to portray their time spent at home as short and within their allowed breaks, the facts do not support this assertion. More importantly, the conclusions of Mitchell and Miller do not have to be uncontested fact, but must instead simply be supported by enough evidence to support their good faith belief in the cause for termination. The facts support this good faith belief that Lingard and Williams were staying at home when they should have been working. We conclude that classification of this behavior as Group I was made in good faith.

CONCLUSION

For the reasons stated above, the directed verdict is

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Melvin H. Mowrer, Appellant,

v.

Charleston County Park and Recreation Commission and Charleston County, Respondents.

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

Opinion No. 3881
Heard September 14, 2004 - Filed October 25, 2004

REVERSED AND REMANDED

Justin O'Toole Lucey, of Mt. Pleasant, for Appellant.

Henry P. Wall, Warren C. Powell, Jr. and Joey R. Floyd, of Columbia, for Respondents.

GOOLSBY, J.: Melvin H. Mowrer appeals a directed verdict for the Charleston County Park and Recreation Commission and Charleston County

(collectively "Defendants") in his lawsuit arising from an alleged inverse condemnation of his property. We reverse and remand.

FACTS AND PROCEDURAL BACKGROUND

Mowrer and his family own two adjacent properties located at 525 and 529 Mill Street in the town of Mount Pleasant, South Carolina. Mowrer and his wife purchased 525 Mill Street in 1987. Their house is located at Shem Creek and overlooks the marsh and water. Mowrer owns 529 Mill Street with his brother.

Both properties are located near the intersection of Simmons and Mill Streets. They are also close to Shem Creek Landing, a boat ramp where boats on trailers are put into and pulled from Shem Creek. Shem Creek Landing and a nearby parking lot are owned by the County and leased to the Commission.

When the Mowrers purchased their home, Shem Creek Landing was a small, simple boat ramp and unsuitable for large boats. Both Mill and Simmons were originally two-way streets. Moreover, the Mowrers could access Coleman Boulevard, a main thoroughfare, by driving from their driveway directly onto Mill Street.

In 1992, the Commission approved a $34,000,000 bond issue for public works projects. One of the projects, for which $3,000,000 from the bond issue had been allocated, failed to go forward. At the request of the Charleston County Council, the Commission took over all the boat landings in the county, with the agreement that the previously allocated $3,000,000 would be used on new boat ramps. In addition, the County provided an additional $200,000 to the Commission for this responsibility.

Prior studies had recommended closing Shem Creek Landing because of its small size and deplorable condition. The South Carolina Department of Natural Resources and the Town of Mount Pleasant, however, had already begun redesigning the landing before the Commission became involved. The

Commission eventually hired an engineer to design and reconfigure the landing.

The engineer submitted a number of landing designs to the Commission. Some plans included closing off Mill Street while others did not. Similarly, the plans varied as to whether Simmons Street would remain a two-way street.

The renovation plans chosen by the Commission initially called for the condemnation of both Mowrer properties. The Mowrers disagreed with the Commission's appraisal values and obtained second appraisals at the Commission's expense. These appraisals assigned higher values to both properties. Defendants opted not to pay the higher amounts and proceeded with the renovation of the boat ramp by working around the Mowrer properties. The project was approved by the Town of Mount Pleasant and was completed in the late 1990s. The parties stipulated that the Commission designed and constructed the improvements and made the changes to the boat landing at Shem Creek.

As a result of the expansion of the boat ramp, Simmons Street is used to queue up boaters for the landing. This has resulted in vehicles sometimes being parked in front of the Mowrers' driveway curb cuts, thus restricting the Mowrers' access to their properties. In addition, the Mowrers cannot access Simmons Street from the front of their house because the road has raised curbs that make it one-directional in the opposite way. Also, a median built in connection with the project blocks the Mowrers' direct access to Mill Street. The Mowrers' driveways now terminate in the boat landing itself, requiring them to go through the boat ramp parking lot to access Mill Street.

To reach Coleman Boulevard, the Mowrers must now exit their driveway into the parking lot and turn right onto Scott Street before finally making a left turn onto Mill Street. If any boaters are backing out while the Mowrers attempt to go through the parking lot, the Mowrers have to wait for an opportunity to drive forward. Compounding the problem is the fact that one of the Mowrer properties has access to the street only because the Mowrer family owns the adjacent lot.

The enhanced landing now attracts more people with larger boats. In addition to traffic congestion, the increased use of the boat ramp has resulted in more noise, fumes, and litter. An appraiser estimated that, because of the boat ramp expansion, the Mowrer properties lost one third of their value.

Mowrer sued the Commission and the County, alleging their actions constituted a taking, an inverse condemnation, and a nuisance.[1] In their responsive pleadings, Defendants denied the allegations of the complaint and raised additional defenses, including waiver, failure to exhaust administrative remedies, and immunity from suit.

Mowrer later moved for partial summary judgment, arguing the blocking of his access to Mill Street constituted a taking as a matter of law. On the day the trial was to begin, after a jury was drawn but before presentation of the testimony, the trial court denied the motion.

At the conclusion of the testimony, the trial court directed a verdict for Defendants. The trial court also denied Mowrer's post-trial motions.

LAW/ANALYSIS

1. Mowrer argues the trial court erred in directing a verdict for Defendants on his inverse condemnation claim. We agree.

Article I, Section 13 of the South Carolina Constitution prohibits the taking of private property for public use without the payment of just compensation.[2] This provision "extends to all cases in which any of the

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[1] Both Mowrer's wife and brother executed assignments to Mowrer for the prosecution of this action.

[2] See S.C. Const. art. I, § 13 ("Except as otherwise provided in this Constitution, private property shall not be taken . . . for public use without just compensation being first made therefor.").

essential elements of ownership has been destroyed or impaired as the result of the construction or maintenance of a public street."[3] In South Carolina, "an obstruction that materially injures or deprives the abutting property owner of ingress or egress to and from his property is a 'taking' of the property, for which recovery may be had."[4] Moreover, "[t]he fact that other means of access to the property are available affects merely the amount of damages, and not the right of recovery."[5]

"The elements of an inverse condemnation are (1) an affirmative, positive, aggressive act on the part of the governmental agency, (2) a taking, (3) the taking is for a public use, and (4) the taking has some degree of permanence."[6] This court has recently held that the erection of a median barrier could be an actionable interference with a constitutionally protected property right of an abutting landowner.[7]

In granting the directed verdict, the trial court held Mowrer failed to prove that Defendants had the authority to commit the acts on which his

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[3] Sease v. City of Spartanburg, 242 S.C. 520, 524-25, 131 S.E.2d 683, 685 (1963) (emphasis added).

[4] South Carolina State Highway Dep't v. Allison, 246 S.C. 389, 393, 143 S.E.2d 800, 802 (1965); see also 29A C.J.S. Eminent Domain § 97, at 268 (1992) ("[A]ny occupation or use of a street or highway for public use which obstructs it so as to destroy or materially impair the easements of an abutting owner is a taking of, or injury to, private property entitling such owner to compensation, even though done by public authorization.").

[5] Allison, 246 S.C. at 393, 143 S.E.2d at 802.

[6] Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct. App. 1993).

[7] Hardin v. South Carolina Dep't of Transp., 359 S.C. 244, 249-54, 597 S.E.2d 814, 816-19 (Ct. App. 2004).

complaint was based.[8]

Although there is authority that only a party with eminent domain power can be sued for inverse condemnation, there is also authority to the contrary, i.e., that "[a]s long as the state acts through one of its arms in such a way as to deprive an individual of his property for public use, it is irrelevant whether the state arm doing the actual taking has eminent domain power."[9]

Case law from this jurisdiction would seem to indicate that South Carolina follows the latter view.[10] Moreover, we find persuasive the reasoning in Fountain v. Metropolitan Atlanta Rapid Transit Authority, wherein the Eleventh Circuit Court of Appeals held that "[a]s long as the

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[8] The trial court appeared to rely on a tenet of the South Carolina Tort Claims Act that liability is founded on acts that are within a governmental defendant's scope of official duty. See S.C. Code Ann. § 15-78-50(a) (Supp. 2003) ("Any person who may suffer a loss proximately caused by a tort of the State, an agency, a political subdivision, or a governmental entity, and its employee acting within the scope of his official duty may file a claim as hereinafter provided."). This reliance was misplaced. At issue here is not a tort committed by the government against an individual but the taking by the government of private property for public use without the payment of just compensation. Because the right to compensation for such a taking is a constitutional right predating the Tort Claims Act, it cannot be altered by statute. See, e.g., Ins. Fin. Servs. v. S.C. Ins. Co., 282 S.C. 144, 147, 318 S.E.2d 10, 11 (1984) (holding an automobile insurer's contractual right to terminate its agents was protected by the state and federal constitutions and therefore could not be altered by subsequent statutory law).

[9] 29A C.J.S. Eminent Domain § 386, at 761 (1992).

[10] See South Carolina State Highway Dep't v. Moody, 267 S.C. 130, 136, 226 S.E.2d 423, 425 (1976) (holding a landowner whose property was damaged by the government without having been condemned may bring an inverse condemnation "against the contractor, or against the highway department, or against the two, depending on the facts").

state acts through one of its arms in such a way as to deprive an individual of his property for public use, it is irrelevant whether the state arm doing the actual taking has eminent domain power."[11] In so holding, the court gave the following explanation:

> If a private party were unable to seek redress under the just compensation clause when an official agency acts outside its statutory powers and takes property for public use, the state would be able to escape liability under the just compensation clause by taking property through agencies without statutory powers of eminent domain. We think that the threat of this kind of shell game ought to be avoided . . . .[12]

Based on this reasoning, we hold that whether Defendants had the authority to commit the acts about which Mowrer has complained is not relevant to the question of whether these acts amounted to an unconstitutional taking of his property for public use. The fact that the Commission lacked eminent domain power did not render its affirmative, positive, aggressive acts concerning the Mowrer properties any less a taking within the meaning of Article I, Section 13 of the South Carolina Constitution. It was therefore an error of law to direct a verdict against Mowrer on the ground that he did not name the Town as a defendant.

2. Defendants argue that a directed verdict in their favor should be affirmed because Mowrer failed to prove the elements of inverse condemnation. We decline to address this argument[13] and note that, since the

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[11] Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1043-44 (11th Cir. 1982).

[12] Id. at 1044.

[13] See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (stating an appellate court may not rely on Rule 220(c), SCACR, to affirm a judgment "when the court believes it would be unwise or unjust to do so in a particular case"). In a footnote, the supreme court added

present case was tried, there has been at least one appellate decision in this State that appears relevant to this issue.[14]

3. We decline to address Mowrer's arguments that he was entitled to an order of summary judgment and a directed verdict. The denial of summary judgment is not appealable, even after final judgment,[15] and the record does not include Mowrer's directed verdict motion.[16]

REVERSED AND REMANDED.

ANDERSON, JJ., and CURETON, A.J., concur.

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that the appellate court "may or may not wish to address [additional sustaining] grounds when it reverses the lower court's decision." Id. at 420 n.9, 526 S.E.2d at 723 n.9.

[14] See Hardin v. South Carolina Dep't of Transp., 359 S.C. 244, 597 S.E.2d 814 (Ct. App. 2004) (affirming the trial court's determination that the respondents were entitled to just compensation for the loss in value of their properties caused by the closing of two roads at an intersection).

[15] Silverman v. Campbell, 326 S.C. 208, 211, 486 S.E.2d 1, 2 (1997).

[16] See Harkins v. Greenville County, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (noting the appellant has the burden of presenting an adequate record on appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Raymond P. Nelson, Appellant,

v.

Charleston County Parks & Recreation Commission, Respondent.

Appeal From Charleston County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 3882
Heard October 13, 2004 – Filed October 25, 2004

AFFIRMED

Chalmers Carey Johnson, of Charleston, for Appellant.

Reginald W. Belcher, of Columbia, for Respondent.

ANDERSON, J.: Raymond P. Nelson (Nelson) appeals the circuit court's order granting summary judgment to Charleston County Parks and Recreation Commission (CCPRC) on Nelson's action for breach of employment contract. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

CCPRC hired Nelson as a Maintenance Specialist in May 1996, as an at-will employee, and terminated him on February 22, 2001, following a nearly one-month probationary period for substandard performance. For the last two years of Nelson's employment with CCPRC, he worked as the James Island County Maintenance Crew Chief. The position required him to maintain James Island County Park's buildings, water park, campground, utilities, and miscellaneous other structures. The position required, among other things, moderately heavy manual work, technical skills, supervisory knowledge, and the ability to act independently on the job site.

CCPRC terminated Nelson's employment on or about February 22, 2001, because his job performance progressively deteriorated for at least the last eight months of his employment, despite CCPRC's continuing efforts to encourage and prompt him to improve his poor and substandard performance. CCPRC, through Nelson's direct supervisor and two of CCPRC's long-tenured managers, repeatedly attempted to correct Nelson's excessive and unacceptable performance problems by giving him several oral and written reprimands, counselings, and warnings beginning in July of 2000.

Nelson failed to show improvement in any of the areas recommended for corrective action over the next six months. Effective February 1, 2001 until July 31, 2001, CCPRC placed Nelson on six months probation, expressly setting forth the improvements expected from him during that time period, including providing his direct supervisor with a list of goals and objectives by February 15, 2001. Nelson interpreted the probationary status as creating a six-month employment contract, though no particular document, oral statement, or other evidence supported his position.

Nelson failed to prepare the list of goals. Furthermore, his poor and inadequate planning resulted in his crew abandoning one work project on February 8, 2001, and delaying two others. On February 22, 2001, Nelson's direct supervisor and the two managers agreed to terminate Nelson's

employment for "failure to comply with requirements while on probationary status . . . failure to perform work properly or follow work instruction."

Nelson filed a cause of action for wrongful termination under an employment contract on October 31, 2001 against CCPRC, alleging CCPRC altered his employment at-will status when it placed him on probation for his progressively poor job performance. The circuit court granted summary judgment to CCPRC and dismissed the case with prejudice.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002); Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564 S.E.2d 94 (2002). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 324, 566 S.E.2d 536, 539 (2002); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. Young v. South Carolina Dep't of Corr., 333 S.C. 714, 718, 511 S.E.2d 413, 415 (Ct. App. 1999).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 305 (Ct. App. 1999). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. See Hall v. Fedor, 349 S.C.

169, 173-74, 561 S.E.2d 654, 656 (Ct. App. 2002). Moreover, summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. Lanham v. Blue Cross and Blue Shield, 349 S.C. 356, 363, 563 S.E.2d 331, 336 (2002); Trivelas v. South Carolina Dep't of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001).

LAW/ ANALYSIS

I. CCPRC's Actions in Putting Nelson on Probation

Nelson maintains the circuit court erred in granting summary judgment because, viewing the evidence in the light most favorable to Nelson as the nonmoving party, material issues of genuine fact exist concerning whether Nelson's probationary period altered his at-will employment status by creating an employment contract between the parties. We disagree.

South Carolina recognizes the doctrine of employment at-will. See Prescott v. Farmers Tel. Coop., Inc., 335 S.C. 330, 516 S.E.2d 923 (1999). This doctrine provides that a contract for permanent employment is terminable at the pleasure of either party when unsupported by any consideration other than the employer's duty to provide compensation in exchange for the employee's duty to perform a service or obligation. See id. "At-will employment is generally terminable by either party at any time, for any reason or no reason at all." Id. at 334, 516 S.E.2d at 925.

South Carolina courts have carved out exceptions to the at-will employment doctrine. See Small v. Springs Indus., Inc., 300 S.C. 481, 388 S.E.2d 808 (1990) (Small II); Davis v. Orangeburg-Calhoun Law Enforcement Comm'n, 344 S.C. 240, 542 S.E.2d 755 (Ct. App. 2001). First, an employee has recourse against an employer for termination in violation of public policy. Small II, 300 S.C. at 484, 388 S.E.2d at 810; Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985). Second, an at-will employee may not be terminated for exercising constitutional rights. Prescott, 335 S.C. at 335 n.3, 516 S.E.2d at 925 n.3; Moshtaghi v. The Citadel, 314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994). Finally, an employee

has a cause of action against an employer who contractually alters the at-will relationship and terminates the employee in violation of the contract. Davis, 344 S.C. at 246-47, 542 S.E.2d at 758. An employer and employee may contractually alter an at-will employment relationship, and as a result, limit the ability of either party to terminate the employment relationship without incurring liability. See Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987) (Small I); Baril, 352 S.C. at 281, 573 S.E.2d at 836; see also Culler v. Blue Ridge Elec. Coop., Inc., 309 S.C. 243, 422 S.E.2d 91 (1992) (emphasizing that the doctrine of employment at-will in its pure form allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability). For example, an employee handbook[1] may create a contract altering an at-will arrangement. See Small II, 300 S.C. at 484, 388 S.E.2d at 810; Baril, 352 S.C. at 281, 573 S.E.2d at 836; see also Davis, 344 S.C. at 247, 542 S.E.2d at 758 (instructing that in certain situations, termination of at-will employee may give rise to cause of action where at-will status of employee is altered by terms of employee handbook). Thus, an employer's written documents can alter the at-will relationship and create an implied employment contract, but only if the employer phrases the document's language in mandatory terms giving "rise to a promise, an

[1] This Court notes the recent amendment to the Code of Laws of South Carolina regarding employee handbooks. However, this amendment is not applicable to the current action as it was enacted subsequent to the institution of this action. Section 41-1-110 of the South Carolina Code provides:

> It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.

Act No. 185, 2004 S.C. Acts 1841.

expectation and a benefit" to an employee. Fleming v. Borden, Inc., 316 S.C. 452, 463, 450 S.E.2d 589, 596 (1994).

The written reprimands, counselings, and warnings, including the notification of probation letter, wholly lacked any mandatory and promissory language guaranteeing Nelson continued or future employment. CCPRC's policies and practices accurately reflected its at-will status throughout Nelson's tenure. Furthermore, the CCPRC never promised or guaranteed that it would ever employ Nelson on any basis except as an at-will employee, as admitted by Nelson.

Further, Nelson claims the following passage, from CCPRC's "probation" section of the "Disciplinary Action" policy in the Personnel Policies and Procedures Manual, constituted an implied contract:

> Probation: This is defined as a specific period of time usually 3-6 months, which shall cause the affected employee to lose his or her regular status. This may be used as an alternative action if deemed appropriate. Any infraction of Commission policies during this period may result in more severe disciplinary action, depending on the facts of the case. Periods of disciplinary action shall be set forth in writing to the employee referencing the reason and/or disciplinary action which invoked the period of probation, notifying the employee that a special performance appraisal will be conducted at the close of the probationary period. An interim counseling session must be conducted. The use of probation must be approved by the Executive Director.

This Court has applied standard principles of contract interpretation in determining whether an employee handbook constitutes an employment contract. "Where an action presents a question as to the construction of a written contract and the language of the contract is clear and unambiguous," the alleged contract shall determine the "rights and obligations of the parties." Holden v. Alice Mfg., Inc., 317 S.C. 215, 220, 452 S.E.2d 628, 631 (Ct. App. 1994).

The foregoing policy did not create an implied contract. In fact, it gave the Commission discretion to impose "more severe disciplinary action" during the probationary period. The only mandatory language used in the paragraph is in relation to the procedures that should be followed when initially administering the probation.

This case differs from Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002), because the employer in Conner used mandatory terms such as "shall" and "will" in its employee handbook to the extent that the grievance committee voted to reinstate the employee, proving to the supreme court that "reasonable minds could differ." Id. at 464, 560 S.E.2d at 612. Not only did CCPRC's managers and Nelson's direct supervisor unanimously agree to terminate his employment, CCPRC's Executive Director upheld Nelson's termination upon his appeal. Furthermore, unlike the employee in Conner, Nelson reiterates that he was always employed on an at-will basis with CCPRC.

Nelson could not identify any particular document or oral statement that supported his position. During Nelson's deposition, he testified:

> Q. Is there any other reason why you believe your status as an at-will employee was altered?
>
> A. No.
>
> Q. Is there any language, any written language, that you can show me in any document that we've traded back and forth in this case that would support your position?
>
> A. I'm not sure.
>
> Q. Is there anything in the exhibit stack here today that you can go back and show me that you think supports your position in that regard?
>
> A. I'm not sure if it will or not.

Even in his deposition, Nelson confirms that there is no genuine issue as to a material fact concerning whether an employment contract resulted from the probationary period. For example, Nelson testified:

> Q. We'll read that sentence [from the policy manual] that starts: 'There is no particular order in which the above-noted disciplinary actions must be used. The Commission reserves in its sole discretion the option to utilize any disciplinary action at any time.' [. . .] Doesn't that one paragraph indicate to you that the Commission again could terminate someone at its sole discretion at any time without following any particular steps?
>
> A. I guess so.
>
> Q. . . . You would agree that's what this paragraph says?
>
> A. Yes.
>
> Q. And you understood this to be the policy of the Commission throughout your employment there?
>
> A. Yes.
>
> Q. . . . [Y]ou would agree that the Commission throughout your employment maintained the right to terminate an employee at any time without necessarily exhausting any particular steps or procedures?
>
> A. I don't think it's right.
>
> Q. I understand that you don't think it's right, but you understood that that was the policy of the Commission?
>
> . . . .

A. Yes.

Q. And that was the policy throughout your employment there?

A. As far as I know.

Finding that an employment contract resulted from this probationary period would lead to the result of giving greater rights and job security to employees whose performance had fallen below the employer's expectations. Even Nelson could see the absurdity in this result as apparent by his testimony during his deposition:

Q. . . . Did you consider yourself to be at a greater risk of termination during your probationary period than you were before you were placed on probation?

A. Probably.

Q. And why do you say that?

A. Because you're on probation.

. . . .

Q. Your supervisor looked at your performance more closely after you were on probation; would you agree with that?

A. Probably.

Q. At the Commission do you think that an employee who is on probation is at a higher risk of being terminated than employees who are not on probation?

A. Probably.

Q. Do you think that's right? Do you think that's the way it should be?

A. Yes.

Q. And why do you think that? Why do you think that's the way it should be?

A. I just do.

Finally, an employee's at-will status can be altered where the discharge violates a clear mandate of public policy. Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 225, 337 S.E.2d 213, 213 (1985). In Stiles v. American Gen. Life Ins. Co., 335 S.C. 222, 516 S.E.2d 449 (1999), the supreme court held that an employee subject to a notice provision prior to termination is not an employee at-will, and, therefore, discharge of that employee for refusing to violate a law was against public policy. Id. at 224, 516 S.E.2d at 450. Stiles is easily distinguishable from the case at hand. In Stiles, the employer inserted an employment end date in the policy, signifying a term by which the employment would be guided, not simply the ending of a probationary period. Id. In the instant case, Nelson never alleged any public policy violation or claimed that the Commission promised him any specific notice prior to terminating him. In fact, Nelson confessed that his performance had not been up to par.

II. CCPRC's Actions in Terminating Nelson's Employment

Nelson claims the circuit court erred in granting summary judgment because, viewing the evidence in the light most favorable to Nelson as the nonmoving party, material issues of fact exist regarding whether CCPRC's actions in terminating his employment breached an employment contract between CCPRC and Nelson. We disagree.

Even if the parties had entered into a contract, we find CCPRC's actions would not constitute a breach. When an employment contract only

permits termination for cause, the appropriate test on the issue of breach focuses on whether the employer had a "reasonable good faith belief that sufficient cause existed for termination." Conner v. City of Forest Acres, 348 S.C. 454, 464, 560 S.E.2d 606, 611 (2002). "[T]he fact finder must not focus on whether the employee actually committed misconduct; instead, the focus must be on whether the employer reasonably determined it had cause to terminate." Id. at 464-65, 560 S.E.2d at 611.

CCPRC had a unanimous, reasonable good faith belief that Nelson had failed or refused to improve his poor and substandard performance in any respect, giving CCPRC substantial cause to terminate his employment. Nelson's managers and direct supervisor notified him on several different occasions of the deficiencies in his performance. He was given set guidelines through two performance memorandums in July 2000 and January 2001, attempting to coach Nelson to succeed so he could continue his employment with CCPRC as a productive and satisfactory employee. As a last ditch effort, management agreed to place Nelson on probation and executed a Disciplinary Action report, which stated the areas that needed improvement. The main areas included his ability to effectively manage time and resources, his ability to understand the requirements necessary to accomplish or complete a project, his knowledge of budgets and correctly allocating those funds, and his ability to plan goals and objectives for the crew, which the management asked be compiled and turned in to his immediate supervisor by February 15, 2001.

He admittedly failed in all these tasks. His crew abandoned a work project at a fishing dock due to a lack of materials. A shower valve project was delayed because he failed to have the proper equipment available. A seam replacement project was delayed because he failed to make available the proper safety equipment and gave unclear directions to his crew. Lastly, he never provided his supervisor with the requested list of goals and objectives.

Nelson professed that, as an employee on probation, he would be more closely scrutinized and at a greater risk for termination than before he was placed on probation. Nelson's theory that the probationary status created an

employment contract goes against the very crux of being on probation. For Nelson to prevail, this Court would need to find that CCPRC granted greater job security to probationary employees than to employees who were more successful, better performing workers. We refuse to reach that illogical result.

We hold the probationary status did not create an employment contract, and, even if a contract had been formed, CCPRC's actions did not constitute a breach.

CONCLUSION

For the reasons stated herein, the circuit court is

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Teresa Shadwell, Appellant,

v.

James Craigie, M.D.,
Individually and as agent for
Loris Surgical Associates and
Loris Surgical Associates, Respondents.

Appeal From Horry County
Steven H. John, Circuit Court Judge

Opinion No. 3883
Heard June 8, 2004 – Filed November 1, 2004

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Ralph J. Wilson, of Conway, for Appellant.

William W. Doar, Jr., of Georgetown, for Respondents.

PER CURIAM: Teresa Shadwell appeals the trial court's grant of summary judgment in favor of James Craigie, M.D., and Loris Surgical Associates (collectively "Respondents") in this medical malpractice action. We affirm in part, reverse in part and remand.

FACTS

In January 1996, Shadwell was referred to Dr. Craigie by her treating physician, Dr. Robert A. Ziff, because she was experiencing lower abdominal pain. Dr. Craigie ordered laboratory tests for Shadwell at Loris Hospital Laboratory prior to performing a colonoscopy. The lab results were reported to Dr. Craigie on January 25, 1996. The results showed Shadwell had an elevated creatinine level, indicating problems with her kidneys. Dr. Craigie performed a colonoscopy on Shadwell on January 26, 1996. Shadwell returned to Dr. Craigie's office for a follow-up examination on February 9, 1996, at which time she complained of abdominal cramps and diarrhea. Shadwell was scheduled to return on March 27, 1996, on a "needs basis – only if she continued to have complaints," but she did not appear for the appointment. Dr. Craigie had no further contact with Shadwell following the February visit. Dr. Craigie never informed Shadwell of the test results indicating problems with her kidneys, nor did he forward the results to Shadwell's treating physician, Dr. Ziff.

In January and February of 1998, while pregnant with her daughter, Shadwell underwent two twenty-four hour kidney tests at Loris Hospital at the direction of Dr. Ziff. These tests revealed her kidneys were functioning at only twenty percent of normal capacity. Following the birth of her daughter, Shadwell's kidney function began to deteriorate, at one point functioning at only eight percent. Because her kidneys were not functioning properly, Shadwell went on dialysis to assist in removing toxins from her blood. On August 14, 2000, Shadwell successfully underwent a kidney transplant.

In 2001, Shadwell filed suit against Dr. Ziff and other physicians who provided treatment during her pregnancy. One of the grounds for the lawsuit was that Dr. Ziff failed to properly diagnose her condition after receiving the results from the 1998 kidney function tests.

During the course of preparing for the case against Dr. Ziff, the parties took several depositions including that of Shadwell, Dr. Ziff, and Dr. Craigie. It is not clear from the record when Shadwell learned of the January 1996 lab results showing elevated creatinine levels. During Dr. Craigie's August 17, 2001 deposition, he confirmed the January 1996 lab results. During Shadwell's September 12, 2001 deposition, she testified that she learned at Duke Hospital in late 1998 that she should have been made aware of prior lab results. It is not altogether clear whether she was referring to the results from Dr. Craigie's 1996 lab tests or from the tests performed early in 1998 during her pregnancy. During Dr. Ziff's October 17, 2001 deposition, he was shown the results from the January 1996 tests for the first time.

Shadwell commenced the current action against Dr. Craigie and Loris Surgical Associates on March 4, 2002, alleging, among other things, that Dr. Craigie was negligent in: (1) failing to discuss these lab results with her, and (2) failing to forward a copy of the results to Dr. Ziff, as her referring physician, or to inform any of Shadwell's other physicians of the abnormal results. Shadwell alleged in her complaint that she first became aware of Dr. Craigie's negligence when she received discovery in the prior case. Specifically, she stated "[t]hat until August 17, 2001, [she] was unaware that any duty had been breached by [Dr.] Craigie or that any negligence occurred."

Respondents answered the complaint with general denials and asserted that the statute of limitations governing medical malpractice actions barred the case. Accordingly, Respondents moved to have the case dismissed under Rule 12(c), SCRCP. On July 8, 2002, the court denied the motion finding it to be premature. Respondents then filed a motion for reconsideration. The primary dispute at the hearing on the motion for reconsideration concentrated on whether the action was filed within the six-year time period established by the statute of repose.

On September 23, 2002, the trial court issued an order denying the motion for reconsideration holding that a genuine issue of material fact existed concerning when the physician-patient relationship ended

between Shadwell and Dr. Craigie. Thus, the trial court found that an issue of fact existed as to whether Shadwell's action was barred by the statue of repose. Following receipt of this order, Respondents moved pursuant to Rule 59(e), SCRCP to alter or amend, seeking a ruling as to whether the three-year statute of limitations also acted as a time bar to Shadwell's action.

In an order dated November 15, 2002, the trial court granted Respondents' motion for summary judgment. Based on the deposition testimony taken in Shadwell's prior lawsuit, the court ruled that by the end of 1998, Shadwell "was aware of sufficient facts that would have put her on notice of the existence of a cause of action against Dr. Craigie for allegedly not informing her of the results of the lab tests performed on her on January 24, 1996." Therefore, because Shadwell did not file her suit against Dr. Craigie until March 2002, her action was barred by the three-year statute of limitations.

Shadwell filed a motion to alter or amend arguing the trial court erred in dismissing her claims. Shadwell argued that she raised two claims in her complaint: (1) that Dr. Craigie committed malpractice in failing to inform her of the lab results; and (2) that Dr. Craigie committed malpractice in failing to inform her referring physician of the lab results. Because she did not learn until Dr. Ziff's October 17, 2001 deposition that Dr. Craigie failed to inform him of the test results, Shadwell argued the trial court erred in also dismissing her second claim as barred by the statute of limitations. Shadwell argued that these two allegations of negligence constituted separate and independent causes of action, and thus, the court erred in dismissing her case. The trial court denied Shadwell's motion by order dated November 25, 2002. This appeal followed.

STANDARD OF REVIEW

"In reviewing the grant of a summary judgment motion, this Court applies the same standard which governs the trial court under Rule 56(c), SCRCP." Fisher v. Stevens, 355 S.C. 290, 294, 584 S.E.2d

149, 151 (Ct. App. 2003). Accordingly, summary judgment is appropriate when "'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Id. (quoting Rule 56(c), SCRCP). "In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." McNair v. Rainsford, 330 S.C. 332, 341, 499 S.E.2d 488, 493 (Ct. App. 1998).

LAW/ANALYSIS

I

Shadwell argues the trial court erred in granting summary judgment because the record does not support the trial court's finding that she should have known about Dr. Craigie's failures by late 1998. Regardless of when Shadwell learned of Dr. Craigie's failures, the record in this case supports a finding that Shadwell's cause of action for failure to inform her of the test results was barred by the statute of repose.[1]

Medical malpractice actions are governed by a three-year statute of limitations and a six-year statute of repose. The statute provides:

> In any action, other than actions controlled by section (B), to recover damages for injury to the person arising out

[1] An appellate court may affirm a trial court's order based on any grounds found in the record. Rule 220(c), SCACR; I'on, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding that an appellate court may affirm the circuit court's ruling using any additional reasons that are both raised by the respondent's brief and found within the record). Respondents also argue this basis for affirmance in their brief.

> of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . acting within the scope of his profession must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section.

S.C. Code Ann. § 15-3-545(A) (Supp. 2003) (emphasis added).[2]

Respondents contended the trial court properly granted summary judgment in their favor because the occurrence took place more than six years prior to the commencement of Shadwell's action. On the other hand, Shadwell argued that the statute of repose did not bar her action against Dr. Craigie because the time period was tolled while she was under Dr. Craigie's continuous treatment. Thus, Shadwell asserted the "occurrence" did not happen until after she missed her March 27, 1996 appointment.

Our supreme court has recently addressed the continuous treatment doctrine. In Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (2003), the guardian for James L. McLean sued the Department of Mental Health and various physicians for negligence in their treatment of McLean from 1982 until his discharge in 1995. The court declined to adopt the continuous treatment/continuous tort doctrine, stating that "judicial adoption of the continuous treatment rule

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[2] In Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993), our supreme court discussed the tolling language in S.C. Code Ann. § 15-3-545(A). The court noted that the tolling language in subsection (A) "clearly indicates that the *only* tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D)." Langley, 313 S.C. at 403, 438 S.E.2d at 243. Subsection (D) provides that the statute will be tolled to a certain extent for minors injured by healthcare providers. S.C. Code Ann. § 15-3-545(D) (Supp. 2003).

would run afoul of the absolute limitations policy the Legislature has clearly set" through statute, including the statute of repose. Harrison, 354 S.C. at 138, 580 S.E.2d at 114; see also Hoffman v. Powell, 298 S.C. 338, 339-340, 380 S.E.2d 821, 821 (1989) (holding that the statute of repose "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered."); Dunbar v. Carlson, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000) ("[T]he statute of repose imposes an outer limit for filing a medical malpractice action, regardless of when it is discovered."). Thus, the statute of repose in the present case was not tolled by the time period between Shadwell's February 1996 and March 1996 appointments, presumably a period of time she was under the care of Dr. Craigie.

We need only determine the time of the "occurrence" in order to determine if the statute of repose barred this cause of action. This court has previously determined the date of occurrence in a medical malpractice claim. O'Tuel v. Villani, 318 S.C. 24, 455 S.E.2d 698 (Ct. App. 1995), *overruled on other grounds by* I'on, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). In O'Tuel, parents alleged their child was injured during birth when they discovered he had certain physical and learning disabilities when he entered school. They sued the delivering physician nine years after the child was born. This court found that since the date of "occurrence" was the date of the child's delivery, the statute of repose barred the parents' action against the physician. O'Tuel, 318 S.C. at 27, 455 S.E.2d at 700 (holding that "while the parents' claim may have accrued when Adam started school, their claim is nonetheless barred because it was instituted more than six years from the date of occurrence, in this case, the date of Adam's birth").

In the present case, the occurrence happened when Dr. Craigie failed to inform Shadwell about the elevated creatinine levels discovered in her January 1996 test results. Dr. Craigie knew about the results before the January 26, 1996 colonoscopy. Dr. Craigie should have informed Shadwell within a reasonable time after learning the results, either at the time of the colonoscopy, or at the latest, at her

follow-up appointment on February 9, 1996. Since he failed to do so, we agree with the trial court that the occurrence in this case is no later than the date of Shadwell's last appointment, February 9, 1996. Accordingly, the six-year statute of repose for Shadwell's cause of action against Dr. Craigie for his failure to inform her of the test results expired prior to the March 4, 2002 filing of the action against Dr. Craigie, regardless of when Shadwell discovered his omission.

II

Shadwell also argues the trial court erred in not specifically addressing her "second cause of action" of Dr. Craigie's failure to inform Dr. Ziff, her treating physician, of the 1996 test results.

As noted, among other allegations, Shadwell averred in her complaint that Dr. Craigie committed two acts of negligence: (1) failing to inform her of the test results, and (2) failing to forward a copy of the results to Dr. Ziff as her referring physician. On appeal, Shadwell argues her second allegation of negligence constitutes a separate cause of action. She, therefore, argues the evidence shows she could not have been aware that Dr. Craigie failed to inform Dr. Ziff of the test results until Dr. Ziff testified to as much in his deposition on October 17, 2001. Accordingly, since she filed her complaint in March 2002, the statute of limitations would not act as a bar to this cause of action.[3]

[3] Although Respondents suggest this argument is not preserved because Shadwell did not raise it at the time the motion for summary judgment was heard, we disagree. Both allegations of negligence were included in Shadwell's complaint. Furthermore, Shadwell's position at the summary judgment hearing was to argue against Respondents' assertion that her action was time barred, not to support her allegations of negligence. Finally, Shadwell did specifically raise this claim in her Rule 59(e) motion submitted after receipt of the court's summary judgment order. Moreover, in denying Shadwell's motion for reconsideration, the court found: "that both parties fully expounded all issues raised in [Shadwell's] Motion for Reconsideration at the

To support her contention that Dr. Craigie's failure to inform her treating physician of the test results constitutes a separate cause of action, Shadwell relies on this court's decision in Jernigan v. King, 312 S.C. 331, 440 S.E.2d 379 (Ct. App. 1993). In Jernigan, a physician admitted the plaintiff to a hospital after plaintiff complained of severe headaches. Id. at 332, 440 S.E.2d at 380. While covering for plaintiffs' admitting physician, another doctor was called to answer an emergency code from plaintiff's room. After resuscitating plaintiff, this physician ordered a number of tests be performed including a CT scan. Thereafter, the admitting physician resumed care for plaintiff. Id.

Neither physician reviewed the results of the CT scan, which revealed plaintiff was suffering from intracranial hemorrhaging. Id. Four days later, while again covering for plaintiff's admitting physician, the same doctor who ordered the first CT scan ordered a second. Upon receiving and reviewing the results, the doctor performed immediate surgery to remedy the problem. Id. at 332-33, 440 S.E.2d at 380. Thus, the essence of plaintiff's claim was that the delay in treatment caused permanent brain damage. Id. at 333, 440 S.E.2d at 380.

Specifically, the plaintiff averred that once the physician ordered the CT scan the first time, he had an obligation to review the results, or at the very least, to see that another physician did. Id. Although this Court eventually found against the plaintiff, in reaching this conclusion, we stated: "[w]e assume, without deciding, [plaintiff] is correct that once [the operating physician] ordered a CT scan on August 3, he was under a duty to see to it that the scan was performed and to see the results, or to see to it that someone else evaluated the results." Id. at 333, 440 S.E.2d at 381 (emphasis added).

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previous hearing." We therefore find the issue is preserved for our review. See Staubes v. City of Folly Beach, 339 S.C. 406, 529 S.E.2d 543 (2000).

From this statement, Shadwell asserts we recognized a separate and distinct cause of action for a physician's failure to inform a patient's primary physician of pertinent test results. Shadwell, however, fails to recognize that in Jernigan we specifically declined to rule on the issue. Accordingly, as a review of our case law uncovers a lack of authority on point, the question is a matter of first impression.[4]

Here, the trial court summarily disposed of this issue, which could have significant implications concerning the liability to which consulting physicians may be exposed. Additionally, application of the statute of limitations and/or the statute of repose to any cause of action Shadwell may have for Dr. Craigie's failure to report the test results to Dr. Ziff may differ from her other cause of action. Moreover, the standard for reporting such findings and proximate cause are issues that need to be developed further. We, thus, hold the trial court improperly disposed of the question by granting summary judgment. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 320 S.C. 143, 153, 463 S.E.2d 618, 624 (Ct. App.1995) (stating that although all issues of novel impression do not require a trial, summary judgment is inappropriate where further inquiry into the facts is desirable to clarify application of the law); See Shea v. State Dept. of Mental Retardation, 279 S.C. 604, 611, 310 S.E.2d 819, 822 (Ct. App. 1983) ("If the statute's application is not absolutely clear as a matter of law, [the] question should not be decided without fully developing the facts by means of trial.") *overruled on other grounds by* McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985).[5]

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[4] In fact, Respondents argue in their brief that it is a novel issue.

[5] While Jernigan did not recognize a separate cause of action for failure of a consulting physician to notify the referring physician of a patient's abnormal test results, we suggest there is a duty on the part of the consulted physician to report abnormal test results to the treating physician if the results indicate a need for further follow-up or treatment. Other courts have likewise concluded such a duty exists. See Sinclair v. Roth, 811 A.2d 460, 465 (2002) ("There is little doubt that the specialist has a duty to advise the referring physician of his findings."); Munoz v. South Miami Hospital, Inc., 764 So. 2d 854, 856

CONCLUSION

Shadwell's cause of action based on the failure of Dr. Craigie to inform her of the test results is barred by the statute of repose. Because the issue of whether the respondents are liable to Shadwell for Dr. Craigie's failure to notify Dr. Ziff of the test results needs further factual development and is a novel issue, we hold the trial court erred in granting summary judgment**.** Accordingly, the trial court's order is reversed as to the latter issue, and this case is remanded to the trial court for a determination as to whether Dr. Craigie's failure to notify Dr. Ziff of the abnormal test results constituted actionable negligence for which Shadwell may recover against the Respondents.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

HEARN, C.J., STILWELL, J. and CURETON, A.J., concur.

(Fla. Dist. Ct. App. 2000) ("[M]edical professionals must, under some circumstances, see to it that serious conditions which they know about [are] remedied either by themselves or by someone else competent to do so."); Santos v. Kim, 706 N.E.2d 658, 663 (Mass. 1999) (finding that the director of a laboratory had a duty to report laboratory test results to plaintiff's treating physician).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Windsor Green Owners Association, Inc., Respondent,

v.

Allied Signal, Inc., Honeywell International, Inc., and Stanley V. Kaminski, Defendants,

of whom Allied Signal, Inc. and Honeywell International, Inc. are, Appellants.

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

Opinion No. 3884
Heard October 12, 2004 – Filed November 1, 2004

REVERSED

William S. Brown and Jeffrey W. Newman, both of Greenville, for Appellants.

E. Glenn Elliott, Robert E. Lee, and Samuel F. Arthur, III, all of Florence, for Respondent.

GOOLSBY, J.: The circuit court granted summary judgment to Windsor Green Owners Association, Inc. on its claim that Allied Signal, Inc. was contractually liable for damages to the common area of a condominium complex that were caused by a fire. The court found Windsor Green was a third-party beneficiary to a lease agreement Allied had with one of the condominium owners. Allied appeals. We reverse.

FACTS

On November 23, 1998, Allied entered into a rental agreement with J.B. Allen Real Estate for the lease of a condominium at the Windsor Green condominium complex in Myrtle Beach, South Carolina. J.B. Allen Real Estate was the agent for the owners, Earl and Ula Reitzel. Windsor Green, the homeowners' association for the complex, was not mentioned in the rental agreement.

Allied allowed one of its employees, Stanley Kaminski, to move into the condominium following a fire that destroyed his home. On November 28, 1998, the condominium caught fire. An investigation revealed that Kaminski's son, Michael, had set both fires. Michael confessed to a history of arsonist activity. Allied had no knowledge of Michael's arsonist tendencies prior to the condominium fire.

Windsor Green is comprised of all the individual condominium owners. Each owner retains an undivided interest in the common areas of the complex. The "Windsor Green Condominiums Rules and Regulations" make individual owners responsible for costs and repairs to their condominiums and for any resultant damage to any adjacent unit. Owners are also responsible for damage caused by their tenants.

On December 27, 2000, Windsor Green sent a letter to Allied demanding payment of $524,712.09 for damage to the common area of the condominium complex caused by the fire. Windsor Green asserted Allied was contractually liable for the damage because Windsor Green was a third-party beneficiary to the rental agreement between Allied and J.B. Allen Real

Estate based on paragraph K of the agreement. That paragraph provides as follows:

> DAMAGE K. Damage to the Property caused by Resident, Resident's family or guests, will be repaired and costs billed to the Resident and payable on demand.

After Allied refused to pay for the damage, Windsor Green filed suit against Allied, Stanley Kaminski, and Honeywell International, Inc.,[1] alleging claims of negligence and breach of contract.

Allied later moved for summary judgment on all causes of action. Some time thereafter, Windsor Green moved for partial summary judgment on its claim of breach of contract.

Judge Steven H. John granted Allied's motion for summary judgment on the negligence claim, but denied its motion on the breach of contract claim. The next day, Judge John L. Breeden, Jr. granted Windsor Green's motion for partial summary judgment on the breach of contract claim and entered judgment in favor of Windsor Green against Allied in the stipulated amount of $524,712.09. Judge Breeden found Windsor Green was a third-party beneficiary to the rental agreement and thus entitled to recover for breach of contract for damage caused to the common area of the condominium complex.

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a

[1] Honeywell International, Inc. is the successor corporation to Allied Signal, Inc. Where appropriate, a reference to Allied shall include Honeywell International.

matter of law." Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). "In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

LAW/ANALYSIS

Allied contends the circuit court erred in finding Windsor Green was a third-party beneficiary to the rental agreement between Allied and J.B. Allen Real Estate and in awarding damages to Windsor Green for breach of contract. We agree.

It is undisputed that Windsor Green is not a named party to the rental agreement. "Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff." Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). "However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Id.

"The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the lease." Gilbert v. Miller, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct. App. 2003) (holding it was clear the lease language evidenced no intent to make the plaintiff, either as a guest or a tenant, a third-party beneficiary by imposing a duty in tort on the landlord to prevent a tenant's dog from injuring another).

"If a contract's language is clear and capable of legal construction, this Court's function is to interpret its lawful meaning and the intent of the parties as found in the agreement." Id. at 30-31, 586 S.E.2d at 864. "A clear and explicit contract must be construed according to the terms the parties have

used, with the terms to be taken and understood in their plain, ordinary, and popular sense." Id. at 31, 586 S.E.2d at 864.

The circuit court rejected Allied's argument that the rental agreement in this case could not be interpreted to indicate the parties' intention to bestow third-party benefits upon Windsor Green. The court noted condominiums are creatures of statute; thus, the rental agreement must be interpreted in view of the provisions of the South Carolina Horizontal Property Regime Act.

Section 27-31-120 of the Horizontal Property Act states "[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner in the common elements, both general and limited, appertaining to the apartment without specifically or particularly referring to same." S.C. Code Ann. § 27-31-120 (1991).

As noted above, paragraph K of the rental agreement provided: "Damage to the Property caused by Resident, Resident's family or guests, will be repaired and costs billed to the Resident and payable on demand." "Property" was not specifically defined in the rental agreement.

The term "property" is defined in the Horizontal Property Act as including "(1) the land whether leasehold or in fee simple and whether or not submerged, (2) the building, all improvements, and structures on the land, in existence or to be constructed, and (3) all easements, rights, and appurtenances belonging thereto." S.C. Code Ann. § 27-31-20(k) (Supp. 2003).

The circuit court found Allied had agreed to pay for any damage to the common areas under paragraph K of the rental agreement by applying the Horizontal Property Act's definition of "property" to the undefined term "property" appearing in paragraph K and by reading "property" to include the common areas.

Although the circuit court noted the rental agreement contained no specific language conferring third-party beneficiary rights upon Windsor Green, it found that Windsor Green was nevertheless a third-party beneficiary

to the contract "since Windsor Green is the entity which maintains and controls the ownership interests of the common elements" and because Allied agreed to be financially responsible for damage to the "property" caused by it or its guests, with the term "property" encompassing the common elements.

We find the circuit court erred in its interpretation of the Horizontal Property Act. Section 27-31-120 does no more than make the lease of an individual condominium unit serve to also lease the owner's undivided interest in the common elements to the lessee, whether or not use of the common elements is addressed in the lease. Thus, a lessee has the same right to use the common areas of the condominium complex, such as the hallways, the stairways, etc., as has the owner.

In any case, even if section 27-31-120 and the definition of "property" as used in the Horizontal Property Act are applied to the rental agreement, nothing in the language of the contract itself implies any contractual duty on the part of Allied to be liable for damage to anyone other than to J.B. Allen Real Estate on behalf of the owners, the Reitzels. No third-party beneficiary status is created absent an intent by the parties to confer a substantial benefit on Windsor Green. Since we find no evidence of an intent to benefit Windsor Green, we hold the circuit court erred in granting summary judgment to Windsor Green on its claim for breach of contract.

As an alternative sustaining ground, the circuit court further ruled that, while Windsor Green was not specifically mentioned in the rental agreement, a condominium owner and a lessee cannot enter into a lease for the conveyance of a leasehold interest without also creating reciprocal contractual duties and obligations between the homeowners' association and the lessee despite the lack of privity. Since the owner's undivided interest in the common areas passes with the lease pursuant to the Horizontal Property Act, any rights Windsor Green would have to pursue a recovery from the owner for damages to the common areas attach to the lessee by virtue of the lease agreement; therefore, the circuit court reasoned, Windsor Green is a

third-party beneficiary of the rental agreement to the extent Allied assumed obligations of the owners with respect to damage to the common areas.[2]

We do not think a rental agreement between a condominium owner and the owner's tenant by which the tenant voluntarily agreed to pay the owner for any property damage caused by the tenant, his family, or guests, goes so far as to make the homeowners association a third-party beneficiary of the contract, notwithstanding the fact that, by law, the tenant has the right to use the common areas. Under this rationale, a homeowners' association could directly hold a tenant contractually responsible for assessments, association dues, or any other expenses even though the parties did not intend this result by virtue of entering into a rental agreement.

Based on the foregoing, the order granting summary judgment to Windsor Green on its claim for breach of contract is

REVERSED.

ANDERSON and WILLIAMS, JJ., concur.

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[2] The circuit court based its ruling on section 27-31-120 of the Horizontal Property Act, as well as the supreme court's decision in Davenport v. Cotton Hope Horizontal Property Regime, 333 S.C. 71, 508 S.E.2d 565 (1998), while noting Davenport was factually distinguishable.

In Davenport, the lessee sued the condominium association after he fell down a stairway at night in an area where the lights were not working. The supreme court cited its earlier holding in Murphy v. Yacht Cove Homeowners Association, 289 S.C. 367, 345 S.E.2d 709 (1986) that a member of a condominium association may bring a tort action against the association for failing to properly maintain the common elements. The holding in Murphy coupled with section 27-31-120 led the court to conclude that a lessee could bring an action in tort against the property regime for its failure to maintain the common areas. Davenport, 333 S.C. at 88, 508 S.E.2d at 574. The current appeal does not involve a tort claim; rather, it concerns contractual liability. Consequently, we find Davenport inapposite.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ex Parte: Horry County State Bank,	**Appellant.**
In Re: Ken's Cabana, LLC and Winner's World, Inc. both d/b/a Winner's World Tours, a joint venture,	**Plaintiffs,**
v.	
Flemington Properties, LLC, North Myrtle Beach Marine & Boatworks, Inc., Rack Pack, Inc., RAM Corp., Inc., C&B Properties, Inc. and Stardancer Casino, Inc.,	**Defendants,**
of whom Flemington Properties, LLC and North Myrtle Beach Marine & Boatworks, Inc. are	**Respondents.**

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

Opinion No. 3885
Heard October 12, 2004 – Filed November 1, 2004

AFFIRMED

Carroll D. Padgett, of Loris, for Appellant.

Kathryn M. Cook, of N. Myrtle Beach, for Respondents.

ANDERSON, J.: Horry County State Bank (the Bank) appeals the trial judge's denial of its motion to intervene pursuant to Rule 24(a)(2), SCRCP in a case involving the termination of a nonexclusive easement held by Ken's Cabana, LLC (Ken's Cabana) on which the Bank held a mortgage. Because we find the trial judge did not abuse his discretion in finding the Bank's interest was adequately represented, we affirm.

FACTUAL/PROCEDURAL BACKGROUND

This case arises from the termination of a nonexclusive parking easement at the North Myrtle Beach Marina (the Marina). Susan and Bruce Robertson (the Robertsons) were the owners of the Marina through their company, Rack Pack, Inc. The Robertsons, as individuals, owned the River Boat Restaurant, located next to the Marina.

In May of 1999, the Robertsons sold the .14 acre River Boat Restaurant property to Ken's Cabana. At the same time, the Robertsons' company, Rack Pack, Inc., granted a nonexclusive parking easement on a 1.3 acre lot to Ken's Cabana. The easement provides:

> Failure to obtain the consent of Rack Pack, Inc., its successors and/or assigns, . . . to any transfer or assignment of the rights granted to Ken's Cabana, LLC hereunder, shall terminate the rights granted hereunder. Further, the use of the paved parking

> lot . . . for any purpose other than parking in conjunction with an evening restaurant/lounge/nightclub business (evening being defined as the hours between 4:00 p.m. and 6:00 a.m.) . . . shall result in the termination of the parking rights granted hereunder.

Nothing in the terms of the easement required the owner of the parking lot to give the Bank notice prior to termination of the easement, or the right to cure if the easement was violated.

In connection with the purchase of the restaurant property, the Bank issued Ken's Cabana a $448,000 loan secured by a mortgage covering both the restaurant site and the easement. The Bank did not require Ken's Cabana to notify it if the easement was terminated.

On January 23, 2001, Flemington Properties, LLC (Flemington) purchased the Marina property from Rack Pack, Inc. and became the owner of the lot on which Ken's Cabana held its parking easement. At the same time, Rack Pack, Inc. sold the assets of the Marina to North Myrtle Beach Marina and Boatworks, Inc. Flemington and North Myrtle Beach Marina and Boatworks, Inc. (Flemington/Boatworks) have a common principal, Bill Bartus.

Sometime in late 2001 or early 2002, Ken's Cabana entered into a joint venture with Winner's World, Inc. to operate a casino boat out of the restaurant property. In addition, Ken's Cabana was operating a lunch business out of the restaurant earlier than 4:00 p.m. Both of these actions violated the terms of the easement.

Based on these violations, Flemington/Boatworks terminated Ken's Cabana's parking easement by letter on January 29, 2002. Subsequently, Flemington/Boatworks posted restricted parking signs in the Marina parking lot. Ken's Cabana, Winner's World, Inc., and Winner's World Tours (collectively referred to as Ken's Cabana) initiated this action on February 7, 2002 against Flemington/Boatworks, alleging civil conspiracy, unfair trade practices, violations of the Fifth and Fourteenth Amendments, inverse condemnation, and violations of the Sherman Anti-Trust and Clayton Acts.

Flemington/Boatworks answered and counterclaimed seeking a declaratory judgment affirming their termination of Ken's Cabana's easement. Flemington/Boatworks then filed a motion for summary judgment which was heard on January 30, 2003.

The trial judge granted the motion for summary judgment in favor of Flemington/Boatworks and filed an order to that effect on February 24, 2003. Ken's Cabana filed a motion to reconsider on March 5, 2003, and a hearing was set for May 27, 2003. The Bank first learned of the litigation on May 22, 2003. It promptly filed a motion to intervene pursuant to Rule 24(a)(2), SCRCP, along with a motion to set aside the summary judgment order. The motion to reconsider and the Bank's motions were heard together on May 27, 2003. The trial judge ruled from the bench, denying all three motions. The Bank appeals the denial of its motion to intervene.

STANDARD OF REVIEW

The standard of review for a Rule 24(a)(2) motion is whether the judge abused his discretion in granting or denying the motion. S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988) (citation omitted). "On reviewing the trial judge's decision as to whether adequacy of representation exists, we must appraise all of the circumstances of a particular case as to whether interests sufficiently overlap so as to deny intervention." Berkeley Electric Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 191, 394 S.E.2d 712, 715 (1990).

LAW/ANALYSIS

Intervention is a procedural device whereby a third party who is not a named party in an existing lawsuit, but who has an interest in its outcome, may become a party to the action. See Black's Law Dictionary 826 (7th ed. 1999). Intervention may be of right or permissive; intervention of right is governed by Rule 24(a), SCRCP, which is modeled after the federal rule. Intervention should be liberally granted, particularly where judicial economy

will be promoted by the declaration of rights of all parties who may be affected. See Berkeley Electric at 189, 394 S.E.2d at 714. However, this does not mean intervention should always be granted. Instead, "we must consider the pragmatic consequences of a decision to permit or deny intervention and avoid setting up rigid applications of Rule 24(a)(2)." Id. "Each case will be examined in the context of its unique facts and circumstances." Id.

Rule 24(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Thus, a party seeking intervention under Rule 24(a)(2) must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. Ex Parte Reichlyn, 310 S.C. 495, 427 S.E.2d 661 (1993).

The parties do not dispute that the Bank timely filed for intervention and has an interest in the subject of the underlying action. At issue is whether Ken's Cabana adequately represented the Bank's rights.[1]

[1] Because this case turns on adequacy of representation, we need not address whether intervention is necessary to prevent the impairment or impediment of the Bank's mortgage.

The burden of demonstrating inadequacy of representation is on the applicant. Berkeley Electric at 191, 394 S.E.2d at 715. This burden may be satisfied by a showing that the representation of the applicant's interest "may be" inadequate. Id. (citation omitted).

In Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983), the leading case on intervention of right, the court articulated a set of factors for determining when an absent party's interest is adequately represented. The court considered "whether the [existing party] will undoubtedly make all of the intervenor's arguments, whether the [existing party] is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected." Id. at 528 (citations omitted). Subsequently, in Berkeley Electric, our supreme court adopted the following Sagebrush factors for determining the adequacy of representation:

> (1) whether the existing parties will undoubtedly make all of the intervenor's arguments; (2) whether the existing parties are capable and willing to make such arguments; and (3) whether the intervenor offers different knowledge, experience, or perspective on the proceedings that would otherwise be absent.

Berkeley Electric at 191, 394 S.E.2d at 715. We find the Bank has failed to demonstrate its interest was not adequately represented by Ken's Cabana.

The trial judge found that the Bank's interest was adequately represented because "Ken's Cabana has vigorously defended against the termination of the easement," and the interests of the Bank and Ken's Cabana were essentially the same. On appeal, the Bank offers nothing to convince us otherwise. The Bank addresses no arguments or defenses that were not made by Ken's Cabana and points to no unique knowledge, experience, or perspective that the Bank could bring to the proceedings. It simply does not address the Sagebrush factors.

Instead, the Bank asserts Ken's Cabana "may have different intentions" than the Bank—i.e., Ken's Cabana "may desire to sell the restaurant or even

declare bankruptcy," whereas the Bank is concerned with protecting its security interest. While there is nothing in the record to suggest Ken's Cabana is planning to sell the restaurant or declare bankruptcy, even if there were, this argument fails to address whether or not Ken's Cabana has adequately represented the Bank's interest in the easement. If representation could be shown inadequate by the mere possibility that two parties could have different intentions, little would be left of the doctrine of adequacy of representation.

Commentators have noted that adequacy of representation cases generally fall into one of three categories. See 7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1909, at 318-49 (2d ed. 1986). First are cases where "the interest of the absentee is not represented at all" or where "all existing parties are adverse to him." Id. at 319. In these situations there is an obvious lack of adequate representation. At the other extreme are cases where "the interest of the absentee is identical with that of one of the existing parties or there is a party charged by law with representing the interest of the absentee." Id. at 324. Examples of this second category include class actions and cases where an executor, administrator, trustee, or other formal fiduciary represents the interest of the absent party. Id. In between these two extremes is the third category consisting of situations where "the interests of the absentee, and of the party thought to represent him, are different, though perhaps similar." Id. at 346. The case sub judice falls into this third category.

By focusing on the possibility that the Bank and Ken's Cabana might have different intentions, the Bank apparently would limit the denial of intervention, if at all, to that second category of cases where the interests of the parties are identical. However, that is not the law in South Carolina. Instead, we avoid "setting up rigid applications of Rule 24(a)(2)" and take each case "in the context of its unique facts and circumstances." Berkeley Electric at 191, 394 S.E.2d at 715. Adequacy of representation is determined by the Sagebrush factors. Essentially, we look to "whether the absentee is likely to have anything of his own to say that will be of value." See Wright & Miller at 350. The Bank points to nothing additory or instructive it would bring to the dispute, but merely reiterates that it has an interest.

The crux of the underlying case is whether Ken's Cabana will be able to continue to use the easement. The Bank's mortgage on the parking easement is only as good as Ken's Cabana's right to use it. As the trial judge found, "The rights and defenses of the Bank rise and fall with the acts and omissions of their mortgagor, Ken's Cabana." They share the same interest and objective.

In S.C. Tax Comm'n v. Union County Treasurer, 295 S.C. 257, 368 S.E.2d 72 (Ct. App. 1988), we affirmed the trial court's denial of the South Carolina Tax Commission's application for intervention precisely because we were "unable to discern from the Commission's argument that its ultimate objective in th[e] case [was] different from that of the Auditor and Treasurer." Id. at 260-61, 368 S.E.2d 74. There, the underlying action arose when Milliken & Company sued the Treasurer and Auditor of Union County to collect over $87,000 in taxes paid under protest to Union County. The Tax Commission had exempted a Milliken manufacturing establishment located in Union County from ad valorem taxes. The Union County Auditor and Treasurer levied a tax against Milliken that the county characterized as a nonexempt municipal tax rather than an exempt county tax. The trial judge denied the South Carolina Tax Commission's application for intervention. In affirming, we concluded:

> The burden to show that the representation may be inadequate is on the applicant. 3B J. Moore, Moore's Federal Practice Section 24.07[4] (2d ed. 1987). **WHEN AN APPLICANT FOR INTERVENTION AND AN EXISTING PARTY HAVE THE SAME INTERESTS OR ULTIMATE OBJECTIVE IN THE LITIGATION A PRESUMPTION ARISES THAT ITS INTERESTS ARE ADEQUATELY REPRESENTED AND THE APPLICATION SHOULD BE DENIED UNLESS A SHOWING OF INADEQUATE REPRESENTATION IS MADE BY DEMONSTRATION OF ADVERSITY OF INTEREST, COLLUSION, OR NONFEASANCE.** . . . [T]he County Officers' objective was to retain the tax for the county and [the Commission's] objective is to have the court rule the tax

> was not a county tax from which Milliken's property is exempt. We see no difference of interest.
>
> . . . .
>
> The Tax Commission has made no convincing showing the representation of its interest may be inadequate. It seems to argue the County Officers' interest in a determination of the issue is local while its interest is statewide. We fail to appreciate this distinction in the context of this case. **Regardless of how the parties' interests are characterized, the Commission and the County Officers seek the same outcome in the case.**

Id. at 260-61, 368 S.E.2d at 74 (emphasis added).

Similarly, we see no difference of interest here. Both Ken's Cabana and the Bank seek the same outcome in the case: retention of the easement. Ken's Cabana obviously wants to retain parking for its customers, and it trenchantly contended against the easement's termination. The Bank's security interest in the easement exists only so long as Ken's Cabana is allowed to use the easement. Both parties want to preserve the easement to enhance the value of the restaurant property. Apodictically, the parties seek the same outcome.

Berkeley Electric offers an instructive example of an intervenor satisfying the Sagebrush adequacy of representation factors. 302 S.C. 186, 394 S.E.2d 712. The underlying lawsuit in Berkeley Electric arose when Berkeley Electric sued Mt. Pleasant over the right to provide electrical services to a newly annexed area of the town. South Carolina Electric & Gas (SCE & G) moved to intervene, but the trial judge denied its motion. Our supreme court reversed, finding:

> SCE & G has raised certain issues outside the existing pleadings. SCE & G has also plead several special defenses to Berkeley Electric's complaint. Additionally, SCE & G may be able to assert certain defenses that Mt. Pleasant may or may not be able

> to raise. SCE & G also has the ability to bring a different perspective or experience to the proceeding that would otherwise be absent. For example, SCE & G has extensive experience in the area of territorial service questions which arise after annexation.

Id. at 191-92, 394 S.E.2d at 715-16.

Contrastively, the Bank has failed to raise, argue, or even mention any defense not already asserted by Ken's Cabana. The Bank had no right to notice or right to cure upon breach of the terms of the easement and thus has no independent grounds to defend the termination of the easement. The Bank does not point to any area of expertise it could bring to address the termination of the easement. It does not address the Sagebrush factors at all.

The Bank cites Thomasson v. Ocean Point Golf, Inc., 300 S.C. 29, 386 S.E.2d 282 (Ct. App. 1989), for support. Thomasson involved a bank's intervention in a suit between the lessor and lessee of a golf course. The bank was the assignee of the lessee's right to receive dues from the Fripp Island Club. A dispute arose between the lessor and lessee of the golf course, and the lessee's right to payment of dues was one of the contended issues. The trial judge allowed the bank's intervention, and we affirmed, stating:

> [W]e find no abuse of discretion in this case. . . . Thomasson makes no convincing argument that the disposition of the suit would not impair or impede [the bank]'s ability to protect [its] interest, nor has it convinced us that the bank's interest was adequately represented by other parties to the suit. We find no error in the order granting intervention.

Id. at 33, 386 S.E.2d at 285.

In this case the trial judge found that the Bank's interest was competently and adequately represented. His order states that Ken's Cabana vigorously defended against termination of the easement. Further, the Bank

has offered nothing to show that Ken's Cabana's representation was inadequate. Therefore we find no abuse of discretion.

CONCLUSION

Cognizant that intervention should be liberally granted, we come to the ineluctable conclusion that the denial of the motion to intervene in this case was properly decided by the circuit judge. The Bank and Ken's Cabana share the same ultimate objective and seek the same outcome. Based on his fact-intensive review, the trial judge found that adequate, competent, and dynamic representation of the Bank's interest occurred. Moreover, the Bank has proffered nothing pertinent to the Sagebrush factors. We find the trial judge did not abuse his discretion by denying the Bank's motion to intervene. Accordingly, the judgment of the trial court is

AFFIRMED.

GOOLSBY and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Louise P. Majstorich, Personal Representative for the Estate of Roger D. (Bill) Prince, Appellant,

v.

John P. Gardner Jr., Respondent.

Appeal From Darlington County
Sidney T. Floyd, Circuit Court Judge
John M. Milling, Circuit Court Judge

Opinion No. 3886
Submitted September 15, 2004 – Filed November 1, 2004

AFFIRMED

Louise P. Majstorich, of Myrtle Beach; for Appellant.

Lawrence B. Orr, of Florence; for Respondent.

BEATTY, J.: In this fee dispute case, Roger D. Prince[1] appeals the circuit court's order granting summary judgment in favor of his attorney, John P. Gardner, Jr. We affirm.[2]

FACTS

In May 1991, a Florence County jury convicted Prince of solicitation to commit murder, conspiracy, and accessory before the fact of murder. The trial judge granted Prince's motion for a new trial as to the charge of accessory before the fact of murder. Prince appealed his convictions to the supreme court. The State appealed the trial judge's grant of a new trial for the accessory charge.

In addition to his two appellate attorneys, Prince retained Gardner for $25,000 on March 1, 1993, to argue half of the oral argument before the supreme court.

On April 19, 1993, the supreme court heard oral arguments and considered Gardner's motion for a new trial based on after-discovered evidence. The supreme court issued an opinion on December 13, 1993, in which it affirmed Prince's convictions, reversed the grant of a new trial as to the accessory charge, and remanded the case for sentencing. State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993).

On February 4, 1994, Prince filed a petition for rehearing, a motion to stay sentencing/remittitur, and a motion for a new trial based on after-discovered evidence. Prince paid Gardner an additional $7,500 to arrange a

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[1] During the pendency of the appeal, Prince passed away. His sister, Louise P. Majstorich, now represents his interests as the personal representative of the estate.

[2] Because oral argument would not aid the court in resolving the issue on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

meeting with Attorney General Travis Medlock to discuss the new trial motion. Medlock declined to re-open the case.

During this time, Prince retained Jack Swerling to file a supplemental petition for rehearing, a motion to stay sentencing/remittitur, and a motion for a new trial.

On August 26, 1994, the supreme court denied the petition for rehearing and the motion for a new trial. On the same date, the court issued the remittitur. The next day, Prince was informed of the court's decision. Prince then contacted Gardner and paid him $5,000 to arrange for his sentencing date to be delayed until he completed his ongoing treatment for cancer.

On August 29, 1994, Gardner filed with the supreme court a motion to stay Prince's sentencing date until Prince completed his cancer treatments on October 22, 1994. Because the remittitur had been issued, the supreme court returned the motion for lack of jurisdiction. Upon discovering that his sentencing date could not be delayed, Prince absconded for eleven months until he was apprehended.

While incarcerated, Prince sent Gardner a letter on February 8, 1999, informing Gardner that he intended to seek the return of the fees that had been paid. In the letter, Prince expressed his dissatisfaction with Gardner's representation, particularly his failure to obtain the favorable ruling that he had guaranteed.

On March 23, 1999, Prince filed an application for the resolution of the disputed fees with the South Carolina Fee Disputes Board. An assigned member issued an opinion, finding the stated fee was "fair and equitable based upon all of the surrounding facts and curcumstantces [sic]." Prince appealed this decision to the full panel. After a hearing, the Fee Dispute Hearing Panel issued its decision on December 2, 1999, in which it found "the fees charged by [Gardner] were reasonable and the complaint is without merit."

Subsequently, Prince appealed the Panel's decision to the circuit court. In response, Gardner moved to dismiss the appeal on the following grounds: (1) Prince failed to properly serve the appeal; (2) the appeal was untimely; and (3) the statute of limitations had expired prior to the filing of his claim with the Fee Disputes Board. Circuit Court Judge Edward Cottingham granted Gardner's motion and dismissed the appeal with prejudice.

On June 16, 2000, Prince filed suit against Gardner, alleging causes of action for: breach of contract; excessive fees/unjust enrichment; breach of fiduciary duty; negligence; fraud, deceit, and misrepresentation; and intentional infliction of emotional distress. Gardner moved for summary judgment on the grounds: (1) the complaint failed to state a cause of action; (2) Prince's claims were barred by the statute of limitations; and (3) Prince's claims were barred by having submitted them to the Fee Disputes Board.

After a hearing, Circuit Court Judge Sidney Floyd issued an order on February 23, 2001, granting summary judgment in favor of Gardner. Judge Floyd primarily granted the motion on the statute of limitations ground, finding Prince knew or should have known that he had a cause of action against Gardner on or before August 29, 1994. He further held the cause of action for excessive fees was barred by the previous resolution by the Fee Disputes Board. Finally, he ruled a cause of action for an attorney's failure to achieve a guaranteed result is not recognized in South Carolina. See Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000) (holding no cause of action exists in South Carolina for legal malpractice based on breach of express warranty to obtain a specific result).

On March 16, 2001, Prince appealed the order to this court[3] and filed a motion for reconsideration in the circuit court. After a hearing on the motion for reconsideration, Circuit Court Judge John Milling[4] issued an order on July 23, 2001, in which he denied the motion on the statute of limitations ground.

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[3] Because the notice of appeal was premature, this court dismissed it without prejudice.

[4] Judge Milling assumed the case upon Judge Floyd's retirement.

On November 26, 2001, Prince appealed this order and Judge Floyd's order dated February 23, 2001.[5] On the same day, Prince sent Judge Milling a letter in which he stated that Judge Floyd had failed to rule on his motion to supplement his pleadings in response to Gardner's motion for summary judgment.

On January 22, 2002, Judge Milling again denied Prince's motion for reconsideration. He ruled that Prince's motion to supplement his pleadings was untimely. He further found that even if the motion had been timely, it did not provide a basis to reverse Judge Floyd's order granting summary judgment in favor of Gardner.

Prince appealed this order on February 26, 2002.

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Cunningham v. Helping Hands, Inc., 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003).

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Therefore, on appeal from an order granting summary judgment, this court

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[5] Prince alleged he had not received a copy of Judge Milling's order until November 16, 2001.

will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the nonmoving party below. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

DISCUSSION

Prince argues the circuit court[6] erred in granting summary judgment in favor of Gardner based on the statute of limitations. He contends the court erred in applying a subjective standard of the discovery rule. Under an objective standard, Prince asserts he was not neglectful of his rights. Because the purpose of the discovery rule is to guard against those who fail to enforce their rights with reasonable diligence, he contends he should not be precluded from pursuing the causes of action against Gardner.[7] We disagree.

Actions for breach of contract and personal injuries that arise after April 5, 1988, must be commenced within three years. S.C. Code Ann. § 15-3-530(1), (5) (Supp. 2003). The discovery rule, as outlined in section 15-3-535, provides that "the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of

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[6] Although Prince has specifically appealed the two circuit court judges' orders, we refer to the judges as the circuit court in the interest of clarity.

[7] We note that Prince has not appealed the circuit court's remaining grounds for the grant of summary judgment. This fact alone would warrant our affirming the grant of summary judgment as to the excessive fees cause of action and the breach of contract cause of action. See Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871 (2000) (stating an unappealed ruling is the law of the case); Brading v. County of Georgetown, 327 S.C. 107, 113, 490 S.E.2d 4, 7 (1997) (recognizing that where a decision is based on more than one ground, an appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case). Because, however, the statute of limitations ruling is applicable to the other causes of action, we decide to address the issue with respect to all of the causes of action raised by Prince.

reasonable diligence that a cause of action arises from the wrongful conduct." Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996); S.C. Code Ann. § 15-3-535 (Supp. 2003) ("Except as to actions initiated under Section 15-3-545, all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action."); see Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 271-72, 384 S.E.2d 693, 694-95 (1989) (extending the discovery rule to contract actions while recognizing only certain statutes have "built in" discovery provisions within the statute itself), overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995); Mills v. Killian, 273 S.C. 66, 70, 254 S.E.2d 556, 558 (1979) (holding the discovery rule applies to professional negligence causes of action).

"The 'exercise of reasonable diligence' means the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." True v. Monteith, 327 S.C. 116, 119, 489 S.E.2d 615, 616-17 (1997). "The date on which discovery should have been made is an objective, not subjective, question." Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999). "In other words, whether the particular plaintiff actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." Id.

Viewing the evidence in the light most favorable to Prince, we find Prince knew or should have known that he had a claim against Gardner on August 29, 1994, the day Prince admits Gardner last represented him. As evidenced by his complaint and affidavits, Prince was dissatisfied with Gardner's representation on each of the three occasions that he performed work. Based on this deficient performance, Prince felt that he had been defrauded of the fees that had been paid. Specifically, Prince claimed Gardner's "shockingly poor performance and presentation [before the

supreme court] was totally responsible for the adverse decision." Prince was aware of the unfavorable decision on December 13, 1993. Prince also believed that his payment of $7,500 to Gardner in February 1994 was excessive given Gardner only arranged a meeting with Attorney General Travis Medlock regarding the new trial motion. Finally, when Gardner failed to obtain a stay of Prince's sentencing on August 29, 1994, Prince felt he had been "scammed" out of another $5,000.

Even though Gardner's representation of Prince was completed on August 29, 1994, Prince waited until June 16, 2000, to file suit against him. Applying the discovery rule under an objective standard, we hold Prince's suit was untimely and, thus, barred by the three-year statute of limitations.

Accordingly, the grant of summary judgment in favor of Gardner is

AFFIRMED.

STILWELL and SHORT, JJ., concur.