OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

November 26, 2001

ADVANCE SHEET NO. 41

Daniel E. Shearouse, Clerk
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Phillip P. Watts, Sr., Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From York County
Frank Eppes, Trial Judge
J. Derham Cole, Post-Conviction Judge

Opinion No. 25378
Submitted October 24, 2001 - Filed November 26, 2001

REVERSED AND REMANDED

Assistant Appellate Defender Aileen P. Clare, of South Carolina Office of Appellate Defense, of Columbia, for petitioner.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General B. Allen Bullard, Jr., Assistant Attorney General David Spencer, all of

Columbia, for respondent.

CHIEF JUSTICE TOAL: Phillip F. Watts, Sr. ("Petitioner") appeals the denial of his application for Post Conviction Relief ("PCR"). We reverse and remand for a new trial.

FACTUAL/PROCEDURAL BACKGROUND

Petitioner was indicted by the York County Grand Jury for distribution of crack cocaine on March 14, 1996. Petitioner pled guilty to distribution of crack cocaine, second offense, in May 1996. Petitioner was sentenced to 8 years imprisonment.

Petitioner was not represented by counsel at his plea proceeding. At some point before Petitioner entered his guilty plea on May 6, 1996, the court relieved Petitioner's court appointed attorney upon Petitioner's motion. During the plea proceeding, the solicitor told the plea judge he had advised Petitioner to hire a new, private attorney when Petitioner relieved his appointed attorney. The plea judge did not inquire as to why Petitioner had failed to hire a new attorney or advise Petitioner of the disadvantages of appearing without an attorney. The plea judge told Petitioner he had a right to counsel, and that he had been appointed counsel which he had chosen to relieve. However, the judge said nothing further and did not elicit any response from Petitioner regarding his right to counsel or his waiver of that right.

On June 24, 1996, Petitioner filed an application for post conviction relief, alleging that he had no lawyer when he entered his guilty plea, and that his plea was coerced. An evidentiary hearing was held on June 2, 1997 and Petitioner's application was denied in an order dated August 18, 1997. This Court granted certiorari on the following issue:

I. Is Petitioner entitled to a new trial because he did not knowingly and intelligently waive his right to counsel before pleading guilty?

LAW/ANALYSIS

I. Waiver of Right to Counsel

Petitioner argues his guilty plea was invalid because he did not knowingly and intelligently waive his right to counsel when he appeared at trial with no attorney and pled guilty. We agree.

In order to waive the right to counsel, the accused must be (1) advised of his right to counsel and (2) adequately warned of the dangers of self-representation. *Prince v. State,* 301 S.C. 422, 392 S.E.2d 462 (1990) (citing *Faretta v.California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1972)). It is the trial judge's responsibility to determine whether there is a competent, intelligent waiver by the defendant. *State v. Dixon*, 269 S.C. 107, 236 S.E.2d 419 (1977) (citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). If the trial judge fails to address the disadvantages of appearing *pro se*, as required by the second prong of *Faretta v. California*, "this Court will look to the record to determine whether petitioner had sufficient background or was apprised of his rights by some other source." *Prince,* 301 S.C. at 424, 392 S.E.2d at 463 (citing *Wroten v. State,* 301 S.C. 293, 391 S.E.2d 575 (1990)).

> While a specific inquiry by the trial judge expressly addressing the disadvantages of a *pro se* defense is preferred, the ultimate test is not the trial judge's advice but rather the defendant's understanding. If the *record demonstrates* the defendant's decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied.

Wroten, 301 S.C. at 294, 391 S.E.2d at 576 (citing *Fitzpatrick v. Wainwright,* 800 F.2d 1057, 1065 (11th Cir. 1986)) (emphasis added).

In a PCR action, if the record fails to demonstrate the petitioner made an

informed choice to proceed *pro se,* with "eyes open," then the petitioner did not make a knowing and voluntary waiver of counsel and the case should be remanded for a new trial. *See Wroten; Prince; Bridwell v. State*, 306 S.C. 518, 413 S.E.2d 30 (1992). Our precedent requires the trial judge to conduct "a hearing to determine whether a request to proceed *pro se* was accompanied by a knowing and intelligent waiver." *State v. Bateman,* 296 S.C. 367, 369, 373 S.E.2d 470, 471 (1988). In *Bateman*, all six defendants refused the judge's attempts to appoint counsel and also his offer to have a public defender sit with them during the trial for support. The judge allowed the trial to proceed without an extensive inquiry into the background of any of the six defendants. This Court reversed and remanded for a new trial because it found "no determination as to waiver of counsel was made with regard to any of the six appellants." *Id.*

It is clear from the record in this case the plea judge made no effort to advise Petitioner of the disadvantages of appearing *pro se* during the plea proceeding. The plea judge permitted *the solicitor* to relate the circumstances of Petitioner's release of his appointed attorney. The judge did not ask Petitioner a single question about why he relieved his counsel or if he wished to have counsel present. He simply stated, "You have the right to a lawyer. And the court appointed you one, you didn't want him, so he got relieved," apparently relying on the solicitor's word that he told Petitioner to get a new attorney by trial as sufficient information. Furthermore, Petitioner did not say anything about counsel during the plea proceeding. He never said he wished to waive his right to counsel, he did not want an attorney, or he wanted to represent himself. According to these facts, it is clear the plea judge did not effectively warn Petitioner of the dangers of appearing *pro se*, as required by *Faretta v. California.*

As discussed, in the absence of proper *Faretta* warnings, the reviewing court may look to the record to determine whether Petitioner's background indicated he could make an intelligent waiver without such advice. *Prince*. The plea judge failed to make a meaningful inquiry into Petitioner's background to determine whether Petitioner had sufficient experience or knowledge to waive counsel. The judge asked Petitioner for his age and education level, and about his first offense. Petitioner answered that he was 41 years old and had graduated

from high school. When the judge asked Petitioner about his first offense, the *solicitor answered for Petitioner*, stating he was convicted "sometime ago" (in 1983) of simple possession of marijuana and strong arm robbery. The solicitor explained, "[i]t's for that reason that I'm recommending he be sentenced to the minimum – to a cap of eight years." The plea judge did not inquire into the circumstances of the prior conviction, and there is nothing in the record to indicate whether Petitioner served time, pled guilty to the charges, or was represented by counsel.

At Petitioner's PCR hearing, Petitioner's counsel argued there was nothing in the record to show either Petitioner (1) was warned or (2) had sufficient background to understand the disadvantages of self-representation, enabling him to intelligently waive his right to counsel. In response, the State argued the transcript of the proceeding in which Petitioner moved to relieve his appointed attorney *probably* reflected that the presiding judge explained the danger of going further without representation to Mr. Watts. The State, however, did not have this transcript at the PCR hearing and never produced it to the Court. Instead, the State offered the testimony of the prosecuting solicitor, Mr. Cranshaw. Mr. Cranshaw testified he did not specifically recall the hearing in which Petitioner's appointed attorney was released, but that he *believed* the judge *would have warned* Petitioner.

The record fails to demonstrate Petitioner was warned adequately of the dangers of self-representation when he relieved his appointed counsel and, affirmatively demonstrates Petitioner was *not warned* by the plea judge, as *Faretta v.California* requires. Further, the record fails to show Petitioner had sufficient background to make an intelligent waiver of counsel absent *Faretta* warnings. Therefore, the denial of PCR is reversed and the case is remanded for a new trial.

CONCLUSION

For the foregoing reasons, we **REVERSE** the denial of PCR and **REMAND** for a new trial.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Masterclean, Inc., CPM Environmental, Inc., William B. Smith and Barbara P. Smith, Plaintiffs,

v.

Star Insurance Co., Defendant and Third Party Plaintiff,

v.

Masterclean of North Carolina, Inc., Third Party Defendant.

CERTIFIED QUESTION
Matthew J. Perry, Jr., Senior United States District Judge

Opinion No. 25379
Heard October 23, 2001 - Filed November 26, 2001

QUESTIONS ANSWERED

Robert Bryan Barnes and Kate B. Barroll, of Rogers, Townsend & Thomas, of Columbia, for Plaintiffs.

C. Allen Gibson, Jr., and Jonathan D. Crumly, Sr., both of Buist, Moore, Smythe & McGee, of Charleston, for Defendant/Third Party Plaintiff.

L. Franklin Elmore and Nancy W. Monts, of Ogletree, Deakins, Nash, Smoak & Stewart, of Greenville; and Edward G. Gallagher, of Washington, D.C., for Amicus Curiae The Surety Association of America.

JUSTICE BURNETT: We agreed to answer the following questions certified by the United States District Court for the District of South Carolina:

> Does South Carolina recognize a cause of action in tort by a principal against its surety for the surety's bad faith refusal to pay first party benefits to an obligee pursuant to a construction performance bond?
>
> If so, what are the elements of this cause of action and what legal standards apply to the surety's actions in the investigation and resolution of an obligee's claim against the bond?
>
> Does a principal have a private right of action against its surety pursuant to S.C. Code. Ann. §§ 38-57-70 & 38-59-20 (1989)?

FACTS

The University of South Carolina ("U.S.C.") contracted with Masterclean, Inc.[1] ("Masterclean") to remove asbestos from a U.S.C. building. Masterclean obtained a performance bond from Star Insurance Company ("Star") pursuant to South Carolina law for $1,383,214 to assure performance. See S.C. Code Ann. § 11-35-3030 (2)(i) (Supp. 2000).

U.S.C. notified Star in November 1995 of Masterclean's default on the contract and made a claim on the bond. Star began a claim investigation. U.S.C. formally terminated the contract in December 1995.

Star eventually concluded Masterclean defaulted on the contract but refrained from deciding the claim on the bond pending negotiations with U.S.C. As negotiations progressed, U.S.C. hired a replacement contractor to complete the project.

The South Carolina Chief Procurement Officer issued a ruling in May 1996 finding Masterclean in default and ordering it to pay $1,000,000 in damages. All parties entered a negotiated settlement for $900,000 with Star liable for $100,000 and Masterclean paying the difference.

Plaintiff argues Star should have mitigated the damages by performing its bond obligations once it determined Masterclean defaulted and before

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[1] Plaintiffs Masterclean, Inc., CPM Environmental, Inc., William B. Smith and Barbara P. Smith sued Star Insurance Company in state court. Star removed the case to federal court. Star filed a Third Party Complaint against Masterclean for indemnification. For simplicity we refer to Masterclean, Inc., CPM Environmental, Inc., William B. Smith and Barbara P. Smith collectively as Plaintiff.

U.S.C. obtained a replacement contractor.[2] Plaintiff alleges Star's failure to take over the project entitles it to damages in tort for Star's bad faith refusal to honor U.S.C.'s claim under the bond.

ISSUE

Can Plaintiff sue Star in tort for its bad faith refusal to pay U.S.C. under the performance bond?

LAW/ANALYSIS

A surety is a tripartite agreement among the surety company, the principal who is primarily responsible for performing the contract, and the obligee for whose benefit the agreement is made. 74 Am. Jur. 2d *Suretyship* § 3 (1974). "Suretyship is a contractual relation resulting from an agreement whereby one person, the surety, engages to be answerable for the debt, default, or miscarriage of another, the principal." Id. § 1; see also, Philco Fin. Corp. v. Mehlman, 245 S.C. 139, 139 S.E.2d 475 (1964). South Carolina law treats a surety agreement as a credit arrangement where the surety lends credit to the principal who otherwise has insufficient credit to obtain the

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[2]The bond provided, in part:

> Whenever the Contractor shall be, and declared by Owner to be in default under the Contract, the Owner having performed Owner's obligations thereunder, the Surety may promptly remedy the default, or shall promptly
>
> 1) Complete the contract in accordance with its terms and conditions, or
>
> 2) Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and...arrange for a contract between such bidder and Owner.

contract with the obligee. Philco Fin. Corp. v. Mehlman, supra.

A surety must pay the obligee only if the principal defaults, but the surety generally retains a right of indemnification from the principal. Restatement (Second) of Security § 82 cmt. b (1974). At all times, the principal retains the primary obligation to perform the contract and the primary liability for default of the contract. 74 Am. Jur. 2d *Suretyship* § 3 (1974).

Plaintiff asserts sureties are insurers and a performance bond is insurance. Such a determination would allow Plaintiff to sue in tort for Star's bad faith refusal to pay insurance benefits on a first party claim under Nichols v. State Farm Mutual Automobile Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983). This is an issue of first impression in South Carolina.[3] A survey of other states shows a split of authority in allowing such suits. See Transamerica Premier Ins. Co. v. Brighton Sch. Dist. 27 J, 940 P.2d 348 (Colo. 1997)(finding an obligee may sue a surety in tort for bad faith refusal); see also, United States for the Use of Don Siegel Constr. Co., Inc. v. Atul Constr. Co., 85 F. Supp. 2d 414 (2000)(Federal district court construing New Jersey law to allow an obligee to sue for bad faith damages against a surety); Loyal Order of Moose, Lodge 1392 v. International Fid. Ins. Co., 797 P.2d 622 (Alaska 1990); Dodge v. Fidelity and Deposit Co., 161 Ariz. 344, 778 P.2d 1240 (Ariz. 1989); K-W Indus. v. National Sur. Corp., 231 Mont. 461, 754 P.2d 502 (Mont. 1988); Szarkowski v. Reliance Ins. Co., 404 N.W.2d 502 (N.D. 1987); cf. Board of Dirs. of Ass'n of Apartment Owners v. United Pac. Ins. Co., 77 Haw. 358, 884 P.2d 1134 (Haw. 1994)(court found a surety owes a duty of good faith to the obligee and principal on the bond, but specifically declined to address whether Hawaii recognized a tort claim against a surety for bad faith refusal); but see, Cates Constr., Inc. v. Talbot Partners, 21 Cal. 4th 28, 980 P.2d 407 (Cal. 1999)(California does not

[3] While the South Carolina Court of Appeals dealt with this issue in American Fire and Casualty Co. v. Johnson, 332 S.C. 307, 504 S.E.2d 356 (Ct. App. 1998), it refused to determine whether Nichols applied to sureties.

recognize an obligee's bad faith tort claim against a surety); Great American Ins. Co., v. North Austin Mun. Util. Dist. No. 1, 908 S.W.2d 415 (Tex. 1995); Institute of Mission Helpers of Baltimore City v. Reliance Ins. Co., 812 F. Supp. 72 (D. Md. 1992)(construing Maryland law to not allow a bad faith claim by obligee against surety).

Plaintiff advances three arguments to support the contention that a surety agreement is an insurance contract subjecting the surety to a Nichols claim. Initially, Plaintiff asserts the Legislature intended to treat sureties as insurance companies for purposes of Nichols liability because they are regulated by the state insurance code. See S.C. Code Ann. § 38-1-10, et. seq. (Supp. 2000). Several courts who find an action for a surety's bad faith refusal to pay an obligee base their decision on similar state laws. See Transamerica Premier Ins. Co. v. Brighton Sch. Dist. 27 J, supra; Dodge v. Fidelity and Deposit Co., supra.

The South Carolina Insurance Code regulates surety companies. See S.C. Code Ann. § 38-1-20 (13), (22), (25), (37) (Supp. 2000). However, the surety's presence in a regulatory scheme does not render common law duties of an insurer applicable to a surety. A bad faith tort action arises from the common law due to special characteristics of the insurance relationship, not simply because it is a regulated industry. See Nichols v. State Farm Mut. Auto. Ins. Co., supra. The insurance regulatory scheme provides for administrative penalties, not a Nichols common law right of action. See S.C. Code Ann. § 38-2-10 (Supp. 2000) (providing administrative penalties for violating the insurance laws of this state). In sum, because South Carolina regulates surety companies under the insurance code does not mandate finding a Nichols common law action in this case. Cf. Wilson v. McCleod, 274 S.C. 525, 265 S.E.2d 677 (1980) (the presence of a business in the insurance code does not necessarily create an insurance relationship).

Next, Plaintiff contends this Court should extend Nichols to sureties because courts treat surety agreements as insurance contracts at common law. Plaintiff misconstrues the common law's analogy between surety contracts and insurance contracts. A leading treatise on insurance practice highlights

the source of this confusion:

> It has frequently been held that contracts of suretyships are regarded as those of "insurance," where a corporate surety engages in the business for a profit, and that the rights and liabilities of the parties are governed by the rules applicable to contracts of insurance. This is a rule governing the construction of such contracts, however, and is not intended to alter the normal incidents of a suretyship contract, such as the surety's recourse against the principal for losses paid by it. If a compensated surety's contracts were regarded as insurance for all purposes, it is apparent that the surety would not have such right of recourse, together with all the other rights and duties which devolve upon a surety as such.

Appleman, Insurance Law and Practice, § 5273 (1981).

The treatise clearly shows the surety-insurance analogy is intended for purposes of contract construction alone. This analysis is supported by our holding in State Agricultural & Mechanical Society v. Taylor, 104 S.C. 167, 88 S.E. 373 (1916). In that case, we examined the difference between a "voluntary" surety and a for-profit surety company. Traditionally, courts viewed sureties as a favorite of the law, construing contracts *strictissimi juris* resolving all doubts and technicalities in the surety's favor. See Laurence P. Simpson Suretyship 101-12 (1950).

The State Agricultural & Mechanical Society rule removes *strictissimi juris* in surety contracts by for-profit companies. Courts now construe for-profit surety contracts similar to insurance contracts, resolving any doubts against the surety. See, Greenville Airport Commission v. U.S. Fidelity & Guaranty Co. of Baltimore, Md., 226 S.C. 553, 86 S.E.2d 249 (1955). Courts analogize insurance with surety for purposes of contract construction, not to expand common law duties in tort.

Finally, Plaintiff attempts to create a common law duty by arguing the

public policy reasons articulated in Nichols exist in the surety context. These policy considerations are either nonexistent or less persuasive in the surety context.

One public policy rationale the Nichols Court relied upon was the existence of a strong public interest in insurance contracts. Nichols, 279 S.C. at 340, 306 S.E.2d at 619. A surety agreement affects the public interest, but its interest is significantly less than in insurance. Surety agreements in public construction projects involve commercial entities and do not involve the public's interest as do insurance contracts. See e.g., S.C. Code Ann. § 56-10 -20 (Supp. 2000)(requiring all motor vehicle owners in South Carolina to maintain liability insurance).

A second public policy reason the Nichols court relied upon was an insured lacks bargaining power and must accept policies on an accept or reject basis. Nichols, 279 S.C. at 340, 306 S.E.2d at 619. Inequities in bargaining power are largely absent in the surety context because the obligee, not the surety, usually dictates the bond requirements.

A more important distinction is the obligations of each party are set by the underlying construction contract, not the bond. On a public project, the owner sets the terms of the contract and all bidders must agree to it, the surety usually does not participate in these negotiations and has little or no say in the terms of the contract whose performance it guarantees. See R. Cooper Shattuck, Bad Faith: Does It Apply To Sureties In Alabama?, 57 Ala. Law. 241, 244 (1996). The principal is in position to contractually control the limits of its performance and liability. This process contrasts sharply with insurance where the insurer offers policies on standard forms on an accept or reject basis.

Another public policy reason underlying Nichols holding is the understanding an insurer, liable only in contract, may delay and deny a claim with virtual impunity at the risk of only paying the policy limits. Nichols, 279 S.C. at 340, 306 S.E.2d at 619. We have previously held a surety's liability cannot extend beyond the penal amount of the bond. South Carolina

Pub. Serv. Comm'n v. Colonial Constr. Co., 274 S.C. 581, 266 S.E.2d 76 (1980). This situation may give the surety, like an insurer, the incentive to delay and deny bond claims because it will ultimately only have to pay the bond amount.

We believe this factor alone is insufficient to recognize a bad faith claim for sureties. This determination is strengthened by this Court's reluctance to extend tort actions for violating good faith obligations. See F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 54-55 (1990). The presence of a principal's use of bad faith as a defense in contract, discussed below, also mitigates any danger of a surety company acting in bad faith to delay payment under the bond.

The Nichols court completed its public policy analysis by noting an "insured does not contract to obtain any kind of commercial advantage or leverage but only to protect himself against the specter of accidental [or unavoidable] loss." Nichols, 279 S.C. at 340, 306 S.E.2d at 619 (quoting Trimper v. Nationwide Ins. Co., 540 F. Supp. 1188, 1193 (D.S.C. 1982)). A surety bond, unlike insurance, is used to obtain a commercial advantage. "The principal does not seek protection from the surety against calamity...the principal seeks the commercial advantage of obtaining a contract with the obligee, which requires a performance or payment bond." Bernard L. Balkin & Keith Witten, Current Developments in Bad Faith Litigation Involving the Performance and Payment Bond Surety, 28 Tort & Ins. L.J. 611, 624 (1993).

The state requires performance bonds for public construction contracts to protect itself from a principal's breach. The principal obtains the bond merely for the economic advantage of competing for the contract. There is no objective economic reason why a principal would voluntarily choose to provide a bond since it still bears the burden of performing and indemnifying the surety for any default. See Simpson, supra, at 2-3.

Even if the public policy concerns outlined in Nichols were present here, the nature of the principal-surety relationship itself would mandate finding a bad faith cause of action by a principal against its surety does not

sound in tort. We note Plaintiff does not cite to any case which a court allowed a principal to sue its surety in tort for a bad faith refusal to pay a claim. In fact, our research indicates no court has held a surety liable to the principal "on the basis of the special relationship that has been found in insurance cases." Balkin & Witten, supra, at 623-24; see e.g., Associated Indem. Corp. v. Cat Contracting, Inc., 964 S.W.2d 276 (Tex. 1998).

The reason for this absence of support in the case law is the general understanding that a principal cannot maintain a suit against a surety for his own default. 74 Am. Jur. 2d *Suretyship* § 205 (1974). The surety bond makes the surety and principal responsible to the obligee. Tooks v. Indemnity Insurance Co., 381 Pa. 607, 610, 114 A.2d 135, 136 (Pa. 1955). The bond is designed to protect the obligee not the principal.

The bond's primary obligation rests on the principal to perform the contract. When the principal fails, the surety performs according to the terms of the bond. The surety is then entitled to indemnity from the principal. Once the principal defaults, its interests are tertiary to the obligee and the surety.

Regardless of Nichols' public policy applicability, the bond does not exist to protect the principal against an unknown calamity but to protect the obligee against the principal's potential default. It cannot be said a principal is the true intended beneficiary of the bond.

In holding that a principal cannot sue a surety in tort for a bad faith refusal to pay a first party claim, it is important to note we do not preclude a principal from using a surety's bad faith in all instances. Several courts, including those not recognizing a principal's right to sue on bad faith in tort, allow the principal to assert a surety's bad faith as a defense to indemnification. Balkin & Witten, supra, at 623; see, e.g., Associated Indem. Corp. v. Cat Contracting, Inc., supra. Our Court of Appeals dealt with this issue in dicta in American Fire and Casualty Co. v. Johnson, supra. While a principal may not use bad faith as a sword to extract damages from a surety in tort, a principal is not precluded from using bad faith as a shield in contract

against a surety seeking indemnification. [4]

Having answered the first question in the negative, the second question is moot.

ISSUE

Do S.C. Code. Ann. §§ 38-57-70 & 38-59-20 (1989) provide a private right of action?

LAW/ANALYSIS

Plaintiff asserts the Insurance Trade Practices Act, S.C. Code Ann. §§ 38-57-10, et seq. (1989), and the Claims Practices Act, S.C. Code Ann. §§ 38-59-20, et seq. (1989), create a private causes of action. We disagree.

The Insurance Trade Practices Act prohibits insurers from misrepresenting an insurance policy with the intent to settle the claim "on less favorable terms than those provided in and contemplated by the contract or policy." S.C. Code Ann. § 38-57-70 (1989). The statute mandates the penalties for violating the statute. S.C. Code Ann. § 38-2-10 (1989). The Department of Insurance is vested with determining whether an insurer has violated the insurance code. See S.C. Code Ann. § 38-3-110. The statute clearly manifests legislative intent to create an administrative remedy and not a private right of action.

The Claims Practice Act provides relief for a third party victim of an improper claims practice. S.C. Code Ann. §§ 38-59-10, et seq. (Supp. 2000). This relief is important because South Carolina does not recognize a third party action for bad faith refusal to pay insurance benefits. Kleckley v.

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[4]Although we conclude a principal cannot assert a Nichols action against its surety, we do not decide whether an obligee may institute such an action against its surety.

Northwestern Nat'l Cas. Co., 330 S.C. 277, 498 S.E.2d 669 (1998).

Third parties do not have a private right of action under S.C. Code Ann. § 38-59-20. Gaskins v. Southern Farm Bureau Cas. Ins. Co., 343 S.C. 666, 541 S.E.2d 269 (Ct. App. 2000). Instead, third parties are entitled to administrative review before the Chief Insurance Commissioner. See Kleckley v. Northwestern National Casualty Company, supra; S.C. Code Ann. § 38-59-30 (Supp. 1999).

Certified Questions Answered

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Ocean Winds Corporation of Johns Island, Plaintiff,

v.

Lee Lane d/b/a Lane Drywall and Plastering, Pelham Roofing and Sheet Metal Works, Inc., and Andersen Windows, Inc., of whom Andersen Windows, Inc., is the party answering the Certified Question, Defendants.

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT

Opinion No. 25380
Heard October 9, 2001 - Filed November 26, 2001

Certified Question Answered

W. Jefferson Leath, Jr., and G. Hamlin O'Kelley, III, of Leath, Bouch & Crawford, L.L.P., of Charleston, and W.H. Bundy, Jr., of Smith, Bundy, Bybee & Barnett, P.C., of Charleston, for Plaintiff.

G. Dana Sinkler and Margaret K. Manuel, of Warren & Sinkler, L.L.P., of Charleston, for Defendant Andersen Windows, Inc.

JUSTICE PLEICONES: We accepted this certified question from the United States District Court to determine whether certain events trigger the running of the statute of repose codified at S.C. Code Ann. § 15-3-640 (Supp. 2000).

FACTS

The district court made the following findings of fact: Plaintiff Ocean Winds Corporation of Johns Island ("Ocean Winds") developed, built, and owned a condominium project on Seabrook Island. In April 1997, Ocean Winds Council of Co-Owners sued Ocean Winds in its capacity as owner/developer/builder for water damage and other structural problems with the property. Ocean Winds thereafter filed suit against the defendants, including Andersen Windows ("Andersen"), seeking recovery for any damages Council of Co-Owners might recover from Ocean Winds. Andersen manufactured and supplied the windows used in the condominium project. The windows were installed no later than December 2, 1986. This case was not commenced against Andersen until February 2000, more than thirteen years after the installation of the windows. Certificates of Occupancy were issued for the various units between June 9, 1987, and May 6, 1991.

CERTIFIED QUESTION

Where the owner/developer/builder of a building brings a lawsuit

against a window manufacturer/supplier for allegedly defective windows, installed as an improvement during the construction of that building, for purposes of the statute of repose, S.C. Code Ann. § 15-3-640 (Supp. 2000), does the "substantial completion of such improvement" occur upon substantial completion of the installation of the windows or upon substantial completion of the building as a whole?

DISCUSSION

Section 15-3-640 provides, in part:

> No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than thirteen years after substantial completion of such an improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
> . . .
> (6) an action for contribution or indemnification for damages sustained on account of an action described in this subdivision; . . .
> (9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property. . . .

"Substantial completion" is defined in S.C. Code Ann. § 15-3-630 (1976) as "that degree of completion of a project, improvement, or a specified area or portion thereof . . . upon attainment of which the owner can use the same for the purpose for which it was intended . . . ."

The cardinal rule of statutory construction is that legislative intent prevails. Statutory provisions should be given a reasonable and practical

construction consistent with the purpose and policy expressed in the statute. Folk v. Thomas, 344 S.C. 77, 81, 543 S.E.2d 556, 558 (2001).

Ocean Winds argues the thirteen year period set forth in § 15-3-640 did not begin to run until certificates of occupancy were issued for the various units. Conversely, Andersen argues the period should run from the date installation of the windows was completed, despite the fact that certificates of occupancy were not issued until some time later.

We hold that the thirteen year period prescribed in the statute of repose began running when installation of the windows was complete. The definition of "substantial completion" contained in § 15-3-630 requires this result. The legislature defines "substantial completion" as "that degree of completion of a project, improvement, or a specified area or portion thereof . . . upon attainment of which the owner can use the same for the purpose for which it was intended . . . ." (Emphasis supplied).

Here the windows were "a specified area or portion" of the larger condominium project. Upon their incorporation into the larger project, which occurred no later than December 2, 1986, the owner, Ocean Winds Corporation, could use the windows "for the purpose for which [they were] intended." Andersen should have been able to assume with confidence that it would not be amenable to suit as of December 3, 1999, thirteen years and one day after its windows were installed, and its portion of the project was substantially complete.

We find additional support for this conclusion in the preamble to § 15-3-640.[1] The preamble provides

Whereas, the General Assembly finds that persons involved in

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[1]In determining legislative intent, the Court may be guided by a statute's preamble. State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994).

> improvements to real property are subject to the economic and emotional burdens of litigation and liability for an indefinite period of time upon allegations of defective or unsafe conditions; and. [sic]
>
> Whereas, the General Assembly finds it in the public interest to provide a measure of protection against claims and litigation arising years after substantial completion of an improvement to real property; and. [sic]
>
> Whereas, the General Assembly finds that substantial differences exist between improvements to real property and other activities for which liability may be alleged, including the fact that improvements to real property have lengthy useful lives and are utilized, changed, and affected by many people, forces, and things after completion; and. [sic]
>
> Whereas, the General Assembly finds it reasonable and necessary to distinguish between a person in actual possession or control of an improvement to real property and those otherwise involved in an improvement to real property, for the following reasons: because acceptance of some future responsibility for the condition of the premises is implied in the acceptance of an improvement to real property; because possession or control of the premises is a reasonable and fair basis for imposing some additional liability; because after the date of acceptance of the work by the owner, there exists the possibility of neglect, abuse, poor maintenance, mishandling, improper modification, or unskilled repair of an improvement; because owners and persons in control have the opportunity to avoid liability by taking care of the improvement and by regulating its use . . . .

Thus, the preamble indicates that the legislature sought to address those instances where "persons involved in improvements to real property are subject to the economic and emotional burdens of litigation and liability for an indefinite period of time upon allegations of defective or unsafe conditions."

Adopting Ocean Winds' interpretation would frustrate the legislature's intent in enacting the statute of repose. In the instant case, for example, installation of the windows was unquestionably completed by December 2, 1986. The windows first became subject to the forces of nature and the "possibility of neglect, abuse, poor maintenance, mishandling, improper modification, or unskilled repair" on that date. However, certificates of occupancy were not issued on all units until May 6, 1991, nearly four and a half years later. The legislature could not have intended that the date upon which a subcontractor – clearly a "person[] involved in improvements to real property" – becomes free from liability with regard to a particular job hinges upon the diligence of the general contractor and/or developer in completing construction. To so hold would subject the subcontractor to "the economic and emotional burdens of litigation and liability for an indefinite period of time." The purpose of the statute of repose is served where the period prescribed therein begins to run on the date installation and incorporation into the larger improvement is complete, rather than the date on which certificates of occupancy are issued. It is the date of installation and incorporation which marks the point in time when the windows are first "utilized, changed, and affected" by "people, forces, and things" beyond Andersen's control.

Our holding is consistent with decisions in a number of other jurisdictions addressing the issue. E.g. Industrial Risk Insurers v. Rust Engr. Co., 283 Cal. Rptr. 873 (Cal. App. 1991) (a defendant's services with respect to an improvement may be completed well before the improvement itself is finished; if the limitations period does not commence until substantial completion of the larger improvement, construction industry members may be subject to liability for an indefinite time after the substantial completion of their work); Fueston v. Burns & McDonnell Engr. Co., Inc., 877 S.W.2d 631 (Mo. Ct. App. 1994) (where plaintiffs allege a defect in a component improvement, incorporated within a larger improvement, it is the date on which the defective improvement was completed, and not the date on which the larger improvement is completed, that is relevant to the determination whether the statute of repose bars the plaintiffs' action); Gordon v. Western Steel Co., 950 S.W.2d 743 (Tex. App. 1997) (where different subcontractors

are responsible for the construction of different parts of a larger project, the statute of repose should be applied to each of those individual subcontractors when they complete their respective improvements); contra Patraka v. Armco Steel Co., 495 F. Supp. 1013 (M.D. Pa. 1980) (by employing the term 'after completion of an improvement,' state legislature intended to mark the commencement of the limitations period as that point when third-parties would be exposed to defects in design or construction).

CONCLUSION

We answer the certified question as follows: For purposes of § 15-3-640, and under the facts of this case, "substantial completion of such improvement" occurred upon substantial completion of the installation of the windows and not upon substantial completion of the project as a whole, nor on the date of issuance of certificates of occupancy.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Sue Brown, as Personal Representative of the Estate of James E. Brown, III,

Respondent,

v.

John M. Stewart and J. David Gibson,

Appellants.

Appeal From Richland County
Alison R. Lee, Circuit Court Judge

Opinion No. 3408
Heard September 6, 2001 - Filed November 19, 2001

AFFIRMED IN PART and REVERSED IN PART

Harry A. Swagart, III, and Robert L. Reibold, both of Swagart, Walker & Reibold, of Columbia, for appellants.

Michael H. Montgomery and Douglas L. Novak, both of Montgomery, Patterson, Potts & Willard, of Columbia, for respondent.

CURETON, J.: James E. Brown, III brought this action against John M. Stewart and J. David Gibson (collectively, Appellants) alleging they made misrepresentations in securing his investment in Mid-Atlantic Administrators, Inc. and managed the corporation for their own benefit. Brown also sought an injunction to prevent the proposed sale of Mid-Atlantic's assets. Appellants appeal from a jury verdict in favor of Brown. We affirm in part and reverse in part.

FACTS

Mid-Atlantic was a South Carolina corporation formed in 1995 by Frank Altier (President), J. David Gibson (Vice President), John M. Stewart (Secretary/Treasurer), and John Silvers, with each holding a 25% ownership interest. The corporation operated as a third-party health insurance administrator (TPA).

In April 1996, Brown purchased a 20% interest in Mid-Atlantic, a total of seventy-five shares, for $100,000. Altier, Gibson, Stewart, and Silvers each retained a 20% interest in the corporation.

In a Letter of Intent dated December 5, 1997, Carolina Benefit Administrators, Inc. (CBA) offered to purchase the assets of Mid-Atlantic for $1,000,000, of which $300,000 was to be paid as consulting fees to Gibson, Silvers and Stewart, "the three principal producers." In a subsequent Letter of Intent dated January 12, 1998, CBA offered to purchase the assets of Mid-Atlantic for $725,000 including the consulting fees of $300,000 to be paid to Gibson, Silvers, and Stewart. The proposed sale was scheduled to take place on January 22, 1998.

After reviewing the terms of the proposed sale, Brown concluded Appellants had used his money to cash out their own investments and they were receiving excessive consulting fees. Brown instituted this lawsuit in January 1998 to recover the full value of his shares plus a return on his investment, alleging numerous misrepresentations had been made to him regarding Mid-Atlantic. He further alleged he relied on the representations in deciding to make his investment. Brown asserted claims for, among other things, fraud, negligent

misrepresentation, and breach of fiduciary duty. He also sought a temporary restraining order (TRO) to prevent the proposed sale of Mid-Atlantic's assets. Appellants answered and counterclaimed for tortious interference with prospective contractual relations and sought actual damages of at least $555,000, as well as punitive damages.

On January 20, 1998, the trial court granted Brown's request for a TRO until a hearing could be held. The order provided, among other things, that Appellants were enjoined from individually collecting any funds for the sale of Mid-Atlantic but that "the corporation may collect the sales proceeds and deposit them in its account to be later distributed in accordance with orders of this court[.]" [Emphasis added.] On February 13, 1998, the court, with the consent of Appellants' counsel, continued the provisions of the TRO until further order.

At trial in October 1999, the court granted Brown's motion for a directed verdict on Appellants' counterclaim. The jury returned a verdict for Brown jointly and severally against Appellants for $50,000 actual damages on each of the three remaining causes of action for fraud, negligent misrepresentation, and breach of fiduciary duty.[1]

Appellants filed motions for (1) a JNOV or new trial, and (2) election of remedies. The trial judge denied the motion for a JNOV or new trial. By separate order, the court granted Appellants' motion for an election of remedies, ruling Brown "is entitled to recovery on the breach of fiduciary duty verdict and either the fraud or the negligent misrepresentation verdict." The court stated Brown "must elect between remedies on the fraud and negligent misrepresentation awards, choosing to recover $50,000 in damages on only one of those verdicts. The court noted Brown's "recovery of damages on the breach

[1] Silvers and Altier were originally named as defendants but were dismissed prior to trial. Mid-Atlantic was dismissed as a defendant at trial.

of fiduciary duty verdict is unaffected by his election of remedies regarding the other verdicts." This appeal followed.[2]

LAW/ANALYSIS[3]

I. Fraud and Negligent Misrepresentation

Appellants first contend the trial court erred in denying their motions for a directed verdict, JNOV, or new trial on Brown's claims for fraud and negligent misrepresentation. We disagree.

The trial court, in ruling on motions for directed verdict and JNOV, is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and deny the motions where either the evidence yields more than one inference or its inference is in doubt. Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994). "The trial court can only be reversed by this Court when there is no evidence to support the ruling below." Id. at 430, 445 S.E.2d at 440.

"A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." Gastineau v. Murphy, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). If more than one inference can be drawn from the evidence, the grant of a JNOV is improper and the case must be left to the jury's determination. Id. "The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict." Shupe v. Settle, 315 S.C. 510, 515, 445 S.E.2d 651, 654 (Ct. App. 1994).

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[2] Brown passed away during the pendency of this appeal and his wife, as personal representative of his estate, has been substituted for him as a party for this appeal.

[3] Appellants allege over sixty errors on appeal. We have consolidated the allegations where possible.

A party asserting a claim for fraud in the inducement to enter into a contract must establish "(1) a representation, (2) its falsity, (3) its materiality, (4) knowledge of its falsity or reckless disregard of its truth or falsity, (5) intent that the representation be acted upon, (6) the hearer's ignorance of its falsity, (7) the hearer's reliance on its truth, (8) the hearer's right to rely thereon, and (9) the hearer's consequent and proximate injury." Parker v. Shecut, 340 S.C. 460, 482, 531 S.E.2d 546, 558 (Ct. App. 2000). As noted in Parker:

> The failure to prove any one of these elements is fatal to the claim. Generally, the representation must relate to a present or pre-existing fact rather than a statement of future events or an unfulfilled promise. An exception to the general rule is recognized for unfulfilled promises which were made by a party who never intended to fulfill the promise and only made it to induce the performance of another party.

Id. (citations omitted). "Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence." Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993).

A plaintiff in a negligent misrepresentation action, must prove (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997).

Thus, a key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement. Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 20, 419 S.E.2d 795, 799 (Ct. App. 1992) ("Recovery in negligent misrepresentation cases is based upon negligent conduct and predicated upon a negligently made false

statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation. It is not a fraud and deceit action; it is a negligence action . . . .") (citation omitted).

To support his claims for fraud and negligent misrepresentation, Brown alleges the following misrepresentations were made to him to induce him to invest $100,000 in Mid-Atlantic. First, Appellants told him that they (Gibson and Stewart) along with Silvers had each "invested" approximately $25,000 in the company and were given equal shares (25%) of the stock, and that Altier was given an equal amount of stock (25%) as "sweat equity" based on his expertise in running TPAs. However, Brown later discovered that Appellants had characterized their funds as "loans" instead of stock equity, and they had used his investment to repay the loans to themselves with interest of nearly 16%. Second, Appellants falsely represented to him that his investment would be used for computers, computer software, marketing, and additional personnel. However, as noted above, Brown's invested capital went instead to pay back the "loans" from Appellants. Third, appellant Gibson gave Brown a letter dated February 20, 1996 from Altier, Mid-Atlantic's president, which made specific representations about the number of employee lives and groups that were currently covered by Mid-Atlantic and its plans for acquiring certain other groups. The letter also stated that Mid-Atlantic was "in the final stages of linking our computers and expect[ed] to be operational by April 1, 1996."

As additional examples of Appellants' misrepresentations, Brown testified that when he asked Gibson for additional financial information after receiving the Altier letter, Gibson took Brown down the hall to see Stewart, who gave him a balance sheet. According to Brown, Stewart told him Mid-Atlantic was having cash flow problems, Appellants had invested as much as they could, and Appellants needed additional capital to finance their growth. Brown testified that he never would have invested $100,000 in the corporation if he had known Appellants had no equity interest or investment in the corporation. Brown stated he was never told Appellants had only made loans to the corporation and would be using his investment to repay themselves instead of purchasing computers and hiring additional staff as was represented to him.

Brown asserted Appellants also told him "they were [going to] be in Mid-Atlantic for the long haul . . . and pay out some dividends to . . . shareholders eventually." Brown testified that despite this representation, he never received dividends from the corporation; rather, the corporation did not show a profit and "[e]verything [he] could determine [that] should be profits were going into David Gibson, John Stewart's and John Silvers' pockets." Moreover, Brown alleged Appellants abused their positions as officers and directors of the corporation to orchestrate the sale of Mid-Atlantic's assets in a way that was unduly favorable to themselves.

Appellants argue they were entitled to a directed verdict, JNOV, or new trial on both the fraud and negligent misrepresentation claims. Appellants contend there was no misrepresentation in any of their statements. They particularly assert that their statement alleging they had each "invested" $25,000 in Mid-Atlantic was not misleading as "invested" can also mean "loaned." They further argue there was no evidence Brown ever relied on any of the alleged misrepresentations.

We find the evidence presented by Brown created a question of fact for the jury as to whether any of the alleged statements could be deemed misleading. We note that, as to the meaning of "invested," the evidence showed Brown was told all of the other shareholders, except Silvers, had "invested" approximately $25,000 in return for their stock, so a reasonable inference is they maintained an equity interest in the corporation. As to the February 1996 letter, Altier testified that at the time he wrote the letter, he was attempting to describe the business and "the fact that we were acquiring enough business at such a fast pace that there was a need for additional capitalization of the company so that we could basically lease more space, we could hire some more personnel and all of the things that we needed including computers and so forth." Further, Brown testified repeatedly as to his reliance, asserting he never would have invested in Mid-Atlantic had he known Appellants had virtually no capital investment in the corporation and that they were going to use his investment to repay themselves instead of purchasing computers, computer software, marketing, and additional personnel as had been represented to him at the time of his investment.

Appellants further argue Brown had no right to rely upon the alleged misrepresentations and failed to exercise due diligence. They contend the balance sheet given to Brown showed loans made to the corporation, and that they did not have a confidential relationship with Brown to justify his reliance. Appellants also argue "Brown's cause of action for negligent misrepresentation is barred because his losses were caused by his own negligence." They assert, "[t]he failure to exercise due diligence is as much a defense to negligent misrepresentation as it is to fraud."

We find there is a jury question presented as to the legitimacy of Brown's right of reliance in this case. Although Appellants apparently presented one balance sheet to Brown which indicated some loans had been made to the corporation, they simultaneously told him that they had each invested $25,000 in the corporation and were seeking additional capital to finance their expansion. In addition, when Altier was asked whether the money was a loan or capital investment, he testified as follows: "It was my understanding at the time that the money basically would be capital into the company that would set up to get the company going and it would be basically set up through stock issuance on an equal basis." Altier asserted, "It was not my understanding it was a loan[.]" Altier conceded that he did not believe Appellants or any of the other shareholders would be entitled to take out any of the money contributed unless the corporation succeeded and made a profit.

Brown testified that he believed he had a right to rely on Appellants as they controlled all of the information about Mid-Atlantic and he could not obtain it from any other source. He stated Appellants "were upstanding citizens in the community and had been in the insurance business for a number of years." Brown testified he had known Gibson casually "for a number of years." We find that Brown's right to rely was a matter to be resolved by the jury after considering the conflicting evidence in this regard. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 240-41 nn.2 & 3, 489 S.E.2d 470, 471 nn.2 & 3 (1997) (adopting section 552 of the Restatement (2d) of Torts (1977), which provides: "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transaction, is subject to liability . . . .").

Appellants also contend there is insufficient evidence of damages to support Brown's claims. Brown testified that he lost his initial investment of $100,000 plus the amount of interest or gain he would have earned on this money had the corporation operated properly. Brown stated if his money had been placed in a savings account at 5% annually instead of Mid-Atlantic it would have been worth $120,000. Moreover, he testified that if Appellants had sold the assets and properly distributed the proceeds, he would have received approximately $140,000.[4] Reviewing all of the evidence in the light most favorable to Brown, as we are required to do, we find there is evidence to support the trial court's decision to deny Appellants' motions. There was more than one reasonable inference arising from the evidence as to whether Appellants either knowingly or negligently made false representations to Brown to induce his investment in Mid-Atlantic. Further, the evaluation of the testimony and the credibility of the witnesses were matters for the jury to determine. See Doe v. Asbury, 281 S.C. 191, 194, 314 S.E.2d 849, 850 (Ct. App. 1984) ("Judging the credibility of the testimony of witnesses is a function of the jury, not the court, as is the weight to be given to such testimony.").

II. Breach of Fiduciary Duty

Appellants argue the trial court erred in denying their motions for directed verdict, JNOV, or new trial on Brown's claim for breach of fiduciary duty. In their brief, Appellants initially argue there was no evidence to support the claim for breach of fiduciary duty because Brown lacks standing to seek damages for injuries allegedly suffered by Mid-Atlantic. We agree.[5]

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[4] This represents Brown's share of the proceeds if Mid-Atlantic had been sold according to the December 5, 1997 Letter of Intent.

[5] Because we agree with Appellants' argument that any damages arising from a breach of fiduciary duty accrue to the corporation rather than to Brown individually, we need not address Appellants' other issues in support of their argument that the trial court erred in denying their motion for directed verdict on Brown's breach of fiduciary duty claim.

In his complaint, Brown alleged that Appellants "owed plaintiff [Brown] a fiduciary duty to operate the corporation in accordance with all applicable laws and in a proper business manner and to act in good faith and with due regard to [his] interest as a minority shareholder." [Emphasis added.] In addition to the two grounds urged on appeal, Brown enumerated other acts of self-dealing he alleged constituted a breach of fiduciary duty, stating "the corporation has been damaged and is entitled to judgment against the defendants for actual damages suffered and for other such relief as the court deems just and proper." [Emphasis added.] At the start of trial, the court granted Brown's oral motion to amend his complaint to include the allegation that Appellants' failure to go forward with the offer to purchase Mid-Atlantic's assets constituted a breach of fiduciary duty and that he suffered individual damages separate from that of the corporation. The trial court dismissed Brown's derivative claim on behalf of the corporation for failure to assert damages suffered by the corporation.

Brown did not appeal the dismissal of his derivative claim. On appeal, Brown asserts two factors giving rise to his individual claim for breach of fiduciary duty. First, he alleges Appellants participated in the structure of the proposed sale agreement which directed a large portion of the proceeds to Appellants in the form of consulting fees. Second, he alleges Appellants' failure to consummate the transaction in accordance with the TRO resulted in the ultimate loss of the entire proceeds to Brown. Appellants argue Brown's assertion of damages essentially are limited to the reduction in the value of his stock and nonpayment of dividends.

Brown testified that the December 5, 1997 Letter of Intent from CBA offered $1,000,000 to purchase "the stock and assets of" Mid-Atlantic, of which $300,000 represented consulting fees payable to Appellants and Silver as "the three principal producers." A second letter dated December 30, 1997 characterized the transaction as an asset purchase. On January 12, 1998, CBA sent a Letter of Intent to purchase the assets for $425,000 plus $300,000 to be paid in consulting fees to Appellants and Silvers.

Brown testified that with the first offer on December 5, 1997, he would have received 20% of the $700,000, or $140,000. He stated he was not happy about the large percentage of the proceeds going to pay consulting fees, but he

would have recouped his investment in the sale and made an additional $40,000, and thus he was in favor of proceeding with the transaction. However, by the time of the January 12, 1998 letter, Brown stated he voiced his displeasure with the arrangement because he noticed that "[t]he purchase price had been reduced but the consulting fees had not." Brown stated he "wanted to have fair treatment for all five shareholders." Brown testified, "I realize[d] that some people had put some effort in but I had put a hundred thousand dollars in this company and for somebody that had put what I later found out was seventy-five dollars to come away with a hundred and forty thousand dollars and I put in a hundred thousand and I was going to come away with maybe forty thousand just didn't seem right to me." Brown stated he paid $100,000 essentially "to finance their operation and they are lining their pockets with special deals[.]"

Brown also alleged Appellants breached a fiduciary duty by failing to consummate the purchase in accordance with the provisions of the TRO, which called for any proceeds to be paid into the corporation's account, not to the shareholders individually, to be later distributed according to the court's order.

William Worthy testified that he initially spoke to Altier, Mid-Atlantic's president, to inquire about purchasing the corporation's assets for CBA. Worthy stated he met with Altier, Appellants, and Silvers to negotiate a purchase price. Worthy said he was surprised to learn that Appellants had already formed another TPA called Preferred Group Administrators (PGA). Brown was apparently unaware of the new TPA and was not a participant. In their discussions, Worthy stated that he was planning to pay 70% for the assets and 30% in consulting fees for Mid-Atlantic, regardless of the total purchase price. Worthy testified, however, that Appellants "were more eager to sell Preferred Group Administrators first because of some claims problems," so he acquiesced and purchased PGA instead of Mid-Atlantic around February 1st and paid the proceeds directly to Appellants.

Worthy stated thereafter "there were many negotiations" with Appellants regarding the offer to purchase Mid-Atlantic's assets. Worthy stated that in the months after he purchased PGA, Mid-Atlantic's employees started leaving when they heard of the impending sale, and they began having problems with claims not being processed. Finally, in May 1998 his offer (based on the expected

revenue then) was for "roughly three hundred fifty thousand dollars and we were going to buy the balance of that revenue basically [using] sort of the same formula and with an earn-out based on retention [of employee groups]." When he met with Appellants at closing, however, Worthy discovered that Appellants had not told him that many of the groups he was purportedly purchasing had already signed on with other companies. Worthy stated Appellants would have had to know the groups were not coming to him because there was a sixty-day notice period in the contracts used by Mid-Atlantic. Worthy stated he gave a check for $50,000 to Silvers and/or Gibson, which they cashed within fifteen minutes, but he did not receive all of the accounts he expected.

"The fiduciary obligation of dominant or controlling stockholders or directors is ordinarily enforceable through a stockholder's derivative action . . . ." 19 Am. Jur. 2d Corporations § 2268, at 166 (1986). An action seeking to remedy a loss to the corporation is generally a derivative one. Hite v. Thomas & Howard Co., 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991) (citations omitted), overruled on other grounds by Huntley v. Young, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." Id.; see also Todd v. Zaldo, 304 S.C. 275, 278, 403 S.E.2d 666, 668 (Ct. App. 1991) ("If an individual stockholder has suffered a particular loss due to mismanagement of a corporation then the stockholder may bring an action for his loss since it is his personal asset. But, this loss must be personal and not a loss of the corporation.").

"If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder. Of course, a suit based on the misconduct can be brought by the individual stockholder." Ward v. Griffin, 295 S.C. 219, 221, 367 S.E.2d 703, 703-04 (Ct. App. 1988). "It becomes material, therefore, to inquire whether the acts of mismanagement charged to the directors affected the plaintiffs directly, or as their interests were submerged in the corporation whose assets were thus dissipated." Stewart v. Ficken, 151 S.C. 424, 427, 149 S.E. 164, 165 (1929).

An individual action is also allowed if the alleged wrongdoers owe a fiduciary relationship to the stockholder and full relief to the stockholder cannot be had through a recovery by the corporation. 19 Am. Jur. 2d Corporations § 2268, at 167 (1986). In Babb v. Rothrock, our supreme court discussed an exception to the general rule that individual stockholders may not sue corporate directors for losses suffered by the corporation. 303 S.C. 462, 464-65, 401 S.E.2d 418, 419-20 (1991) (discussing exception relied on by the defendants found in Thomas v. Dickson, 301 S.E.2d 49 (Ga. 1983)). The exception permits a stockholder to file an individual action for losses suffered by the corporation if the underlying reasons for requiring a derivative action are absent. Id. In Thomas, the Georgia Supreme Court stated:

> The reasons underlying the general rule [that shareholders must file derivative actions for losses suffered by the corporation] are that 1) it prevents a multiplicity of lawsuits by shareholders; 2) it protects corporate creditors by putting the proceeds of the recovery back in the corporations; 3) it protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and 4) it adequately compensates the injured shareholder by increasing the value of his shares.

301 S.E.2d at 51. Our court in Babb declined to adopt the Thomas exception finding that even if it were adopted, the parties in Babb could not maintain the action as an individual action because at least one of the reasons for the general rule was not absent. Babb, 303 S.C. at 464-65, 401 S.E.2d at 419-20 (finding the claims of corporate creditors would be jeopardized).

In this action, Brown alleged damages arising from the proposed sale which would divert $300,000 of the sales proceeds as consulting fees from the corporation to Stewart, Gibson, and Silvers. Brown further alleged damages arising from Appellants' failure to consummate the transaction in accordance with the TRO resulting in a greatly reduced sales price to the corporation. We

find Brown's assertions are limited to damage to the corporation. Thus, Brown did not suffer individual damages, apart from the damage to the corporation.

Furthermore, Brown may not rely on the Thomas exception. As a result of the damage to the corporation, Brown suffered a reduction in the value of his stock. The damage to Brown as a stockholder, however, was shared by all of the stockholders including Silvers and Altier, who were dismissed from this action. Permitting Brown to maintain his action as an individual action would not protect the interests of all stockholders because the diminution in the value of the stock was suffered by all of the stockholders. Thus, the reasons for requiring a derivative action described in Thomas were not absent. Pursuant to Babb, where the reasons are not absent, we must rely on the general rule that individuals may not sue corporate directors or officers for losses suffered by the corporation. Babb, 303 S.C. at 464-65, 401 S.E.2d at 419-20. Cf. Hite, 305 S.C. at 361-62, 409 S.E.2d at 342 (holding a minority shareholder's causes of action for breach of fiduciary duty and negligent mismanagement did not have to be brought in a shareholder's derivative suit because the alleged reduction in the minority shareholder's percentage of corporate control was separate and distinct from any general diminution in value of corporate stock).

We hold the trial court erred in denying Appellants' motion for a directed verdict as to Brown's claim for breach of fiduciary duty. Accordingly, the verdict on the breach of fiduciary duty cause of action is reversed.

III. Evidentiary Rulings

Appellants next argue the trial court made numerous incorrect rulings regarding their objections to the evidence and the questions propounded by opposing counsel. They maintain the court's rulings constitute an abuse of discretion entitling them to a new trial on all causes of action. We disagree.

"The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996). To warrant reversal, the appellant "must show both the error

of the ruling and resulting prejudice." Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994).

Appellants point to numerous instances in the transcript where they contend testimony was improperly admitted because it was either irrelevant, without proper foundation, dealt with matters of law, was hearsay, or was in response to leading questions by opposing counsel. We have examined each of Appellants' alleged errors in turn and find no error warranting reversal as the court's rulings were either properly made or resulted in no prejudice to Appellants.

We note that among these alleged errors is Appellants' assertion that Brown's attorney improperly expressed his personal opinion about the credibility of Appellants' testimony during closing argument. Appellants contend that after they objected to the remark, the trial court failed to give the jury a curative instruction. We find no error preserved for our review in this regard. The trial court sustained Appellants' objection to the remarks, and Appellants did not thereafter move to strike or ask for a curative instruction. 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."); State v. Patterson, 324 S.C. 5, 18, 482 S.E.2d 760, 766 (1997) (holding the alleged impropriety of closing argument was not preserved for review where the trial court sustained an objection by opposing counsel, but counsel did not move to strike or request a curative instruction). Accordingly, we hold Appellants are not entitled to a new trial based on any of the trial court's evidentiary rulings.

IV. Jury Instructions

Throughout their brief, Appellants argue numerous errors allegedly committed by the trial court concerning the jury charge on Brown's causes of actions. Appellants contend that each of the individual errors as well as their cumulative effect entitle them to a reversal on all causes of action. They further assert the trial court committed reversible error by violating the provisions of

Rule 51, SCRCP, by failing to adequately reveal the contents of her contemplated jury charge prior to closing arguments. We disagree.

It is not error to refuse a request to charge when the substance of the request is included in the general instructions. Varnadore v. Nationwide Mut. Ins. Co., 289 S.C. 155, 160, 345 S.E.2d 711, 715 (1986). In reviewing jury charges for error, we construe the court's charge as a whole in light of the evidence and issues presented at trial. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999). If the instructions of the trial court, construed as a whole, correctly state the law, there is no reversible error. Marks v. I. M. Pearlstine & Sons, 203 S.C. 318, 330, 26 S.E.2d 835, 839 (1943). To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial, and the enumeration of hypercritical exceptions will not suffice to overthrow a jury's verdict. Arkwright Mills v. Clearwater Mfg. Co., 217 S.C. 530, 553, 61 S.E.2d 165, 175 (1950).

We have reviewed each of Appellants' allegations and find no reversible error in the trial court's charge to the jury. We conclude the court's instructions fairly set forth the applicable law in South Carolina. The charge as a whole was reasonably free from error and we discern no prejudice suffered by Appellants. We particularly note that, as to Appellants' arguments that the trial court erred in failing to instruct the jury on its proposed charges Nos. 4, 7, 9B, and 12, we find no error as the requested instructions were either unnecessary or already fairly covered in the trial court's general charge.

To the extent Appellants assert the trial court violated Rule 51 of the South Carolina Rules of Civil Procedure because she failed to properly advise counsel of the substance of her charge, we find this argument unavailing.

Rule 51, SCRCP provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon

> the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed.

On appeal, Appellants contend that during the initial charging conference, the trial court postponed her decision on their requests to charge No. 2 (Breach of Fiduciary Duty -- Permitted Activities), No. 2A (Employing Relatives), No. 4A (Shareholder's Right to Inspection), and No. 12 (Plaintiff's Negligence as a Defense), as well as its requests to charge the jury on nondisclosure and conflict of interest transactions.[6] Appellants state when court convened the next day, the trial court failed to advise them of the substance of the instructions to be given.

Our review of the record indicates that during the initial conference, the trial court stated she was not inclined to charge the jury on Appellants' requests to charge Nos. 2 & 2A, but that if she did it would be in another form. As to No. 4A, the court stated if she charged it, it would be from the Code section. The court extensively discussed No. 12 with counsel, stating she disagreed with counsel's characterization of the evidence and whether the charge was appropriate, but that she would review it further. The trial court stated she would "charge nondisclosure as a representation, but not necessarily in that form." When court convened the next day, Appellants' counsel asked the trial court whether she was going to charge nondisclosure as fraud, and that he had some proposed jury instructions if it was to be charged. The trial court informed counsel that she was still completing work on the charge, but believed she had sufficiently advised counsel of the proposed charge and had satisfied the requirements of Rule 51. Appellants' counsel did not specifically request a ruling on the other requests to charge that are now urged on appeal.

We find that, under the circumstances, the trial court adequately apprised the parties of the substance of her intended charge, and we discern no prejudice to Appellants in this regard. During the initial charging conference, the trial

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[6] In view of our reversal of the trial court's denial of Appellants' motion for directed verdict on the breach of fiduciary duty claim, the charges relating to that cause of action are moot.

court reviewed each of the proposed instructions seriatim and discussed her thoughts as to each one. The court additionally advised the parties that she planned to charge the jury on the elements of fraud, negligent misrepresentation, and breach of fiduciary duty; the definitions appropriate to the elements of fraud; and that the burden of proof for fraud was clear and convincing evidence. She advised the parties her standard charge included the burden of proof, evidence, weighing the credibility of witnesses, and the use of a deposition or prior inconsistent statement to impeach a witness. She also discussed the verdict form to be used. Accordingly, we find no reversible error in either the court's instructions to the jury or in the court's discussion of the charge with counsel prior to closing arguments.

V. Election of Remedies

Appellants contend the trial court erred in permitting Brown to retain a remedy for breach of fiduciary duty in addition to an election for either fraud or negligent misrepresentation. In light of our reversal of the trial court's denial of the motion for a directed verdict on the breach of fiduciary duty cause of action, we decline to address this issue.

VI. Appellants' Counterclaim

Appellants asserted a counterclaim against Brown for tortious interference with prospective contractual relations. They alleged Brown "filed this lawsuit and obtained the injunction with the purpose and intent of causing CBA's offer to be withdrawn." Appellants asserted that "[a]s a proximate and consequent result of [Brown's] interference," they lost the benefits of CBA's offer. They sought actual damages of "at least" $555,000 as well as punitive damages.

The elements of this cause of action are (1) intentional interference with prospective contractual relations, (2) for an improper purpose or by improper methods, and (3) resulting injury. Crandall Corp. v. Navistar Int'l Transp. Corp., 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990). The trial court granted Brown's motion for a directed verdict on the basis that a party's exercise of a legal right does not constitute an improper motive or an improper purpose. The court found Brown's institution of this lawsuit and the securing of a TRO was

an attempt to protect his rights as an investor and shareholder and did not constitute an improper motive or an improper purpose.

We find no error as there is no evidence to suggest any purpose or motive by Brown other than the pursuit of the protection of his rights as a minority shareholder and investor in Mid-Atlantic. As to the TRO, we note that Appellants consented to its continuance when given the opportunity to challenge the initial TRO. In addition, the order provided that any party could move to amend, modify, or vacate the TRO with ten days notice, and there is no indication in the record that any such motion was thereafter made or denied by the trial court. See, e.g., Webb v. Elrod, 308 S.C. 445, 448, 418 S.E.2d 559, 561 (Ct. App. 1992) ("The exercise in good faith of a legal right by a party to a contract affords no basis for an action by the second party for intentional interference with a contract even though the consequence of the exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party."). Accordingly, we affirm the court's grant of a directed verdict on Appellants' counterclaim.

VII. Cumulative Error

Appellants finally maintain that the errors described above require a new trial. Alternatively, they argue that if the individual errors identified by Gibson and Stewart are insufficient to warrant a new trial, then the cumulative effect of the many trial errors justifies reversal. In rebuttal, Brown asserts that "the number and sheer repetitiveness of [Appellants'] 64 cited errors does not equate to a cumulative effect that worked to deny them a fair trial and/or taint the jury's verdict in this case."

We note that Appellants previously filed a motion with this Court for an enlargement of the time in which to serve and file their initial brief and "for permission to exceed the length limitation in their [brief] by 25 pages." This Court granted the motion for additional time and to exceed the page limitation. Upon reviewing Appellants' brief, however, we agree with Brown's observation that "an appeal is not an open invitation for factual interpretation, but rather a venue for review of real errors in legal judgment that can be deemed to cause prejudice to a party to the extent that they rise to the level of reversible error."

Although we do not condone this exhaustive, shotgun approach to pursuing an appeal, we have individually and collectively reviewed all of Appellants' errors. See Smith v. Murray, 477 U.S. 527, 536 (1986) (stating "the process of 'winnowing out weaker claims on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.") (quoting Jones v. Barnes, 463 U.S. 745, 751-51 (1983)). We conclude Appellants are not entitled to a new trial based on cumulative error.

CONCLUSION

We affirm the trial court's denial of a directed verdict, JNOV, or new trial on Brown's causes of action for fraud and negligent misrepresentation. In addition, we find no reversible error in the numerous objections Appellants raise on appeal regarding the trial court's admission of evidence and the court's instructions to the jury on all causes of action. We reverse the trial court's denial of a directed verdict on Brown's breach of fiduciary duty cause of action and therefore set aside the jury verdict on that cause of action. Finally, we affirm the trial court's granting of a directed verdict on Appellants' counterclaim.

AFFIRMED IN PART and REVERSED IN PART.

HEARN, C.J., and HOWARD, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert Rorrer,

Respondent,

v.

P.J. Club, Inc., d/b/a Jamaica Joe's,

Appellant.

Appeal From Horry County
Alison Renee Lee, Circuit Court Judge

Opinion No. 3409
Submitted September 4, 2001 - Filed November 19, 2001

AFFIRMED

Clifford L. Welsh, of Wheless & McInnis, of North Myrtle Beach, for appellant.

L. Sidney Connor, IV, of Kelaher, Connell & Connor, of Surfside Beach, for respondent.

HOWARD, J.: Robert Rorrer brought this action pursuant to South Carolina Code Annotated Section 32-1-20[1] to recover the excessive gambling losses sustained by his wife while playing video poker at a nightclub called Jamaica Joe's. A jury awarded Rorrer $21,320, which the trial court trebled in accordance with the statute.[2] On appeal, Jamaica Joe's raises the following two arguments: (1) the trial court erred in failing to grant its motions for a directed verdict and a judgment notwithstanding the verdict (JNOV); and (2) damages under section 32-1-20 are punitive in nature, and the trial court erred in failing to apply a clear and convincing burden of proof. We affirm.

FACTS

Jamaica Joe's operated video poker machines in Myrtle Beach, South Carolina in 1996 and 1997. Rorrer's wife played video poker at Jamaica Joe's three or four nights per week from December 1996 through March 1997. At trial, Rorrer introduced credit card receipts showing dates and amounts charged by his wife at Jamaica Joe's and bank statements showing dates and amounts withdrawn. According to Rorrer's wife, her net losses at Jamaica Joe's ranged from a low at one sitting of $200 to a high of $8,600. Rorrer contends the combined net loss was in excess of $100,000.

Robbie Singleton, one of the owners of Jamaica Joe's, corroborated some aspects of Rorrer's claim. Singleton confirmed Rorrer's wife lost money while gambling at Jamaica Joe's on a regular basis from December 1996 until March 1997 and that she used her American Express card to get cash for gambling.

Jamaica Joe's moved for a directed verdict and, following the verdict, for a JNOV, arguing Rorrer had failed to present evidence of his wife's net losses. The trial court denied both motions.

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[1] S.C. Code Ann. § 32-1-20 (1991) (providing that any person may recover the gambling losses of another only after the three month period during which the gambler himself may seek recovery).

[2] Section 32-1-20 allows recovery of the gambling losses and treble the value thereof.

At the conclusion of the evidence, Jamaica Joe's asked the trial court to charge the jury that Rorrer had the burden of proving his wife's gambling losses by clear and convincing evidence, arguing damages recoverable under section 32-1-20 are punitive in nature. The trial court declined to do so, charging the preponderance of the evidence standard. The jury returned a verdict for Rorrer, making specific findings as to the dates and amounts of each loss. The award totaled $21,320, which the trial court trebled. Jamaica Joe's appeals.

DISCUSSION

I. Construction of Statute

Rorrer filed this action pursuant to section 32-1-20 which is penal in nature. See Trumbo v. Finley, 18 S.C. 305 (1882). Recently, while construing section 32-1-20, our supreme court reiterated the following pertinent rules of statutory construction:

> The principle is well established that penal statutes are strictly construed, and one who seeks to recover a penalty for the failure on the part of the defendant to discharge some duty imposed by law, must bring his case clearly within the language and meaning of the statute awarding the penalty. Such laws are to be expounded strictly against the offender and liberally in his favor. And it is immaterial, for the purpose of the application of the rule of strict construction whether the proceedings for the enforcement of the penal law, be criminal or civil.

S.C. Dep't of Revenue v. Collins Entm't Corp., 340 S.C. 77, 79, 530 S.E.2d 635, 636 (2000) (citations omitted).

a. Burden of Proof

Jamaica Joe's contends section 32-1-20 should be strictly construed and Rorrer had the burden of bringing his claim clearly within the language and meaning of the statute. Specifically, Jamaica Joe's contends throughout its

argument the trial court should have imposed a heightened burden of proof upon Rorrer due to the penal nature of the statute. We disagree.

The statutory scheme establishing a private right to recover excessive gambling losses is found in sections 32-1-10[3] and 32-1-20. While our supreme court has determined that section 32-1-10 is remedial in nature, it has reaffirmed that section 32-1-20 is penal in nature and must be strictly construed. See Francis v. Mauldin, 215 S.C. 374, 381, 55 S.E.2d 337, 340 (1949). In first construing section 32-1-20, our supreme court noted that "[t]he object of the statute was manifestly to punish excessive gaming." Trumbo, 18 S.C. at 310. Consequently, the statutory scheme is part remedial and part penal. See Francis, 215 S.C. at 381, 55 S.E.2d at 340; see also Berkebile v. Outen, 311 S.C. 50, 55, 426 S.E.2d 760, 763 (1993) (stating the legislature contemplated a policy which prevents a gambler from allowing his vice to overcome his ability to pay).

However, contrary to Jamaica Joe's argument, rules of statutory construction do not increase the burden of proof.

> The rule that penal statutes, as contradistinguished from remedial statutes, must be construed strictly, is but a means of arriving at the intention. When a law imposes a punishment which acts upon the offender alone, and not as a reparation to the party injured, and when it is entirely within the discretion of the lawgiver, it will not be presumed that he intended it should be extended further than is expressed; and humanity would require that it should be so limited in the construction as to be certain not to exceed the intention.

Kaufman v. Carter, 67 S.C. 312, 320, 45 S.E. 211, 214-15 (1903) (quoting State v. Stephenson, 18 S.C.L. (2 Bail.) 156, 156 (1831)); see State v. Lewis, 141 S.C. 207, 139 S.E. 386 (1927).

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[3] S.C. Code Ann. § 32-1-10 (1991) (allowing gambler who loses fifty dollars at any sitting to recover within three months).

Furthermore, our supreme court has declined to require an increased burden of proof merely because a statute is penal in nature. See Ford v. Atl. Coast Line R.R. Co., 169 S.C. 41, 168 S.E. 143 (1932).[4]

b. Jury Charge

Jamaica Joe's asserts that the trial court erred when it instructed the jury Rorrer had the burden of proving each gambling loss by a preponderance of the evidence because damages recoverable pursuant to section 32-1-20 are punitive in nature and the correct burden of proof is by clear and convincing evidence. We disagree.

Section 15-33-135[5] states that in a civil action where punitive damages are claimed, the burden of proof is by clear and convincing evidence. Jamaica Joe's contends this statute is applicable. In support of its proposition, Jamaica Joe's cites Adamson v. Marianne Fabrics, Inc., 301 S.C. 204, 391 S.E.2d 249 (1990). In Adamson, the verdict of the trial court included both punitive damages and statutorily imposed multiple damages. On appeal, our supreme court reversed the award of punitive damages, concluding that to allow both would impermissibly allow a double recovery. Adamson, 301 S.C. at 208, 391 S.E.2d at 251. Jamaica Joe's incorrectly construes this ruling to mean multiple damages are punitive damages.

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[4] Imposing a higher degree of proof in a civil action based upon a penal statute is not a novel concept. See Gill v. Ruggles, 95 S.C. 90, 78 S.E. 536 (1913); Burckhalter v. Coward, 16 S.C. 435 (1882); Cf. Ford, 169 S.C. at 88-89, 168 S.E. at 160 (stating that the "only 'possible exception to the general civil rule that a plaintiff is required to prove the allegations of the complaint by the preponderance of the evidence, or the defendant his defense by a like degree of proof' is in support of a plea of justification where the action is one based on slander or libel in which a crime is therein charged against the plaintiff") (quoting Kirven v. Kirven, 162 S.C. 162, 166, 160 S.E. 432, 434 (1931)).

[5] S.C. Code Ann. § 15-33-135 (Supp. 2000).

We look first to the wording of sections 32-1-10 and 32-1-20. The following rule of statutory construction is firmly established in South Carolina:

> The primary rule of statutory construction requires that legislative intent prevail if it can reasonably be discovered in language used construed in light of intended purpose. The legislature's intent should be ascertained primarily from the plain language of the statute. If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation, and the court has no right to look for or impose another meaning.

Richland County Sch. Dist. Two v. S.C. Dep't of Educ., 335 S.C. 491, 496, 517 S.E.2d 444, 447 (Ct. App. 1999) (citations omitted).

Furthermore, even though penal statutes are to be strictly construed, "the canons of construction certainly allow the court to consider the statute as a whole and to interpret its words in the light of the context." State v. Standard Oil Co. of N.J., 195 S.C. 267, 288, 10 S.E.2d 778, 788 (1940). We should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. See S.C. Coastal Council v. S.C. State Ethics Comm'n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991).

It is evident from the plain meaning of the words used in sections 32-1-10 and 32-1-20 that the measure of damages is the actual loss sustained by the gambler at one sitting. "Courts begin with the assumption that compensatory damages compensate for those pecuniary losses which resulted from the defendant's wrong." 22 Am.Jur.2d Damages § 28 (1988); see Bowers v. Charleston & W. Carolina Ry. Co., 210 S.C. 367, 378, 42 S.E.2d 705, 709 (1947) (Oxner, J., concurring) ("Actual or compensatory damages are damages in satisfaction of, or in recompense for, loss or injury sustained."); Johnson v. Atl. Coast Line R.R. Co., 142 S.C. 125, 138, 140 S.E. 443, 447 (1927) (stating that compensatory damages relate mainly to the injured party).

Furthermore, the treble damage award under section 32-1-20 is not denominated by the legislature as punitive damages, and the statute does not delineate a greater burden of proof. The legislature is presumed to have fully understood the meaning of the words it used in a statute, and unless this meaning is vague or indefinite, we presume that it intended to use them in their ordinary and common meaning or in their well defined legal sense. See Powers v. Fid. & Deposit Co., 180 S.C. 501, 186 S.E. 523 (1936).[6] As our supreme court recently stated in construing this same statute, "[a]lthough not a criminal statute, it would be equally improvident to judicially engraft extra requirements to legislation which is clear on its face." Berkebile, 311 S.C. at 55-56, 426 S.E.2d at 763.

Even though the damages allowed under section 32-1-20 may not be compensatory because recovery is not allocated to the person who actually suffered the loss, the measure of such damages is the actual pecuniary loss suffered from the defendant's wrong. As our courts have recognized, generally it is the spouse and family of the gambler who are thus protected. See Id. at 55, 426 S.E.2d at 763 ("The legislature adopted a policy to protect a citizen and his family from the gambler's uncontrollable impulses.").

Quite apart from the statutory construction analysis, a firmly established rule of law in South Carolina is that there can be no recovery of punitive damages without a finding of actual damages. See Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). Section 32-1-20 mandates the automatic addition of treble damages, without mandating a higher degree of culpability through proof of wilful or intentional conduct. Therefore, requiring clear and convincing proof would necessitate that the entire award be considered punitive damages. If we were to agree with this argument, there would be no actual

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[6] Cf. S.C. Code Ann. § 56-15-110 (1991) (providing for treble damages, and, if wilful and malicious conduct is proved, the allowance of punitive damages); see Toyota of Florence v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994) (ruling there was no prohibition against recovery of multiple damages and punitive damages where the legislature intended both to be recoverable). Indeed, the instances in which our legislature has specifically allowed or disallowed punitive damages by name are too numerous to mention.

damage award, and the verdict could not stand under the firmly established rule stated above.

For all of the above reasons, we conclude section 32-1-20 provides a measure of actual damages equal to the actual loss sustained by the gambler at one sitting. The burden of proof is by the preponderance of the evidence, and the trial court properly charged the jury.

II. Directed Verdict/ JNOV

Jamaica Joe's contends the trial court erred in failing to grant its motions for a directed verdict and a JNOV because Rorrer failed to prove damages. We disagree.

We have concluded that the appropriate burden of proof is by the preponderance of the evidence. Furthermore, the appropriate standard of review by this Court is whether there is any evidence to support the verdict. Collins v. Doe, 343 S.C. 119, 125, 539 S.E.2d 62, 64 (Ct. App. 2001) (finding that when considering a directed verdict motion, neither this Court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony and evidence); see also Madden v. Cox, 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985) (concluding that where an appeal is taken from a jury verdict on the ground of insufficiency of the evidence, the reviewing court must sustain the verdict if there is any evidence to support the verdict).

In ruling on motions for a directed verdict and a JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt. Creech v. S.C. Wildlife & Marine Res. Dep't, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997). The trial court can only be reversed by this Court when there is no evidence to support the ruling below. Id.

Jamaica Joe's contends the testimony of Rorrer's wife regarding her losses was insufficient because there was evidence she also won money on many occasions and because Rorrer was unable to demonstrate that his wife's losses

directly resulted from gambling at Jamaica Joe's. However, Rorrer's wife testified with specificity as to each loss she sustained at Jamaica Joe's, referring to the credit card and bank records as corroboration. Each of these losses was for amounts in excess of fifty dollars, and, according to her testimony, each was a net loss at that particular sitting. These losses exceeded the amount awarded by the jury. Furthermore, while she acknowledged that she had gambled at two other establishments, she claimed she did not lose any money on those rare occasions.

Viewing the evidence in a light most favorable to Rorrer, we conclude the testimony was sufficient to raise a factual issue which the trial court properly submitted to the jury.

CONCLUSION

The trial court did not err in refusing to grant motions for a directed verdict or a JNOV, and it properly instructed the jury that Rorrer had the burden of proving his damages by the preponderance of the evidence. Therefore, the decision of the trial court is

AFFIRMED.[7]

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

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[7] Because oral argument would not aid this Court in resolving any issue on appeal, we decide this case without oral argument pursuant to Rule 215, and 220(b)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Marvin Boone,

Appellant,

v.

Sunbelt Newspapers, Inc., d/b/a The Times and Democrat,

Respondent.

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

Opinion No. 3410
Heard November 6, 2001 - Filed November 19, 2001

AFFIRMED

Jeffrey S. Holcombe and Clyde C. Dean, Jr., both of Dean Law Firm, of Orangeburg, for appellant.

Jay Bender, of Baker, Ravenel & Bender, of Columbia, for respondent.

ANDERSON, J.: This is a defamation action. Marvin Boone,

a law enforcement officer, sued Sunbelt Newspapers, Inc., d/b/a The Times and Democrat ("Sunbelt"), alleging it published a newspaper article that contained false, misleading, and defamatory statements made about him by a local citizen. The trial court granted summary judgment in favor of Sunbelt, finding the article could not be understood as making false statements with a defamatory meaning about Boone and, in the alternative, the statements were privileged. Boone appeals. We affirm.

FACTS/PROCEDURAL BACKGROUND

On July 4, 1988, 67-year-old Clyde Myers, a resident of Branchville, drove a truck loaded with drums containing 500 gallons of gasoline through the doors of the Orangeburg-Calhoun Law Enforcement Complex ("LEC"), flooded the floor with gasoline, ignited it, and then engaged in a twenty-minute gun battle that wounded four officers. The LEC was nearly destroyed in the attack. Myers had purchased a bulletproof vest, steel helmet, and gas mask in preparation for the incident.[1] Charges against Myers were nolle prossed in May 1989 when he was declared unable to assist in his own defense. In July 1997, Myers, then 76-years-old, was re-indicted for the attack by the Orangeburg County grand jury.

This litigation arises out of Sunbelt's publication of an article in the August 3, 1997, edition of its newspaper, The Times and Democrat, in which Sunbelt employees interviewed Myers and published his account of the events that precipitated the attack and explanation for attempting to burn down the LEC.[2] The publication coincided with the re-indictment of Myers and was

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[1] Myers was also injured. He claimed his thumb was shot off so he "couldn't hold the gun no more," and his foot had to be amputated after it became infected from his injuries. Myers was hospitalized and later spent time at the South Carolina Department of Mental Health. Myers stated he was so medicated that he "didn't know nothing for about two or three years."

[2] It was accompanied by another article, "Grand jury revives case against Myers."

headlined on page 1A as follows:

> On July 4, 1988, a heavily armed man attacked the law enforcement building in Orangeburg, set it afire and waged a gun battle with officers. Nine years later, for the first time …
>
> **Clyde Myers tells story of LEC attack**

The headline on the jump page (at page 10A) proclaimed:

Myers' hate aimed at one deputy but another deputy says he made arrest

The article stated, "For nine years, Clyde Burdell Myers, 76, has been mum about why it happened. On Thursday, he told his story to The Times and Democrat."

Myers' account of the events described a dispute in 1988 with the Orangeburg County Council over a road adjoining his property and Myers' belief that he had been treated improperly when arrested for malicious injury to county property in connection with the road dispute. Myers stated his attack on the LEC was in retaliation for this arrest, and that he was "standing up for [his] civil rights." The article declared:

> **Ironically, the one man Myers continues to hate to this day for hurting him during that arrest isn't even the man who arrested him.**

(emphasis added).

According to Myers, when County Council did not respond to a 10-day

deadline he had imposed for a response to his inquiry about who owned a local road, Myers proceeded on the morning of the 10th day to plow up half the road adjacent to his property and place barricades on each end of the road. Myers then drove to a local store to purchase "No Trespassing" signs. Upon his return, he encountered two Orangeburg County sheriff's deputies on the highway. Myers got out of his vehicle, took some tacks and a claw hammer, and began placing the signs on the barricades. The article stated:

> He claims it was then-Deputy Marvin Boone who told him he had an arrest warrant for him for damaging the county roadway.

Myers asserted Boone placed the handcuffs too tightly on his left wrist and repeatedly "jerked down" on the handcuffs, injuring his hand. The article explained Myers' apparent mistaken identification of Boone as the arresting officer:

> **Arrest sparked hatred for wrong officer**
>
> Claiming that the deputy "treated me like a mad dog" during the arrest, Myers said he developed a hatred for the officer that set the wheels of revenge in motion — a hatred so intense that Myers admitted he had even considered crashing a truck loaded with gasoline into Boone's home.
>
> "Marvin Boone was the main one. In my mind one time I had sort of halfway planned [on] attacking his home in Rowesville, but I overruled attacking his home and family and children, because I didn't know how many children were in the neighborhood," Myers said. "If I'd of run that sucker up against that house and torched it like I did that complex, a lot of people would have been hurt."
>
> That revelation became even more chilling Friday when Boone, the son of then-Sheriff Vance Boone who is now a lance corporal in the State Transport Police, said he was not the officer who arrested Myers — insisting he doesn't remember ever meeting

the [sic] Myers, much less arresting him.

The Orangeburg County Sheriff's Office backed up Boone's assertion Friday, stating it was former deputy Johnny Haddock who, along with Larry Williams, arrested Myers for damaging the county roadway.

"Yeah. Larry and I arrested him for damaging county property," Haddock said Saturday. "He claimed we broke his wrist and later filed a civil rights complaint with the FBI. FBI agent Bill Daniels came down to investigate the complaint. After checking into it, Daniels cleared us of any wrongdoing. He told me it appeared Myers made the complaint just out of spite."

. . . .

[Haddock] said he never jerked down on the handcuffs as Myers claimed.

"Myers was 67 years old at the time. We didn't need to use any force, especially having a fella Larry Williams' size there. He didn't try to fight us during the arrest. He just stood there with that off-in-the-west look," Haddock said.

. . . .

"I've always felt like when he came up there and burned that complex he came looking for me and Larry," Haddock said.

Why Myers continues to insist it was Marvin Boone who arrested him during the road incident is a mystery, Haddock said.

"Marvin and I looked enough alike, I reckon. We were both the same height and size and both of us had dark hair. I had a moustache and Marvin didn't," he said. "But Myers' bread ain't

exactly done, either. That's got a lot to do with it."

The article stated when Sunbelt's reporters confronted Myers with evidence that Boone was not the arresting officer and asked if it were possible he had confused Boone with Haddock all these years, Myers insisted he knew without a doubt the arresting officer was Boone. Myers contended the reason "[his] arm was about tore off" was because Boone was upset with him for reporting to the FBI an illegal drug operation from which Myers said law officers were profiting. Myers maintained he had reported to the FBI that a patrol car regularly visited a nearby home and the deputy would "exchange something" with the occupant, and he was suspicious. The article stated: "Myers said he would not identify by name the officer who was going to the residence, but he insinuated Boone and others in the sheriff's office may have been involved."

The paper contacted Boone for his response to Myers' allegations and duly reported that Boone found them "groundless":

> Boone, saying he cannot talk further about Myers because he may be called to testify if Myers is brought to trial, did say that such an allegation about drugs is completely groundless. "I never have done anything like that and I never would."

Finally, the article noted: "Adding a final ironic twist to his story, Myers said the letter he had been waiting for from [the Orangeburg County Attorney] informing him who owned Sub Road actually did arrive on the 10th day of the 10-day deadline he gave the county. The problem was it arrived at 3 p.m. that afternoon, after he had plowed up the road." When asked if he had any regrets about the incident, Myers said, "No," and asserted, "Ain't nobody going to deny me of my civil rights. I'd die first … anytime, anywhere!" The article concluded with Myers' explanation that he "just wanted the public to know what happened."

Boone brought this action for libel against Sunbelt in 1998, alleging he was a public official and Sunbelt published the allegations concerning the

alleged use of excessive force and his purported illegal drug activity with actual malice. Boone averred the statements were "false, defamatory, and beyond any qualified privilege." He sought both actual and punitive damages, claiming the article injured his reputation and caused him severe physical and mental suffering.

The trial court granted Sunbelt's motion for summary judgment, ruling the article could not reasonably be read to make a false statement of fact with a defamatory meaning of and concerning Boone. In the alternative, the court concluded as a matter of law that, even if the statements were false, they were privileged under the "neutral reportage doctrine" because they concerned a matter of public interest. Boone appeals.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001), cert. denied; Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001), cert. granted; Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); see also Green v. Cottrell, 346 S.C. 53, 550 S.E.2d 324 (Ct. App. 2001), cert. pending (stating that a trial court should grant motion for summary judgment when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law).

Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Carolina Alliance for Fair Employment v. South Carolina Dep't of Labor, Licensing, and Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999). Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere

allegations or denials contained in the pleadings; rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. Rule 56(e), SCRCP; Peterson v. West Am. Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party opposing summary judgment. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997); Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997).

"The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." Carolina Alliance for Fair Employment, 337 S.C. at 485, 523 S.E.2d at 800.

On appeal, this Court reviews the grant of summary judgment using the same standard applied by the trial court. Bray v. Marathon Corp., Op. No. 3386 (S.C.Ct.App. filed September 10, 2001) (Shearouse Adv. Sh. No. 33 at 81); see also Estate of Cantrell, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990) ("On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party. The judgment may be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.") (citations omitted).

LAW/ANALYSIS

I. Absence of False Statement of Fact and Defamatory Meaning

Boone contends the trial court erred in granting summary judgment to Sunbelt on the basis the article, when considered as a whole, did not make false statements about him and was not defamatory as a matter of law. We disagree.

"The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff." Swinton Creek Nursery v. Edisto Farm Credit,

ACA, 334 S.C. 469, 484, 514 S.E.2d 126, 133 (1999) (citation omitted).

The elements of a cause of action for defamation include: (1) a false and defamatory statement concerning another, (2) an unprivileged publication to a third party, (3) fault on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998) (Holtzscheiter II) (Toal, J., concurring), recited in Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001).

> In addition to being defamatory, the statement must be false. Under the common law, a defamatory communication was presumed to be false. However, truth could be asserted as an affirmative defense. The Supreme Court's holding in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69, 106 S. Ct. 1558, 1559, 89 L. Ed. 2d 783, 787 (1986), modified the common law rule: "[A]t least where a newspaper publishes speech of public concern, a private figure plaintiff cannot recover damages without also showing that the statements at issue are false." Thus, an initial question that must be answered is whether the speech is of public concern. If it is a matter of public concern (at least where a media defendant is involved), the plaintiff must also prove its falsity. If it is a matter of private concern, the plaintiff does not have to prove falsity. "The publisher may avoid liability if it successfully proves the statement is true (i.e. the affirmative defense of truth is available to the publisher in any type of case)." Whether a communication is reasonably capable of conveying a defamatory meaning is a question of law for the trial court to determine.

Fleming v. Rose, 338 S.C. 524, 533-34, 526 S.E.2d 732, 737 (Ct. App. 2000), cert. granted (citations omitted).

"In defamation actions involving a 'public official' or 'public figure,' the plaintiff must [also] prove the statement was made with 'actual malice,' i.e., with either knowledge that it was false or reckless disregard for its truth." Elder

v. Gaffney Ledger, 341 S.C. 108, 113, 533 S.E.2d 899, 901 (2000) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) and Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)).[3] "Whether the evidence is sufficient to support a finding of actual malice is a question of law [for the trial court]." Id. at 113, 533 S.E.2d at 901-02.

Malice must be shown by clear and convincing evidence. Miller v. City of West Columbia, 322 S.C. 224, 228, 471 S.E.2d 683, 685 (1996) ("To recover on a claim for defamation, the Constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth.") (citations omitted). Constitutional actual malice required in defamation actions involving public officials is distinguishable from common law malice, which refers to feelings of ill-will, spite, or desire to injure. Sanders v. Prince, 304 S.C. 236, 403 S.E.2d 640 (1991).

As our Supreme Court recently reiterated in George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001):

> The constitutional guarantee of free speech requires that a public official or public figure must prove a defamatory statement was made "with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

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[3] The parties agree that, in his capacity as a law enforcement officer, Boone is a public official for purposes of this defamation action. See McClain v. Arnold, 275 S.C. 282, 270 S.E.2d 124 (1980) (joining the majority of jurisdictions in holding that a police officer is a public official for defamation actions, thereby requiring the plaintiff's proof of actual malice); see also Botchie v. O'Dowd, 315 S.C. 126, 432 S.E.2d 458 (1993) (applying actual malice standard to deputy sheriff's defamation action); Gause v. Doe, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994) (public officials such as police officers must establish actual malice).

> At trial, the plaintiff must prove actual malice by clear and convincing evidence.

Id. at __, 548 S.E.2d at 874 (citations omitted).

"In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege. Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) (citations omitted). "In general, the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court." Murray v. Holnam, Inc., 344 S.C. 129, 140, 542 S.E.2d 743, 749 (Ct. App. 2001). "However, the question whether the privilege has been abused is one for the jury." Id.

"[T]he intent and meaning of an alleged defamatory statement must be gathered not only from the words singled out as libelous, but from the context; all of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have." Jones v. Garner, 250 S.C. 479, 485, 158 S.E.2d 909, 912 (1968) (citation omitted).

"It is the trial court's function to determine initially whether a statement is susceptible of having a defamatory meaning." White v. Wilkerson, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997) (citation omitted). A motion for summary judgment should be granted if the court determines the publication is incapable of any reasonable construction that will render the words defamatory. Id. at 183-84, 493 S.E.2d at 347.

In the current appeal, the trial court found when the article was considered in its entirety, "it is clear as a matter of law that the article does not have a defamatory meaning with respect to [Boone]." The court observed: "Since the allegations by Myers against [Boone] hinged entirely on the accuracy of Myers' identification of [Boone] as his arresting officer, and the article refuted Myers'

identification of [Boone], the article in its entirety rendered innocuous the allegations by Myers against [Boone]." The court concluded: "The only reasonable interpretation of the article complained of by the plaintiff is that it does not state actual facts with respect to the plaintiff as the person identified by Myers as his arresting officer or the person involved in suspicious activity. Myers' identification of plaintiff was refuted throughout the article."

Boone argues the trial court erred in ruling this case was distinguishable from Stevens v. Sun Publishing Company, 270 S.C. 65, 240 S.E.2d 812 (1978). Sun Publishing published two newspapers containing allegedly libelous articles regarding the plaintiff, a state senator. The article implied the plaintiff was being manipulated by his brother and incorrectly stated he was being sued for abuse of political power. Sun Publishing appealed the denial of its JNOV motion, asserting the articles were not defamatory, but the Supreme Court affirmed a verdict in favor of the plaintiff. The Court found the articles contained blatantly false statements and opinions by a biased informant that implied improper conduct by a public official.

Boone asserts that, as in Stevens, the informant in this case, Myers, was clearly biased against him and the newspaper was aware of the bias and yet reported blatantly false statements about him. We disagree.

The trial court stated "Stevens is fully distinguishable from the case at hand. In Stevens, the newspaper adopted as the basis of its news story statements which it knew to be from a biased source. The paper made no additional investigation of the potential falsity of the information from the source, and the reporter acknowledged an animus against the plaintiff. None of these factors have been shown to exist in this case." We agree with the trial court's analysis in this regard and find Stevens does not afford a basis for relief.[4]

[4] Further, in Stevens, the Court focused on the issue of actual malice as the statements were shown to be false. In the current appeal, because we find the disputed statements were not false statements of fact susceptible of a

In presenting Myers' explanation of his actions some nine years before, the article clearly stated in the text at the outset: "Ironically, the one man Myers continues to hate to this day for hurting him during that arrest isn't even the man who arrested him." Further, the article's heading on the article's jump page on page 10A stated: "Myers' hate aimed at one deputy but another deputy says he made arrest"; a subheading in the text also proclaimed: "Arrest sparked hatred for wrong officer." See Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 81, 221 S.E.2d 770, 773 (1976) ("As a general rule, both the headline and the article following it must be considered as one document in determining whether it is defamatory.") (citations omitted).

The article is a first-person account from a citizen who took extreme steps to seek revenge against a law enforcement officer he believed had mistreated him during an arrest. A review of the article reveals that Myers was mistaken in his identification, thus casting doubt on his explanation of the events. The article reported Boone's statement that he was not the arresting officer; moreover, the newspaper identified the deputies who actually made the arrest, Haddock and Williams, and included its interview with Haddock, who acknowledged he was in fact one of the arresting officers. Contrary to the circumstances in Stevens, Sunbelt's newspaper did not adopt the version of events propounded by Myers.

In addition, the article included background information about Myers' treatment for emotional problems, which further cast doubt on any identification of Boone. For example, the article noted Myers had been treated at the South Carolina Department of Mental Health after this incident and included Myers' description of his purported instructions upon discharge: "He [Myers] said a doctor at the mental institution told him and his wife that 'I cannot come to

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defamatory meaning of and concerning Boone, we need not address whether the statements were made with actual malice. Cf. Botchie v. O'Dowd, 315 S.C. 126, 130, 432 S.E.2d 458, 460-61 (1993) (stating "[w]e need not determine the truthfulness of the statement as we find in the record no evidence that it was made with malice").

Orangeburg County again. I can go anywhere else in the state or nation but not Orangeburg County.'" A photograph of Myers chained to a chair accompanied the article and the caption read: "Clyde Myers, now 76, had a history of protest against county government. In 1985, amid warnings that he would be ejected from County Council meetings, Myers chained himself to a chair in council chambers."

Thus, we agree with the trial court that, when considering the article as a whole, it could not reasonably be interpreted as stating false statements with a defamatory meaning of and concerning Boone. See, e.g., Early v. Toledo Blade, 720 N.E.2d 107 (Ohio Ct. App. 1998) (stating the trial court must read the statements at issue in the context of the entire article to determine whether a reader would interpret them as defamatory and finding a police officer plaintiff had failed to establish a newspaper article regarding police brutality and misconduct was personally defamatory); cf. Sweeney v. Sengstacke Enters., Inc., 536 N.E.2d 823, 826 (Ill. App. Ct. 1989) (holding newspaper's article reporting that police officer had stated he and others planned to kill the city mayor was not capable of an innocent construction so as to be nonactionable, whether read alone or in the context of the entire article, the court rejecting the defendants' assertion that the remainder of the article gave it a different, innocent meaning, and finding "[t]he entire focus of the article is the threat by a police officer on the life of the mayor" and noting the headline announced "policeman threatened mayor"). Accordingly, we affirm the trial court's grant of summary judgment to Sunbelt based on the court's finding the newspaper article did not contain false statements with a defamatory meaning of and concerning Boone.

II. Neutral Reportage Privilege

Boone next challenges the trial court's alternative finding that the statements published by Sunbelt, even if false, were not actionable because they were privileged.

The trial court, citing Sunshine Sportswear & Electronics, Inc. v. WSOC Television, Inc., 738 F. Supp. 1499 (D.S.C. 1989), alternatively found Sunbelt

was insulated from liability under the "neutral reportage doctrine." The court explained:

> In recognition of the protection for criticism of public officials as a protected practice in a democracy, the reporting of the criticism is also protected under the doctrine of "neutral reportage." This doctrine insulated from liability the reporting of defamatory statements made against public figures when the republication does not adopt, espouse or concur in the charges.

The trial court further found that, "rather than rely[ing] on this protection alone, [Sunbelt] went beyond the reporting of the charges and exposed the misidentification of the plaintiff by Myers, and thereby established that [Boone] could not have been guilty of the misconduct alleged by Myers."

Boone contends the trial court erred in finding the neutral reportage privilege and its exposure of Myers's misidentification insulated Sunbelt from liability. Boone contends there is a factual issue regarding whether Sunbelt "accurately and disinterestingly" reported the statements Myers made against him. Boone asserts: "Viewing the article as a whole, a jury could find the manner in which the Defendant reported Myers' accusations against Plaintiff left a reasonable reader with the impression that the story Myers told had some validity."

The trial court's reliance on the neutral reportage privilege assumes the challenged statements were false. It is a doctrine that provides an exception to liability for what could otherwise be a defamatory statement. Since we have affirmed the trial court's grant of summary judgment to Sunbelt based on its finding the newspaper article did not contain false and defamatory statements about the plaintiff, we need not reach this alternative ground in support of summary judgment. See, e.g., Ross, 266 S.C. at 80, 221 S.E.2d at 772 ("Since we agree with the trial judge's determination that the [newspaper] articles were clearly not false or defamatory, we need not reach the question of qualified privilege."); Fuller-Ahrens Partnership v. S.C. Dep't of Highways & Pub. Transp., 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993) (holding where an

appellate court affirms trial court's grant of summary judgment on a particular ground, the appellate court need not discuss the remaining grounds); Weeks v. McMillan, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous.") (citation omitted).

CONCLUSION

We hold that a cause of action for defamation fails when there is an absence of false statement and defamatory meaning. Based on the foregoing, the trial court's order granting summary judgment to Sunbelt is

AFFIRMED.

CONNOR and HOWARD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No. 96-CP-23-1538

Robert W. Binkley and Susan B. Binkley,

Respondents,

v.

Rabon Creek Watershed Conservation District of Fountain Inn, South Carolina,

Appellant.

Case No. 97-CP-23-690

Robert W. Binkley and Susan B. Binkley,

Respondents,

v.

John Burry; Haynsworth, Marion, McKay & Guerard, LLP; Donald A. Harper; Greenville County; and Fant Engineering & Surveying Co., Inc.,

Defendants,

and

Haynsworth, Marion, McKay & Guerard, LLP,

Third-Party Plaintiff,

v.

Rabon Creek Watershed Conservation District of Fountain Inn, South Carolina,

Appellant.

Case No. 96-CP-23-345

John N. Lopresti and Janice M. Lopresti,

Plaintiffs,

v.

John Burry, Rabon Creek Watershed Conservation District of Fountain Inn, South Carolina, Everette H. Babb, Fredrick E. Landrith, Landrith Surveying, Inc., and Greenville County,

Defendants.

Case No. 95-CP-23-3542

Steven W. McConnell,

Plaintiff,

v.

John Burry, Rabon Creek Watershed Conservation District of Fountain Inn, South Carolina, and T. H. Walker, Jr.,

Defendants.

Case No. 96-CP-23-3515

David Hearn and Debbie Hearn,

Plaintiffs,

v.

Timothy Farr, John Burry, and the County of Greenville, South Carolina,

Defendants.

Case No. 97-CP-23-690

Robert W. Binkley and Susan B. Binkley,

Respondents,

v.

John Burry; Haynsworth, Marion, McKay & Guerard, LLP; Donald A. Harper; Greenville County; and Fant Engineering & Surveying Co., Inc.,

Defendants,

and

Haynsworth, Marion, McKay & Guerard, LLP,

Third-Party Plaintiff

v.

Rabon Creek Watershed Conservation District of Fountain Inn, South Carolina,

Appellant.

Case No. 97-CP-23-2758

Mitchell and Rebecca King and Arlin and Maxine Verley,

Plaintiffs,

v.

John Burry, Rabon Creek Watershed Conservation District of Fountain Inn, South Carolina; The United States of America; The United States Department of

Agriculture; The County of Laurens; The Laurens Soil and Water Conservation District; The County of Greenville; and The Greenville County Soil and Water Conservation District,

Defendants,

of whom

John Burry and Rabon Creek Watershed Conservation District of Fountain Inn, South Carolina are

Appellants,

and

John N. Lopresti, Janice M. Lopresti, Steven W. McConnell, David Hearn, Debbie Hearn, T. H. Walker, Jr., Timothy Farr, Robert W. Binkley, Susan B. Binkley, Haynsworth, Marion, McKay & Guerard, LLP, Donald A. Harper, Mitchell and Rebecca King and Arlin and Maxine Verley are

Respondents. _____

Appeal From Greenville County
John W. Kittredge, Circuit Court Judge

_____

Opinion No. 3411
Heard October 3, 2001 - Filed November 19, 2001

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AFFIRMED IN PART AND REVERSED IN PART

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Andrew F. Lindemann, of Davidson, Morrison &

Lindemann, of Columbia; and John R. Devlin, Jr., of Greenville; for Rabon Creek Watershed Conservation District of Fountain Inn, South Carolina; and W. Francis Marion, Jr., of Haynsworth, Marion, McKay & Guerard, of Greenville, for John Burry, appellants.

David L. Thomas, of Greenville, for David Hearn and Debbie Hearn; Michael S. Chambers, of Greenville; and Keith M. Babcock, of Lewis, Babcock & Hawkins, of Columbia, both for John N. Lopresti, Janice M. Lopresti, Robert W. Binkley and Susan B. Binkley; Samuel W. Outten, of Leatherwood, Walker, Todd & Mann, of Greenville, for Timothy Farr; H. W. Pat Pascal, Jr., of Miller & Paschal, of Greenville, for Steven W. McConnell, Mitchell and Rebecca King, Arlin and Maxine Verley; John E. Johnston, of Leatherwood, Walker, Todd & Mann, of Greenville, for Haynsworth, Marion, McKay & Guerard, LLP; H. Michael Spivey, of Mauldin, for T. H. Walker, Jr.; Donald A. Harper; and N. Heyward Clarkson, of Clarkson, Fortson, Walsh & Rheney, both of Greenville, for Donald A. Harper, respondents.

William G. Walsh, of Simpsonville, for defendant Fant Engineering & Surveying Co., Inc.; John W. Howard, III, for defendant Fredrick E. Landrith, and W. Howard Boyd, Jr., of Gibbs, Gallivan, White & Boyd, for defendant Greenville County, both of Greenville; and Alexander Cruickshanks, IV, of Clinton, for defendant Laurens County.

GOOLSBY, J: In this declaratory judgment action to determine the extent and enforceability of an easement, Rabon Creek Watershed Conservation

District of Fountain Inn[1] (Rabon Creek) appeals the grant of a Rule 60(b)(5) motion vacating the final order in Binkley v. Rabon Creek (Binkley I) and the consolidation of Binkley I with Binkley v. Burry (Binkley II) and the other present actions.

Rabon Creek further appeals, inter alia, the trial court's ruling in the consolidated case that it was equitably estopped from enforcing an easement against Respondents Robert and Susan Binkley, David and Debbie Hearn, John and Janice LoPresti, Steven McConnell, Mitchell and Rebecca King, and Arlin and Maxine Verley (referred to collectively as the Homeowners).

The secondary Appellant, John Burry, appeals the trial court's findings: 1) the easement extended to the top of the dam; 2) the Homeowners did not have notice of the easement; and 3) Rabon Creek may enforce the easement against Burry but not against the Homeowners. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

In the summer of 1976 John Burry bought 172 acres of land from the Gray family. Burry paid $650 an acre for the land known as tract 34. Two months later three men representing the Rabon Creek Watershed Conservation District asked Burry if he would sign an easement for the construction of a dam and the impoundment of water to create Lake Beulah. Burry signed the agreement in October 1976. Rabon Creek duly recorded the easement.

After the dam was built, the resulting lake covered part of tract 34. Burry subdivided the remaining property into lots and sold lakefront lots for approximately $20,000 an acre.

The Homeowners all purchased or constructed residences on lots previously owned by Burry and within the easement claimed by Rabon Creek.[2]

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[1] Rabon Creek Watershed Conservation District is a governmental subdivision pursuant to S.C. Code Ann. Section 48-11-10(1) (Supp. 2000).

[2] Not all Homeowners purchased directly from Burry.

The Binkleys purchased three lots in 1991 and constructed a lakefront

On Friday, August 25, 1995, it began to rain. Homeowner Steve McConnell awoke around 4:00 a.m. to discover the LoPresti's home next door was flooding.

The water reached McConnell's home around 5:30 a.m. McConnell ultimately had five feet of water on his first floor. Like McConnell and the LoPrestis, the other Homeowners in this action all experienced flooding from this storm.

After the flood, the Homeowners filed individual actions against parties including: John Burry, Rabon Creek, land surveyors, and their respective closing attorneys.[3]

In June 1996 the Binkleys filed an action against Rabon Creek alleging the easement did not give Rabon Creek the right to flood their property and seeking, inter alia, declaratory and injunctive relief to prevent Rabon Creek from flooding the property in the future.

Rabon Creek and the Binkleys moved for summary judgment on the interpretation of the easement. In December 1996 Judge Kittredge granted summary judgment to Rabon Creek, finding it held an easement extending to the top of the dam. Judge Kittredge's order stated the parties consented to dismiss all remaining claims and defenses with prejudice and to waive the right to

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home. The Hearns also built a lakefront home. The LoPrestis purchased an already-completed lakefront residence in 1994. The McConnells purchased a lakefront lot in 1992 and constructed a residence. They moved into their home in January 1995.

The Kings and the Verleys purchased lots and constructed residences. Mitchell King's father, an attorney, performed a title check for his son and discovered the easement but concluded it only burdened the edge of his son's property.

[3] John and Janice LoPresti filed an action against Rabon Creek and others in February 1996. Steven McConnell filed an action in December 1995. The Hearns filed an action in December 1996. The Kings and the Verleys filed an action in August 1997.

appeal the order.

The Binkleys subsequently filed Binkley II in which they named John Burry, Haynsworth, Marion, McKay & Guerard (Haynsworth Marion), Donald Harper, Greenville County, and Fant Engineering & Surveying as defendants. Haynsworth Marion impled Rabon Creek as a third-party defendant. The court consolidated Binkley II with the actions of the other Homeowners.

In August 1997 the Binkleys moved to set aside Judge Kittredge's order in Binkley I pursuant to Rule 60(b)(5), SCRCP, arguing it was no longer equitable that the judgment should have prospective application and inconsistent and inequitable results and consequences could occur if they were not granted relief. Judge Kittredge denied the motion.

In December 1997 the Binkleys moved for reconsideration. On October 2, 1998, Judge Kittredge granted the motion. He set aside the judgment in Binkley I and consolidated Binkley I with Binkley II. Rabon Creek appeals this order.

In the combined actions, Judge Kittredge granted summary judgment regarding the existence of an easement but denied summary judgment regarding the scope of the easement and the affirmative defenses to its enforcement, including equitable estoppel.

Following a non-jury trial solely on the extent and enforceability of the easement, the trial court held: 1) the language of the easement was ambiguous, but other evidence demonstrated the parties intended for the easement to extend to the top of the dam; 2) the Homeowners did not have actual or constructive knowledge that Rabon Creek claimed an easement to the top of the dam; and 3) Rabon Creek was equitably estopped from enforcing the easement against the Homeowners. The trial court found the Homeowners relied upon Rabon Creek's silence in purchasing or constructing homes within the flood plain and Rabon Creek "acted recklessly in willfully failing to conduct the mandated inspections."

The trial court, however, permitted Rabon Creek to enforce the easement against Burry finding "[Burry's] testimony was not credible, and it conflicted with the credible evidence regarding the purpose of Lake Beulah in the overall

project." Rabon Creek and Burry appeal.

LAW/ANALYSIS

I.

Rabon Creek contends the language of the recorded document creating the easement clearly and unambiguously extends the easement to the top of the dam. Burry argues the easement only extended to a fifteen-foot buffer area around the lake and did not extend to the top of the dam.

The scope of an easement is an equitable matter in which a reviewing court may take its own view of a preponderance of the evidence.[4] The language of an easement determines its extent.[5] "Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense."[6] We must first decide if the language used by the grant here is plain and unambiguous and, if so, what does that language mean.

We agree with Rabon Creek. The language in question is clear and unambiguous. But does that language extend the easement to the top of the dam as Rabon Creek claims?

The recorded document states in pertinent part:

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[4] Tupper v. Dorchester County, 326 S.C. 318, 323, 487 S.E.2d 187, 190 (1997) (citations omitted); Eldridge v. City of Greenwood, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998). But see Giles v. Parker, 304 S.C. 69, 72, 403 S.E.2d 130, 131-32 (Ct. App. 1991) (holding the determination of the width of an easement is a question at law).

[5] See Howorka v. Harbor Island Owners' Ass'n, 292 S.C. 381, 385, 356 S.E.2d 433, 436 (Ct. App. 1987); Marlow v. Marlow, 284 S.C. 155, 161, 325 S.E.2d 703, 706 (Ct. App. 1985).

[6] South Carolina Pub. Serv. Auth. v. Ocean Forest, Inc., 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981).

> Dr. John Burry . . . does hereby grant, bargain, sell, convey, and release unto the Rabon Creek Watershed Conservation District . . . an easement in, over, and upon the following described land . . .
>
> The approximate location of the area involved in the easement herein conveyed as Tract No. 34 shown on a Sketch Map of Rabon Creek Watershed (Project) . . . which Sketch Map is, by reference, incorporated in and made a part of this instrument.
>
> For or in connection with the construction, operation, maintenance, and inspection of a floodwater retarding structure . . . for the flowage of any waters in, over, upon, or through such structure; and for the permanent storage and temporary detention, either or both, of any waters that are impounded, stored, or detained by such structure.[7] (Emphases added).

The language of the easement clearly grants "flowage rights" to Rabon Creek. "Flowage rights" have been defined as "the 'private right to operate a dam and flood [flow] the property of upstream waterfront landowners'"[8] and the right to set "water back against the up stream river banks and over them to at least the level that the surface of the water is maintained at the dam."[9]

These flowage rights permit Rabon Creek to flow water "in, over, upon, or through" the dam. Obviously, if water may flow "over or upon" the dam, the easement necessarily extends at least to the top of the dam.

Furthermore, the Sketch Map, incorporated by reference into the easement, explicitly refers to the "top of the dam elevation" and includes a contour line on the map corresponding to this elevation. Although water in the

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[7] The same type of Natural Resources Conservation Service (NRCS) easement form at issue in this case was used across the country.

[8] Trask v. Pub. Util. Comm'n, 731 A.2d 430, 433 (Me. 1999) (citation omitted).

[9] Petition of Citizens Util. Co., 91 A.2d 687, 691 (Vt. 1952).

lake is usually at an elevation of 700.5 feet, under the unambiguous language of the flowage easement, Rabon Creek has the right to flood land surrounding the lake up to the 724.5 foot contour line, i.e., the top of the dam.

In addition, the Sketch Map contains a table listing the number of acres of Tract 34 affected by the easement. The table states 56.7 acres of Tract 34 are within the contour line corresponding to the top of dam elevation and thus encumbered by the easement. The only possible reason to include this information in the recorded document is to describe the extent of the easement.

Indeed, easements for flowage are customarily described in terms of elevation, contour lines, and/or acreage.[10] The trial court thus erred in finding the language of the easement was vague and ambiguous. Although, as Rabon Creek argues, it was unnecessary, and in fact improper, for the trial court to take further evidence regarding the intent of the parties to the easement, the trial court correctly found the easement extended to the top of the dam.[11] Given the

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[10] See Atkinson v. Carolina Power & Light Co., 239 S.C. 150, 156, 121 S.E.2d 743, 745 (1961) ("[P]laintiff herein admits that the defendant is entitled to condemn a flowage easement in so much of his land as will actually be used to impound water up to the 220 foot elevation contour line . . . ."); Thomas v. Greenville-Carolina Power Co., 105 S.C. 268, 269, 89 S.E. 552, 552 (1916) (involving a document granting "[t]he right to permanently overflow and damage that portion of my lands situate in said county and state lying on or near [the] Saluda river within contour line 110, as shown by plat of Lockwood, Greene & Co., made in July, 1908, and containing by estimation 22.70 acres, more or less."). See also Hostetler v. Gray & Co., 523 So.2d 1359, 1362 (La. Ct. App. 1988); Trask, 731 A.2d at 434 (stating flowage rights may be referred to in terms of acreage covered); Smith Mountain Lake Yacht Club, Inc. v. Ramaker, 542 S.E.2d 392, 394 (Va. 2001).

[11] Nonetheless, this evidence also supports the conclusion the easement extends to the top of the dam. Numerous witnesses, such as Lesley Morgan of the South Carolina Department of Natural Resources, Bill Earle, retired Soil Conservation District Manager for the Greenville County Soil and Water Conservation District, and Albert McAlister, an attorney for the Laurens County Water Resources Commission, testified the easement extended to the top of the

clear and unambiguous language granting Rabon Creek flowage rights over the dam, the easement without doubt extends to the top of the dam.

Burry's argument that the easement only extended to fifteen feet around the lake is not supported by the language of the easement itself. Also, the trial court found Burry's testimony regarding the extent of the easement was not credible.[12] Our broad scope of review in equitable actions does not require this court to disregard the trial court's credibility findings.[13]

II.

A.

Rabon Creek next argues the trial court erred in finding it was equitably estopped from enforcing the easement against the Homeowners. Burry appeals the portion of the trial court's ruling finding Rabon Creek is not estopped as to him.[14]

The trial court found the recorded documents failed to provide notice to the Homeowners. The issue of notice to the Homeowners of the scope of the easement lies at the very heart of this case. The first element that a party

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dam.

NRCS employee Grady Adkins testified the Watershed Work Plan for the construction of the dam stated: "[e]asements will be obtained to the top of dam elevation at sites 20 and 21 and will include 715 acres."

[12] In 1984 Burry challenged the extent of the area from which the NRCS could remove soil from his property for use in the construction of the dam. Burry then argued the NRCS could not remove any soil above the 724.5 foot contour line. There was testimony that Dr. Burry premised this argument on the idea the easement extended to 724.5 feet and no further.

[13] See Pinckney v. Warren, 344 S.C. 382, 544 S.E.2d 620 (2001).

[14] In the alternative, Burry argues the Homeowners had notice of the easement.

seeking to assert equitable estoppel must prove is a lack of knowledge and of the means of knowledge of the truth regarding the facts in question.[15] If the Homeowners had actual or constructive notice of the easement, they may not equitably estop Rabon Creek.[16]

Rabon Creek contends the recording of the easement gave actual or constructive notice to the Homeowners requiring them to make inquiries about the scope of the easement. Having already determined the language of the

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[15] Southern Dev. Land and Golf Co. v. South Carolina Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993). The remaining elements are a reliance upon the conduct of the party estopped and a prejudicial change in position. The elements of equitable estoppel with respect to the party estopped are:

> 1) conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
> 2) intention, or at least expectation, that such conduct shall be acted upon by the other party;
> 3) knowledge, actual or constructive, of the real facts.

Id.

[16] We note that because Rabon Creek is a governmental entity, it is even more difficult for the Homeowners to demonstrate they are entitled to an equitable estoppel against it than it would be against a non-governmental party.

> As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy. The acts of government agents acting within the scope of their authority can give rise to estoppel against the government, but unauthorized conduct or statements do not give rise to estoppel.

Town of Sullivans Island v. Byrum, 306 S.C. 539, 544, 413 S.E.2d 325, 328 (Ct. App. 1992) (citations omitted).

easement was clear and unambiguous, we agree.

It is undisputed the easement was properly recorded in each Homeowner's chain of title. "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments."[17] "Notice of a deed is notice of its whole contents . . . and it is also notice of whatever matters one would have learned by any inquiry which the recitals of the instrument made it one's duty to pursue."[18] Property owners are charged with constructive notice of instruments recorded in their chain of title.[19] "A properly recorded title normally precludes an equitable estoppel against assertion of that title due to the requirement that the party raising the estoppel be ignorant of the true state of title or reasonable means of discovering it."[20]

> To afford notice of a provision in a recorded instrument, the language must be so intelligible and significant that it would naturally raise a well-grounded suspicion in the mind of a reasonably prudent person, or a person of ordinary diligence and understanding, sufficient to suggest an inquiry that would lead to a knowledge of the facts.[21]

A description of an easement in a recorded document is sufficient when it contains language that acts as a guide to the location of the easement on the land such that the easement is "capable of being rendered to a certainty [by

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[17] 28A C.J.S. Easements § 57, at 235 (1996).

[18] 66 C.J.S. Notice § 19, at 454 (1998) (emphasis added).

[19] Carolina Land Co. v. Bland, 265 S.C. 98, 107, 217 S.E.2d 16, 20, (1975); Harbison Cmty. Ass'n v. Mueller, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995); Fuller-Ahrens P'ship v. South Carolina Dep't of Highways and Pub. Transp., 311 S.C. 177, 183, 427 S.E.2d 920, 923-24 (Ct. App. 1993).

[20] Dressel v. Weeks, 779 P.2d 324, 330 (Alaska 1989).

[21] Fuller-Ahrens, 311 S.C. at 183, 427 S.E.2d at 924 (citation omitted).

reference] to something extrinsic . . . to which it refer[s]."[22] As discussed above, the Sketch Map included the elevation of the dam, a map showing the approximate location of a contour line corresponding to the elevation of the dam, and an acreage table listing the number of acres affected by the easement.

A surveyor armed with this information could have located the easement on a homeowner's property. "It is not essential to the validity of a grant of an easement that it be described by metes and bounds or by figures giving definite dimensions of the easement."[23] This is particularly true of flowage easements.

The facts of this case do not justify a finding of equitable estoppel. The description in the easement was sufficient to place the Homeowners at the very least on constructive notice of its extent. We conclude, therefore, that the Homeowners failed to meet the first element of equitable estoppel - lack of knowledge of the extent of the easement and of the means by which to obtain knowledge. "One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been mis[led]."[24]

B.

The Homeowners argue also that Rabon Creek's silence during the construction of their homes amounted to a misrepresentation. The Homeowners contend contracts between Rabon Creek, the United States Department of Agriculture, Greenville County Soil and Conservation District, and Laurens County Water and Soil Conservation District for periodic inspections of the dam

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[22] See Allen v. Duvall, 316 S.E.2d 267, 270 (N.C. 1984); Stines v. Willyng, Inc., 344 S.E.2d 546, 547 (N.C. Ct. App. 1986). See also Lake View Acres Dev. Co. v. Tindal, 306 S.C. 477, 480, 412 S.E.2d 457, 459 (Ct. App. 1991) (stating in construing deeds, "it is elementary 'that boundaries govern acreage and inaccuracies relating to the area of a tract are generally immaterial if the description clearly identifies the land conveyed and its boundaries"') (citation omitted).

[23] 28A C.J.S. Easements § 54, at 233 (1996).

[24] Southern Dev., 311 S.C. at 34, 426 S.E.2d at 751.

established a duty on the part of Rabon Creek to inform the Homeowners that they were building homes within the flood plain.[25] The trial court agreed.

In support of their argument, the Homeowners cite Southern Development Land and Golf Company v. South Carolina Public Service Authority for the proposition that "[s]ilence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel."[26] Their reliance on Southern, however, is misplaced. Southern did not address estoppel asserted by a party with actual or constructive notice from a properly recorded instrument. Our supreme court addressed that situation in South Carolina State Highway Department v. Metts.[27]

In Metts, landowners claimed the Highway Department's failure to object and inform them that a service station island and gas pumps lay within the Highway Department's easement estopped the Department from asserting any right to the easement.

The supreme court disagreed, finding the Department properly recorded the easement and the landowners were charged with constructive knowledge of its existence. The court noted there was no "action [by the Department] tending to misrepresent the actual state of facts to appellants or evidencing an intent to abandon a portion of [the easement]."[28] The court also stated "[t]he record conclusively shows that appellants had ample opportunity to ascertain what, if any, right of way had been conveyed over the property for highway purposes."[29]

This holding is in accord with the rule that silence after properly recording

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[25] One of the contracts states that Rabon Creek will "[p]rohibit the installation of any structure or facilities that will interfere with the operation or maintenance of the project measures."

[26] 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993).

[27] 270 S.C. 73, 240 S.E.2d 816 (1978).

[28] Metts, 270 S.C. at 76, 240 S.E.2d at 818.

[29] Id.

an instrument is not usually conduct justifying the imposition of equitable estoppel. "As a 'general rule . . . mere silence or acquiescence will not operate to work an estoppel where the other party has constructive notice of public records which disclose the true facts.'"[30] "Because of the doctrine of constructive notice, there is little duty, outside the avoidance of affirmative misleading acts, which is imposed upon the holder of an interest in property, where his or her interest in the land is disclosed by the public records."[31]

In the instant case, there is no evidence Rabon Creek committed any affirmative or misleading act or concealed the true scope of the easement. In contrast to the facts in Southern, none of the Homeowners contacted Rabon Creek to inquire about the scope of the easement or received assurances that the homes in question were not in the flood plain.[32] Although reliance is also an element of equitable estoppel, the record contains no evidence that the Homeowners relied on Rabon Creek's contracts to inspect the dam in deciding to purchase or construct homes or that the contracts somehow induced the Homeowners to do so.[33] Not a single Homeowner testified he or she even knew of Rabon Creek's contracts. At oral argument, counsel for the Homeowners conceded none of the Homeowners knew of the contracts when they purchased

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[30] Dressel, 779 P.2d at 331 (citation omitted).

[31] 28 Am. Jur. 2d Estoppel and Waiver § 100, at 524 (2000) (emphasis added).

[32] Prior to purchasing property for development, Southern contacted Santee Cooper and received assurances that no exposed power lines would be on the property. This information was incorrect as Santee Cooper had already finalized plans to construct overhead high voltage, transmission towers and lines on the property. Significantly, these plans were not matters of public record. Southern filed suit claiming it relied on Santee Cooper's assurances in deciding to purchase the property.

[33] Steve McConnell testified he did not even know of Rabon Creek's existence at the time he built his home. Mitchell King merely testified he had no knowledge his home lay within an easement and he never contacted Rabon Creek. This testimony does not support a finding that the Homeowners relied on Rabon Creek's conduct or alleged contractual duty to speak.

lakefront property.

Moreover, Rabon Creek's silence did not discourage the Homeowners from conducting a title search to locate the easement or from hiring a surveyor to determine where the easement fell on each property. "When a landowner has actual or constructive notice of a matter, and does not show any misrepresentation or concealment by the government, estoppel will not lie against the government."[34]

Although it is regrettable that the Homeowners suffered property damage because their homes were located within a flood easement, the trial court erred in finding Rabon Creek was equitably estopped from enforcing the easement against the Homeowners.[35]

CONCLUSION

To summarize, we reverse the trial court's findings that the recorded easement was ambiguous and Rabon Creek was equitably estopped from enforcing the easement against the Homeowners. We affirm the trial court's findings that the easement extends to the top of the dam and that Rabon Creek may enforce the easement against Burry.

Because we reverse the trial court's findings regarding equitable estoppel, it is unnecessary for us to further address Rabon Creek's argument that the court decided issues of negligence not properly before it, and we make no findings as to whether Rabon Creek breached contracts with the United States Department

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[34] Town of Sullivan's Island v. Byrum, 306 S.C. at 544, 413 S.E.2d at 328.

[35] See also South Carolina Pub. Serv. Auth. v. Ocean Forest, Inc., 275 S.C. 552, 554-55, 273 S.E.2d 773, 774 (1981) (rejecting equitable estoppel when easement was recorded and there was no evidence of misrepresentation or concealment); Stickney v. City of Saco, 770 A.2d 592, 608 (Me. 2001) ("Equitable estoppel should be 'carefully and sparingly applied.'") (citation omitted).

of Agriculture and others.[36] It is also unnecessary for us to review the propriety of the grant of the Rule 60(b) motion in Binkley I.[37]

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and STILWELL, JJ., concur.

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[36] This court will not issue advisory opinions that have no practical effect on the outcome. See Springob v. Farrar, 334 S.C. 585, 592, 514 S.E.2d 135, 139 (Ct. App. 1999).

[37] But see Tench v. The South Carolina Dep't of Educ., Op. No. 25364 (S.C. Sup. Ct. filed October 1, 2001) (Davis Adv. Sh. No. 35 at 12, 16-17) (stating relief from judgment under Rule 60, SCRCP, is not a substitute for appeal) (citing Smith Companies of Greenville v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993)).