The Supreme Court of South Carolina

In the Matter of Clyde Nelson Merrell, Respondent.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 15, 1974, Clyde Nelson Merrell was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Bar, dated December 23, 2003, Clyde Nelson Merrell submitted his resignation from the South Carolina Bar. We accept Mr. Merrell's resignation.

Clyde Nelson Merrell shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, he shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Clyde Nelson Merrell shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The

resignation of Clyde Nelson Merrell shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/Jean H. Toal C.J.

s/James E. Moore J.

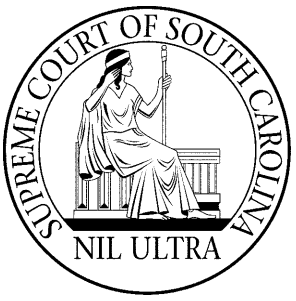
s/E. C. Burnett, III J.

s/Costa M. Pleicones J.

Justice John H. Waller, Jr. not participating

Columbia, South Carolina

February 6, 2004



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

February 9, 2004

ADVANCE SHEET NO. 6

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kiawah Property Owners Group, Appellant,

v.

The Public Service Commission of South Carolina, Respondent,

and Kiawah Island Utility, Inc., Intervenor-Respondent.

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Opinion No. 25782
Heard October 7, 2003 - Filed February 9, 2004

AFFIRMED

Michael A. Molony and Lea Kerrison, both of Young, Clement, Rivers and Tisdale, of Charleston, for Appellant.

Fred David Butler, of Columbia, for Respondent S.C. Public Service Commission.

G. Trenholm Walker and Clay B. McCullough, of Pratt-Thomas, Epting and Walker, of Charleston, for Intervenor-Respondent, Kiawah Island Utility Company.

JUSTICE WALLER: This is an appeal from an order of the Public Service Commission (PSC) approving a rate increase for Respondent, Kiawah Island Utility (Utility). In 1999, this Court reversed and remanded the matter in order for the PSC to set forth sufficient evidentiary detail supporting its conclusions. Kiawah Prop. Owners Group v. Pub. Serv. Comm'n, 338 S.C. 92, 525 S.E.2d 863 (1999) (KPOG I). On remand, the PSC affirmed its prior holdings. The circuit court affirmed, finding the PSC's order sufficiently complied with this Court's mandate. We affirm.

FACTS

The pertinent facts are set forth in KPOG 1:

> Kiawah Island Utility, Inc. (the Utility) provides water and sewer service to the residents of Kiawah Island. The Utility is wholly owned by Kiawah Resort Associates (the Developer). In July of 1996, the Utility applied to the Public Service Commission for an increase in its existing rates and charges for water and sewer service. The appellant, Kiawah Property Owners Group as well as the consumer advocate . . . intervened in opposition to the increase and participated in the Commission's proceedings.
>
> Prior to the 1996 adjudication, the rates and charges of the Utility had been approved by the PSC in 1992. The Utility sought to increase its operating margin by 5.43%. After the hearings, the PSC issued an order granting the Utility an increase of only 3.55%. . . . . The circuit court issued its order upholding the PSC.

338 S.C. at 94, 525 S.E.2d at 864. In KPOG 1, we found the PSC had failed to set forth a sufficient evidentiary basis for its determinations.

ISSUES

1. Does the PSC have jurisdiction over Developer?

2. Did the PSC properly refuse to either rescind land leases between Developer and Utility, or require Developer to donate the land in question to Utility?
3. Did the PSC properly refuse to require Developer to reimburse Utility for expenditures Owners claim were attributable to Developer?
4. Should "building incentive" paid to Developer have been included as revenue to Utility?
5. Did the PSC properly refuse to invalidate the cross-collateral and cross-default provisions of Utility's 1995 loan agreement with NationsBank?

STANDARD OF REVIEW[1]

This Court applies a deferential standard in reviewing decisions by the PSC and will affirm those decisions if supported by substantial evidence. Total Envtl. Solutions, Inc. v. South Carolina Pub. Serv. Comm'n, 351 S.C. 175, 568 S.E.2d 365 (2002); Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of South Carolina, 324 S.C. 56, 478 S.E.2d 826 (1996). We will not substitute our judgment for that of the PSC where there is room for a difference of intelligent opinion. Id. The PSC's findings are presumptively correct, requiring the party challenging an order to show the decision is "clearly erroneous in view of the substantial evidence on the whole record." Id.

Normally, the expenses of a Utility are presumed to be reasonable when incurred in good faith. KPOG I, 338 S.C. at 95, 525 S.E.2d at 864, citing Hamm v. South Carolina Pub. Serv. Comm'n, 309 S.C. 282, 422 S.E.2d 110 (1992). However, when payments are made to an affiliate, a mere showing of actual payment does not establish a prima facie case of

[1] As noted by this Court in KPOG I, supra, the basis for most of Owners' arguments on appeal is that "due to the Developer's control over the Utility, the Developer entered into deals with the Utility that would result in greater profit to the Developer and higher rates for the Utility's customers. KPOG's position is that no independent utilities would have entered into such deals with a developer because those deals were bad for the Utility and the ratepayers." 338 S.C. at 97, 525 S.E.2d at 825, n. 1.

reasonableness. Hilton Head Plantation Utilities, Inc. v. Pub. Serv. Comm'n, 312 S.C. 448, 451, 441 S.E.2d 321, 323 (1994). The PSC must review and analyze intercompany dealings and determine if they are reasonable; if there is an absence of data and information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such services can be ascertained, the allowance is properly refused. Id.

1. PSC JURISDICTION OVER DEVELOPER

Owners assert that since Utility is a wholly-owned subsidiary of Developer, Developer should have a) donated numerous items to it (such as fire hydrants, transmission/distribution lines), or b) not have charged Utility for other items (such as management fees), and c) that Developer should be required to reimburse Utility for any expenses it claims were unreasonable.[2] We agree with the PSC that it simply does not have authority to order the relief requested.

In its order on rehearing, the PSC ruled that since it had jurisdiction only over public **utilities**, it did not have authority to "order an affiliate company to pay back funds to a utility. . . . The Commission's authority rests solely over public utilities themselves. Therefore, we are limited to granting in whole or in part, or denying proposed adjustments in utility rate cases, based on our view of the evidence. . ."

The statute conferring authority on the PSC, S.C. Code Ann. § 58-5-210 (1976), states:

> The [PSC] is . . . vested with power and jurisdiction to supervise and regulate the rates and service of every **public utility** in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State and the State hereby

[2] Initially, we agree with the PSC that these costs are not being passed on to the ratepayers. Further, to the extent the PSC found that items were not justified or reasonable, they were excluded from the rate base, such that they do not affect the rates set forth in the order.

> asserts its rights to regulate the rates and services of every "public utility" as herein defined.

(Emphasis supplied). Notwithstanding Developer is not a "public utility,"[3] Owners assert PSC does, in fact, have jurisdiction over Developer, pursuant to S.C. Code Ann. § 58-5-20 (1976). Section 58-5-20 provides:

> Any corporation or person not engaged in business exclusively as a public utility shall be governed by the provisions of Articles 1, 3 and 5 of this chapter in respect only of the public utility owned, leased, operated or managed by it or him and not in respect to any other business or pursuit.

We find § 58-5-20 was simply intended to subject the provider to regulation by the PSC **as a utility with respect to its activities in the provision of utility services**; we do not believe it was intended, as Owners suggest, as authority for PSC to order a separate entity to donate land to its subsidiary, to rescind its land leases, to make payments to the Utility for certain assets, to donate fire hydrants to the utility, etc.

Moreover, we find it is simply unnecessary for PSC to exercise direct jurisdiction over Developer. To the extent a transaction is not done at "arms-length," or is found by the PSC to be unreasonable, it is properly excluded from the rate-base, thereby ensuring that improper or unreasonable transaction costs are not passed on to rate-payers. See generally Lee R. Russ, Annotation, Amount Paid By Public Utility to Affiliate for Goods or Services as Includable in Utility's Rate Base and Operating Expenses in Rate

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[3] The term "public utility" is defined in S.C. Code Ann. § 58-5-10(3) (1976) to include the following:

> every corporation and person delivering natural gas distributed or transported by pipe, and every corporation and person furnishing or supplying in any manner heat (other than by means of electricity), water, sewerage collection, sewerage disposal, and street railway service, or any of them, to the public, or any portion thereof, for compensation; provided, however, that a corporation or person furnishing, supplying, marketing, and/or selling natural gas at the retail level for use as a fuel in self-propelled vehicles shall not be considered a public utility by virtue of the furnishing, supplying, marketing, and/or selling of such natural gas.

Proceeding, 16 A.L.R. 4th 454 (1982)(recognizing public service commissions may scrutinize transactions between affiliates and adjust operating expenses accordingly). In fact, the PSC did exclude numerous items and amounts in the present case,[4] and granted an increase to Utility's operating margin of only 3.55%, rather than the 5.43% operating margin requested. The PSC properly declined to exercise jurisdiction over Developer.

2. LAND LEASES

Pursuant to 23 S.C. Code Ann. Regs. § 103-541:

> No utility shall execute or enter into any agreement or contract with any person, firm, partnership, or corporation or any agency of the Federal, State or local government which would impact, pertain to, or effect said utility's fitness, willingness, or ability to provide sewer service, including but not limited to the collection or treatment of said sewerage, **without first submitting said contract in form to the Commission and obtaining approval of the Commission**.

(Emphasis supplied). It is undisputed that Utility entered into two land leases with Developer without obtaining prior PSC approval. One of the leases is for a "down island storage facility" used for a one million gallon above ground storage tank for potable water, and the other is land next to Utility's wastewater treatment plant on which Utility built a holding pond for treated effluent. Although the PSC ruled the better practice would be for Utility to have prior approval of the lease agreements, it found the leased property was useful to, and used by, Utility. We agree.

Developer leased the land for the holding pond to Utility for an annual rental of $66,000. PSC approved a $33,000 annual expense for the leased

[4] For example, Utility sought to include $100,000 in management fees as direct labor costs and overhead; PSC found Utility had not proved that amount, but instead had only justified $36,000 in management fees. PSC also denied Utility's attempt to include $10,836 in rate case expenses (incurred in seeking a rate increase), and $500,000 to plant for the construction of the Eugenia Avenue Sewer Project.

premises for the holding pond. In its order, the PSC cited the testimony of Utility's engineer, Mr. Bohannon, which indicated that Utility needed additional storage capacity for treated effluent to serve the needs of all of its customers. The PSC also cited the testimony of Utility's CEO, Mr. Clarkson, to the effect that alternatives for increasing storage capacity would have cost much more money, that Utility would have had a hard time borrowing sufficient funds from a bank to purchase the property, and that an independent appraisal firm had determined the fair market rental value for the property. Owners do not contest the evidence cited by PSC in support of its decision; they simply contend that an independent utility would not have entered the leases. However, this Court refrains from substituting its judgment for that of the PSC where there is room for a difference of intelligent opinion. Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of South Carolina, supra.

As noted by the PSC, Owners have at no time challenged the reasonable rental value of the property, nor did they present any evidence that the fair rental value is less than that allotted by PSC. Owners also did not challenge that an additional holding cell for treated effluent was necessary. Accordingly, as there is evidence supporting PSC's decision that the land leases were both necessary and reasonable, its decision is affirmed.[5]

3. UNREASONABLE EXPENDITURES

Owners next assert the trial court should have required Developer to reimburse Utility for numerous expenditures it claims were attributable to Developer rather than Utility. As noted in Issue 1 above, the PSC simply does not have authority to require Developer to reimburse Utility for these items. Accordingly, we need not address the merits of these issues.

[5] We are troubled that PSC did not require compliance with its own regulation. However, we acknowledge that the Commission has wide latitude to determine its methodology in rate-setting and there is no abuse of discretion where substantial evidence supports the finding of a just and reasonable rate. See Heater of Seabrook, Inc. v. Pub. Serv. Comm'n, 324 S.C. 56, 478 S.E.2d 826 (1996). Given the evidence in support of its decision, we simply cannot say the PSC committed an abuse of discretion.

Moreover, we find substantial evidence supports the PSC's determination that each of the challenged expenditures was reasonable and attributable to Utility. Heater of Seabrook, supra.

4. BUILDING INCENTIVE/AVAILABILITY FEES

Owners next assert the PSC erred in failing to attribute "building incentive fees" collected by Developer as a contribution in aid of construction to Utility. We disagree.

In its 1992 Order, Order No. 92-1030, the PSC ruled that "availability fees" collected by Developer[6] did not constitute any type of revenue to the Utility and found they were more appropriately recognized as a contribution in aid of construction, such that rate base was reduced accordingly.

In the present case, Owners argued that the current "building incentive fees" charged by Developer should be treated as a contribution in aid of construction and an adjustment of $530,098 made. The PSC ruled that 1.6 million dollars had already been deducted from Utility's rate base in recognition of the previously paid availability fees. It then found that the current "building incentive fees" charged by Developer are not the same as the "availability fees" imposed prior to 1991. The PSC stated, "To encourage construction of houses on the unimproved lots that it sells, the developer. . . assesses a building incentive fee against the owners of undeveloped lots. This fee is paid directly to [Developer]. The building incentive fee is entirely different from the availability fees that were once (but no longer) charged by [Developer] for infrastructure that included water and sewer lines."

The PSC relied upon the testimony of Mr. Clarkson, Utility's CEO, that the prior availability fees paid to it had been treated as a contribution in aid of construction as ordered, and that the PSC's auditor had made the same adjustment. Utility also presented proof to the PSC that no availability fees had been collected since 1991, that the Utility did not receive any monies from the building incentive fees currently collected by Developer, and that

[6] The order recognizes that the "availability fees" are now known as "building incentive" fees.

none of these fees related to Utility's provision of water and sewer service on the island.

Given the abundant evidence that the current "building incentive" fees do not benefit Utility, we find the PSC properly refused to attribute them to Utility. See Total Envtl. Solutions v. S.C. Pub. Serv. Comm'n, 351 S.C. 175, 182, 568 S.E.2d 365, 369 (2002)(PSC lacks jurisdiction to regulate availability fees where no evidence exists Utility collected or directly benefited from them).

5. CROSS-COLLATERAL/DEFAULT LOAN PROVISIONS

Finally, Owners challenge certain loan provisions Utility has with NationsBank (now Bank of America).

Utility and Developer had loan agreements with NationsBank, and the agreements have as collateral the assets of both Developer and Utility. They also specify that a default by either of the entities constitutes a default by the other. The PSC noted that "[t]he cross-collateralization required by NationsBank has benefited the Utility and has never had a negative effect." Id. Owners' reply brief acknowledges this statement is presently true, but contends the loan agreements were nonetheless commercially unreasonable and may affect Utility's customers **in the future**.

This Court is obligated to inquire in every action whether a justiciable controversy exists in a matter. Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002); Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983).

Here, it is patent there is no present, justiciable controversy. Owners assert only that the loan provisions may have some negative impact in the

future. This is simply insufficient to warrant this Court's review. Accordingly, the PSC's findings are affirmed.

CONCLUSION

We find the PSC's 2000 order sets forth sufficient evidence on which to conclude its decision is supported by substantial evidence. Accordingly, the PSC's rulings are affirmed.

AFFIRMED.

TOAL, C.J., MOORE, BURNETT and PLEICONES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Edward D. Sloan, Jr., individually, and as a Citizen, Resident, Taxpayer and Registered Elector of South Carolina, and on behalf of all others similarly situated, Petitioner,

v.

Marshall Clement Sanford, Jr., Respondent.

ORIGINAL JURISDICTION

Opinion No. 25783
Heard December 3, 2003 - Filed February 9, 2004

James G. Carpenter and Jennifer J. Miller, of The Carpenter Law Firm, PC, of Greenville, for petitioner.

Henry J. White and Swati S. Patel, both of the Office of the Governor; Vance J. Bettis and Shahin Vafai, of Gignilliat, Savitz & Bettis, L.L.P., all of Columbia, for respondent.

JUSTICE BURNETT: Petitioner, Edward D. Sloan, brings this action in the Court's original jurisdiction against the Honorable Marshall Clement Sanford, Jr., Governor of South Carolina. Petitioner argues that

because Governor Sanford holds a Commission under the Government of the United States as an officer in the Reserve of the Air Force, he does not meet the qualifications for Governor set forth in the South Carolina Constitution, Article IV, Section 2. Petitioner requests we issue a declaratory judgment holding Governor Sanford ineligible to serve as Governor because he holds a commission from the United States. For the following reasons, we decline to so rule.

Factual Background

On January 22, 2002, Governor Sanford was tendered an indefinite term appointment as a Reserve of the Air Force in the grade of First Lieutenant, Medical Service Corps. On January 30, 2002, Governor Sanford signed an Oath of Office to serve as a commissioned officer in the Air Force Reserve. Approximately one year later, on January 15, 2003, Governor Sanford was sworn in as Governor of South Carolina.

Issues

I. Does petitioner have standing to challenge respondent's eligibility to serve as South Carolina's governor?

II. Is Governor Sanford's holding of a commission in the Air Force Reserve consistent with the eligibility requirements to be governor as set forth in the South Carolina Constitution?

I.

Petitioner contends he has standing to bring this action as a citizen, resident, taxpayer, and registered elector of the State of South Carolina. We agree.

As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation. Glaze v. Grooms, 324 S.C. 249, 478 S.E.2d 841 (1996). Additionally, a private person may not

invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger, of sustaining prejudice therefrom. Blandon v. Coleman, 285 S.C. 472, 330 S.E.2d 298 (1985).

In Culbertson v. Blatt, 194 S.C. 105, 9 S.E.2d 218 (1940), we held a plaintiff, suing in his capacity as a citizen and taxpayer, lacked standing to bring an action against several dual office-holding public officials. Since this Court's ruling in Culbertson, we have recognized, under certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance. Evins v. Richland County Historic Preservation Comm'n, 341 S.C. 15, 532 S.E.2d 876 (2000); Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) (citing Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 229 S.E.2d 718 (1976)). An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

We conclude Petitioner has public interest standing because of the importance of the issue he raises. Our conclusion is consistent with prior case law. In Baird, *supra*, doctors sued Charleston County to enjoin the issuance of tax-exempt bonds to the Medical University of South Carolina (MUSC) for its purchase of St. Francis Hospital. We held the issuance of the hospital bonds clearly impacts a profound public interest, the public health and welfare. The eligibility of South Carolina's governor to serve in this State's highest elected office is at least as important as the proper funding for a clinical hospital for MUSC. Accordingly, we confer standing.

II.

Petitioner contends Governor Sanford's holding of a commission in the Air Force Reserve is inconsistent with the eligibility requirements to

serve as Governor as set forth in the South Carolina Constitution. We disagree.

The last sentence of Article IV, Section 2 of the South Carolina Constitution provides:

> No person while Governor shall hold any office or other Commission (except in the militia) under the authority of this State, or of any other power.[1]

The "militia" exception of Article IV, Section 2 includes within its ambit Governor Sanford's service in the Air Force Reserve, thereby rendering his military commitment consistent with the South Carolina Constitution. For the following reasons, we conclude Article IV, Section 2 of the South Carolina Constitution permits the Governor to serve in the military reserves.

First, an historical analysis of the South Carolina "militia" reveals the term refers to a fighting force of citizen-soldiers, as distinguished from, professional soldiers. The concept of the militia as consisting of a force of armed citizens, available to serve in times of emergencies, dates back at least as far as the rule of King Alfred the Great. In varying degrees, the English model of the militia was transported to North America with the settlement of the New World. In the first decade of settlement, the South Carolina militia was called upon to make incursions against foreign enemies. Later in the colonial period, the militia served primarily as a local defense force. See Theodore Harry Jabbs, The South Carolina Colonial Militia 1663-1733 (1973) (unpublished Ph.D. dissertation, University of North Carolina) (on file with South Caroliniana Library).

In the Antebellum years, the "militia" continued to consist of citizen-soldiers, called out in times of emergency, to quash insurrection or protect against invasion. The federal Uniform Militia Act of 1792, and

[1] The Constitution of 1778 and all subsequent South Carolina Constitutions have contained a similar provision.

enabling legislation passed by South Carolina's General Assembly, required most male citizens to serve in the state militia. While membership was required in the "line" militia, some of these citizen-soldiers, formed semi-autonomous volunteer companies. See Michael Stauffer, Volunteer or Uniformed Companies in the Antebellum Militia: A Checklist of Identified Companies, 1790-1859, 88 South Carolina Historical Magazine 108 (Jan. 1987).

The tradition of the volunteer component of the "militia" continues today. The framers of the 1778 Constitution could not have specifically envisioned the "militia" would consist of the Air Force Reserve, which was officially designated in 1948. However, like the militias of yesteryear, the Air Force Reserve consists of citizen-soldiers, who serve primarily on a part-time basis and who can be called up to serve full time in emergencies. We believe the history of the South Carolina militia, a fighting force, which has consisted of the citizen-soldier, encompasses the Air Force Reserve and supports our finding Governor Sanford's part-time military service is consistent with the South Carolina Constitution.

Second, a principal purpose of Article IV, Section 2 is to ensure the separation of powers of the three branches of government, that is, to keep the executive, judicial, and legislative branches of government separate. In 1969, a committee chaired by John C. West, presented a final report to then Governor McNair, after the committee analyzed each section of the State's Constitution. The minutes of the West Commission Committee meetings confirm the dual-office holding purpose of the provision.[2] Proceedings of the

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[2] The following discussion occurred:

> Mr. Stoudemire (staff consultant): All right. "No person while Governor shall hold any office or other commission except in the militia under authority of this State or any other power at one and the same."
>
> Mr. West: I think we can approve that and I think it's a good thing.

Committee to Make a Study of the Constitution of South Carolina (1895), August 25, 1966 – December 29, 1967 (Oct. 27, 1967) p. 66. Although certain qualifications for Governor are included within Article IV, Section 2,[3] we do not believe these qualification provisions negate the dual-office holding purpose and underlying separation of powers rationale intended by the last sentence of Article IV, Section 2. Because Governor Sanford is not serving in two of the three branches of government by holding a commission in the Air Force Reserve, he is not holding dual offices as envisioned by the last sentence of Article IV, Section 2 and is not in violation of the South Carolina Constitution.[4]

> Mr. Stoudemire: This is a standard dual office holding provision designed to prevent dual office holding.
>
> Mr. West: You know several states don't have that dual office holding.
>
> Mr. Stoudemire: Mr. Chairman, is that last sentence agreed to, then?
>
> Mr. West: It's agreed. Yes, sir.

[3] Article IV, Section 2, contains, *inter alia*, age and residency requirements for the governor.

[4] A number of courts interpreting dual-office holding clauses have held such clauses do not prohibit holders of state office from serving in the reserves or from being called upon to temporarily defend the country. See McCoy v. Board of Supervisors of Los Angeles County, 114 P.2d 569 (1941) (the chief engineer of a California county could also serve as a major in the Marine Corps Reserve); In re Advisory Opinion to the Governor, 8 So.2d 26 (Fla. 1942) (the induction of a sheriff into the United States Army does not disqualify the sheriff from office); Baker v. Dixon, 174 S.W.2d 410 (Ky. 1943) (the Commonwealth's Attorney was not disqualified from office due to his service in the Army); In re Opinion of the Justices, 29 N.E.2d 738

Petitioner argues South Carolina has always required its Governor's singular, devoted attention to the office and the Governor's military service could impede the exercise of his gubernatorial duties. Although we agree South Carolina has always demanded its governor's loyalty, the historical context giving rise to what is now the last sentence of Article IV, Section 2 indicates the framers were more likely concerned the colonial governors' loyalties would lie with England and not with South Carolina.[5]

(Mass. 1940) (a superior court judge's position as a member of a local or an appeal board created by the Federal Selective Training and Service Act were not incompatible); State ex rel. McGaughey v. Grayston, 163 S.W.2d 335 (Mo. 1942) (the constitutional prohibition against the holding of an office or profit under the United States and under the state does not apply to disqualify a circuit judge from service); In re Advisory Opinion to the Governor, 28 S.E.2d 567 (N.C. 1944) (the Governor of North Carolina could grant the Comptroller of State Board of Education a leave of absence while serving as a captain in the United States Army, without vacating his civil office); Critchlow v. Monson, 131 P.2d 794 (Utah 1942) (a state supreme court justice was not required to vacate his position due to temporary military obligations); State ex rel. Thomas v. Wysong, 24 S.E.2d 463 (W.Va. 1943) (a Captain in the United States Army could also serve as Attorney General).

[5] In March of 1776, South Carolina became the first southern colony and the second of the thirteen to draft a state constitution. Walter Edgar, South Carolina A History, 226 (Univ. of South Carolina Press 1998). Although the 1776 Constitution did not contain the provision addressing the governor's service in the militia, the preamble of the 1776 Constitution lends insight into the historical context under which the framers of the 1778 Constitution were working. The preamble provides, in part:

> And whereas, instead of obtaining that justice, to which the Colonists were and are of right entitled, the unnatural civil war into which they were thus precipitated and are involved, hath been prosecuted with unremitted violence, and the Governors and others bearing the royal commission in the colonies have broken

The framers of South Carolina's early constitutions minimized the governor's potential corruption and disloyalty to the State by preventing dual office holding on the part of the Governor. However, the framers, realizing temporary military service would not subvert the governors' obligations to the State, did not restrict such service by the governors. Likewise, we do not believe the Governor's service in the Air Force Reserve today impinges on his allegiance to South Carolina.

Third, state and federal policy support the performance of military service by citizens. The policy favoring military service by citizens is evidenced in both state and federal legislation.[6] South Carolina Code Ann. § 8-7-30 (1986) provides "[t]he absence of any officer from his office or position caused by his being in the military service shall not create a forfeiture of or vacancy in the office or position to which such officer was elected or appointed…." In the absence of a clear intent on the part of our Constitution's framers to exclude the Governor from military service as a citizen-soldier, we decline to penalize him for his efforts.

> the most solemn promises and engagements, and violated every obligation of honor, justice and humanity, have caused the persons of divers good people to be seized and imprisoned, and their properties forcibly taken and detained, or destroyed, without any crime or forfeiture….

Additionally, Article XXXVI of the 1778 Constitution required all persons in positions of trust to take an oath acknowledging South Carolina as a free and sovereign state, and renouncing any allegiance to King George III.

[6] The federal Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301- 4333, prohibits discrimination or acts of reprisal against an employee based on the employee's military service.

We, therefore, conclude Governor Sanford's service in the Air Force Reserve is consistent with Article IV, Section 2 of the South Carolina Constitution.

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

The Supreme Court of South Carolina

In the Matter of George Turner Perrow, Petitioner.

ORDER

On August 27, 2001, petitioner was indefinitely suspended from the practice of law, retroactive to August 2, 2000. In the Matter of Perrow, 346 S.C. 515, 552 S.E.2d 295 (2001). Petitioner has now filed a petition for reinstatement. The Committee on Character and Fitness recommends the petition be granted upon certain conditions.

We grant the petition for reinstatement, subject to the following conditions:

1. Petitioner must practice under the supervision of a mentor for the first two years after he returns to the practice of law. Petitioner and the Office of Disciplinary Counsel shall agree on the attorney selected to be the mentor. The attorney who serves as petitioner's mentor shall file a written report with the Office of

Disciplinary Counsel on a semi-annual basis for the two (2) year period.

2. At his own expense, petitioner's financial statements shall be audited on a quarterly basis and reports shall be submitted to the Office of Disciplinary Counsel for its review for a two (2) year period.

3. Petitioner must enroll in and successfully complete the Risk Management Program or a similar program provided by the South Carolina Bar. The South Carolina Bar shall notify the Office of Disciplinary Counsel of petitioner's successful completion of the review program.

Prior to reinstatement, petitioner shall reimburse the Lawyers' Fund for Client Protection if any fund amounts were expended on behalf of petitioner. The Lawyers' Fund for Client Protection shall promptly notify the Court in writing that petitioner has either reimbursed the Fund or that it has not expended funds on petitioner's behalf. Once the Court has received proof of petitioner's compliance with this provision, petitioner shall be scheduled to be sworn in.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT
Waller, J., not participating

Columbia, South Carolina

February 5, 2004

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gregory Tillotson, Appellant,

v.

Keith Smith Builders, Respondent.

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

Opinion No. 3740
Heard June 11, 2003 – Filed February 2, 2004

REVERSED AND REMANDED

D. Garrison Hill and Kenneth C. Porter, of Greenville, for Appellant.

James W. Logan, Jr., of Anderson, for Respondent.

BEATTY, J.: Gregory Tillotson ("Tillotson") appeals from the trial court's grant of summary judgment in favor of Keith Smith Builders ("Builder").

FACTS

Tillotson, a self-employed electrical subcontractor, was hired by Builder, a general contractor, to relocate a light fixture box in a residential home. Builder required Tillotson to submit proof of workers' compensation

insurance. Tillotson submitted a "Certificate of Liability Insurance" produced by R.V. Chandler & Associates listing Tillotson as the named insured with Commercial Casualty Insurance Company of Georgia and Capital City Insurance Company as the insurers. Allegedly, Tillotson was subsequently injured at Builder's job site.

After the injury, Tillotson informed Builder that Tillotson's employees were covered by the insurance policy, but that he was not. Tillotson sued Builder in tort. Builder answered that it was immune from a suit in tort under S.C. Code Ann. § 42-1-415 (Supp. 2002). As such, Builder argued, Tillotson's sole route of recovery was through workers' compensation.

STANDARD OF REVIEW

A trial court should grant summary judgment only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Café Assocs., Ltd. v. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). Summary judgment is not proper where further inquiry into the facts of the case is desirable to clarify the application of the law. Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court. George v. Fabri, 345 S.C. 440, 451, 548 S.E.2d 868, 873 (2001).

ISSUE

> Did the trial court err in granting summary judgment based solely on its belief that Tillotson was barred from bringing his action in tort because of S.C. Code Ann. § 42-1-415?

LAW/ANALYSIS

Tillotson argues the trial court erred in granting summary judgment on the sole basis of § 42-1-415. We agree.

Generally, coverage under the Workers' Compensation Act is dependent on the existence of an employer-employee relationship. Neese v.

Michelin Tire Corp., 324 S.C. 465, 471, 478 S.E.2d 91, 94 (Ct. App. 1996). Whether an employer-employee relationship exists is an initial fact to be established prior to applying the Workers' Compensation Act. Nelson v. Yellow Cab Co., 343 S.C. 102, 108, 538 S.E.2d 276, 279 (Ct. App. 2000); Dawkins v. Capitol Constr. Co., 250 S.C. 406, 410, 158 S.E.2d 651, 653 (1967); Gray v. Club Group, Ltd., 339 S.C. 173, 184, 528 S.E.2d 435, 441 (Ct. App. 2000). In the absence of such a relationship, the Workers' Compensation Commission lacks jurisdiction. Nelson v. Yellow Cab Co., 343 S.C. at 108, 538 S.E.2d at 279; see also Glass v. Dow Chem. Co., 325 S.C. 198, 482 S.E.2d 49 (1997).

In the absence of a statutory provision to the contrary, an injured person who is not an employee, but an independent contractor, is not within the scope of the compensation act. McDowell v. Stilley Plywood Co., 210 S.C. 173, 182, 41 S.E.2d 872, 876 (1947). We find nothing in the record to reflect a finding by the trial court that an employer-employee relationship existed between Tillotson and Builder.

Builder argues that Tillotson, by submitting an insurance certificate that listed Tillotson as an insured, subjected himself to the jurisdiction of the Workers' Compensation Act through S.C. Code Ann. § 42-1-415(a). This section provides:

> Notwithstanding any other provision of law, upon the submission of documentation to the commission that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this title except as specifically provided in this section. In the event that employer is uninsured, regardless of the number of employees that employer has, the higher tier subcontractor, contractor, project owner, or his insurance carrier shall in the first instance pay all benefits due under this title . . . Any disputes arising as a

> result of claims filed under this section must be determined by the commission.

A court construing a statute must first seek to ascertain and effectuate legislative intent. Koenig v. South Carolina Dep't of Public Safety, 325 S.C. 400, 403, 480 S.E.2d 98, 99 (Ct. App. 1996). The cardinal rule of statutory construction is to give words used in a statute their plain and ordinary meaning without resort to subtle or forced construction. Id. The language must be read to harmonize its subject matter with its general purpose. Id. "In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction." Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992); see also Jackson v. Charleston Cty. Sch. Dist., 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose.").

Builder, in advancing its argument, concentrates on the first portion and the last sentence of § 42-1-415(a). Builder argues it is not liable to Tillotson because Tillotson represented himself as having workers' compensation insurance at the time it engaged him to work. Builder also argues the last sentence of the statute vests the adjudication of any dispute in the Workers' Compensation Commission, not the circuit court. We disagree.

When read in its entirety and in harmony with the other statutes within the Workers' Compensation Act, § 42-1-415(a) is inapplicable to this case. First, the statute itself makes clear its purpose is to ensure that statutory employees are protected, although their immediate employer may have misrepresented to a contractor that it had workers' compensation insurance. The section removes liability from the contractor except in certain circumstances.

Importantly, in keeping with the statutory employee doctrine, § 42-1-415(a) requires the upstream contractor initially pay all benefits due to the subcontractor's injured employee. The contractor may then petition to transfer responsibility of future payments to the Uninsured Employers' Fund. In addition, the contractor may be reimbursed by the Fund.

The section may be viewed as enforcing the statutory employee doctrine even when a subcontractor commits fraud by stating it has workers' compensation coverage. The purpose of the section is further clarified when read in context of surrounding statutes. Each section, from § 42-1-410 to 450, deals with certain aspects of the statutory employee doctrine. Section 42-1-415 is principally concerned with protecting a subcontractor's injured employees.

Additionally, Builder's reliance on the last sentence in § 42-1-415 (a) is misguided. The sentence states "[a]ny disputes arising as a result of claims **filed under this section** must be determined by the commission." S.C. Code Ann. § 41-1-415 (Supp. 2002) (emphasis added). Tillotson did not file a claim that can be construed as a § 42-1-415 claim. Further, absent the existence of an employer-employee relationship, Tillotson cannot file a workers' compensation claim.

Accordingly, we reverse the trial court's grant of summary judgment and remand this case to the trial court for a determination of whether an employer-employee relationship exists and for any further action appropriate for the disposition of this case.

REVERSED AND REMANDED.

HOWARD, J. and JEFFERSON, A.J. concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ellie, Inc., **Appellant,**

v.

Ronald R. Miccichi, **Respondent,**

Ronald R. Miccichi and Ronco of Charleston, Inc., **Respondents,**

v.

Ellie, Inc., Maple Games, Inc. and Robert Stefani, Sr., **Appellants.**

Appeal From Charleston County
Roger M. Young, Master-in-Equity

Opinion No. 3741
Heard January 13, 2004 – Filed February 2, 2004

AFFIRMED

Francis T. Draine, of Columbia, for Appellants.

Justin O'Toole Lucey, of Mount Pleasant, for Respondents.

ANDERSON, J.: Ellie, Inc., and Ronald R. Miccichi and Ronco of Charleston, Inc., filed competing claims of breach of contract and sought a declaratory judgment on the status of the lease between the parties. The trial court denied all claims by Ellie and found Ellie had breached the lease. The court concluded the breach was accompanied by fraudulent acts and awarded actual and punitive damages,[1] Miccichi validly terminated the lease, and Stefani was personally liable under his Guaranty. We affirm.

FACTS/PROCEDURAL BACKGROUND

Miccichi owned and ran Sports, a bar in Mount Pleasant. Robert Stefani and Miccichi entered negotiations regarding Stefani taking over the bar's operations. Stefani established Ellie, Inc., for management of the bar. Miccichi, on behalf of Ronco, and Stefani, acting for Ellie, signed a Management Agreement in July 1995, in which Ellie was hired to operate the bar. The agreement outlined the basic responsibilities and compensation to Ellie. Attached to the Agreement was an Addendum dealing with equipment rental and the installation and maintenance of video gaming machines by Miccichi. Under the Addendum, Ellie received nominal compensation for handling the daily payouts for the machines, but did not acquire any portion of the profits.

Simultaneously, Miccichi, as owner of the property, and Ellie entered into a Lease Option Agreement. Ellie was granted the option to lease and operate Sports for five years with possibilities of renewal for three five-year terms. The agreement set forth several acts of default, the failure to observe, keep and perform any of the duties contained within the lease after sixty days notice. Miccichi was given the power to extinguish the lease for default with fifteen days notice. Miccichi signed the lease, but enclosed a corporate authorization by Ronco, indicating he was the president and had authority to

[1] The only issues on appeal are whether: (1) the lease was validly terminated; (2) Stefani's Guaranty is enforceable; and (3) if several factual findings were supported by the evidence. Neither Stefani nor Ellie has appealed the actual award of damages as a result of the breaches by Stefani.

sign. An identical Addendum to the one appended to the Management Agreement was attached to the Lease Option Agreement.

Contemporaneously, Stefani executed a Guaranty and non-compete contract. He personally guaranteed the payments required under the lease, and up to $30,000.00 in liquidated damages in the event of Ellie's default. Stefani signed the Guaranty individually and as president of Ellie.

The parties executed a first amendment on December 18, 1995, which expressly modified the Addendum to the Lease Option and Management Agreements. The amendment established Ellie's first shares of revenue from video gaming. Ronco would purchase a five-seat gaming machine and the profits would be divided. Ellie would maintain the machine and the payouts. The amendment also ratified the existing contracts and expressly enunciated that the Guaranty remained in full effect.

A second amendment on April 4, 1996, had more efficacy upon the original agreements. It altered the Lease Option Agreement to allow for installment payments of the fees in the event it was exercised. Additionally, it changed some of the equipment rental provisions. The parties agreed a second video gaming machine would be purchased and the parties would share revenues of the second machine. Finally, the amendment acknowledged that the prior agreements remained in effect.

Several months after this amendment, Stefani exercised the Lease Option. Therefore, the Management Agreement was no longer in effect. However, there is no indication Stefani was released from the Guaranty as it also applied to the financial responsibilities of Ellie under the Lease Option contract.

Ronco and Miccichi presented a third amendment on July 6, 1998, which provided Ellie a share of all the gaming machines' revenues. The amendment defined net revenues, and allocated twenty percent to Ellie. Miccichi and Ronco retained ownership of the machines, but Ellie was responsible for twenty percent of certain costs, including licenses.

Additionally, Ellie was to handle daily collection of money from the machines, insure the collections, and report any problems to Ronco.

On September 28, 1998, the parties adjusted the amount of gaming proceeds being paid to Ellie, as well as allowed Ronco to lease no more than twenty percent of the building for gaming use. This fourth agreement indicated that the revenues allocated to Ellie would pass on to any sublet tenant. The agreement further established that the cost of all new machines would be paid off before any profits are distributed.

The parties next signed off on a "letter . . . for the purpose of clarifying the relationship between Ronco/Ron Micciche [sic] and Ellie/Bob Stefani with regard to the operation of video gambling machines . . . ." The agreement, dated December 2, 1998, allocated seventy-five percent of the first $500,000.00 in net revenue to Ronco. Once net revenue surpassed $500,000.00, the parties divided the revenue evenly. Ellie/Stefani continued to pay twenty-five percent of the expenses, and the parties agreed to add additional rooms onto the property for gaming. The rooms would be paid for seventy-five percent by Ronco and twenty-five percent by Ellie. The agreement included a provision, which made the terms transferable with Ronco having the right of first refusal on any offer. Finally, the contract included a provision, which read: "This agreement is binding on Ellie and Ronco and replaces any previous agreement(s) between these parties."

The final amendment on May 1, 1999 introduced a new company, Maple Games, Inc., into the collection of money and sharing of revenues. Maple was owned and operated by Stefani. The amendment continued the $500,000.00 revenue threshold and split Stefani's share between Maple and Ellie. The amendment also included a provision allowing for a higher share of revenue for Stefani in the summer months. The provision was not contained in the previous amendment. Finally, the amendment defined net revenue as total income less total payouts and Miccichi wrote in "less expenses!" that was not objected to by Stefani prior to Miccichi signing.

The parties' disagreements centered around the video gaming and their sharing of revenues. In October 1999, Stefani claimed the revenues had

reached the $500,000.00 level at which time the revenues were split evenly. Miccichi wanted an accounting to verify the revenue figures, and claimed Stefani excluded expenses, which should have reduced the net revenues. After reviewing the reconciliation, Miccichi identified two "phantom entries" on dates where he knew no reconciliation had been performed because he and his daughter were out of the country on vacation.

In striving to analyze the reports, Miccichi requested additional information to support the figures. Miccichi also attempted to retake control of the collection process. He sent a locksmith to the premises to change the locks on the machines, but Stefani refused the locksmith admittance.

Furthermore, the parties disputed the meaning of the "merger clause" in the letter clarifying their relationship. Miccichi sent a letter asking Stefani's opinion regarding the status of the lease. An additional letter was sent in which his counsel stated: "If [Stefani] has not vacated the property within thirty days, we will take it as a confirmation that the current lease document . . . is still in full force and effect . . . and that the only modifications that have potentially occurred to the lease are purely with regards to gaming provisions." Stefani's counsel responded, "[T]he applicability and effect of the clause will have to be determined on a case by case basis if, and when, a conflict arises between two competing agreements."

Miccichi's counsel responded by letter indicating that it was his belief the merger clause superseded the lease, and the tenancy was considered month to month. Alternatively, he stated that to the extent the lease was valid, he placed Stefani on notice regarding the violations of the gaming provisions and the refusal to allow the locks of the machines to be changed. Miccichi then gave notice that the lease would be terminated.

Approximately a month later, Ellie notified Miccichi that it sought to assign the lease to another corporation. Miccichi, through his counsel, denied the requested assignment. Ellie then initiated this lawsuit.

Ellie proceeded to trial on four main causes of action. Ellie sought a declaratory judgment that the lease was valid and Miccichi improperly denied

its assignment of the lease. It claimed damages for breach of contract and in the alternative breach of contract with fraudulent intent. Its final cause of action alleged Miccichi interfered with a prospective relationship. Miccichi answered, denying all of Ellie's claims, and filed a counterclaim for breach of contract accompanied by fraudulent intent and a declaratory judgment that the lease was validly terminated and his denial of the validity of the assignment was valid. The case was referred to the master-in-equity by consent of the parties.

At trial, Miccichi presented evidence of five financial irregularities regarding the collection of the gaming money. He asserted there were incorrect tabulations of when the threshold level was met, unaccounted periods where the machines were reset, errors in determining the percentage allotted to Stefani, failure to properly include all expenses in calculation of net revenue, and phantom entries.

Stefani claimed the violations of the gaming agreements were insufficient to be considered a breach of the lease. Additionally, he maintained the parties to the lease were different, and therefore the lease was a separate document from the gaming agreements.

The Master denied all of Ellie's claims and found in favor of Respondents on the counterclaims. The Master concluded the Lease Option agreement, the video gaming Addendum, and the numerous amendments all formed one contract. The Master ruled that the parties were all the same even if they were referred to as different names. The Master noted that some contracts referred to the parties one way and others used different titles to denote the same party.

The Master ruled Ellie concealed money and violated the agreement by not reporting the errors and in trying to inflate the revenues. He found Ellie breached the provisions of the agreement and the breach was accompanied by fraud in Stefani's failure to report the additional money in Ellie's possession. The Master awarded Respondents $47,164.00 in gaming revenues owed to them under the contract. Respondents were awarded $60,000.00 in double rent based upon Ellie's occupancy of the premises beyond the termination of

the lease. The Master awarded $46,984 in punitive damages on the breach of contract accompanied by fraudulent intent claim. The total actual and punitive damages award was $154,148.00. Additionally, he awarded $73,319.00 in attorney's fees under the contract. The Master also found Respondents were entitled to a verdict up to $30,000.00 against Stefani individually based on his Guaranty.

Finally, the Master held the breaches of the video gaming provisions were breaches of the Lease Agreement, and therefore Miccichi's termination of the lease was valid and justified. The Master determined Miccichi properly denied Ellie the right to assign the lease as it had been terminated. The Master ruled in the alternative that because all of the amendments related to the Lease contract in addition to the video gaming provisions, the merger clause extinguished the lease. Therefore, the Master concluded the tenancy was month-to-month and the notice provided by Miccichi was sufficient to terminate the tenancy.

ISSUES

I. Did the Master err in ruling the contract between the parties in existence in 1999 when their dispute arose consisted of the Lease Agreement, the Addendum, and all the amendments?

II. Did the Master err in finding sufficient evidence to terminate the Lease?

III. Did the Master err in holding Stefani personally liable for up to $30,000.00 pursuant to his personal Guaranty?

IV. Did the Master err in finding Ellie and Stefani concealed income from the video gaming machines?

V. Did the trial court err in not applying the doctrines of laches, equitable estoppel, or waiver to the issue of the breaches of the video gaming portions of the contract?

STANDARD OF REVIEW

"An action for breach of contract seeking money damages is an action at law." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 430, 540 S.E.2d 113, 117 (Ct. App. 2000); accord Sterling Dev. Co. v. Collins, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992); Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 589, 538 S.E.2d 15, 20 (Ct. App. 2000). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. . . . The judge's findings are equivalent to a jury's findings in a law action." Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); accord Cohens v. Atkins, 333 S.C. 345, 347, 509 S.E.2d 286, 288 (Ct. App. 1998); Small v. Pioneer Mach., Inc., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997).

LAW/ANALYSIS

I. The Contract

Ellie and Stefani maintain the video gaming agreements were separate and distinct from the Lease Option Agreement. They attest the parties and the subject matter of the contracts were dissimilar. We disagree.

The initial contract was the Lease Option with the Addendum. The Addendum included all the video gaming provisions as well as the parties' responsibilities with regard to collections of money from the machines. The Addendum was specifically incorporated into the Lease Option Agreement by paragraph seven:

> The attached addendum regarding equipment, repairs, taxes, insurance warranties and indemnity is hereby incorporated by reference as if set forth herein. For an obligation which pre-existed the exercise of this lease option, said obligations shall be deemed a pre-existing or continuing obligation, as appropriate and not a new one.

The parties to the Lease Option were Miccichi, as owner of the property, and Ellie, as the tenant. Miccichi signed the Lease Option as President of Ronco. The parties to the Addendum were the same.

The first and second amendments to the contract both specifically recognized the changes were being made to the Addendum and that the Lease Option continued in full effect. These amendments added video gaming machines and split their revenues between Ellie and Ronco. Additionally, the second amendment made alterations to the payments in the event Ellie exercised its option. Clearly both of these contracts were amendments to the original transaction and constituted a single agreement between the parties.

The July 1998 amendment does not expressly sever the Addendum from the Lease Agreement. At this time, Ellie had executed its option and was formally leasing the premises. This amendment allocated a portion of all game revenue to Ellie, and not just revenue from the two machines in the previous amendments. It allowed Ronco to place the machines in any of three locations within its discretion. This provision alters paragraph four of the Addendum.

Moreover, this amendment specifically stated either party could terminate it and then the parties would "[return] to the agreement in the contract between the two above parties [Ronco and Ellie]." The only contract left to return to was the Lease with the Addendum. This July 1998 amendment changed the provisions established in the previous two amendments as well as provisions of the Addendum. As such, it is read as part of one contract between Miccichi, Ronco, and Ellie.

The September 1998 amendment adjusted the definition of the demised premises and altered Lease provisions if necessitated by state gaming laws. The amendment contained a provision allowing Ellie to transfer the gaming revenues to a subtenant. The parties to this amendment were Miccichi for Ronco and Stefani for Ellie. Again, this amendment is tied to the Lease and Addendum and is not read as a separate contract.

The December 2, 1998, letter was "for the purpose of clarifying" the parties' relationship. It altered video gaming provisions, such as the amount of revenue paid, and changed Lease provisions. The parties modified the equipment rental provisions of the Addendum. Finally, the parties agreed to add rooms to the premises for gaming, and varied the monthly rental costs accordingly. The parties to the letter were listed as "Ronco/Ron Micciche [sic] and Ellie/Bob Stefani." Unequivocally, the parties considered themselves and their corporations as one for purposes of the contracts and amendments. It is impossible to hold that this is a separate contract and not an amendment to the original Lease and Addendum.

The final amendment brought in Maple Games as another of Stefani's corporations. While this agreement only modifies the way in which revenue from the games was split, it specifically recognized "Ellie, Inc. (Robert J. Stefani, operator of SPORTS Bar and Grill) is a party to an agreement between itself and Ronco of Charleston (Ronald Micciche [sic], owner of Ronco) . . . ." The final amendment expressly stated that the previous agreement remained in effect.

In South Carolina, two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole. Café Assocs., Ltd. v. Gerngross, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991); Moshtaghi v. Citadel, 314 S.C. 316, 321, 443 S.E.2d 915, 918 (Ct. App. 1994) (citing Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 25 (1977)). "The date of the writings constituting the transaction is not material." Moshtaghi, 314 S.C. at 321, 443 S.E.2d at 918 (citing Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991)); Plaza Dev. Servs. v. Joe Harden Builder, Inc., 294 S.C. 430, 433-34, 365 S.E.2d 231, 233 (Ct. App. 1988) ("Where instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties."). Moreover, where one of the contracts explains, amplifies, or limits the other, those provisions will be given effect between the parties so that the whole agreement, as actually contracted by the parties, may be effectuated. Moshtaghi, 314 S.C. at 321, 443 S.E.2d at 918; Edward Pinckney Assocs.,

Ltd. v. Carver, 294 S.C. 351, 354, 364 S.E.2d 473, 474 (Ct. App. 1987) ("Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated."); See Wilbur Smith & Assocs. v. Nat'l Bank of South Carolina, 274 S.C. 296, 299, 263 S.E.2d 643, 645 (1980) (finding two instruments must be read together to determine the whole agreement and intent of the parties where the broker and property owner entered into two exclusive listing agreements, the first of which provided that the sale price was to be mutually agreed upon after completion of a feasibility study and provided that the contract was binding on heirs and assigns, and the second of which set the sale price but made no reference to heirs and assigns). One contract draws contractual sustenance from the other. Edward Pinckney Assocs., 294 S.C. at 354, 364 S.E.2d at 474. "This rule applies even where the parties are not the same, if the several instruments were known to all the parties and were delivered the same time to accomplish an agreed purpose." 17A Am. Jur. 2d Contracts § 388 (1991).

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. D.A. Davis Constr. Co., Inc. v. Palmetto Props., Inc., 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984) Williams v. Teran, Inc., 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976); RentCo., a Div. of Fruehauf Corp. v. Tamway Corp., 283 S.C. 265, 267, 321 S.E.2d 199, 201 (Ct. App. 1984); see Mishoe v. Gen. Motors Acceptance Corp., 234 S.C. 182, 188, 107 S.E.2d 45, 47 (1958) ("Contracts should be liberally construed so as to give them effect and carry out the intention of the parties."). The parties' intention must, in the first instance, be derived from the language of the contract. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); Jacobs v. Service Merch. Co., 297 S.C. 123, 375 S.E.2d 1 (Ct. App. 1988); see Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977) ("Where the agreement in question is a written contract, the parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof."); Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) ("The primary test as to the character of a contract is the

intention of the parties, such intention to be gathered from the whole scope and effect of the language used."). If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976). "Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001). The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect. Superior Auto Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973).

However, where an agreement is ambiguous, the court should seek to determine the parties' intent. Smith-Cooper v. Cooper, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct. App. 2001); Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct. App. 1998). A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. Bruce v. Blalock, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962). In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered. Klutts Resort Realty, Inc., 268 S.C. at 89, 232 S.E.2d at 25; Bruce, 241 S.C. at 161, 127 S.E.2d at 442; Mattox v. Cassady, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct. App. 1986). "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." Blakely, 266 S.C. at 73, 221 S.E.2d at 769; accord Kable v. Simmons, 217 S.C. 161, 166, 60 S.E.2d 79, 81 (1950).

We hold the parties to the various agreements and amendments considered their relationship as one transaction with a series of amendments. They did not evidence intent to separate the video gaming provisions as

originally found in the Addendum from the Lease provisions. The trial court correctly found the various writings between the parties were all construed together to constitute the contract they were bound to at the time of their dispute.

II. Termination of Lease

As we have construed all the various writings of the parties as one contract, we must determine whether the trial court correctly found Ellie's actions with regard to the gaming revenues constituted a sufficient breach to terminate the lease. Ellie and Stefani argue the breaches of the video gaming provisions were inadequate to justify termination of the lease. We find there were significant breaches of the video gaming provisions as well as other lease provisions, which warranted termination of the lease.

Rescission is an "abrogation or undoing of [a contract] from the beginning, which seeks to create a situation the same as if no contract ever had existed." Gov't Employees Ins. Co. v. Chavis, 254 S.C. 507, 516, 176 S.E.2d 131, 135 (1970); Boddie-Noell Props., Inc. v. 42 Magnolia P'ship, 344 S.C. 474, 483, 544 S.E.2d 279, 283 (Ct. App. 2000). When a party elects and is granted rescission as a remedy, he is entitled to be returned to status quo ante. First Equity Inv. Corp. v. United Serv. Corp., 299 S.C. 491, 496, 386 S.E.2d 245, 238 (1989). Rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore him to the position occupied prior to the making of the contract. Bank of Johnston v. Jones, 141 S.C. 98, 115-16, 139 S.E. 190, 196 (1927); Boddie-Noell Props., 344 S.C. at 483, 544 S.E.2d at 283. Rescission, as a remedy, returns the parties to the status quo ante. Government Employees Ins., 254 S.C. at 516, 176 S.E.2d at 135. A return to the status quo ante necessarily requires any party damaged to be compensated. Boddie-Noell Props., 344 S.C. at 483, 544 S.E.2d at 284.

"The general rule is that for a breach of contract to warrant rescission, the breach must be so fundamental and substantial as to defeat the purpose of the contract." Gibbs v. G.K.H., Inc., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993); accord Elliot v. Snyder, 246 S.C. 186, 191, 143 S.E.2d 374,

375 (1965). "[A] rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties." Rogers v. Salisbury Brick Corp., 299 S.C. 141, 143-44, 382 S.E.2d 915, 917 (1989).

Under South Carolina Code section 27-37-10 (1991), "[t]he tenant may be ejected upon application of the landlord or his agent when (1) the tenant fails or refuses to pay the rent when due or when demanded, (2) the term of tenancy or occupancy has ended, or (3) the terms or conditions of the lease have been violated." "[T]he majority of courts hold that to justify forfeiture, the breach must be material, serious, or substantial." Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). As held in Kiriakides, "the landlord's right to terminate is not unlimited and that the court's decision to permit termination must be tempered by notions of equity and common sense." Id. at 276, 440 S.E.2d at 366. The court continued: "[W]e hold that a forfeiture for a trivial or immaterial breach of a commercial lease should not be enforced." Id. The Kiriakides court adopted the standards articulated in Restatement (Second) of Contracts § 241 (1981) for determining whether the breach of a commercial lease is trivial or immaterial:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> > (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> > (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived;
> > (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> > (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Kiriakides, 312 S.C. at 276, 440 S.E.2d at 366-67 (quoting Restatement (Second) of Contracts § 241 (1981)).

Ellie and Stefani do not seem to argue the trial court erred in finding them in breach of the video gaming provisions. Clear evidence is in the record that Ellie failed to properly report revenues and that two phantom entries into the revenues resulted in an increase in the total revenue. Additionally, Stefani admitted he miscalculated the amount he was entitled to by adding an additional five percent in months for which it was not provided in the contract.

The main areas of contention center around the alleged resets of the video gaming machines and the failure to include certain expenses. At trial, much of the time and testimony was spent detailing the resets of the machines and the probable causes for the resets. Stefani maintained the resets were caused by mechanical failures or lightning strikes.

Miccichi presented an expert in the video gaming technology, who testified the machine resets were not a consequence of lightning strikes, but had to be the result of a deliberate reset of the machine. Additionally, he professed the printout detailing the money collected would show substantial differences, such that anyone would have known a reset occurred. The Master had sufficient evidence to demonstrate Stefani knew or should have known of the resets and that Stefani did nothing to prevent them or to communicate them to Miccichi.

Stefani had a duty to report any of the problems with the machines immediately to Miccichi. He could not retain the money that was collected above and beyond what he was entitled to under the agreement. Stefani knew Ellie had more money on hand due to the phantom entries, the miscalculations, and most notably the machine resets. Instead of presenting the discrepancies to Miccichi, Ellie kept the money without Miccichi's

knowledge or authorization. This was in violation of Miccichi's trust and at least one provision of their contract.

Miccichi contends there were other breaches, albeit minor ones, of the contract that when taken in total would provide justification for cessation of the lease. Stefani failed to properly insure Sports and its equipment as required by the Lease, list Miccichi as an insured on the policy, and account for repair money.

Miccichi testified that on several occasions he requested Stefani provide proof of sufficient insurance. He averred he was not provided evidence and could not obtain it from the insurance agent. Stefani's insurance agent professed that the value of the policy on Sports was only $400,000.00 until right before the time for trial when Stefani called to change it to the required $600,000.00.

The breaches of the gaming portions of the contract were significant. Miccichi presented evidence that Ellie knew it had excess cash on hand and failed to report it to Miccichi. This omission was a breach of their agreement requiring monies be turned over to Miccichi and mandating the reporting of any irregularities in the machines. In addition to the gaming violations, Miccichi provided evidence that neither Stefani nor Ellie was providing sufficient insurance on Sports as ordered by the Lease. Accordingly, we find there was sufficient evidence to support the Master's finding that termination of the lease was proper.

III. Guaranty

Stefani maintains the Master erred in finding him personally liable for $30,000.00 of the damages pursuant to his Guaranty signed at the same time as the lease. He first argues that Miccichi and Ronco did not plead the Guaranty. Additionally, he asserts the Guaranty was no longer in existence.

Ronco and Miccichi brought their counterclaim against Ellie, Maple Games, and Stefani individually. While it is true the Guaranty was not specifically listed as grounds for recovery in Respondent's pleadings, the

issue was tried by consent of the parties. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Rule 15(b), SCRCP; accord Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 608, 567 S.E.2d 514, 520 (Ct. App. 2002) ("A cardinal rule of law in South Carolina edifies: 'When issues not raised in the pleadings are tried by consent, they will be treated as if they had been raised in the pleadings.'"); Woods v. Rabon, 295 S.C. 343, 347, 368 S.E.2d 471, 474 (Ct. App. 1988) ("If neither party timely objects to evidence raising issues not pleaded, each is deemed impliedly to consent to the trial of such issues.").

Stefani and Ellie included the Guaranty in their complaint and introduced it at trial. No objection was made regarding the introduction of testimony or evidence supporting Respondent's right to collect under the Guaranty. Stefani does not assert he was not on notice of the default, just that it was not pled. Finally, Stefani's motion to alter or amend did not raise the issue of whether the Guaranty was properly pled. As we find the issue regarding the applicability of the Guaranty was tried by consent, we affirm the decision of the Master requiring payment of $30,000.00 by Stefani.

Stefani contends the Guaranty was merged out of existence and, therefore, Ronco and Miccichi could not collect damages. In the brief, Ellie and Stefani fail to cite any supporting authority for the position, and all arguments made are merely conclusory statements. South Carolina Appellate Court Rules specify what is required in the arguments section for an appellant's brief: "The brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority." Rule 208(b)(1)(D), SCACR. Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal. Glasscock, Inc. v. United States Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000); Welch v. Epstein, 342 S.C. 279, 288 n.1, 536 S.E.2d 408, 412 n.1 (Ct. App. 2000). We find Stefani and Ellie abandoned the issue on appeal.

IV. Concealment and other Findings of Fact

Stefani maintains the Master made several errors in his findings of fact. He asserts these errors detail a bias on the part of the judge. Finally, he contends the Master erred in concluding Stefani concealed income from the gaming machines. We find no evidence of bias on the part of the Master and rule his finding of fact that Ellie concealed income was supported by ample evidence.

Stefani first asserts the trial court erred in finding: "The Lease had been amended, modified, and/or superceded by a number of later agreements, giving rise to a dispute as to what agreements were in effect in 1999." Stefani avers the Lease Option Agreement played no part in the parties' dispute, and the only controversy was regarding the video gaming revenues.

However, there is ample evidence in the record showing Miccichi, through his counsel, requested a statement from Stefani as to what agreements were in effect and whether the merger agreement applied to the lease. Stefani's counsel refused to issue a response regarding what agreements were in effect, and instead answered: "Given the present conflict between the parties, my client will not set forth a blanket statement of its position regarding the merger clause. Instead, the applicability and affect [sic] of the clause will have to be determined on a case by case basis if, and when, a conflict arises between two competing agreements." While much of the dispute did involve the gaming revenues, there were further questions regarding what agreements were controlling. The finding of fact challenged by Stefani plays little to no part in the ultimate decision of the Master. Regardless, there is evidence in the record to support the finding of the Master.

Stefani next asseverates the Master erred in finding he "undertook a course of conduct to leverage and cause Miccichi to give him a share in the revenue." Again, the finding of fact is not highly relevant to the ultimate conclusion of the Master. However, we rule it was supported by evidence in the record. Testimony was presented that gaming machines were unplugged

or had other problems prior to Stefani being given a share of the machines revenues. A provision in one of the agreements specifically required the machines to stay plugged in during operating hours. The above evidence supports the Master's finding of fact.

Next, Stefani contends the trial court erred in finding: "Having Ellie report its computation of money owed first served as a check and balance system to Miccichi's numbers . . . . Stefani stopped giving Kate his spread sheet [sic], and then stopped giving his numbers first, subtly inducing her to give her numbers from the period Z tapes first." Miccichi testified that Stefani gave him the revenue reports, and then they would be reconciled with Miccichi's reports. His daughter averred that Stefani would get her report first or would not give her a report at all during the reconciliation. Finally, the main conflict over the money reported compared to the money received originated when Miccichi discovered entries in Stefani's records for dates when Miccichi and his daughter were both out of town. We find there was evidence presented to support the conclusion of the Master.

Finally, Stefani argues the Master erred in ruling he concealed money from Miccichi. However, there is evidence in the record to support the finding that money was concealed and Stefani had a duty to report the money to Miccichi.

Stefani improperly recorded money on several occasions, and because of the resets, Ellie had more money on hand than it was supposed to collect. The Master found Ellie had additional money and had a duty to disclose that to Miccichi.

"The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect

good faith and full disclosure without regard to any particular intention of the parties." Regions Bank v. Schmauch, 354 S.C. 648, 673-74, 582 S.E.2d 432, 445-46 (Ct. App. 2003). "Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." Anthony v. Padmar, Inc., 320 S.C. 436, 449, 465 S.E.2d 745, 752 (Ct. App. 1995). "Nondisclosure is fraudulent when there is a duty to speak." Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993). "Non-disclosure becomes fraudulent concealment only when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction." Lawson v. Citizens S. Natl. Bank of S.C., 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (1972); accord Manning v. Dial, 271 S.C. 79, 83, 245 S.E.2d 120, 122 (1978); Jacobson v. Yaschik, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967).

Under the July 1998 agreement, Ellie was responsible for collecting the money from the machines and the agreement stated: "If Ellie withholds any money taken from the machines it will be considered theft . . . ." The concealment by Ellie of the additional money in its possession amounted to a breach of contract and a fraudulent concealment.

The court's order states:

> This court finds that while there is no direct evidence that Stefani unlawfully took the money out of the machines and caused the resets, there is substantial circumstantial evidence that proves Ellie, either through Stefani or one of its other agents, did so.
>
> . . . .
>
> The handling of another person's cash is intrinsically fiduciary. The operation of the contract necessarily relied in part upon Stefani's honesty. Silence in the face of these duties constituted concealment and fraudulent activity.

We find evidence in the record to support the ruling by the trial court that Ellie had additional money on hand. Stefani had a duty to report it or turn it over to Miccichi, failed to perform on that duty, and therefore, concealed money from Miccichi.

V. Laches, Equitable Estoppel, and Waiver

Finally, Appellants maintain the trial court erred in not holding Respondents waived their right to complain about the additional revenues in Ellie's possession, or in the alternative, Respondents were barred from asserting the breaches by operation of the doctrine of laches or equitable estoppel. We disagree.

First, the issue may not be preserved for review on appeal. The Master did not specifically rule on any of the doctrines in his final order. The motion to alter or amend does not appear in the record, and the transcript of the hearing does not evidence the fact that these doctrines were specifically raised to the trial court. As such, they would not be preserved for review on appeal.

"It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (citing Creech v. South Carolina Wildlife and Marine Res. Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)). "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" Id. (citing I'on v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)); 4 C.J.S. Appeal and Error § 213 (1993)). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." Id. "It is well settled that . . . an appellate court cannot address an issue unless it was raised to, and ruled upon by, the trial court." Smith v. Phillips, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (emphasis added) (citing Beaufort County v. Butler, 316 S.C. 465, 451 S.E.2d 386 (1994)). See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the

first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

On the merits, every indication was that Miccichi trusted Stefani and relied upon Ellie through Stefani to keep proper records. Stefani was under obligation to report deviations and not withhold excess money. Miccichi found out about the discrepancies in the record keeping as soon as disagreements between the parties began. He immediately took steps to examine the records, including requesting Stefani's records and attempting to take control of the collection process. Appellants give no indication that the additional money in Ellie's possession could have been discovered sooner. There is sufficient evidence to support the conclusion that Respondents did not waive their right to complain about the breaches, nor do the doctrines of equitable estoppel or laches prevent them from maintaining Appellants breached the contract.

CONCLUSION

We find the Lease Option and the numerous subsequent agreements form one contract under which the parties were operating at the time their dispute arose in 1999. Appellants have breached various provisions of the contract, including the video gaming provisions relating to the collection and distribution of revenues. These breaches are sufficient justification for the termination of the lease. We conclude the personal Guaranty signed by Stefani was still in existence and enforceable. The Master correctly found Stefani liable for up to $30,000.00 of damages. Respondents did not waive their right to argue the retention of the money by Appellants was a breach of the contract, and neither the doctrine of equitable estoppel nor laches apply to bar the termination of the lease. Based on our standard of review, we find there was evidence to support the findings of the Master. Accordingly, the decision of the Master is

AFFIRMED.

GOOLSBY and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Larry Dean McCluney,

Appellant.

Appeal From Cherokee County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 3742
Heard January 14, 2004 – Filed February 2, 2004

REVERSED

Jack B. Swerling, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson and Assistant Attorney General David Spencer, all of Columbia; and Solicitor Harold W. Gowdy, III, of Spartanburg, for Respondent.

ANDERSON, J.: Larry Dean McCluney was convicted of trafficking in "more than 400 grams of cocaine." The trial judge sentenced McCluney to twenty-five years imprisonment and a $200,000 fine. McCluney appeals. We reverse.

FACTS/PROCEDURAL BACKGROUND

In February of 1999, Glenn Hadden, a drug dealer, had a conversation with Scott Simmons "about transferring a large quantity of cocaine" to Simmons. Shannon Randolph, Hadden's friend to whom he sold drugs, introduced Hadden to Simmons. Hadden advised Simmons that he could sell him two or three kilograms of cocaine. The two men reached an agreement whereby Hadden would sell "two kilos of cocaine" to Simmons for $40,000.

Hadden contacted Lieutenant David Oglesby, with the Cherokee County Sheriff's Department, and informed him of the drug deal with Simmons. Hadden agreed to work as a confidential informant in this drug transaction. The police then tape recorded Hadden's next phone call to Simmons. During the phone conversation, Simmons stated that someone from Shelby, North Carolina would be arriving in a black Lexus with the money for the transaction. At trial, Simmons testified the person he was referring to was McCluney.

Hadden arranged to meet with Simmons at a secluded location. Hadden was accompanied by an undercover police officer carrying two blocks of imitation cocaine. Immediately prior to the transaction, Simmons met McCluney and another individual at Brown's Store, a local gas station. McCluney, a native of Shelby, North Carolina, was driving a black Lexus. Police arrested McCluney at Brown's Store after Simmons and Hadden completed the drug transaction.

At trial, defense counsel cross-examined Hadden about the circumstances of the drug transaction. Specifically, counsel asked Hadden whether Shannon Randolph "said that Simmons was looking for two kilos of cocaine." Hadden responded: "Something to that effect." At that point, the following exchange occurred:

[The State]: Objection as to what that person may have said.

[Defense Counsel]: This goes to the state of mind of this witness, Your Honor, because he's the one that ultimately took the ball at that point and ran with it.

[The State]: I'm not sure how state of mind is relative, based on that conversation.

The Court: Sustained.

At the close of the State's case, defense counsel moved for a directed verdict arguing that, as the substance in this case was imitation cocaine, the State failed to prove the criminal offense of trafficking cocaine. Defense counsel contended that our Supreme Court, in Murdock v. State, 311 S.C. 16, 426 S.E.2d 740 (1992), held "it is not illegal . . . to possess imitation drugs with intent to distribute." The trial judge denied the motion for a directed verdict, finding that (1) Murdock was based on a narrow set of facts and (2) the trafficking statute was very broadly written.

ISSUES

I. Did the trial judge err in denying McCluney's motion for a directed verdict?

II. Did the trial judge err in refusing to allow defense counsel to cross-examine Simmons regarding the mandatory nature of the sentence provided for the crime charged?

III. Did the trial judge err in finding Hadden's testimony was inadmissible hearsay?

LAW/ANALYSIS

Directed Verdict

McCluney contends the trial judge erred in denying his motion for a directed verdict because, as the substance involved was imitation cocaine, the State was unable to present evidence of trafficking in cocaine. We agree.

On appeal from the denial of a directed verdict in a criminal case, an appellate court must view the evidence in the light most favorable to the State. State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002); State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003); State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002). When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Wilds, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003); State v. McLauren, 349 S.C. 488, 563 S.E.2d 346 (Ct. App. 2002). If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury. State v. Harris, 351 S.C. 643, 572 S.E.2d 267 (2002); State v. Condrey, 349 S.C. 184, 562 S.E.2d 320 (Ct. App. 2002). On the other hand, a defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McKnight, 352 S.C. 635, 576 S.E.2d 168 (2003); State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001); State v. Padgett, 354 S.C. 268, 580 S.E.2d 159 (Ct. App. 2003).

An "imitation controlled substance" is defined as a "noncontrolled substance which is represented to be a controlled substance and is packaged in a manner normally used for the distribution or delivery of an illegal controlled substance." S.C. Code Ann. § 44-53-110 (2002). In contrast, a "counterfeit substance" is defined as:

> a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who, in fact, manufactured, distributed, or dispensed such substance and which, thereby, falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser.

Id.

Lieutenant Oglesby testified the substance used in the drug transaction was imitation cocaine. Specifically, Oglesby stated the substance was "fake cocaine." That is, the substance was primarily "ground up" salt and flour mixed with other substances such as caffeine, lidocaine, and benzocaine. However, McCluney was indicted under the trafficking statute, S.C. Code Ann. § 44-53-370 (2002 & Supp. 2003), which refers to only the trafficking of controlled or counterfeit substances. Imitation controlled substances, such as the imitation cocaine used in the present case, are not mentioned in § 44-53-370. In fact, the only indictable offense applicable to imitation cocaine would be under S.C. Code Ann. § 44-53-390(a)(6) (2002), the statute prohibiting the delivery or distribution of imitation controlled substances. Section 44-53-390(a)(6)(A) provides: "It is unlawful for a person knowingly or intentionally to . . . distribute or deliver . . . an imitation controlled substance with the expressed or implied representation that the substance is a narcotic . . . controlled substance . . . ." Section 44-53-390(a)(6) differs from the general trafficking statute in that the offense of distribution or delivery of imitation controlled substances is not keyed to weight, whereas the trafficking statute is dependent upon it. Unlike the mandatory sentence of twenty-five years imprisonment for trafficking in controlled or counterfeit substances, the maximum sentence for delivery or distribution of imitation controlled substances is five years imprisonment and a $10,000 fine. S.C. Code Ann. § 44-53-390(b) (2002).

The Supreme Court explained the difference between imitation and counterfeit substances in Murdock v. State, 311 S.C. 16, 426 S.E.2d 740 (1992). In Murdock, the defendant was found in possession of "what was believed to be cocaine and . . . LSD." SLED tested the substances and determined they were not controlled substances. The defendant subsequently pled guilty to two counts of possession of a counterfeit substance with intent to distribute. Id. at 17-18, 426 S.E.2d at 741. The Court declared:

> This case revolves around the confusion between "counterfeit" and "imitation" substances. [Defendant] was indicted for two counts of possession with intent to distribute a *counterfeit* substance.
>
> "Counterfeit substance" means a controlled

> substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispenses such substance and which thereby falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser.

S.C. Code Ann. § 44-53-110 (1985).

The drugs found in [defendant's] possession were not counterfeit drugs. They were imitation drugs.

> "Imitation controlled substance" means a noncontrolled substance which is represented to be a controlled substance and is packaged in a manner normally used for the distribution or delivery of an illegal controlled substance.

S.C. Code Ann. § 44-53-110 (1985). We take this opportunity to clarify the practical difference between counterfeit and imitation substances. While there may be exceptions, such as when these substances are legally used for legitimate medical purposes, ordinarily there is no offense involving *counterfeit* LSD or cocaine, as these drugs are typically produced illegally and, therefore, usually do not have a trademark or label of a manufacturer.

Id. at 18, 426 S.E.2d at 742 (emphasis in original). After noting the differences in the statutory definitions of these substances, the Court found the defendant had not committed a crime because "it is not a criminal offense to possess *imitation* drugs with the intent to distribute. It is illegal only to actually distribute or deliver imitation drugs." Id. at 18-19, 426 S.E.2d at 742 (emphasis in original).

Given the differences between sections 44-53-370 and 44-53-390, we find the trial judge erred in denying McCluney's motion for a directed verdict. Imitation cocaine, the substance at issue in this case, is not a counterfeit substance and does not fall under the purview of the trafficking statute. This error was compounded by the trial judge's jury charge on trafficking. The judge did not charge the jury that the substance at issue in this case was imitation cocaine. Rather, he referred to the substance as counterfeit five times in the jury charge.

CONCLUSION

We reverse the trial judge's denial of McCluney's motion for a directed verdict because, as McCluney was in possession of imitation cocaine, he was improperly indicted under the trafficking statute. We do NOT reach any other issues. Based on the foregoing, McCluney's conviction and sentence is

REVERSED.

GOOLSBY, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard N. Kennedy, Appellant,

v.

Scott Edward Griffin and Dick Simon Trucking, Inc., Respondents.

Appeal From Cherokee County
Gary E. Clary, Circuit Court Judge

Opinion No. 3743
Heard November 5, 2003 – Filed February 3, 2004

REVERSED AND REMANDED

Kenneth L. Holland, of Gaffney, for Appellant

William S. Brown, of Greenville, for Respondent(s).

CONNOR, J.: Richard Kennedy appeals the trial judge's denial of his motion for a new trial based upon: (1) the admission of a blood test showing marijuana was in his system at the time of his automobile accident; and (2) the trial judge's jury instruction regarding the *per se* negligence statute. We reverse and remand.

FACTS

On May 29, 1998, Kennedy was driving his pickup truck on U.S. Route 29 in Cherokee County, approaching the intersection with Secondary Road 164. Scott Griffin was driving an eighteen-wheeler

truck in the scope of his employment with Dick Simon Trucking, Inc., on Secondary Road 164. At the intersection, Griffin pulled out in front of Kennedy to make a left turn onto U.S. Route 29. Kennedy's truck collided with the rear set of tires on the trailer of Griffin's truck. The weather was clear on the day of the accident.

Maxie Littlejohn witnessed Kennedy applying his brakes at the last second before impact, causing Littlejohn to wonder why Kennedy did not slow down to avoid the accident. The investigating officer found short skid marks in Kennedy's lane, suggesting Kennedy was not paying attention or panicked and froze before slamming on the brakes. Griffin testified that he saw Kennedy's truck and thought he had a safe distance to make the turn. Kennedy testified that Griffin bolted out in front of him, blocked both lanes of traffic, and then slammed on his brakes, forcing Kennedy to apply his brakes and swerve.

Kennedy was taken to the hospital by ambulance for treatment of his injuries. As part of a routine practice when treating victims of automobile accidents, the emergency room physician performed a blood test on Kennedy to determine if any substances were present in his system that would react adversely to medicines administered to him. The results of the blood test indicated the presence of marijuana in Kennedy's blood stream. The test results did not indicate the level of drugs in Kennedy's system or how long the drugs had been in his system. Nothing in the record indicates that marijuana was found in or around Kennedy's vehicle or that Kennedy smelled of marijuana.

Kennedy filed suit against Griffin and Dick Simon Trucking, Inc., seeking to recover damages for negligence. Prior to trial, Kennedy filed a motion *in limine* to exclude the admission of the blood test analysis showing the presence of marijuana in his system. The judge denied the motion. Kennedy's treating physician later testified before the jury that the toxicology report showed Kennedy had marijuana in his system, but the report did not indicate the level of intoxication or how long the marijuana had been in his system.

The trial judge instructed the jury on the law of negligence *per se* under the driving under the influence statute. The jury returned a verdict finding Kennedy was seventy percent at fault for the accident and Griffin and Dick Simon Trucking were thirty percent at fault. Kennedy, thus, was unable to recover any damages. He moved for a new trial, and the trial judge immediately denied the motion. Kennedy appeals.[1]

ISSUES

I. Did the trial judge err in allowing the admission of evidence that Kennedy had marijuana in his system?

II. Did the trial judge err in charging the jury on the law of negligence *per se*?

SCOPE OF REVIEW

The denial of a motion for a new trial is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion. Haselden v. Davis, 341 S.C. 486, 495, 534 S.E.2d 295, 300 (Ct. App. 2000), aff'd, 353 S.C. 481, 579 S.E.2d 293 (2003).

DISCUSSION

I. Admission of Marijuana Evidence

Kennedy argues he was entitled to a new trial due to the admission of the toxicology test results into evidence because the

[1] Dick Simon Trucking filed a Chapter 11 Petition on February 25, 2002, and an automatic stay was placed on the appeal. The United States Bankruptcy Court for the District of Utah entered an order liquidating Dick Simon Trucking. The order further allowed a lifting of the bankruptcy stay to the extent that Kennedy seeks to recover available insurance coverage.

probative value of the results was substantially outweighed by undue prejudice.

"Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue." Hoeffner v. The Citadel, 311 S.C. 361, 365, 429 S.E.2d 190, 192 (1993); Rule 401, SCRE; Rule 402, SCRE. However, otherwise relevant evidence may be excluded where its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Owens, 346 S.C. 637, 666, 552 S.E.2d 745, 760 (2001). A trial judge's decision to admit or exclude evidence is within his discretion and will not be disturbed unless an abuse of discretion occurs. Pike v. S.C. Dep't of Transp., 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000).

In support of their argument that the trial judge did not err in admitting the blood test results, Griffin and Dick Simon Trucking cite Gulledge v. McLaughlin, 328 S.C. 504, 492 S.E.2d 816 (Ct. App. 1997). In Gulledge, this Court discussed the admissibility of blood test results in a car accident case showing the deceased had a blood alcohol content (BAC) of .166. The deceased's spouse argued the BAC test result should not have been admitted because, standing alone, it was insufficient to establish impairment. Reviewing the deceased's BAC level of .166, testimony from a medical technologist that a BAC level of .4 or .5 would be inconsistent with life, the beer cans and cooler found near the deceased's vehicle, and the circumstances of the accident, the Court found there was evidence sufficient for a jury to conclude the deceased was impaired from alcohol consumption at the time of the accident. This Court held the trial judge did not abuse his discretion in admitting the evidence. Gulledge, 328 S.C. at 511-12, 492 S.E.2d at 819-20.

The present case is clearly distinguishable from Gulledge. Although Kennedy tested positive for marijuana, the test did not measure the quantity of marijuana in Kennedy's system or how recently Kennedy had been exposed to marijuana. Unlike the evidence

in Gulledge, no evidence in the present case indicated whether the marijuana was of such a level as to impair Kennedy's judgment. Further, the circumstantial evidence did not support an inference that Kennedy was impaired due to marijuana use. No marijuana was found in or near Kennedy's truck and there was no testimony that Kennedy smelled of marijuana. Although witnesses noticed that Kennedy delayed in applying his brakes, Kennedy's actions did not necessarily suggest that he was driving under an impairment.

Under these circumstances, evidence of the mere presence of marijuana, without further indication of impairment, could mislead the jury. The admission of this evidence was more prejudicial than probative because there was no correlation between the marijuana and the accident. Accordingly, the trial judge erred in allowing its admission. See Simco v. Ellis, 303 F.3d 929, 933-34 (8th Cir. 2002) (holding that evidence of a truck driver's cocaine use at the time of the accident should have been excluded as prejudicial where the toxicology test did not support a finding of intoxication and the mere mention of cocaine could inflame a jury); State v. McClain, 525 So. 2d 420 (Fla. 1988) (finding the trial court did not abuse its discretion in excluding evidence of trace amounts of cocaine in the defendant's blood where chemist could not express opinion on whether it would have affected defendant's driving and it would have seriously prejudiced defendant in the eyes of the jury); Martinez v. Graves, 2003 WL 21466962 (Tex. App. 2003) (affirming the trial judge's exclusion of evidence of cocaine in the deceased's system because the amount of cocaine was not established and there was no correlation between the cocaine and the accident).

II. Negligence *Per Se* charge

Kennedy also asserts he was entitled to a new trial because the trial judge erred in charging the law of negligence *per se* to the jury.

It is unlawful to drive in this State while under the influence of alcohol or drugs. S.C. Code Ann. § 56-5-2930 (1991).[2] A driver is "under the influence" when ingestion of drugs or alcohol results in the impairment of the driver's faculties, impairs the driver's ability to operate the vehicle with reasonable care, or impairs the driver's ability to drive as a prudent driver would operate the vehicle. State v. Kerr, 330 S.C. 132, 143-44, 498 S.E.2d 212, 217 (Ct. App. 1998).

"Negligence *per se* is established by proof that a party violated a statute which has the essential purpose of protecting persons such as the injured party from the kind of harm suffered." Gulledge, 328 S.C. at 510, 492 S.E.2d at 819 (internal citations omitted); Coleman v. Shaw, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1984) (holding that violation of a statute is negligence *per se*). "Where there is evidence from which the jury can reasonably infer one is in violation of a statute, that evidence will support a charge of that statute." Jefferson v. Synergy Gas, Inc., 303 S.C. 479, 481, 401 S.E.2d 427, 428 (Ct. App. 1991). A trial judge's decisions on jury instructions will not be reversed on appeal absent an abuse of discretion. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. at 389, 529 S.E.2d at 539 (citations omitted).

Over Kennedy's objection, the judge charged the jury on negligence *per se* as follows:

> It is unlawful for any person who is a habitual user of narcotic drugs, or any person who is under the influence of

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[2] This version of section 56-5-2930 was in effect at the time of the May 29, 1998, accident. Effective June 29, 1998, section 56-5-2930 was substantially revised. The new version incorporates the definition of "under the influence." It provides that it is unlawful to drive while under the influence of alcohol or drugs "to the extent that the person's faculties to drive are materially and appreciably impaired." S.C. Code Ann. § 56-5-2930 (Supp. 2002).

> intoxicating liquors, narcotic drugs, barbiturates, paraldehydes or drugs, herbs, or any other substance of like character, whether synthetic or natural, to drive any vehicle within this state.
>
> I charge you that violation of any of the provisions of these statutes is negligence as a matter of law. This means that proof of such violation is in itself proof of negligence, so that should you find such violation, your only concern would be whether the violation caused the injury and damage.

There was no evidence in the present case that Kennedy was under the influence of marijuana. As previously discussed, the blood test indicated the presence of the drug but not the level of intoxication. No marijuana was found on Kennedy or in his vehicle and no evidence was presented that Kennedy smelled of marijuana. Although there was evidence that Kennedy hesitated before braking, no evidence was presented to support an inference that his ability to drive was impaired from the ingestion of marijuana. There was no evidence that the marijuana in Kennedy's system was of such a level as to impair his ability to drive with reasonable care, and thus, there was no evidence to support an inference that Kennedy was driving "under the influence."

Accordingly, it was error for the trial judge to instruct the jury on the law of negligence *per se* where no evidence existed showing Kennedy was driving under the influence. See State v. Cooley, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000) (holding the trial judge erred when he issued a voluntary manslaughter charge because the record contained no evidence supporting a finding of sufficient legal provocation). Further, there is a reasonable probability that the jury based its verdict on the erroneous charge, in conjunction with the erroneous admission of evidence showing marijuana in Kennedy's system. As such, it is proper to grant a new trial. See Taylor v. State, 312 S.C. 179, 183, 439 S.E.2d 820, 822 (1993) ("[W]e cannot say beyond a reasonable doubt the jury did not base its verdict on the

erroneous jury charge . . . Because there is a reasonable possibility that the error contributed to the verdict, we REVERSE.").

CONCLUSION

The trial judge in this case erred in allowing the admission of blood test results showing the presence of an unmeasured amount of marijuana in Kennedy's system absent any other evidence indicating Kennedy was under the influence or driving under an impairment. Similarly, the trial judge erred in charging the jury on negligence *per se* when there was no evidence that Kennedy was driving "under the influence." The trial judge should have granted Kennedy's motion for a new trial. Accordingly, the jury's verdict is **REVERSED** and the matter is **REMANDED** for a new trial.

REVERSED AND REMANDED.

ANDERSON, J., concurs and GOOLSBY, J., dissents in a separate opinion.

GOOLSBY, J., dissenting: I disagree with Kennedy's argument that the circuit court erred in denying his motion to suppress the blood test.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[1] "All relevant evidence is admissible."[2] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[3] A trial judge's decision to admit or exclude evidence is within his discretion and will not be disturbed on appeal unless an abuse of discretion occurs.[4] Evidence showing the presence of drugs in Kennedy's system at the time of the accident is highly probative of impairment.[5]

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[1] Rule 401, SCRE.

[2] Rule 402, SCRE.

[3] Rule 403, SCRE.

[4] Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 185, 573 S.E.2d 789, 792 (2002).

[5] Gulledge v. McLaughlin, 328 S.C. 504, 510, 492 S.E.2d 816, 819 (Ct. App. 1997) (holding evidence of blood alcohol content admissible, stating that "obviously, evidence of [blood alcohol content] tends to make the existence of [the fact that plaintiff was driving under the influence] more or less probable"); see S.C. Code Ann. § 56-5-2930 (Supp. 2002) (declaring unlawful the operation of a motor vehicle while under the influence of a narcotic drug); State v. Long, 186 S.C. 439, 446, 195 S.E. 624, 627 (1938) (holding it is gross and culpable negligence for a drunken person to attempt to operate an automobile

The circumstances surrounding the accident, as in Gulledge v. McLaughlin,[6] provide corroborating evidence that Kennedy may have been under the influence of marijuana at the time of the accident and supply the basis for the admission of the blood test results. Kennedy's failure to stop quickly enough to avoid the accident, even though the tractor-trailer was in plain view, and the presence of marijuana in his blood system support an inference of impairment that the jury should have been allowed to consider in determining fault.

I also disagree with Kennedy's argument that the judge erred in instructing the jury that a violation of S.C. Code Ann. § 56-5-2930 (Supp. 2002) would constitute negligence per se.

A trial judge should confine jury instructions to the issues raised by the pleadings and supported by the evidence.[7] Here, the question of Kennedy's negligence was an issue framed by the pleadings and there was evidence that he had marijuana in his system at the time of the accident.[8] As our supreme court recognized in Field v. Gregory, [9] a

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upon a public highway).

[6] Gulledge, 328 S.C. at 510, 492 S.E.2d at 819.

[7] Ellison v. Parts Distribs., Inc., 302 S.C. 299, 301, 395 S.E.2d 740, 741 (Ct. App. 1990).

[8] See supra note 5.

[9] Field v. Gregory, 230 S.C. 39, 44, 94 S.E.2d 15, 18 (1956); see also State v. Wong, 486 A.2d 262, 268 (N.H. 1984) (holding a person who is proven to have driven an automobile while intoxicated is criminally negligent per se); cf. State v. Kellison, 11 N.W.2d 371, 373 (Iowa 1943) (holding drunken driving in violation of statute is not merely malum prohibitum, but is malum in se); State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 676 (1957) (holding that driving an automobile on a public highway while intoxicated is not only malum prohibitum but

violation of an applicable statute by a motorist is negligence per se. The jury instruction concerning the statute at issue was, therefore, proper. I would affirm.

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malum in se).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda Angus, Appellant,

v.

Burroughs & Chapin Co., Myrtle Beach Herald, Doug Wendel, Pat Dowling, Deborah Johnson, Chandler C. Prosser, Marvin Heyd, Chandler Brigham, and Terry Cooper, Respondents.

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

Opinion No. 3744
Heard September 9, 2003 – Filed February 9, 2004

AFFIRMED IN PART, REVERSED IN PART

L. Sidney Connor, IV, of Surfside Beach, for Appellant.

Jerry Jay Bender and Robert L. Widener, both of Columbia; L. Morgan Martin, Linda Weeks Gangi and Michael W. Battle, all of Conway; Scott B. Umstead, Thomas C. Brittain and William Edward Lawson, all of Myrtle Beach; and William C. Barnes, of Florence, for Respondents.

BEATTY, J.: Linda Angus appeals the circuit court's order granting summary judgment on her cause of action for civil conspiracy. We affirm in part and reverse in part.

FACTS/PROCEDURAL HISTORY

Linda Angus began employment with Horry County as its county administrator and chief operating officer on June 3, 1996. Her employment contract stated that she was "employed at the will" of the Horry County Council. The contract stipulated that Angus was to be given 365 days notice or 365 days severance pay in the event of a termination. On June 22, 1999, Horry County terminated her employment. Pursuant to the terms of the agreement, Angus was paid for 365 days and was extended the appropriate benefits.

On January 14, 2000, Angus filed a complaint against Burroughs & Chapin Co., Doug Wendel, Pat Dowling, Myrtle Beach Herald, Deborah Johnson, Chandler Prosser, Marvin Heyd, Chandler Brigham, and Terry Cooper ("the respondents"). Wendel and Dowling were employees of Burroughs & Chapin; Johnson was an employee of the Myrtle Beach Herald; Prosser, Heyd, Brigham, and Cooper were all Horry County Council members. Angus alleged numerous causes of action, including tortious interference with contractual relations, defamation, civil conspiracy, and unfair trade practices, all arising from the termination of her employment by Horry County. Specifically, Angus alleged that the respondents "conspired with numerous persons … to see that Angus was terminated from her employment as Horry County Administrator." And she alleged that the respondents did this to gain financial advantage and to avoid regulatory requirements.

After orders dismissing the causes of action for intentional interference with contractual relations, defamation, and unfair trade practices, the only remaining cause of action was for civil conspiracy. In an order dated November 28, 2001, the circuit court granted summary judgment to all Respondents as to the civil conspiracy claims. Angus appeals.

STANDARD OF REVIEW

"Summary judgment is proper where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law." Dawkins v. Fields,

345 S.C. 23, 27, 545 S.E.2d 515, 517 (Ct. App. 2001) (citing Rule 56(c), SCRCP; Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000)). "Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusions to be drawn from those facts." Id. at 28, 545 S.E.2d at 517 (citing Piedmont Engineers, Architects & Planners, Inc. v. First Hartford Realty Corp., 278 S.C. 195, 196, 293 S.E.2d 706, 707 (1982)). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Id. at 28, 545 S.E.2d at 518 (citing Bishop v. South Carolina Dep't of Mental Health, 331 S.C. 79, 85, 502 S.E.2d 78, 81 (1998)). "Summary judgment should be invoked cautiously to avoid improperly denying a party a trial on the disputed factual issues." Id. (citing Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)).

ANALYSIS

Angus argues the trial court erred in granting the respondents' motion for summary judgment as to the claim for civil conspiracy. We agree in part.

In South Carolina, "[a] civil conspiracy exists when there is (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes the plaintiff special damage." Robertson v. First Union Nat. Bank, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002) (citing Island Car Wash, Inc. v. Norris, 292 S.C. 595, 600, 358 S.E.2d 150, 152 (Ct. App. 1987)). "A civil conspiracy may, of course, be furthered by an unlawful act. … [but] an unlawful act is not a necessary element of the tort. An action for conspiracy may lie even though no unlawful means are used and no independently unlawful acts are committed." Lee v. Chesterfield General Hosp., 289 S.C. 6, 11, 344 S.E.2d 379, 382 (Ct. App. 1986). "A conspiracy is actionable only if overt acts pursuant to the common design proximately cause damage to the party bringing the action." Future Group, II v. Nationsbank, 324 S.C. 89, 100, 478 S.E.2d 45, 51 (1996) (citing Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981)).

In granting summary judgment, the trial court relied exclusively on Ross v. Life Ins. Co. of Va., 273 S.C. 764, 259 S.E.2d 814 (1979). There, plaintiff brought a wrongful termination action against his former employer, alleging that the former employer had conspired with others to terminate his employment. Our supreme

court sustained the summary judgment for the former employer, reasoning that an at-will employee "may be terminated at any time for any reason or no reason at all." Id. at 765, 259 S.E.2d at 815. The supreme court based its decision largely on the employer's ability to fire plaintiff at any time, for no reason or for a bad reason.

Ross clearly holds that at-will employees can be fired for any reason. Moody v. McLellan, 452, 295 S.C. 157, 162, 367 S.E.2d 449 (1988). It also holds that an at-will employee cannot maintain an action against a former employer for civil conspiracy that resulted in the employee's termination. Mills v. Leath, 709 F. Supp. 671, 675 (D.S.C. 1988). The trial court was therefore correct to dismiss the action as to the four council members. Angus claims that she was suing them not as council members, but in their capacity as individuals. That argument is unpersuasive. The employment agreement stated on its face that Angus served "at the will" of the Council. Clearly, the council members acted within their authority when they fired Angus and they cannot be sued for doing what they had a right to do. See Antley v. Shepherd, 340 S.C. 541, 550, 532 S.E.2d 294, 298 (Ct. App. 2000) (holding that a county official was immune from liability in his individual capacity since that official acted within his authority in firing an employee who was serving at the will of the official).

Burroughs & Chapin, Wendel, Dowling, the Myrtle Beach Herald, and Johnson ("the remaining respondents") present a different issue than the one addressed in Ross. They are not Angus's former employers. As to them, the appropriate inquiry is whether an at-will employee can maintain an action for civil conspiracy against a third-party (other than the former employer) on the theory that the third-party's conspiracy caused the former employer to fire the employee. We believe that an at will-employee can maintain such an action.

In Todd v. S.C. Farm Bureau, 283 S.C. 155, 321 S.E.2d 602 (Ct. App. 1984) (overruled on other grounds), the Court recognized that a former employee could bring an action for tortious interference against a third party, even if the employment was at will. In that case, Farm Bureau, the employer, had hired Equifax to investigate some irregularities. Equifax identified Todd, an employee, as the alleged wrongdoer. Farm Bureau then fired Todd. Todd sued Farm Bureau and Equifax. The jury found for Todd, awarding him damages. Farm Bureau and Equifax appealed. The Court ruled that "where a third party induces an employer to discharge an employee who is working under a contract terminable at will, but which employment would have continued indefinitely except for such interference, a cause of action arises in favor of the employee against the third person," if the

alleged inducement "influence[d], … or coerce[d] one of the parties to the contract to abandon the relationship or breach the contract." Id. at 163, 321 S.E.2d at 607 (citation omitted). However, the Court found that the evidence failed to show that Equifax had participated in a conspiracy and reversed.[1]

Other jurisdictions have adopted the same principle. The Georgia Court of Appeals ruled in favor of an attorney who had sued a railroad company because the railroad company had "induced the [attorney's] client, and conspired with him" to fire the attorney. Studdard v. Evans, 135 S.E.2d 60, 64 (Ga. Ct. App. 1964). As a result, the attorney was forced to withdraw from the case. The railroad company argued that the attorney did not state a cause of action because the client was free to fire him at any time. The court rejected the argument. The court held that "the fact that employment is at the will of the employer, [does] not give immunity to a third person who, without justification, interferes with the relation between the parties to the contract." Id.

North Carolina reached a similar conclusion in Smith v. Ford Motor Co., 221 S.E.2d 282 (N.C. 1976). There, the court first defined an "outsider" as "one who was not a party to the terminated contract and who had no legitimate business interest of his own in the subject matter thereof." Smith, 221 S.E.2d at 292. Then the court explained:

> The question presented to us by this appeal is: If A, knowing B is employed by C under a contract terminable at will by C, maliciously causes C to discharge B, which C would not otherwise have done, can B maintain in the courts of this State an action against A for damages? Our conclusion is that he can.

Id. at 290.

These facts are similar if not identical to those alleged by Angus. If the remaining respondents maliciously caused Horry County to discharge Angus,

[1] In Todd v. S.C.Farm Bureau, 287 S.C. 190, 336 S.E.2d 472 (1985), the Supreme Court reversed that decision, reasoning that the Court had replaced the jury's findings of facts with its own. Having found "some competent evidence on which the jury could return a verdict for Todd" (Equifax was the party that identified Todd as "leaking information," had administered a "voice stress" test, and was slated to conduct a polygraph), the Supreme Court reinstated the jury's award against Equifax.

assuming that Angus was able to continue performing her job well – then the answer is yes, Angus can bring an action against them.[2]

As stated earlier, the trial court in the current case relied on Ross in reaching its conclusion. Ross in turn cites Kirby v. Gulf Oil, 230 S.C. 11, 94 S.E.2d 21 (1956) as its authority for the principle that "a conspiracy may not be based upon an act done in the exercise of a legal right." Ross, 273 S.C. at 765, 259 S.E.2d at 815. Kirby cites McMaster v. Ford Motor Co., 122 S.C. 244, 115 S.E. 244 (1921) and Howle v. Mountain Ice Co., 167 S.C. 41, 165 S.E. 724 (1932). But any reliance on Ross and those cases is misplaced. Kirby, McMaster and Howle are all easily distinguishable from Angus's claim, for there is no third party involvement in those cases.

Kirby involved real estate. Kirby had a month-to-month lease on a gas station, but Kirby's landlord, Whitlock, terminated the lease, causing Kirby to lose the business. Kirby sued, alleging Whitlock, Gulf Oil, and Whitlock's son conspired to take his gas station. The supreme court sustained a dismissal in favor of the defendants, holding that "a conspiracy may not be based upon an act done in the exercise of a legal right." Kirby, 230 S.C. at 27. The court found that Whitlock, Sr., had terminated the lease for his own reasons, without any prompting from anyone. Neither Whitlock's son nor Gulf Oil had played an active role in Kirby's ruin.

McMaster, too, is easily distinguished from this case. In McMaster, the issue revolved around a party's right to determine with whom to conduct business. McMaster sued Ford and Ford's dealers because Ford would not use and would not allow its dealers to use McMaster's products on Ford-manufactured automobiles. Since the dealers were Ford's agents, no independent third party was involved. See Todd, 283 S.C. at 164, 283 S.E.2d at 607 (1984) (citing Muller v. Stromberg, 427 So.2d 266 (Fla. Dist. App. 1983) (ruling that an officer or agent of a corporation acting for or on behalf of the corporation is not a third party)). In dismissing the action, the McMaster court explained that "[w]hile there is some difference of opinion, the weight of authority is in favor of the general proposition that an act done in the exercise of a legal right cannot be treated as wrongful and actionable merely because a malicious motive prompted the exercise of the right." McMaster,

[2] Angus had been employed for about three years at the time and had received excellent evaluations.

122 S.C. at 246. But that general principle protects only a person directly involved in the underlying relationship, *not* a third party.[3]

Moreover, the McMaster court relied secondarily on the absence of an unlawful act and of an unlawful means. The court reasoned that the allegation of conspiracy was of no import "in the legal consequences, because…[the] defendants did nothing unlawful and resorted to no unlawful means to accomplish their purpose." Id. at 247. However, as indicated earlier, an unlawful means and unlawful purpose are required elements of a criminal, not civil, conspiracy. An action for civil conspiracy may exist even though no unlawful means were used. See LaMotte v. Punch Line, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988); Lee, 289 S.C. at 11, 344 S.E.2d at 382.

Finally, in Howle, the plaintiff sued the defendants alleging they conspired to eliminate competition in the ice business. Even while sustaining a dismissal of the action, the supreme court clarified its position:

> [A]s to conspiracy, [the principle] that two or more may lawfully do, under agreement and regardless of purpose or motive whatever one may lawfully do singly … *is not* the majority view or that of this court. We *should not* be understood as holding that under no circumstances can an act resulting in damage, when done by two or more pursuant to an agreement, be actionable if a like act, when done by one alone, would not be actionable. The decision here is based solely … upon the insufficiency of the evidence to show an agreement between the defendants … the gravamen of the charge.

Id. at 47, 165 S.E. at 729 (*aff'd on reh'g*) (emphasis added).

In the current case, the remaining respondents argued, and the trial court accepted, that "[s]ince Mrs. Angus' employment was terminable at will, she has no

[3] Even in cases involving the former employer, South Carolina courts and others have placed some limitations on the power to terminate at-will employees. See e.g. Ludwick v. Minute of Carolina, Inc., 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985) (recognizing a public policy exception to the doctrine of at-will employment, reasoning that "[w]here the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises); Bd. of County Commrs. v. Umbehr, 518 U.S. 668, 685 (1996) (holding that the First Amendment protects independent contractors from termination or prevention of automatic renewal of at-will government contracts in retaliation for their exercise of freedom of speech); Haddle v. Garrison, 525 U.S. 121, 126 (1998) (holding that a fired at-will employee did suffer an "injury in his person or property" within the meaning of § 1985(2), reasoning that common law had long offered a remedy for such losses).

cause of action for civil conspiracy." That conclusion is excessively broad. In Lee, the Court pointedly rejected the notion that "liability for the tort of conspiracy cannot be grounded on a lawful act." 289 S.C. at 12, 344 S.E.2d at 382.

The United States Supreme Court had reached a similar conclusion much earlier in Truax v. Raich, 36 S.Ct. 7, 9 (1915):

> It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. *The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others.* The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, *the unjustified interference of third persons is actionable although the employment is at will*.

(emphasis added).

CONCLUSION

Its ruling notwithstanding, Ross does not control the current case. The facts as alleged here place the remaining respondents squarely at the heart of the conspiracy. The theory of the case is not that Horry County decided to fire Angus and conspired with the remaining respondents to achieve that result, but rather that they decided to "get rid of" Angus and induced Horry County to fire her.

Based on the foregoing, the trial court's order is **AFFIRMED** as to the council members and **REVERSED** as to the remaining respondents.

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