The Supreme Court of South Carolina

In the Matter of V. Lynn Wiggins, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on May 19, 1987, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the South Carolina Supreme Court, dated February 14, 2007, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of V. Lynn Wiggins shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

March 21, 2007

The Supreme Court of South Carolina

In the Matter of Janet Smith Slusser, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on April 6, 1992, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 23, 2007, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

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

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

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Janet Smith Slusser shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

March 21, 2007

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 12

March 26, 2007
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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IN STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Elizabeth Lane Cook, Respondent.

Opinion No. 26292
Submitted February 26, 2007 – Filed March 26, 2007

PUBLIC REPRIMAND

Henry B. Richardson, Jr., Disciplinary Counsel, and Barbara M. Seymour, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Elizabeth Lane Cook, of Irmo, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to issuance of an admonition or a public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Matter I

In June 2001, respondent contracted with Complainant A's court reporting agency to provide services concerning a particular civil action. Respondent agreed to pay for Complainant A's services within

ninety (90) days of the billing date. Complainant A provided respondent with the requested services and, on July 30, 2001, issued an invoice in the amount of $219.02. In December 2001, Complainant A filed a complaint with the Commission on Lawyer Conduct (the Commission) alleging respondent failed to timely pay the invoice which, at that time, totaled $227.02, including late charges.

On July 19, 2002, respondent entered into a deferred disciplinary agreement with the Commission. That agreement included a disposition of Complainant A's complaint and respondent's admission that she received multiple invoices from Complainant A, that she was not diligent in paying for the court reporting services, and that her lack of diligence constituted a failure to safe keep Complainant A's property. In addition, respondent admitted she failed to respond to ODC's lawful inquiries in regard to Complainant A's complaint.

The deferred disciplinary agreement included a provision that respondent would pay full restitution to "all clients and third parties harmed by [her] actions" within ninety (90) days of the date of the agreement. The agreement included a further provision that respondent would file proof of restitution with ODC within ninety (90) days of the date of the agreement.

Respondent paid all obligations under the deferred disciplinary agreement except Complainant A's bill. In addition, respondent did not file proof of restitution. Respondent did not consult with ODC when her financial and personal circumstances rendered her unable to comply with the terms of her agreement.

Matter II

From December 2002 through March 2004, Complainant A or a representative of his company contacted respondent approximately fourteen (14) times by telephone, voicemail, and facsimile requesting that she pay the outstanding invoice. During this period of time, respondent paid Complainant A's agency $50.00. She did not meet her obligation in full to the court reporting service until April 2004, after

receiving notice of Complainant A's second grievance from ODC. On October 21, 2005, an investigative panel terminated deferment of discipline and resumed full investigation.

Matter III

Respondent represented Complainant B in a civil matter through her employment with the South Carolina Centers for Equal Justice (SCCEJ). Respondent subsequently left SCCEJ. Complainant B was not satisfied with how his matter was handled upon respondent's departure from SCCEJ.

On November 24, 2004, ODC sent respondent a copy of Complainant B's complaint with a request that she provide a written response within fifteen (15) days in accordance with Rule 19(b), RLDE. Respondent did not respond as requested.

On January 19, 2005, ODC sent respondent a reminder letter, again requesting a written response to the complaint and reminding her of her obligations pursuant to In the Matter of Treacy, 277 S.C. 514, 290 S.E.2d 240 (1982). Respondent did not respond as requested.

On March 7, 2005, ODC served respondent with a notice of full investigation which included direction that she respond in writing within thirty (30) days in accordance with Rule 19(c), RLDE. Respondent did not respond until December 1, 2005, almost eight months after her response was due.

ODC has reviewed the SCCEJ file regarding Complainant B's legal matter and finds no misconduct on respondent's part. Respondent acknowledges that her failure to respond and her complete disregard of her obligations to cooperate in this investigation caused ODC to expend unnecessary time and effort.

LAW

Respondent admits that by her misconduct she has violated the Rules of Professional Conduct, Rule 407, SCACR. See Rule 1.15 (lawyer shall promptly deliver funds to which a third party is entitled), Rule 8.1 (lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority), and Rule 8.4 (a) (it is professional misconduct for a lawyer to violate the Rules of Professional Conduct). In addition, respondent acknowledges that her misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate the Rules of Professional Conduct), Rule 7(a)(5) (it shall be ground for discipline for lawyer to engage in conduct tending to bring legal profession into disrepute), and Rule 7(a)(9) (it shall be ground for discipline for lawyer to willfully fail to comply with the terms of a finally accepted deferred disciplinary agreement).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for her misconduct.

PUBLIC REPRIMAND.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Sherry H. Simpson, Respondent,

v.

MSA of Myrtle Beach, Inc. d/b/a Addy's Harbor Dodge, Daimler Chrysler Services NA, LLC, and CrossCheck, Inc., Defendants,

of whom MSA of Myrtle Beach, Inc. d/b/a Addy's Harbor Dodge, is the Appellant.

Appeal from Horry County
B. Hicks Harwell, Jr., Circuit Court Judge

Opinion No. 26293
Heard November 1, 2006 – Filed March 26, 2007

AFFIRMED

Joseph Gregory Studemeyer, of Columbia, for Appellant.

Lawrence Sidney Connor, IV, of Kelaher, Connell & Connor, of Surfside Beach, for Respondent.

CHIEF JUSTICE TOAL: This case arises out of an arbitration clause in an automobile trade-in contract between an automobile dealership and a customer. The automobile dealership filed a motion for protective order and/or to stay and to compel arbitration in response to the customer's civil action. The trial court denied the dealership's motion on the grounds that the arbitration clause was unconscionable. This appeal followed.

FACTUAL/PROCEDURAL BACKGROUND

Appellant MSA of Myrtle Beach, Inc d/b/a Addy's Harbor Dodge ("Addy"), a car dealership, and Respondent Sherry H. Simpson ("Simpson") entered into a contract whereby Simpson traded in her 2001 Toyota 4Runner for a new 2004 Dodge Caravan. Directly above the signature line on the first page of the contract, the signee was instructed in bold to "SEE ADDITONAL TERMS AND CONDITIONS ON OPPOSITE PAGE." The additional terms and conditions contained an arbitration clause stating the following:

> 10. ARBITRATION Any and all disputes, claims or controversies between Dealer and Customer or between any officers, directors, agents, employees, or assignees of Dealer and Customer arising out of or relating to: (a) automobile warranty, workmanship, or repair; (b) the terms or enforceability of the sale, lease, or financing of any vehicle; (c) any claim of breach of contract, misrepresentation, conversion, fraud, or unfair and deceptive trade practices against Dealer or any officers, directors, agents, employees, or assignees of Dealer; (d) any and all claims under any consumer protection statute; and (e) the validity and scope of this contract, shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The parties expressly waive all rights to trial by jury on such claims. Provided, however, that nothing in this contract shall require Dealer to submit to arbitration any claims by Dealer against customer for claim and delivery, repossession, injunctive relief, or monies owed by customer in connection with the purchase or lease of any vehicle

> and any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration. The filing fees for arbitration shall be paid by the party initiating arbitration. The arbitrator may allocate the other arbitration fees as he/she deems appropriate. In addition to any discovery permitted by the Commercial Arbitration rules, any party may take one disposition [sic] of an opposing party. The parties agree to exchange all exhibits to be used in arbitration 7 days before arbitration. The arbitrator shall determine the controversy in accordance with the terms of this contract between the parties and shall not consider any parole evidence which purports to alter, modify, vary, add to, or contradict such contract. The arbitrator shall give effect to all applicable statutes of limitation. Any arbitration under this agreement shall take place in Horry County, South Carolina and Customer agrees that the courts of Horry County, South Carolina shall have exclusive jurisdiction over enforcement of this contract and any award made by any arbitrator pursuant to this contract. In no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party. Unless otherwise agreed in writing, no claims against Dealer shall be consolidated with other claims in the nature of a class action.

Six months later, Simpson filed a complaint in the Horry County court of common pleas alleging Addy violated the South Carolina Unfair Trade Practices Act and the South Carolina Manufacturers, Distributors, and Dealers Act by misrepresenting the trade-in value of the vehicle, artificially increasing the purchase price, and failing to provide all rebates promised. Simpson sought damages consistent with the maximum statutory remedies permitted for violations of these statutes.

Addy's answer denied Simpson's allegations and asserted that the contract between the parties contained an arbitration clause such that the matter should be stayed and that Simpson's only remedy was to file for arbitration. Addy contemporaneously filed a motion for protective order

and/or to stay and compel arbitration. Thereafter, Simpson filed a memorandum in opposition to Addy's motion alleging that the arbitration clause was unconscionable and unenforceable.

At the motion hearing, the trial court ordered the parties to attempt mediation. After the parties notified the trial court that mediation failed, the trial court issued an order denying Addy's motion on the grounds that the arbitration clause was unconscionable. Addy filed this appeal.

The case was certified to this Court from the court of appeals pursuant to Rule 204(b), SCACR, and Addy raises the following issues for review:

I. Did the lower court err in ruling that the arbitration clause was unenforceable without first submitting the issue of enforceability to arbitration?

II. Did the lower court err in denying Addy's motion to stay the civil litigation pending arbitration?

STANDARD OF REVIEW

Arbitrability determinations are subject to *de novo* review. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

LAW/ANALYSIS

I. The appropriate forum for determining the validity of the arbitration clause.

As a preliminary matter, Addy contends that the trial court erred in ruling on the arbitration clause's enforceability rather than first submitting that issue of enforceability to arbitration. We disagree.

The South Carolina Uniform Arbitration Act (UAA) generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. S.C. Code Ann. § 15-48-20(a)(2005). If no agreement is found to exist, the court must deny any application to arbitrate.[1] *Id.*

Our precedents in this area echo the UAA's policy that the trial court should determine the threshold validity of the arbitration agreement. *See Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."); *Hous. Auth. of the City of Columbia v. Cornerstone*

[1] The Federal Arbitration Act (FAA), 9 U.S.C.A. § 1 *et. seq.* (1999) codifies federal policy on arbitration and arbitration agreements. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate transaction. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Although the vehicle trade-in contract at issue in the instant case involves interstate commerce, the contract contains a choice of law provision designating South Carolina law as governing law. Therefore, the UAA governs where, as here, the validity of the choice of law provision is not in issue. Additionally, FAA pre-emption of the UAA is not an issue in this case because the state laws applicable to this case do not operate to completely invalidate the parties' agreement to arbitrate. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001).

This distinction is insignificant in the instant case because the UAA and FAA provisions that apply to the issues are nearly identical. *See* S.C. Code Ann. § 15-48-10(a) (2005) and 9 U.S.C.A. § 2 (1999). Therefore, the analysis under state law is ultimately the same as the analysis under federal law. Moreover, even in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

Hous., LLC, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003) ("The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties."). Such rulings are based on the contractual nature of arbitration agreements. *See Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999) ("Arbitration is available only when the parties involved contractually agreed to arbitrate.").

This proposition finds support in other jurisprudence. The United States Supreme Court has noted that, in limited circumstances, a court should assume that the parties intended the court to decide certain arbitration issues in the absence of "clear and unmistakable" evidence to the contrary. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (quoting *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). These limited circumstances typically involve certain "gateway matters," such as whether the parties have a valid arbitration agreement at all, or whether an arbitration clause applies to a certain type of controversy. *Id.* Thus, the prevailing authority supports the notion that courts may have at least a limited role where an arbitration clause otherwise applies.

In this case, the trial court was the proper forum for determining the enforceability of the arbitration clause in the contract between Simpson and Addy. Although the clause specifically stated that arbitration applied to issues involving "the validity and scope of this contract," Simpson challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place. Under the UAA, the question of this clause's validity was for the court to decide. *See* S.C. Code Ann. § 15-48-20(a) (2005).

Furthermore, because Simpson has challenged the validity of the entire arbitration clause on grounds of unconscionability, there can be no "clear and unmistakable" evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clause's validity. Accordingly, the trial court did not err in ruling on the issue of validity instead of submitting the issue itself to arbitration.

II. Denial of Addy's motion for protective order and/or to stay and compel arbitration.

Addy argues that the trial court erred in denying Addy's motion for protective order and/or to stay and compel arbitration. We disagree.

There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Towles*, 338 S.C. at 34, 524 S.E.2d at 842. The South Carolina Uniform Arbitration Act (UAA) provides that in any contract evidencing a transaction involving commerce, a written provision to settle by arbitration shall be valid, irrevocable, and enforceable. S.C. Code Ann. § 15-48-10(a) (2005). Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

Despite these clear rules, arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44. Accordingly, a party may seek revocation of the contract under "such grounds as exist at law or in equity," including fraud, duress, and unconscionability. S.C. Code Ann. § 15-48-10(a). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364. In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).

In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). It is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

A. Absence of meaningful choice

Addy argues that the facts do not show that Simpson had no meaningful choice in agreeing to arbitrate. We disagree.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989). In determining whether a contract was "tainted by an absence of meaningful choice," *id.* at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* at 293. *See also Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A AM.JUR.2D *Contracts* § 279 (2004))).

There are many cases in this jurisdiction and others involving the enforceability of arbitration clauses in adhesion contracts between commercial entities and consumers. Each transaction is analyzed on its own particular facts in conjunction with the federal and/or state policies favoring arbitration. We begin our inquiry with a focus on the decisions of courts in Ohio, which have heard numerous cases in the very recent past specifically addressing issues of unconscionability of arbitration clauses embedded in adhesion contracts between automobile retailers and consumers. *See Long v.*

N. Ill. Classic Auto Brokers, 2006 WL 3783507 (Ohio Ct. App. 9th Dist. 2006); *Felix v. Ganley Chevrolet, Inc.*, 2006 WL 2507469 (Ohio Ct. App. 8th Dist. 2006), *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 9th Dist. 2004); *Battle v. Bill Swad Chevrolet*, Inc., 746 N.E.2d 1167 (Ohio Ct. App. 10th Dist. 2000).

The Ohio courts characterize automobiles as a "necessity" and factor this characterization into a determination of whether a consumer had a "meaningful choice" in negotiating the arbitration agreement. *See, e.g., Eagle*, 809 N.E.2d at 1175; *Cf. Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 85 (N.J. 1960) (invalidating auto manufacturer's standard-form disclaimers of implied warranties because such disclaimers frustrated consumer protection legislation given that in modern times, "automobiles are a common and necessary adjunct of daily life"). In this same context, the Ohio courts have adhered to the idea that sales agreements between consumers and retailers "are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties." *Eagle,* 809 N.E.2d at 1179. Under the Ohio courts' rationale, "the presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 866 (Ohio 1998).

Turning to the instant case, we first note that under general principles of state contract law, an adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Neither party disputes that the contract entered into by Simpson and Addy was an adhesion contract as such contracts are standard in the automobile retail industry. Adhesion contracts, however, are not per se unconscionable. Therefore, finding an adhesion contract is merely the beginning point of the analysis. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998).

We agree with the rationale of the Ohio courts and proceed to analyze this contract between a consumer and automobile retailer with "considerable skepticism." Under this approach, we first observe that the contract between Simpson and Addy involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society. Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge Simpson's claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter. *But see Munoz*, 343 S.C. 531, 542 S.E.2d 360 (failing to factor in the weaker party's status as a consumer in analyzing an unconscionability claim in an arbitration agreement between a consumer and a lender). Similarly, we note Simpson's allegation that the contract was "hastily" presented for her signature.

Moreover, regardless of the general legal presumptions that a party to a contract has read and understood the contract's terms,[2] we also find it necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Simpson to forego certain remedies that were otherwise required by statute.[3] While certain phrases within other provisions of the additional terms and conditions were printed in all capital letters,[4] the arbitration clause in its

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[2] *See Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 ("[A] person who can read is bound to read an agreement before signing it."); *Towles*, 338 S.C. at 39, 524 S.E.2d at 845 ("[T]he law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents simply from reading the document.").

[3] Specifically, the arbitration clause prohibited an arbitrator from awarding double or treble damages.

[4] This included phrases in the "Disclaimer of Warranties" provision and the "Used Vehicle Disclosure." We note that S.C. Code Ann. § 36-2-316 (2003) requires disclaimers of implied warranties to be "conspicuous."

entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page. Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law. Furthermore, and contrary to Addy's argument, the present transaction may be distinguished from that in *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004), where both parties were sophisticated business interests in an arms-length negotiation.

Accordingly, we find that when considered as a whole and in the context of an adhesion contract for a vehicle trade-in, the circumstances reveal that Simpson had no meaningful choice in agreeing to arbitrate claims with Addy.

B. Oppressive and one-sided terms

1. Limitation on statutory remedies in an arbitration clause

Addy contends that the arbitration clause's limitation on statutory remedies was not oppressive and one-sided. We disagree.

The arbitration clause in Simpson's contract with Addy provides that "[i]n no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party." Simpson's underlying complaint filed in civil court alleged, among other things, that Addy violated the South Carolina Uniform Trade Practices Act (SCUPTA) and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act). The SCUPTA requires a court to award treble damages for violations of the statute.[5]

[5] *See* S.C. Code Ann. § 39-5-140(a) (1976) (providing that a "court *shall* award three times the actual damages sustained and may provide such other relief as it deems necessary or proper" [emphasis added]).

Similarly, the Dealers Act requires a court to award double damages for violations of the statute.[6]

In arguing that this provision was not oppressive and one-sided, Addy relies on *Carolina Care Plan*. In that case, this Court held that the issue of whether an arbitration clause prohibiting an arbitrator from awarding "punitive damages" violated the public policy of the SCUTPA was not ripe for review. 361 S.C. 544, 606 S.E.2d 752. The Court explained that "an arbitrator may or may not choose to award treble damages in accordance with the SCUTPA, depending upon whether an arbitrator finds the SCUPTA was violated and whether the arbitrator finds that statutory treble damages are punitive or compensatory damages." *Id.* at 557, 606 S.E.2d at 759 (discussing *PacifiCare Health Systems v. Book*, 538 U.S. 401 (2003) (holding it was premature to conclude that meaningful relief for the plaintiff under RICO was unavailable in arbitration because the arbitrator may conclude that a restriction on "punitive damages" in an arbitration clause did not preclude the authorization of treble damages under RICO)).

Addy's comparison falls short. In fact, the present case requires the *Carolina Care Plan* analysis to be taken one step further because the arbitration clause at issue here goes beyond banning "punitive" damages generally and specifically prohibits an arbitrator from awarding statutorily required treble or double damages. Therefore, an arbitrator's ultimate classification of an award as "compensatory" or "punitive" is no longer relevant in an analysis of whether this particular clause is unconscionable: under this arbitration clause, treble and double damages – whether classified as compensatory or punitive – are prohibited outright.

The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.

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[6] *See* S.C. Code Ann. § 56-15-110(1) (2006) (providing that an individual "*shall* recover double the actual damages by him sustained" [emphasis added]).

Carolina Care Plan, 361 S.C. at 555, 606 S.E.2d at 758. In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest.[7] Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Accordingly, we find the provision prohibiting double and treble damages to be oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker. In conjunction with Simpson's lack of meaningful choice in agreeing to arbitrate, this provision is an unconscionable waiver of statutory rights, and therefore, unenforceable.

2. Dealer's remedies not stayed pending outcome of arbitration

Addy argues that the arbitration clause's provision reserving certain judicial remedies to the dealer and authorizing the award of the dealer's

[7] This Court has previously recognized the strong public policy notions behind the enactment of the SCUPTA and the Dealers Act. *See deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 263, 536 S.E.2d 399, 404 (Ct. App. 2000) ("It is a violation of the Dealers Act for any manufacturer or motor vehicle dealer 'to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.'"(citing S.C. Code Ann. §56-15-40(1) (1991))); *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 326, 396 S.E.2d 105, 108 (Ct. App. 1989) (defining an unfair trade practice as a practice which is "offensive to public policy or which is immoral, unethical, or oppressive"), *aff'd in part, rev'd in part, on other grounds*, 309 S.C. 263, 422 S.E.2d 103 (1992) (per curiam). The Dealers Act also specifically provides that "any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." S.C. Code Ann. § 56-15-130 (2006).

remedies even if the consumer's arbitration proceedings have not concluded is not oppressive and one-sided. We disagree.

While stating that "all disputes, claims or controversies between Dealer and Customer" are to be settled in binding arbitration, the arbitration clause notes several exceptions. Specifically, the clause provides:

> Nothing in this contract shall require the Dealer to submit to arbitration any claims by Dealer against Customer for claim and delivery, repossession, injunctive relief, or monies owed by Consumer in connection with the purchase or lease of any vehicle and *any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration*. [emphasis added].

Our courts have held that lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable. *See Munoz*, 343 S.C. at 542, 542 S.E.2d at 365 (holding that an arbitration agreement between a consumer and a lender was not unconscionable where it allowed the lender to seek foreclosure while requiring the consumer to arbitrate any counterclaim in the foreclosure action); *Lackey v. Green Tree Financial Corp.*, 330 S.C. at 402, 498 S.E.2d at 905 (same). The primary basis for this conclusion in *Munoz* and *Lackey* was that requiring one party to seek a remedy through arbitration rather than the judicial system did not deprive that party of a remedy altogether. *See Munoz*, 343 S.C. at 542, 542 S.E.2d at 365. The *Lackey* court additionally explained that the judicial remedies which the lender in that case had reserved for itself (*i.e.* replevin and foreclosure actions) provided specific procedures for protecting the collateral and the parties during the pendency of the arbitration proceedings. *Lackey*, 330 S.C. at 401, 498 S.E.2d at 905. Because these protections related to both parties and were facilitated by enforcement procedures specified by law, the court of appeals concluded that, regardless of the lack of mutuality of remedy, the arbitration clause bore "a reasonable relationship to the business risks" inherent in secured transactions. *Id.*

However, the essence of Simpson's unconscionablity claim is not the general lack of mutuality of remedy, but rather the arbitration agreement's

express stipulation that the dealer may bring a judicial proceeding that completely disregards any pending consumer claims that require arbitration. The clauses at issue in *Munoz* and *Lackey* contained no such directives. To this effect, we can easily envision a scenario in which a dealer's claim and delivery action is initiated in court, completed, and the vehicle sold prior to an arbitrator's determination of the consumer's rights in the same vehicle. As the arbitration agreement between Simpson and Addy is written, the dealer collects on a judgment awarded in a judicial proceeding regardless of any protections for the collateral afforded by law.

Addy's suggestion that there are procedural motions[8] available to the consumer which offset any potentially inconsistent effects of this provision, in our opinion, shows an informal acknowledgement on the part of Addy that such a provision on its face is indeed one-sided. These procedural mechanisms only act to place an additional burden on the consumer to ensure that the vehicle in controversy is not disposed of in a court proceeding initiated by the dealer before the adjudication of the consumer's claims in arbitration.

We continue to abide by our previous holdings in *Munoz* and *Lackey* that lack of mutuality of remedy will not invalidate an arbitration agreement. However, we find that the provision in the arbitration clause dictating that the dealer's judicial remedies supersede the consumer's arbitral remedies is one-sided and oppressive and does not promote a neutral and unbiased arbitral forum. Accordingly, in light of Simpson's lack of meaningful choice in agreeing to arbitrate, the provision is unconscionable and unenforceable.

3. Limitation on bringing warranty claims in a judicial forum

Addy argues that Simpson may not attack the arbitration clause on the grounds that it violates the Magnuson-Moss Warranty Act (MMWA), 15 U.S.C.A § 2301 *et seq.* (1997), because Simpson's underlying claims alleged no violation of the MMWA. We disagree.

[8] Specifically, Addy suggests that a motion for protective order or a motion to stay pending arbitration.

The arbitration clause in the contract between Simpson and Addy states that it applies to "any and all disputes" including "automobile warranty" and "any consumer protection statute" – all of which implicate the MMWA. The provision further specifies that such matters are to be resolved only by "binding arbitration."

Rules promulgated by the Federal Trade Commission (FTC) state that informal dispute resolution procedures set forth in written warranties under the MMWA are not to be legally binding on any person. 16 C.F.R. § 703.5(j) (2006). *See also Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321 (11th Cir. 2001). Moreover, the MMWA has been interpreted to supersede the FAA with respect to consumer claims for breach of written warranty. *See Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423, 1437-38 (M.D. Ala. 1997). Therefore, the federal government has made it clear that parties may not agree to arbitrate an MMWA claim as the arbitration clause between Simpson and Addy attempted to do here.

This Court will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan*, 361 S.C. at 555, 606 S.E.2d at 758. The fact that Simpson did not bring a claim under the MMWA is irrelevant to our conclusion that the inclusion of the MMWA in the scope of the arbitration clause is unenforceable as a matter of public policy. Accordingly, we hold that this provision of the arbitration clause is an unconscionable and unenforceable violation of public policy.

C. Severability

In the alternative to its argument that the arbitration clause is not unconscionable, Addy suggests that any provision found by this Court to be unconscionable may be severed from the clause and arbitration allowed to otherwise proceed. In fact, it seems as though the "Additional Terms and Conditions" section of the contract anticipated just such a scenario. Paragraph fifteen (15) articulates a severability clause providing that:

> In the event any provision of this contract shall be held invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not be affected or impaired thereby.

We disagree.

In consideration of the federal and state policies favoring arbitration agreements, severability clauses have been used to remove the unenforceable provisions in an arbitration clause while saving the parties' overall agreement to arbitrate. *See Healthcomp Evaluation Servs. Corp. v. O'Donnell*, 817 So. 2d 1095, 1098 (Fla. Ct. App. 2d Dist. 2002) (holding that an arbitration clause was divisible and therefore a severability provision acted to remove the unenforceable provision from the arbitration clause without affecting the intent of the parties); *Primerica Fin. Servs. v. Wise*, 456 S.E.2d 631, 635 (Ga. Ct. App. 1995) (upholding the trial court's application of a severability clause to an arbitration agreement "in light of the liberal federal policy favoring arbitration agreements and the parties' intentions in entering into those agreements"). Additionally, legislation permits this Court to "refuse to enforce" any unconscionable clause in a contract or to "limit its application so as to avoid an unconscionable result." S.C. Code Ann. § 36-2-302(1) (2003).

At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker v. Robert Half Intn'l Inc*, 413 F.3d 77, 84-85 (D.C. Cir. 2005) (citations omitted). Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for parties. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

In this case, we find the arbitration clause in the adhesion contract between Simpson and Addy wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause. While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions.[9]

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[9] We acknowledge that in light of the state and federal policies favoring arbitration, many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause. However, we find the present case is distinguishable from those cases prescribing severability such that the invalidation of the arbitration clause in its entirety is the more appropriate remedy.

First, the arbitration clause in the contract between Simpson and Addy contained a total of three unconscionable provisions while arbitration clauses examined by courts prescribing severability generally contained only one offending provision. *See Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (severing a provision in an arbitration clause that prohibited the award of treble damages); *Safranek v. Copart, Inc.*, 379 F. Supp. 2d 927 (D. Ill. 2005) (severing a provision in an arbitration clause that violated Title VII by requiring each party to bear its own attorney's fees and costs); *Ex parte Celtic Life Ins. Co.*, 834 So. 2d 766 (Ala. 2002) (severing a provision in an arbitration clause that was void as a violation of public policy by prohibiting the award of punitive damages); *Healthcomp Evaluation Servs. Corp.*, 817 So. 2d 1095 (severing a provision in an arbitration clause that violated state law by not permitting the parties to appeal or review an arbitration award). *But see Primerica Fin. Servs. v. Wise*, 456 S.E.2d 631 (severing two provisions governing the eligibility of arbitrators and the judicial review of an arbitration). Second, two of the provisions in this case were found unconscionable because the provisions contravened state and federal consumer protection law. The sheer magnitude of unconscionability present in a provision that prevents a party from vindicating the party's statutory rights, along with the fact that such a grossly unconscionable provision

Additionally, we note that there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability. Therefore, in holding today that the arbitration clause in the vehicle trade-in contract between Addy and Simpson is unconscionable due to a multitude of one-sided terms, we do not overrule our decision in *Munoz* where we held that an adhesion contract between a consumer and a lender was not unconscionable because it lacked mutuality of remedy. Instead, we emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions.

Accordingly, we affirm the trial court's denial of the motion to compel arbitration.

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occurred not once, but *twice*, requires that we give significant consideration to a remedy in this situation that best serves the interests of public policy. *See Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir. 1994) (noting that severance of illegal provisions is inappropriate when the entire arbitration clause represents an "integrated scheme to contravene public policy" (citations omitted)).

Accordingly, while this Court generally would encourage severability of an unconscionable provision, we do not view the arbitration agreement between Simpson and Addy to be a proper candidate for the application of this remedy. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003); (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"); *In re Cotton Yarn Antitrust Litig.*, 406 F. Supp. 2d 585, 604 (M.D.N.C. 2005) ("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights . . ., the Court finds that the better course of action in this case is to excise the arbitration clauses altogether.").

III. Presentation of evidence to determine unconscionability

Addy argues that the trial court erred in failing to provide Addy a reasonable opportunity to present evidence as to the commercial setting, purpose, and effect of the arbitration clause in order to aid the court in making a determination on unconscionability. We disagree.

S.C. Code Ann. § 36-2-302(2) (2003) provides:

> When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Simpson filed her memorandum in opposition to Addy's motion alleging the unconscionability of the arbitration clause on March 16. After a motion hearing that same day, the trial court ordered mediation. When mediation failed, the court ordered Addy to submit a memorandum in support of its motion, which it did on July 13. The court considered the arguments in both memoranda before issuing its order on August 12.

In our opinion, the four months that passed between Simpson's memorandum and Addy's response was a "reasonable opportunity" for Addy to consider Simpson's arguments and respond with respect to the commercial setting, purpose, and effect of the arbitration clause. Accordingly, the trial court's consideration of the parties' memoranda without a hearing did not deny Addy a reasonable opportunity to present its evidence in order to aid the court's determination.

CONCLUSION

For the foregoing reasons, we find the arbitration clause between Simpson and Addy unconscionable and unenforceable in its entirety.

Accordingly, we affirm the trial court's denial of Addy's motion to stay litigation pending arbitration.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Gary Andrew Barlow, Appellant.

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

AND

The State, Respondent,

v.

Charles David Gibson, Appellant.

Appeal From Spartanburg County
Gordon G. Cooper, Circuit Court Judge

Opinion No. 26294
Submitted March 21, 2007 – Filed March 26, 2007

AFFIRMED

Chief Attorney Joseph L. Savitz, III, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Appellants.

Teresa A. Knox, Tommy Evans, Jr., and J. Benjamin Aplin, all of Columbia, for Respondent.

JUSTICE WALLER: These are direct appeals from appellants' respective probation revocations. Both cases raise the issue of whether the trial court erred in allowing a non-attorney to present the State's case for revocation. We affirm.

FACTS

State v. Barlow

In January 2003, appellant Gary Andrew Barlow was convicted of strong arm robbery and sentenced to 15 years' imprisonment, suspended upon the service of three years' imprisonment and two years of probation. He was released from custody in July 2004 and placed on probation. In September 2004, he was permitted, pursuant to the Interstate Compact for the Supervision of Parolees and Probationers, to move to the State of Washington. In 2005, he was arrested in Washington for violating probation and extradited to South Carolina. South Carolina issued an arrest warrant for Barlow based on the probation violations committed in Washington which included, *inter alia,* submitting an adulterated urine test.

At the probation revocation hearing, Barlow was represented by counsel; a probation agent appeared on behalf of the State. In addition, a victim's advocate presented to the court Sherry Hambrick, the victim of the strong arm robbery who made statements regarding Barlow's crime against her. The victim's advocate also directly addressed the trial court about the facts of the 2002 robbery. The trial court found Barlow willfully violated probation and revoked three years on his sentence.

State v. Gibson

In 2001, appellant Charles David Gibson pled guilty to criminal sexual conduct with a minor, second degree. He was sentenced to 12 years' imprisonment, suspended with probation for five years. In March 2004, Gibson signed a paper which expressly stated he was to have no contact with any minor children. An arrest warrant for Gibson was issued in July 2004 based on several probation violations. Significantly, Gibson was charged with failure to refrain from association with any person the probation agent has instructed him to avoid. This allegation was based on Gibson having his two minor children at his residence on June 19 and 20, 2004.

At the probation revocation hearing, Gibson was represented by counsel; a probation agent appeared on behalf of the State. The probation agent argued to the trial court that, as a sexual offender in counseling, Gibson should not have put himself in a situation where he was at risk to re-offend. Primarily for that reason, the probation agent recommended that a portion of his suspended sentence be revoked. The trial court found Gibson in violation of his probation and revoked two years of the original 12-year sentence.

ISSUE

Did the trial court err by allowing non-lawyers to present the probation revocation cases?

DISCUSSION

Appellants both argue the trial court erred because it allowed the State to present the probation revocation case through a non-lawyer, i.e. a probation agent and victim's advocate for Barlow, and a probation agent for Gibson. We disagree.

By statute, a probation agent has the power to issue an arrest warrant charging a violation of conditions of supervision, as well as the power of arrest. S.C. Code Ann. § 24-21-280(B) (2007); see also S.C. Code Ann. §

24-21-450 (2007) (the trial court or the probation agent "may issue or cause the issuing of a warrant and cause the defendant to be arrested for violating any of the conditions of probation."). A probation agent must report any arrest to the trial court and submit a written report detailing how the probationer has violated his probation. Id. § 24-21-450. The statute outlining the duties and powers of probation agents also specifies that in the performance of a probation agent's duties, he "is regarded as **the official representative of the court**, the department, and the board." Id. § 24-21-280(B) (emphasis added).

We have noted "there is quite a difference between a criminal prosecution and a probation revocation hearing." State v. Franks, 276 S.C. 636, 638, 281 S.E.2d 227, 228 (1981). Although the underlying probation violations "may themselves be criminal offenses, the probation revocation proceeding is not a criminal trial of those charges…, but a more informal proceeding with respect to notice and proof of the alleged violations." Id. (citations omitted); see also U.S. v. Davis, 151 F.3d 1304, 1307 (10th Cir. 1998) ("Probation revocation proceedings are not criminal proceedings"). Significantly, "[n]o additional punishment is invoked" when the trial court decides to revoke probation. Franks, 276 S.C. at 638, 281 S.E.2d at 228.

Given the statutory powers given to probation agents, as well as the fact that a probation revocation hearing is not a formal criminal proceeding, we hold the trial court did not err in allowing the probation agent to "present" these cases. Clearly the statutes envision a close relationship between the sentencing court and the probation agent when there has been an allegation of probation violation. See §§ 24-21-280, 24-21-450. Moreover, we find no error in allowing the victim's advocate to address the trial court. See S.C. Code Ann. § 16-3-1560 (2003) (victim has the right to attend and comment at post-conviction proceedings affecting probation).

Finally, as to appellants' contention that the non-attorneys' activities in these cases amount to the unauthorized practice of law, we find their comments and/or reports to the trial court do not constitute the practice of law. Cf. Leverette v. State, 546 S.E.2d 63 (Ga. Ct. App. 2001) (where the Georgia Court of Appeals found that a probation officer's filing of a petition

seeking a probation revocation hearing did not constitute the unauthorized practice of law). Both parties cite to In re Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1992), wherein this Court reaffirmed the rule that police officers may prosecute traffic offenses in magistrate and municipal courts. Because a probation revocation proceeding is not a criminal prosecution, however, we find In re Unauthorized Practice of Law Rules inapposite to the instant cases.

Nonetheless, the underlying rationale for allowing a patrolman to act as prosecutor in limited circumstances lends support to why it is also permissible for a probation agent to participate in the probation revocation hearing. In State ex rel. McLeod v. Seaborn, 270 S.C. 696, 244 S.E.2d 317 (1978), we stated as follows:

> When the officers of the Highway Patrol present misdemeanor traffic violations in the magistrates' courts…, they do so in their official capacities as law enforcement officers and employees of the State. These officers do not hold themselves out to the public as attorneys, and their activity in the magistrates' courts does not jeopardize the public by placing "incompetent and unlearned individuals in the practice of law."... To the contrary, this activity renders an important service to the public by promoting the prompt and efficient administration of justice.

Id. at 698-99, 244 S.E.2d at 319 (citation omitted). Similarly, when a probation agent presents a probation revocation case, the agent is acting in his official capacity and is not holding himself out to the public as an attorney. See S.C. Code Ann. § 24-21-280(B). Clearly, the agent "renders an important service to the public by promoting the prompt and efficient administration of justice." Seaborn, 270 S.C. at 699, 244 S.E.2d at 319. Thus, we reject appellants' argument that the non-attorneys' actions in these cases amounted to the unauthorized practice of law.

Accordingly, appellants' respective probation revocations are **AFFIRMED.**

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Robert Holland Koon, Respondent,

v.

State of South Carolina, Petitioner.

ON WRIT OF CERTIORARI

Appeal From Cherokee County
J. Mark Hayes, II, Circuit Court Judge

Opinion No. 26295
Submitted December 7, 2006 – Filed March 26, 2007

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Molly R. Crum, of Columbia, for Petitioner.

Deputy Chief Attorney Wanda H. Carter, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, Robert Holland Koon, of Bishopville, for Respondents.

JUSTICE WALLER: We granted the state's petition for a writ of certiorari to review the grant of Post-Conviction Relief (PCR) to Respondent,

Robert Holland Koon. The PCR court found Koon was improperly sentenced to life imprisonment without parole (LWOP). We reverse.

FACTS

In May 1998, Koon was convicted of grand larceny and second degree burglary. Based upon Koon's 1986 guilty plea to four counts of second-degree burglary, he was sentenced as a recidivist to LWOP. His direct appeal was affirmed by the Court of Appeals. State v. Koon, Op. No. 2000-UP-291 (Ct. App. April 18, 2000).[1] His first application for PCR was dismissed after a hearing. After Koon's first PCR hearing, but prior to dismissal of his application, we issued our opinion in State v. Gordon, 356 S.C. 143, 588 S.E. 2d 105 (2003). Koon filed a second PCR application asserting that, pursuant to Gordon, his prior second-degree burglary crimes should have been treated as one crime for purposes of sentencing under the recidivist statute. The PCR court agreed with Koon and vacated the LWOP sentence.

ISSUE

Did the PCR court err in holding Koon was improperly sentenced to LWOP based upon his 1986 second-degree burglary convictions?

DISCUSSION

In State v. Gordon, we addressed the interplay between S.C. Code Ann. § 17-25-45 and § 17-25-50. There, we recognized that § 17-25-45 requires defendants who are convicted of three "most serious" offenses[2] to be

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[1] Koon asserted at the Court of Appeals that the offenses were not "serious offenses" which triggered the recidivist statute, S.C. Code Ann. § 17-25-45 (C)(2)(b). The Court of Appeals found three of the four offenses were "serious offenses." In 2004, this Court vacated one of the four convictions, finding the indictment alleged only third-degree burglary, such that the trial court did not have subject matter jurisdiction to accept the plea to second-degree burglary. Koon v. State, 358 S.C. 359, 595 S.E.2d 456 (2004). However, our holding in Koon I has been overruled by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The PCR court did not consider the conviction which was vacated by this Court in Koon I.

[2] Second-degree burglary under S.C.Code Ann. § 16-11-312 (b) falls into this category. S.C. Code Ann. § 17-25-45(C)(2).

sentenced to LWOP, while § 17-25-50 requires that for purposes of sentencing, "the court shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses." In Gordon, we overruled prior precedent[3] which had held § 17-25-50 was inapplicable in a "three strikes rule" analysis and held, instead, that §§ 17-25-45 and 17-25-50 must be construed together in determining whether crimes committed at points close in time qualify for a recidivist sentence.

Koon contends that, under Gordon, he should not have been sentenced to LWOP. We disagree. Although Gordon stands for the proposition that two offenses committed closely in point of time should be considered as one for purposes of sentencing, Gordon did not establish a bright-line rule as to what constitutes "two offenses committed so closely in point of time." We find the 1986 offenses committed here simply do not fall under § 17-25-50.

The cases which have found "one continuous course of conduct" under § 17-25-50 have been cases in which, for example, the defendant had two convictions arising out of a single incident, see State v. Woody, 359 S.C. 1, 596 S.E.2d 907 (2004) (two previous armed robbery convictions stemmed from a single incident but involved two different victims: Woody robbed a convenience store and was convicted of armed robbery of both the store's clerk and the store itself); or situations which involve crimes closely connected in point of time, State v. Gordon (where trafficking and conspiracy to traffic crack cocaine occurred within a one week period, the offenses were, although separate and distinct offenses for which Gordon was properly sentenced, "so closely connected in point of time" as to properly be treated as one offense for purposes of recidivist sentencing); or apply to a single, continuous crime spree, State v. Benjamin, 353 S.C. 441, 579 S.E.2d 289 (2003), overruled by State v. Gordon, infra (two armed robberies and murder committed within a four-hour period).

[3] State v. Benjamin, 353 S.C. 441, 579 S.E.2d 289 (2003).

Here, the second-degree burglaries which qualified Koon for sentencing as a recidivist were the March 13, 1986 nighttime burglary of the office of P&G Motors; the March 14, 1986 nighttime burglary of the office or dwelling of Bill Willard; and the March 28, 1986 nighttime burglary of Cudd-Lovelace insurance Company.

We need not address whether the March 13th and March 14th crimes could or should have been treated as one for purposes of sentencing. We find the March 28th burglary of a different building, in a different location, which occurred two weeks later, clearly constitutes a separate burglary. Accordingly, Koon had, at the very least, two prior serious convictions such that the present conviction constituted his third, and he was therefore properly sentenced as a recidivist.

REVERSED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

James Custodio, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

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

Opinion No. 26296
Submitted February 14, 2007 – Filed March 26, 2007

REVERSED AND REMANDED

John D. Elliott, of Columbia, for petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Robert L. Brown, all of Columbia, for respondent.

JUSTICE MOORE: Petitioner was charged with numerous

counts of burglary and grand larceny in connection with a string of at least seventy-five burglaries in Richland and Kershaw Counties.[1] He was identified as a suspect in the burglaries after an individual observed him throw a lockbox from the window of his car. The lockbox had been stolen from a home the same day. Petitioner pled guilty to three counts of second-degree burglary and two counts of grand larceny. He was sentenced to an aggregate term of forty-five years' imprisonment for the burglaries and concurrent five year terms for the grand larcenies. Defense counsel's motion to reconsider the sentence was denied. No direct appeal was filed. Subsequently, petitioner's application for post-conviction relief (PCR) was denied.

FACTS

At the PCR hearing, petitioner testified he met with two members of the Richland County Sheriff's Department, and two assistant solicitors of the Richland County Solicitor's Office shortly after his arrest. Petitioner testified that, at the meeting, they offered petitioner a fifteen-year cap on the sentence if he would cooperate and tell them what burglaries he was involved in and help them retrieve stolen property and have it returned to the rightful owners. Petitioner stated that, after the meeting, he met with one of the assistant solicitors alone because he believed she would tell him the truth about the deal. Petitioner testified he asked her how much jail time he would receive if he accepted the deal, and was told it would be five to seven years. Petitioner testified he met with members of the Richland County Sheriff's Department the next day and told them he would accept the deal. That day, the officers drove petitioner around and he showed them twelve to fifteen homes he had burglarized or attempted to burglarize.

Petitioner testified he was worried the plea agreement was not in writing and, during the time he was cooperating, he asked police officers about providing him with a written agreement. Petitioner testified police told him the solicitor's office did not want to put the offer in writing. However,

[1]Petitioner waived venue and pled guilty to the Kershaw burglaries in Richland County.

petitioner testified he felt he was already obligated to help them, and one of the officers told him a written agreement was "'just more of a technical thing. [The solicitor's office will] honor the deal as long as you'll do what you said you were going to do.'" During this time, petitioner was acting without benefit of counsel.

Petitioner testified that, after counsel was appointed, he told her about the agreement and that he wanted the State to honor the fifteen-year cap. Petitioner claimed he continuously requested that counsel attempt to enforce the original agreement, but she advised him he had no right to enforce it. Petitioner testified he did not know he was entitled to have his original plea agreement enforced, and, at the time of the plea, he did not realize the plea agreement was binding on the State. He testified he felt that if he did not plead guilty, then he was going to receive a life sentence. However, he stated he would not have pled had he realized he had a binding plea agreement. Petitioner testified he did not want a new trial, but rather, he wanted the deal the State had promised him.

Counsel testified she was not appointed until after petitioner had cooperated with the police and the solicitor's office. She testified she met with the two assistant solicitors, one of the investigators, and the sheriff, who all confirmed a meeting had occurred between petitioner, the sheriff's office, and the solicitor's office, wherein petitioner was told that, if he agreed to cooperate and return items he had stolen, "the charges would be limited to nonviolent burglary second charges, and there would be a cap of a fifteen-year sentence, and everything would run concurrent." Counsel testified that either immediately before or after she began representing petitioner, the Solicitor decided not to honor the agreement. She noted the Solicitor had not been at the meeting between petitioner and his two assistant solicitors.

Counsel further testified that, when petitioner pled guilty, she did not believe he had the ability to force the State to honor the original plea agreement. Counsel testified she was unaware of the existence of Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999), when she represented petitioner. She stated, at the time she represented petitioner, she believed the only remedy would be to vacate the plea and proceed to trial. She testified

that, had she been aware of Reed, she would have raised it to the solicitor and the plea judge.

The PCR court ruled counsel was not deficient and that there was no agreement whereby petitioner would receive a cap of fifteen years in exchange for his cooperation. The PCR court found the record accurately reflected all plea negotiations, and petitioner had a full understanding of the consequences of his plea and the charges against him. The court further noted there was no testimony from the sheriff's office or the solicitor's office concerning this issue. Therefore, the PCR court denied relief.

ISSUE

Did the PCR court err by finding defense counsel was not ineffective for failing to attempt to specifically enforce his plea agreement?

DISCUSSION

The burden is on the applicant in a post-conviction proceeding to prove the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985), *cert. denied*, 474 U.S. 1094 (1986). To establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668 (1984). On review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The State argues and the PCR court found that a plea agreement between petitioner and the solicitor's office did not exist. The PCR court's finding is without any evidence of probative value sufficient to support a finding that a plea agreement did not exist. *See* Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996) (Court will not uphold PCR court's findings

when there is no probative evidence to support them). Both petitioner and his plea counsel testified regarding the existence of the agreement. Plea counsel specifically stated she met with the assistant solicitors and they confirmed that petitioner was told that if he agreed to cooperate and return items that he had stolen; there would be a fifteen-year cap on his sentence. The only evidence presented was that an agreement in fact existed. Therefore, the PCR court erred by finding a plea agreement did not exist. *Cf.* Jackson v. State, 342 S.C. 95, 535 S.E.2d 926 (2000) (where there is no evidence contradicting or conflicting with petitioner's testimony, PCR court erred by finding petitioner's testimony on the issue was not credible).

Petitioner argues that plea counsel was ineffective for failing to seek specific performance of the original plea agreement. Petitioner's argument is based on the Court of Appeals' decision in Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999). In Reed, the solicitor made an oral offer, which Becka accepted, to allow Becka to plead to a lesser offense with a recommendation of probation. However, after the State consulted with the victim's family, the State withdrew the plea offer. The trial judge found the offer was a valid and enforceable contract and denied the State's motion to withdraw the offer. The Court of Appeals reversed.

The Reed court stated that a defendant does not have a constitutional right to plea bargain, a trial judge is not required to accept a plea bargain, and that ordinarily a plea offer is nothing more than an offer until it is accepted by the defendant by entering a court-approved plea of guilty. However, the Reed court found the general rule is subject to a detrimental reliance exception.

This exception is stated as: Absent an actual plea of guilty, a defendant may enforce an oral plea agreement only upon a showing of detrimental reliance on a prosecutorial promise in plea bargaining. Reed, 333 S.C. at 688, 511 S.E.2d at 402; *see also* State v. Peake, 345 S.C. 72, 545 S.E.2d 840 (Ct. App. 2001)[2] (enforcement of an agreement not to prosecute is subject to

[2]*Aff'd*, State v. Peake, 353 S.C. 499, 579 S.E.2d 297 (2003).

two conditions: (1) the agent must be authorized to make the promise; and (2) the defendant must rely to his detriment on the promise). Even if the agreement has not been finalized by the court, a defendant's detrimental reliance on a prosecutorial promise in plea bargaining may make a plea agreement binding.[3] Reed, 333 S.C. at 688, 511 S.E.2d at 402-403. For example, a defendant who provides beneficial information to law enforcement can be said to have relied to his detriment. *Id.* at 689, 511 S.E.2d at 403. The Reed court adopted the rule that the State may withdraw a plea bargain offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer.

The Court of Appeals properly adopted the detrimental reliance exception.[4] The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon

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[3]In State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994), we held that all plea agreements must be on the record and must recite the scope, offenses, and individuals involved in the agreement. *Id.* Further, we noted that our review of a plea agreement is limited to those terms that are fully set forth in the record. *Id.* We concluded that neither the State nor the defendant will be able to enforce plea agreement terms which do not appear on the record before the trial judge who accepts the plea. *Id.*; *see also* State v. Sprouse, 355 S.C. 335, 585 S.E.2d 278 (2003) (review of an oral plea agreement is limited to terms set forth in the record). The Thrift decision, however, is not directly on point because, in the instant case, we have a plea agreement that was withdrawn by the solicitor. The fact the agreement was oral does not prevent the possible enforcement of the agreement.

[4]*See* Annotation, *Right of Prosecutor to Withdraw from Plea Bargain Prior to Entry of Plea*, 16 A.L.R.4th 1089, § 3(a) (1982) (noting at least twenty-four states have adopted the detrimental reliance exception); 5 Wayne R. LaFave, et. al, *Criminal Procedure* § 21.2(f) (2d. ed. 1999) (prevailing doctrine is that the State may withdraw from a plea bargain agreement at any time prior to, but not after, the actual entry of the guilty plea by the defendant or other action by him constituting detrimental reliance upon the agreement).

the arrangement. Detrimental reliance may be demonstrated where the defendant performed some part of the bargain; for example, where the defendant provides beneficial information to law enforcement.

We find the exception applies to petitioner's situation. In reliance on an agreement offering him a fifteen-year cap, petitioner fully cooperated with law enforcement by informing them of a multitude of burglaries he committed and assisting in the return of over a half million dollars in stolen property. Certainly, helping law enforcement solve several burglary crimes and assisting in the return of stolen property is beneficial information.[5] *See* Reed, *supra* (defendant who provides beneficial information to law enforcement can be said to have relied to his detriment). Petitioner relied on the plea offer to his detriment by taking the substantial step of cooperating with law enforcement, *i.e.* by performing some part of the bargain, before the Solicitor withdrew the plea offer.[6] Accordingly, petitioner could have enforced the oral plea agreement.

Petitioner claims counsel rendered ineffective assistance by not having his plea agreement enforced. To prove counsel ineffective when a guilty plea is challenged, petitioner must show that counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability a guilty plea would not have been entered. Hill v. Lockhart, 474 U.S. 52 (1985); Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). A defendant who pleads guilty upon the advice of counsel may attack the voluntary and intelligent character of the guilty plea only by showing the advice he received from

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[5]*Cf.* State v. Whipple, 324 S.C. 43, 476 S.E.2d 683, *cert. denied* 519 U.S. 1045 (1996) (mere fact that a defendant chooses to reveal otherwise undiscoverable facts in the hope of securing a favorable plea agreement does not bind the State to accept the defendant's terms; a defendant may not attempt to create a firm commitment out of plea negotiations).

[6]While the assistant solicitors were involved in offering the plea agreement to petitioner, the Solicitor was bound by that plea offer. *See* State v. Sprouse, 355 S.C. 335, 585 S.E.2d 278 (2003) (promise of one prosecutor in the office bound all prosecutors in the office).

counsel was not within the range of competence demanded of attorneys in criminal cases. Carter v. State, 329 S.C. 355, 495 S.E.2d 773 (1998).

Because petitioner could have enforced the plea agreement under the detrimental reliance exception and counsel failed to take this action, counsel failed to render reasonably effective assistance. Accordingly, counsel was ineffective in failing to have the plea agreement enforced based on the detrimental reliance exception. *Cf.* Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988) (counsel's conduct fell below professional norms for not protecting Jordan's right to enforce the plea agreement, which had not been withdrawn, with the solicitor's office).

Further, counsel's defective performance prejudiced petitioner. Petitioner testified he felt as if he had to plead, even though the agreement had been withdrawn, because if he did not, then he would receive a life sentence if he went to trial. He stated he would not have pled had he realized he had a binding plea agreement. Accordingly, petitioner was prejudiced by counsel's failure to have the plea agreement enforced.

The appropriate remedy is the specific performance of the plea agreement. *See* State v. Sprouse, 355 S.C. 335, 585 S.E.2d 278 (2003) (specific performance of plea agreement is most efficient option because it eliminated need for new trial or plea hearings and granted parties nothing more and nothing less than the benefit for which they had bargained); Jordan v. State, *supra* (counsel ineffective for failing to withdraw guilty plea once prosecution reneged on plea bargain; remanded for either specific performance of the plea agreement and resentencing or for a new trial). Accordingly, on remand, the solicitor's office cannot assert anything other than the promised plea agreement of a fifteen-year cap on petitioner's sentence.

Because we reverse the PCR court and remand this case for proceedings consistent with this opinion, it is unnecessary to address petitioner's remaining argument. *See* Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issue when resolution of prior issue is dispositive).

REVERSED AND REMANDED.

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

The Supreme Court of South Carolina

In re: Amendments to Rule 403, SCACR.

O R D E R

The Rule 403 Subcommittee of the Chief Justice's Commission on the Profession has proposed amendments to Rule 403, SCACR, which reduce the number of trial experiences required, but insure that the qualifying experiences are a valuable learning tool. The subcommittee has also proposed amendments to the provisions of the rule addressing attorneys admitted in another state, and law clerks and staff attorneys, to reflect the changes in the number of trial experiences required and, in the provision addressing attorneys admitted in another state, to clarify the manner in which proof of equivalent experience may be provided. Finally, the subcommittee has proposed a new provision addressing Judge Advocates.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 403, SCACR, as proposed by the Rule 403 Subcommittee of the Chief Justice's Commission on the Profession. These amendments shall be effective immediately. All civil jury trial, criminal jury trial and

family court trial experiences completed under the rule before the date it was amended will be credited as the equivalent, i.e., a civil jury trial, criminal jury trial or family court trial experience, under the rule as amended; however, all trial experiences completed on or after the date of this order must comply with the rule as amended. The amended rule is attached.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E. C. Burnett, III J.

s/ Costa M. Pleicones J.

Columbia, South Carolina
March 26, 2007

RULE 403
TRIAL EXPERIENCES

(a) General Rule. Although admitted to practice law in this State, an attorney shall not appear as counsel in any hearing, trial, or deposition in a case pending before a court of this State until the attorney's trial experiences required by this rule have been approved by the Supreme Court. An attorney whose trial experiences have not been approved may appear as counsel if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing, trial, or deposition. Attorneys admitted to practice law in this State on or before March 1, 1979, are exempt from the requirements of this rule. Attorneys holding a limited certificate to practice law in this State need not comply with the requirements of this rule.

(b) Trial Experiences Defined. A trial experience is defined as the:

(1) actual participation in an entire contested testimonial-type trial or hearing if the attorney is accompanied by an attorney whose trial experiences have been approved under this rule or who is exempt from this rule, and the other attorney is present throughout the hearing or trial; or

(2) observation of an entire contested testimonial-type trial or hearing.

(c) Trial Experiences Required. An attorney must complete four (4) trial experiences. The required trial experiences are:

(1) one (1) civil jury trial in a Court of Common Pleas or in the United States District Court for the District of South Carolina;

(2) one (1) criminal jury trial in General Sessions Court or in the United States District Court for the District of South Carolina;

(3) one (1) trial in the Family Court; and

(4) one (1) other trial experience selected by the attorney, which may include a trial in equity before a circuit judge, master-in-equity, or special referee, or an administrative proceeding before an Administrative Law Judge or administrative officer of this State or of the United States. The administrative proceeding must be governed by either the South Carolina Administrative Procedures Act or the Federal Administrative Procedure Act, and the hearing must take place within South Carolina.

Each of the trial experiences set forth in (1), (2), and (3) above must include an opening statement, a closing argument and direct and cross examination of at least three witnesses.

(d) When Trial Experiences May be Completed. Trial experiences may be completed any time after the completion of one-half (½) of the credit hours needed for law school graduation.

(e) Certificate to be Filed. The attorney shall file with the Supreme Court a Certificate showing that the trial experiences have been completed. This Certificate, which shall be on a form approved by the Supreme Court, shall state the names of the cases, the dates and the tribunals involved and shall be attested to by the respective judge, master, referee or administrative officer. A filing fee of $25 shall accompany the Certificate.

(f) Attorneys Admitted in Another State. An attorney who has been admitted to practice law in another state, territory or the District of Columbia for three (3) years may satisfy the requirements of this rule by providing proof of equivalent experience in the other jurisdiction for each category of cases specified in (c) above. This proof of equivalent experience shall be made in the form of an affidavit and shall include at least the name of the case, the case number, a brief description of the facts of the case and the type of trial experience used to satisfy the requirements of (c) above. To provide

the definitive evidence required of attorneys under this section, a letter from a judge of a court of record in the other jurisdiction with personal knowledge of the attorney, attesting to that attorney's trial competence, may be substituted for detailed evidence of such experience. The affidavit shall be filed with the Supreme Court. A filing fee of $25 shall accompany the affidavit.

(g) Judge Advocate General Lawyers. The Judge Advocate General's Corps of any service of the Armed Forces of the United States (including the United States Coast Guard) shall be considered a jurisdiction for the purposes of (f) above. Further, for the purposes of (f) above, an attorney who has been a judge advocate for three years or more, either active or reserve, may use a court-martial with members as equivalent experience for the trial experience required in (c)(1), and may use a separation action or other adverse personnel action before a formal board of officers as equivalent experience for the trial experience required by (c)(4). Additionally, an attorney who has served on active duty as a judge advocate for three (3) years or more may submit a letter from a military judge or staff judge advocate in the grade of Colonel or above with personal knowledge of the attorney, attesting to the attorney's trial competence, and this letter shall have the same effect as the letter from a judge under (f) above. All other requirements of (f) must be complied with.

(h) Circuit Court Law Clerks and Federal District Court Law Clerks. A person employed full time for nine (9) months as a law clerk for a South Carolina or as a law clerk for a United States District Court Judge in the District of South Carolina may be certified as having completed the requirements of this rule by participating in or observing one (1) experience described in (c)(3) or (4) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (e) above) must be submitted for the family court trials.

(i) Appellate Court Law Clerks and Staff Attorneys. A person employed full time for eighteen (18) months as a law clerk or staff attorney for the Supreme Court of South Carolina or the South Carolina Court of

Appeals, or the United States Court of Appeal for the Fourth Circuit may be certified as having completed the requirements of this rule by participating in or observing one (1) experience described in (c)(3) or (4) above. A part-time law clerk or staff attorney may be certified in a similar manner if the law clerk or staff attorney has been employed as a law clerk or staff attorney for at least 2700 hours. The law clerk or staff attorney must submit a statement from a judge, justice or other court official certifying that the law clerk has been employed as a law clerk or staff attorney for the period required by this rule. A Certificate (see (e) above) must be submitted for the trials.

(j) Bankruptcy Law Clerks. A person employed full time for nine (9) months as a law clerk for a United States Bankruptcy Judge in South Carolina may be certified as having completed the requirements of this rule by participating in or observing the three (3) trial experiences described in (c)(1), (2) and (3) above. A part-time law clerk may be certified in a similar manner if the law clerk has been employed as a law clerk for at least 1350 hours. The law clerk must submit a statement from a judge or other court official certifying that the law clerk has been employed as a law clerk for the period required by this rule. A Certificate (see (e) above) must be submitted for the trials.

(k) Approval or Disapproval. The Court will notify the attorney if the trial experiences submitted in the Certificate or affidavit have been approved or disapproved.

(l) Confidentiality. The confidentiality provisions of Rule 402(i), SCACR, shall apply to all files and records of the Clerk of the Supreme Court relating to the administration of this rule. The Clerk may, however, disclose whether an attorney's trial experiences have been approved and the date of that approval.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Arcadian Shores Single Family Homeowners Association, Inc., Appellant,

v.

Miriam R. Cromer, Respondent.

Appeal from Horry County
J. Stanton Cross, Jr., Master-in-Equity

Opinion No. 4223
Submitted March 1, 2007 – Filed March 26, 2007

AFFIRMED

C. Scott Masel, of Myrtle Beach, for Appellant

Robin S. Cromer, of Anderson, for Respondent.

SHORT, J.: Arcadian Shores Single Family Homeowners' Association, Inc., (the Association) appeals the master's refusal to issue a permanent injunction requiring Miriam R. Cromer to comply with certain restrictive covenants. The Association contends the master erred in (1) refusing to find Cromer had actual or constructive knowledge of the 1985 Regulations; (2) failing to hold Cromer's motor home violated the intent and purpose of the 1965 Declaration; (3) finding Cromer's motor home did not violate the plain language of the 1985 Regulations; (4) holding the Association abandoned its right to enforce the restrictive covenants; (5) denying its claim for injunctive relief; and (6) awarding Cromer the costs of complying with a temporary injunction. We affirm.[1]

FACTS

On March 11, 1965, Ocean Lakes Investment Company (Developer) adopted and recorded a declaration of restrictions (the 1965 Declaration) applying to lots 5 through 97 of the Arcadian Shores Subdivision (the Subdivision). The 1965 Declaration provides, in pertinent part:

> 4. . . . No building, outbuilding, addition, or fencing shall be constructed without first submitting plans and specifications to and obtaining the written approval of the plans by the Developer, which approval will not be unreasonably withheld.
>
> . . . .
>
> 7. . . Lot owners will comply with such reasonable regulations as the Developer may make as to the location of fixtures or appliances . . . and as to parking or storage of commercial vehicles, boats or machinery on the premises.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

> 8. Except as incidental and necessary to permanent building construction . . . no mobile home, temporary structure or garage apartment shall be erected upon the lot.

On June 14, 1982, the Developer's trustee executed and recorded a corrective quit-claim deed in favor of the Association, purporting to convey all of its rights in the Subdivision, particularly the following:

> All of the [Developer's] rights under recorded restrictions applicable to [the Subdivision] to enforce any and all such restrictions . . . to approve or disapprove plans and specifications . . . to make regulations permitted by the Subdivision restrictions and to enforce same . . . .[2]

On January 15, 1985, the Association attempted to enact a set of regulations applicable to the Subdivision (the 1985 Regulations).[3] The 1985 Regulations specify, in detail, the applicable fencing limits and plainly prohibit motor homes and travel trailers from being parked where they are visible from the street. The 1985 Regulations were also recorded.

On March 24, 2000, the homeowners in the Subdivision elected to create a Special Tax District. Although the Association assigned and delegated many of its rights and duties to the Special Tax District, it retained all of its rights to enforce recorded restrictions, approve or disapprove plans and specifications, and make regulations.

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[2] This recorded deed corrected a prior quit claim deed which did not include the specific rights enumerated.

[3] Fifteen days later, the Association adopted a second declaration which neither party uses to justify relief on appeal.

On July 2, 2003, Cromer obtained title to Lot 96 in the Subdivision. After she purchased Lot 96, she sought to park a motor home and trailer on the property. The motor home and trailer together were seventy feet long. In addition, she submitted plans and specifications to the Association in order to get approval for a fence and other building modifications on the property. The plans called for a three foot high masonry lattice wall in the front yard of Lot 96. The Association approved these plans. However, Cromer built a three foot high solid stucco wall instead.

On January 23, 2004, the Association filed a complaint against Cromer, seeking to enjoin her from parking her motor home in a place where it would be visible from the street and to require Cromer to remove her fence. Cromer answered, denying her motor home or fence violated the applicable restrictive covenants. The Association sought and obtained a temporary injunction requiring Cromer to comply with the 1985 Regulations with respect to her motor home. As a precondition to issuing this injunction, the circuit court required the Association submit a $10,000 surety bond to reimburse Cromer should the injunction later be overruled.

After an order of reference, the master held a hearing and ultimately denied the Association's requests regarding both the motor home and the fence. Of consequence to the present appeal, the master made the following findings and conclusions: (1) the 1985 Regulations were not valid because they were not properly signed, acknowledged, or indexed; (2) the 1965 Declaration does not prohibit Cromer's motor home; (3) the Association abandoned its right to approve of fencing; and (4) Cromer should receive $9,000 of the surety bond for reimbursement of expenses associated with the temporary injunction. This appeal followed.

STANDARD OF REVIEW

"An action to enforce restrictive covenants by injunction is in equity." Seabrook Is. Prop. Owners Ass'n v. Marshland Trust, Inc., 358 S.C. 655, 661, 596 S.E.2d 380, 383 (Ct. App. 2004). In equitable actions, the appellate court may make findings of fact in accordance with its own view of the preponderance of the evidence. Grosshuesch v. Cramer, 367 S.C. 1, 4, 623

S.E.2d 833, 834 (2005). However, the appellate court is not required to ignore the findings of the master when the master was in a better position to evaluate the credibility of the witnesses. Siau v. Kassel, 369 S.C. 631, 638, 632 S.E.2d 888, 892 (Ct. App. 2006).

LAW/ANALYSIS

I. The Motor Home

The Association contends the master erred in refusing to order Cromer to comply with the 1985 Regulations regarding the parking of her motor home and trailer. Specifically, the Association argues (1) Cromer had actual or constructive notice of the 1985 Regulations; (2) the 1985 Regulations prohibit the parking of Cromer's mobile home in an area visible from the street; (3) alternatively, the motor home violated the intent and purpose of the 1965 Declaration; (4) the Association did not waive its right to enforce the motor home restrictions; and (5) as a consequence of the above, the master erred in refusing to issue the injunction and finding Cromer entitled to $9,000 of the surety bond.

A. The Law of the Case

We recognize the master ruled the 1985 Regulations were invalid because they were improperly signed, acknowledged, and indexed. While the Association appealed the issue of whether the Association properly indexed the 1985 Regulations, nothing in the Association's appellate brief addresses the issue of whether the master erred in finding the 1985 Regulations were not validly signed or acknowledged. Because the Association did not appeal this ruling, it is the law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (recognizing an unappealed finding of the master, right or wrong, is the law of the case and should not be considered by this court).

In addition, based on this conclusion, we need not address the issue of whether Cromer had actual or constructive notice of the 1985 Regulations, whether the 1985 Regulations prohibited the parking of the motor home, or

whether the Association waived its right to enforce the motor home restriction. See Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (holding when a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case). Accordingly, we proceed to consider whether the 1965 Declaration, standing alone, precludes the parking of Cromer's motor home in an area visible from the street.

B. The 1965 Restrictions

The Association claims the 1965 Restrictions prohibit the parking of Cromer's motor home in an area visible from the street. We disagree.

"Restrictive covenants are contractual in nature." Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). The language in a restrictive covenant shall be construed according to the plain and ordinary meaning attributed to it at the time of execution. Seabrook, 358 S.C. at 661, 596 S.E.2d at 383. "A restriction on the use of property must be created in express terms or by plain and unmistakable implication and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of the property." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (citations omitted). The court may not limit a restriction, nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998) (citations and quotations omitted).

The Association points to the following provisions of the 1965 Declaration in arguing it prohibits the parking of motor homes in an area visible from the street:

> 7. . . Lot owners will comply with such reasonable regulations as the Developer may make as to the location of fixtures or appliances . . . and as to

> parking or storage of commercial vehicles, boats or machinery on the premises.
>
> 8. Except as incidental and necessary to permanent building construction . . . no mobile home, temporary structure or garage apartment shall be erected upon the lot.

The first provision gives the Developer the power to enact regulations with respect to the parking or storage of commercial vehicles, boats, or machinery. Assuming Cromer's motor home is a commercial vehicle or machinery, this provision does not contain any affirmative prohibition or limitation on its parking or storage.

With respect to the second provision, the Association contends motor homes were largely unknown at the date of execution of the 1965 Declaration and the prohibition on erecting a mobile home shows an intent or purpose to regulate the parking of a motor home. While the Supreme Court of South Carolina initially agreed with this contention in Nance v. Waldrop, 258 S.C. 69, 187 S.E.2d 226 (1972), it subsequently rejected that line of thinking in Taylor, which overruled Nance.

In Nance, restrictions adopted in 1938 provided, in pertinent part: "No house shall be erected thereon [on any lot] costing less than Four Thousand Five Hundred ($4,500.00) Dollars." 258 S.C. at 71, 187 S.E.2d at 227. A subsequent purchaser placed his mobile home on the lot, and his neighbors sought an injunction enforcing the covenant. Id. at 71-72, 187 S.E.2d at 227. The master and circuit court held the mobile home violated the restriction and issued an injunction. Id. at 72, 187 S.E.2d at 227.

On appeal, the Supreme Court noted the mobile home had been "virtually unknown" at the time the covenant was adopted. Id. at 72, 187 S.E.2d at 228. The Court ultimately concluded "[t]he circumstances surrounding the inception of the restrictions and the developments subsequent thereto enforce the argument that the restrictions as drawn were designed and

intended to prevent uses such as the defendant is making of his lot." Id. at 74-75, 187 S.E.2d at 229.

In Taylor, a restrictive covenant provided, in relevant part: "No residence to cost less than $10,000.00 shall be erected on said lots . . . ." 332 S.C. at 3, 498 S.E.2d at 863. To prevent defendant from placing mobile homes on his lots, his neighbors sought an injunction pursuant to this covenant. Id. This court reversed the master's refusal to grant the injunction, and the Supreme Court granted certiorari. Id. The Supreme Court questioned "how the parties in Nance could have intended to prohibit mobile homes which were non-existent when the restrictive covenant was drafted" and thereby overruled Nance. Id. at 4, 498 S.E.2d at 864. In addition, the Court explained: "Here, the restrictive covenant was written in the 1960s when mobile homes were prevalent. Therefore, if the grantor had wanted to restrict mobile homes, he could have done so." Id. at 5, 498 S.E.2d at 864.

Applying Taylor, we hold the Developer did not intend to prohibit the parking of a motor home when it adopted the 1965 Declaration. Moreover, because the 1985 Regulations are not valid, no provision prohibits Cromer from parking her motor home on her property. Therefore, we hold the master did not err in refusing to grant the Association's injunction. Because of this conclusion, we also affirm the master's decision with respect to the surety bond.

II. The Fencing

The Association maintains the master erred in refusing to order Cromer to tear down her fence. In particular, the Association asserts (1) Cromer had actual or constructive notice of the Association's right to approve of fencing; (2) the Association did not waive this right; and (3) as a consequence, the master erred in failing to grant the injunction. We find it necessary only to address the issue of whether the Association waived its right to approve of Cromer's fence.

A. Waiver

The Association contends the master erred in holding it waived its right to approve of fencing. We disagree.

Initially, we reiterate our holding that the master found the 1985 Regulations were invalid and this ruling is the law of the case. As a result, we consider only the 1965 Declaration in determining whether the Association waived its right. The 1965 Declaration provides, in relevant part:

> No building, outbuilding, addition, or fencing shall be constructed without first submitting plans and specifications to and obtaining the written approval of the plans by the Developer, which approval will not be unreasonably withheld.

Waiver has been defined as the intentional relinquishment of a known right. Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993). "Neither the restricting of every lot within the area covered, nor absolute identity of restrictions upon different lots is essential to the existence of a neighborhood scheme." Pitts v. Brown, 215 S.C. 122, 130, 54 S.E.2d 538, 542 (1949). However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts. Id.

In this case, testimony revealed some people did not submit plans or specifications for certain projects to the Association and that the Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures. In fact, the Association's current president testified the Association's board was "fine with the fence," and that Cromer's husband "could have submitted a variance and it could've been approved by the board if he would've been hospitable, but he took it on himself to do whatever." Additionally, we defer to the master's ability to observe the witnesses and emphasize that the master visited the Subdivision and was in

the best position to determine the existence, if any, of a neighborhood scheme. Accordingly, we hold a preponderance of the evidence supports the master's conclusion that the Association waived its right to approve of plans and specifications with respect to Cromer's fence.

CONCLUSION

We hold the master's ruling that the 1985 Regulations are invalid is the law of the case. In addition, we find the 1965 Declaration does not prohibit the parking of Cromer's motor home and trailer on her property. Consequently, we need not address the Association's other contentions with respect to the motor home and affirm the master's decision with respect to the surety bond.

Regarding Cromer's fence, we hold a preponderance of the evidence supports the master's conclusion that the Association waived its right to require approval. As a result, we find the master did not abuse his discretion in denying the Association's request for injunctive relief. Based on the foregoing, the master's decision is

AFFIRMED.

ANDERSON, J., and KITTREDGE, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Case No. 2003-CP-10-02195

Kevin Gissel and Christina Gissel (formerly Christina Eckley), Respondents,

v.

Charles Hart and Gene Hart, Appellants.

Case No. 2003-CP-10-02703

Wade A. McEachern, Respondent,

v.

Charles Hart and Gene Hart, Appellants.

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 4224
Heard March 7, 2007 – Filed March 26, 2007

VACATED IN PART, AFFIRMED IN PART

Steven L. Smith, of Charleston, for Appellants.

Donald Higgins Howe and Walter Bilbro, Jr., both of Charleston, for Respondents.

GOOLSBY, J.: Charles Hart and Gene Hart (the Harts) appeal from an order of the circuit court upholding arbitration awards in favor of Kevin and Christina Gissel (the Gissels) and Wade A. McEachern. We vacate in part and affirm in part.

FACTS

In 2000, the Gissels purchased a mobile home for the stated cash price of $73,919.34 from Homes America, Inc. Around the same time, McEachern purchased a mobile home for a stated cash price of $76,855.00 from Homes America. The sales contracts for each of these two transactions listed Homes America as the "DEALER" and were signed as "Approved" by Gene Hart. The contracts each contained an identical Notice of Arbitration Provision.[1] Homes America subsequently merged into Southern Showcase Housing, Inc.

In 2003, the Gissels and McEachern initiated separate actions against "Homes America, Inc., Southern Showcase Housing, Inc., Charles Hart, Gene Hart and Amery English," alleging claims for (1) negligence, (2) fraud, and (3) breach of contract with fraudulent intent. The amended complaints asserted claims against "the Defendants, jointly, severally and in the alternative" and sought "both actual and punitive damages on each of the above causes of action in an amount to be determined by a jury, together with

[1] The following notice appeared in bold typeface in the contracts – "NOTICE OF ARBITRATION PROVISION: THIS CONTRACT CONTAINS A BINDING AGREEMENT TO ARBITRATE ALL CLAIMS, DISPUTES AND CONTROVERSIES ARISING OUT OF OR IN CONNECTION WITH THIS CONTRACT."

the cost of this action." The complaints essentially asserted the mobile homes were improperly installed and contained a number of defects.

Southern Showcase Housing filed separate Motions to Dismiss against the Gissels and McEachern in August 2003. In September 2003, the Harts also filed Motions to Dismiss separately against the Gissels and McEachern. The motions filed by the Harts were virtually identical to those filed by Southern Showcase Housing and asserted the complaints should be dismissed with prejudice and the matters referred to arbitration under the Federal Arbitration Act (FAA)[2] "as required in the contract by and between the parties." The same attorney represented both Southern Showcase Housing and the Harts.

The circuit court construed the motions as being to stay litigation and compel arbitration. The court issued two orders granting the motions, one with the Gissels as the plaintiffs, and the other with McEachern as the named plaintiff. In each order, the court stated, "This litigation is hereby stayed, and the parties are ordered to arbitrate this matter pursuant to the [FAA] . . . ."

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[2] 9 U.S.C.A. §§ 1 to -16 (West 1999 & Supp. 2006). See generally Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (citing the sections constituting the FAA). The FAA applies to maritime transactions and to transactions involving interstate commerce. 9 U.S.C.A. § 1 (West 1999). The orders compelling arbitration note the transactions at issue here involved interstate commerce because the Gissels and McEachern are residents of South Carolina, Southern Showcase Housing is a North Carolina corporation, and the homes were manufactured by a Delaware corporation that was not named in the suits. In this case, it is not questioned that the transactions involved interstate commerce, and the applicability of the federal act has been established as the law of the case. See Trident Technical College v. Lucas & Stubbs, Ltd., 286 S.C. 98, 104 n.2, 333 S.E.2d 781, 785 n.2 (1985).

(Emphasis added.) The captions in both orders identified the defendants Southern Showcase Housing, the Harts, and Amery English as parties.[3]

At the arbitration hearing, the Harts made an appearance through counsel, who presented evidence on their behalf. According to the Harts, "Defendants Homes America, Inc., Gene Hart and Charles Hart only offered one witness, David Bennett, administrator of the South Carolina Manufactured Housing Board. . . . Basically, Mr. Bennett testified the damages alleged in the Plaintiffs' Amended Complaint were the financial responsibility of Defendant Homes America, Inc."

During the course of the arbitration proceedings, Southern Showcase Housing settled with the Gissels and McEachern; however, the Harts were not included in the settlement and became the only remaining defendants.[4]

The arbitrator thereafter issued decisions awarding both actual and punitive damages to the Gissels and McEachern.[5] The arbitrator awarded the

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[3] The orders of reference in this case state the litigation is being referred pursuant to the motions of Southern Showcase Housing without specifically noting the Harts had also moved for the matters to be arbitrated. During the oral argument for this appeal, counsel for all parties agreed that the orders referred both the Gissels' case and McEachern's case to arbitration in their entirety and encompassed the claims against the corporation and the Harts. Indeed, this is the only reasonable interpretation in light of the fact that the motions of Southern Showcase Housing and the Harts asked for identical relief, i.e., arbitration, and they received the relief they asked for. The failure of the order to note the Harts had made identical motions on this point was, at most, the result of a clerical mistake.

[4] Amery English did not appear at the hearing on the motions to compel arbitration, was not mentioned in the arbitration awards, and is not a party to this appeal.

[5] Since Southern Showcase Housing had settled with the plaintiffs, it was not a named party in the awards and the Harts were the only named defendants.

Gissels $55,000.00 in "actual, consequential and incidental damages" against the Harts "jointly and severally," $45,000.00 in punitive damages against Charles Hart "individually," and $45,000.00 in punitive damages against Gene Hart "individually." In a separate ruling, the arbitrator awarded McEachern $53,000.00 in actual damages against the Harts "jointly and severally," $45,000.00 in punitive damages against Charles Hart "individually," and $45,000.00 in punitive damages against Gene Hart "individually."

The Harts appealed to the circuit court, which upheld the arbitrator's awards. This appeal followed.

LAW/ANALYSIS

The Harts contend the decision of the arbitrator should be vacated because the arbitrator exceeded his powers in entering awards against them individually and his decision constituted a manifest disregard of the law.

"The policy of the United States and South Carolina is to favor arbitration of disputes."[6] "In order to advance the underlying purposes of arbitration, the scope of judicial review is necessarily restricted."[7]

Section 10(a) of the FAA provides that an arbitration award may be vacated[8] on four statutory grounds:

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[6] Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).

[7] Trident Technical College, 286 S.C. at 105, 333 S.E.2d at 785.

[8] Section 11 of the FAA provides that an arbitration award may be modified on three other grounds:

> (a) Where there was an evident material miscalculation of figures or an evident material

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[9]

> mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C.A. § 11(a)-(c) (1999); see also Trident Technical College, 286 S.C. at 105 n.3, 333 S.E.2d at 786 n.3.

[9] 9 U.S.C.A. § 10(a)(1)-(4) (West Supp. 2006) (emphasis added).

The Harts acknowledge there was no fraud, partiality, or corruption in this case, but contend the arbitrator exceeded his powers. "Arbitrators exceed their powers within the meaning of § 10(a)(4) of the FAA where their award resolves an issue that is not arbitrable because it is outside the scope of the arbitration agreement."[10]

The Harts also contend the award constitutes a manifest disregard of the law. "An arbitrator's award may be vacated where there has been a 'manifest disregard or perverse misconstruction of the law.' "[11] "However, this non-statutory ground requires something more than a mere error of law, or failure on the part of the arbitrator to understand or apply the law."[12] It presupposes something beyond a mere error in construing or applying the law and even a clearly erroneous interpretation of the contract cannot be disturbed.[13]

At the hearing before the circuit court, the Harts contended the arbitrator exceeded his powers by awarding damages against them "individually" and the awards constituted a manifest disregard of the law. The Harts asserted the amended complaints stated that "at all times herein mentioned" the Harts were "acting as agents, servants, and employees."[14]

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[10] Lybrand v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 321 S.C. 70, 73, 467 S.E.2d 745, 747 (Ct. App. 1996).

[11] Lauro v. Visnapuu, 351 S.C. 507, 519, 570 S.E.2d 551, 557 (Ct. App. 2002) (quoting Batten v. Howell, 300 S.C. 545, 548, 389 S.E.2d 170, 172 (Ct. App.1990)).

[12] Id.

[13] Trident Technical College, 286 S.C. at 108-09, 333 S.E.2d at 787.

[14] The complaints alleged as to the Harts: "That Defendants Charles Hart and Gene Hart are residents and citizens of the County of Berkeley, State of South Carolina, who, at all times mentioned herein[,] were the agents, servants, and employees of Homes America, Inc."

They further asserted the complaints contained no factual allegations of any wrongdoing by them in their individual capacities. The circuit court, in colloquy from the bench, noted that, "You've got to give some credence to the fact that they are named separately and that they are referred to collectively as defendants." The circuit court ruled from the bench that the arbitrator's awards should be upheld, and subsequently issued a short form order summarily denying the motion to vacate the awards.

On appeal, the Harts argue that the award of damages, both actual and punitive, against them should be vacated because they were not sued in their individual capacities. The Harts assert: "The arbitrator's decision contains no specific findings of fact or conclusions of law. It is therefore impossible to actually pinpoint the basis for his conclusion that each of the individuals named as Defendants in this case [is] liable for . . . actual damages and . . . punitive damages. This decision is clearly beyond both the arbitrator's authority and power, and made with manifest disregard for the law."

"The character in which one is made a party to a suit must be determined from the allegations of the pleadings, and not from the title alone."[15] "Where the allegations of the complaint indicate with reasonable certainty that a plaintiff sues, or a defendant is sued, in a representative capacity, although not specifically stated, this is sufficient to fix the character of the suit."[16] "Where it is doubtful in what capacity a party sues or is sued, the entire complaint must be examined to determine the question, and reference may also be had to the pleadings as a whole or to the entire record."[17]

"If the complaint is unclear on this issue [of whether a defendant is being sued in an official or representative capacity or whether the defendant

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[15] 67A C.J.S. Parties § 173, at 722 (2002).

[16] Id.

[17] Id. (footnotes omitted).

is being sued in an individual capacity], . . . courts will look to the caption of the case, the allegations of the complaint, and the prayer for relief to ascertain the capacity in which the defendant has been sued."[18]

"[T]he statement of capacity in the caption, the allegations, and the prayer for relief allow defendants to have an opportunity to prepare for a proper defense and eliminate the unnecessary litigation that arises when parties fail to specify the capacity."[19] "In the absence of a clear statement of [a] defendant's capacity, a plaintiff is deemed to have sued a defendant in his official capacity."[20]

We agree with the Harts that the complaints did not clearly assert claims against them in their individual capacities. The fact that they were listed as defendants in the captions of the complaints is not determinative of what capacity they were being sued in, and even the captions did not expressly state that they were each being sued in an individual, as opposed to representative, capacity. In addition, the factual allegations in the body of the complaints specifically alleged the Harts were acting "at all times" as agents and employees of the defendant corporation, Homes America, Inc. None of the allegations stated the Harts committed any acts in their individual capacities or that relief was sought against them other than as agents and employees of the corporation.[21] We note that an allegation of joint and several liability is a distinct concept that refers to the allocation of any

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[18] Urquhart v. Univ. Health Sys. of E. Carolina, Inc., 566 S.E.2d 143, 145 (N.C. Ct. App. 2002).

[19] Paquette v. County of Durham, 573 S.E.2d 715, 719 (N.C. Ct. App. 2002).

[20] Id.

[21] See 59 Am. Jur. 2d Parties § 16, at 422 (2002) ("Persons suing or being sued in their official or representative capacity are, in contemplation of law, distinct persons and strangers to any rights or liabilities as individuals.").

damages award, not to whether the defendants are sued in a representative or individual capacity.[22] Moreover, in the request for relief, the complaints essentially sought one recovery against all of the defendants on the various causes of action.[23]

In this case, the contracts signed by the Gissels and McEachern were with Homes America (now Southern Showcase Housing). The contracts were each in the name of the corporation Homes America, which was listed as "DEALER," and signed "By" Gene Hart as a signatory for the corporation. Gene Hart was not listed as signing in an individual capacity on the contract. Additionally, Customer Pre-Delivery and Set-Up Agreements were signed "BY MANAGER" Gene Hart indicating he was signing on behalf of Homes

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[22] See 23 Words and Phrases Joint Liability 164 (1967) ("The main attribute of a 'joint liability', as distinguished from a 'severable liability' or a 'joint and several liability', is the right of one joint obligor to insist that his co-obligor be joined as a codefendant with him, that is, that they be sued jointly." (referencing Schram v. Perkins, 38 F. Supp. 404 (D. Mich. 1941))); id. Joint and Several Liability 49 (Supp. 2006) (defining "joint and several liability" as "a collection mechanism" (referencing EMC Ins. Cos. v. Dvorak, 603 N.W.2d 350 (Minn. Ct. App. 1999))); see also Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 306, 504 S.E.2d 347, 356 (Ct. App. 1998) (stating "[j]oint and several liability arises only when two or more tortfeasors are responsible for a single injury").

[23] Cf. Mullis v. Sechrest, 495 S.E.2d 721, 723-25 (N.C. 1998) (stating the pleadings should clearly indicate in the caption the capacity in which the plaintiff intends to hold a defendant liable, and it should be further indicated in the allegations of the complaint and in the prayer for relief; the court observed that in the absence of such a clear statement, there is a presumption against imposing individual liability; the court noted the fact that there was only one claim for relief against the defendants was indicative of an intent to sue one of the listed defendants in an official capacity as an agent rather than in an individual capacity).

America. Charles Hart was not a signatory to any of the contracts. Thus, there was no basis on which to predicate an award of individual liability.[24]

Based on the foregoing, we vacate the portions of the arbitrator's awards that purport to impose liability "individually" on the Harts for punitive damages and, if the awards can be read to impose liability "individually" on the Harts for actual damages, for actual damages as well. We affirm the awards, however, to the extent that they impose actual damages against the Harts in their representative capacities as agents, servants, and employees of Homes America, the capacities in which they were sued.

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[24] Cf. McKagen v. Windham, 59 S.C. 434, 38 S.E. 2 (1901) (reversing a judgment in favor of the plaintiff who was suing the members of a county board of control on a contract for wages, where the complaint did not allege that the defendants intended to bind themselves personally on the contract, nor did the plaintiff allege facts from which such an inference could be drawn; it is presumed that the members did not intend to bind themselves personally to a contract made by them on behalf of the county). Courts must look to the entire complaint to ascertain the capacity in which a defendant is sued. See, e.g., Johnson v. York, 517 S.E.2d 670, 672-73 (N.C. Ct. App. 1999) (holding, where the plaintiff's complaint contained no clear statement in the caption, the allegations, or the prayer for relief that the defendants were being sued in their individual capacities, the court would treat the complaint as a suit against the defendants solely in their official capacities; the plaintiff had alleged the two defendants were employees of the Department of Corrections and one was the plaintiff's colleague and the other an area administrator); Warren v. Guilford County, 500 S.E.2d 470, 471-72 (N.C. Ct. App. 1998) (treating the complaint as being against the defendant Ann Kelk in her official capacity where "neither the caption, the allegations, nor the prayer for relief contains any reference as to whether Kelk is being sued in her official or individual capacity"; the plaintiff alleged Kelk "was an agent and employee of the Defendant Guilford Mental Health" and operating "as an agent and employee" and sought judgment against the defendants "jointly and severally").

VACATED IN PART, AFFIRMED IN PART.[25]

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

[25] The Harts additionally argue on appeal that (1) the award of punitive damages is outside the scope of the arbitration agreement because the "contract expressly bars the consideration of damages in excess of those determined to have been the actual damage caused by the seller's failure to repair the mobile home," and (2) the award of punitive damages evidences a manifest disregard of the law because there was no examination of the Harts individually, there was no individual allegations asserted against them, and there was no testimony regarding the individual liability of the Harts. These issues, however, were not preserved for appeal as they were not argued below. See Murphy v. Hagan, 275 S.C. 334, 339, 271 S.E.2d 311, 313 (1980) ("The remaining issues were either not raised below and therefore may not be raised on review or were not properly preserved by timely exception and therefore may not be heard on appeal.").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anthony Marlar, Petitioner

v.

State of South Carolina, Respondent

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

Opinion No. 4225
Heard September 14, 2006 – Filed March 26, 2007

VACATED AND REMANDED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant Attorney General Christopher L. Newton, all of Columbia, for Respondent.

BEATTY, J.: Anthony Marlar was convicted of first-degree burglary and first-degree criminal sexual conduct. His petition for post-conviction

relief (PCR) was denied. This court granted certiorari to review the PCR court's denial of relief. We vacate and remand.

FACTS

In the early morning hours of February 23, 1993, two men with stockings covering their faces broke into the victim's home. The victim's three-year-old daughter was sleeping in the bed with her at the time. The victim heard the short, stocky male tell the tall, slim male, "Tony, get the girl out of here." The tall, slim male replied, "Oh, sh--," when the name "Tony" was used. "Tony" took the child out of the room and returned. The short, stocky male asked "Tony," "Is this her?" After "Tony" nodded his head in assent, the two men held a knife to victim and took turns raping her. When they finished, they cleaned the victim and threatened her before leaving.

The victim went to the hospital, and a rape kit was performed. The victim told hospital personnel and police that both males ejaculated during the crime. She told police that she believed the two males were brothers Bobby Marlar and Anthony "Tony" Marlar, because of their build. The Marlar brothers were in her house the prior week to help her roommate, whom Bobby Marlar was dating, move out of the house. The victim did not recognize the voices of the perpetrators. Although both Bobby and Tony Marlar were briefly interviewed, the criminal investigation did not progress for several years.

In 1996, the investigation was reopened. In March 1996, police questioned Jerry Fields, who denied participating in the crime and indicated that he was with Tony Marlar ("Marlar") that evening. After DNA collected from the victim matched Fields, he eventually confessed and implicated Marlar as the second suspect. Fields agreed to plead guilty and to testify at Marlar's trial in exchange for a twenty-year sentence. There was no DNA evidence linking Marlar to the crime, and two pubic hairs found in the bed did not match Fields, the victim, the victim's boyfriend, or Marlar. Prior to the DNA results linking Fields, Marlar was questioned by police and he stated he could not recall where he was three years earlier on the night of the

crime. Marlar also denied any involvement in the crime and indicated that he probably was with Fields that night.

At trial, the victim testified that she was absolutely sure that the tall, slim rapist was Marlar because: (1) of his build; (2) Fields referred to the second rapist as "Tony;" and (3) the second rapist was familiar with her house and knew the telephone in her bedroom did not work. Unlike her initial statement, the victim testified at trial that the second rapist did not ejaculate, explaining the lack of DNA evidence linking Marlar. Fields testified that he had also been in the victim's house, when the victim was not there, to help Bobby Marlar move out his girlfriend prior to the rape. Fields stated that he and Marlar raped the victim, and he denied having any disagreement with Marlar or any other motivation to testify against him. Marlar did not testify and no evidence was presented in his defense. He was convicted and sentenced to a total of forty-four years.

Marlar filed an application for PCR. In his application, Marlar insinuated that Fields and Fields' brother, "Terry," who were both in prison for burglaries they committed together, were the actual rapists. He alleged counsel was ineffective for, among other reasons, failing to cross-examine Fields about his motivation to implicate Marlar because Marlar swore out a warrant against Fields in 1994 for damaging Marlar's truck. Marlar also alleged that counsel was ineffective for failing to present the exculpatory hair evidence and in not allowing him to testify in his own defense.

Counsel testified at the PCR hearing that he did not recall whether Marlar informed him about the warrant taken out against Fields. Counsel stated he did not think Marlar would hold up well on cross-examination by the State. Counsel also stated that he did not subpoena the SLED agent who examined the pubic hairs or present the pubic hair evidence because there was no other DNA evidence linking Marlar to the crime, and he did not want to present any evidence because he did not want to lose the right to last closing argument. Counsel stated that he did not think having the SLED agent to testify regarding the pubic hairs would change anything. The SLED agent who tested the pubic hairs stated at the PCR hearing that if he had been called to testify at the trial, he would have testified that the hairs did not

match Marlar, Fields, the victim, or the victim's boyfriend. Finally, Marlar testified that counsel never discussed the pubic hairs with him, counsel merely informed him that the DNA evidence did not match. Marlar also stated counsel told him not to testify, despite Marlar's desire to do so, because he would lose the last argument.

After a hearing, the PCR court denied relief and dismissed the petition. The court found counsel rendered "reasonably effective assistance under the prevailing professional norms and demonstrated a normal degree of skill, knowledge and professional judgment that is expected of an attorney who practices criminal law." As to the specific issues raised in the PCR application, the court held: "As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them." This petition for certiorari followed.

STANDARD OF REVIEW

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). A PCR court's findings will be upheld on appeal if there is "any evidence of probative value sufficient to support them." Id. The appellate court must reverse where there is no probative evidence to support the findings. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

LAW/ANALYSIS

Marlar argues the PCR court's order was inadequate and should be remanded for specific findings of fact. We agree.

A PCR court "shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. § 17-27-80 (2003). PCR courts have been repeatedly admonished regarding the failure to specifically rule on the issues presented in a PCR application.

See Bryson v. State, 328 S.C. 236, 236-37, 493 S.E.2d 500, 500 (1997) (vacating a PCR order and remanding the matter for specific findings of fact and conclusions of law); McCullough v. State, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995); Pruitt v. State, 310 S.C. 254, 255, 423 S.E.2d 127, 128 (1992) (vacating and remanding PCR order dismissing the action where the PCR court failed to address the issues raised in the application); see also Garner v. State, 371 S.C. 1, 1, 626 S.E.2d 860, 860 (2006) (emphasizing language in section 17-27-80 that specific findings of fact and conclusions of law regarding each issue presented must be made by the PCR court).

Citing Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), the State argues that any complaint regarding the sufficiency of the order is not preserved for review because Marlar did not file a Rule 59(e), SCRCP, motion requesting the PCR court to specifically address each issue raised in the application. In the past, our state supreme court has overlooked the failure to file a Rule 59(e), SCRCP motion in order to attend to the pervasive problem of inadequate orders. McCullough, 320 S.C. at 272, 464 S.E.2d at 341 (remanding matter to PCR court, despite the fact that no Rule 59(e), SCRCP motion had been filed, and admonishing all those involved to carefully prepare and review PCR orders to ensure they specifically address the issues raised and make conclusions of law); Pruitt, 310 S.C. at 255, 423 S.E.2d at 128 (vacating and remanding the PCR court's order, despite the fact that no Rule 59(e), SCRCP motion was filed, to address the failure of many PCR orders to address all the issues raised). In the more recent case of Humbert, the court did not overlook the failure to file a Rule 59(e) motion to preserve one issue not specifically addressed in the PCR order. Humbert, 345 S.C. at 337, 548 S.E.2d at 865 (finding that, although the PCR court addressed the issue of whether it was ineffective assistance of counsel to allow the petitioner to wear the jail jumpsuit during his trial, the issue of whether it was ineffective assistance for trial counsel to allow petitioner to proceed to trial wearing shackles and a jail identification bracelet was not preserved because the PCR court's order did not address it and no Rule 59(e), SCRCP, motion was filed). It does not appear that Humbert overruled the prior cases, and it is not clear whether, in light of Humbert, an appellate court may still take the extraordinary action of overlooking the failure to file a Rule 59(e) motion and remanding matters so that specific orders may be issued by

the PCR court. What is clear, however, is that the problem of PCR orders that do not address each issue raised by an applicant continues to permeate our judicial system.

In any event, we do not believe that we need to take any extraordinary action in this case because we believe the issue is preserved. The PCR court's order specifically acknowledged that some issues were not addressed. The court made the finding that, as to those issues, no evidence was presented. When, as here, the PCR court's order specifically addresses its failure to delineate each issue and gives reasons for the ruling, the issue has been finally ruled upon by the lower court and is preserved for appeal.

As to the merits of the PCR court's ruling, Marlar presented evidence to support his claims. Accordingly, there is no evidence to support the PCR court's finding that he failed to present any evidence. We must vacate the order and remand the matter for a new PCR hearing. We caution the PCR court on remand to make specific findings of fact and conclusions of law as to each issue raised in Marlar's PCR application.

CONCLUSION

For the reasons outlined above, the PCR court's decision denying relief is

VACATED and REMANDED for a new hearing.

HEARN, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Patricia Grand Hotel, LLC, Respondent,

v.

MacGuire Enterprises, Inc., Appellant.

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

Opinion No. 4226
Submitted February 1, 2007 – Filed March 26, 2007

AFFIRMED

John M. Leiter, of Myrtle Beach, for Appellant.

Douglas M. Zayicek, of Myrtle Beach, for Respondent.

BEATTY, J.: MacGuire Enterprises ("MacGuire"), operator of the restaurant, "Chantilly's," within the Patricia Grand Hotel, appeals from the circuit court's order, "Ending Action & Amending Lease." MacGuire argues that the trial court erred in: (1) ruling the parties' agreement not to compete in food and beverage services applied only to the restaurant property, not to

the entire hotel; and (2) failing to find there was not an agreement as to the sale of food and beverages within the hotel. We affirm.[1]

FACTS

Patricia Grand Hotel, LLC, ("Patricia Grand"), owns and operates the oceanfront Patricia Grand Hotel (the "hotel") in Myrtle Beach, South Carolina. In September of 1994, the lease to the space housing the restaurant, Chantilly's, and the attached lounge was assigned from Huffman Investments, Inc., to MacGuire.[2] The lease assigned to and signed by MacGuire stated that MacGuire would provide services within the "demised property," which included: a 140-seat restaurant located within the hotel; a kitchen area with equipment; and an attached lounge area.

MacGuire began operating Chantilly's and the lounge area according to the lease agreement. At some point, MacGuire also began operating a pool bar at the hotel's pool during the summer months. The pool bar area was not attached to Chantilly's or the lounge. Patricia Grand believed operation of the pool bar was not part of the lease, and MacGuire believed that the pool bar was included in the lease because its predecessor in interest also operated the pool bar. The parties could not resolve the dispute, and on October 23, 2003, Patricia Grand filed both an eviction action in magistrate court to evict MacGuire from the pool bar and an action for civil damages in circuit court under the theories of trespass, breach of contract, quantum meruit, conversion, and injunction. MacGuire's motion to have the eviction action transferred from the magistrate court to the circuit was granted, and the eviction action and the damages action were consolidated.

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

[2] The lease with Huffman Investments was with the predecessor in interest to Patricia Grand, Patricia Grand, A South Carolina Limited Partnership. Patricia Grand purchased the hotel and became the lessor of the restaurant thereafter.

Prior to the jury trial, the parties informed the circuit court that they had reached a settlement agreement wherein the lease would be amended to reflect that it "includes the pool bar under the demise [sic] premises," that the rent would increase to $3,300, and that MacGuire could increase some prices on golf and meal packages. MacGuire's attorney then informed the circuit court that "[t]here are a number of outstanding issues, your honor, that constitute the atmospherics between the parties and that's what made discussions up to this point difficult," but that the parties had quickly agreed on the main issue. MacGuire's attorney noted that the parties had "agreed to cooperate in good faith on the number of issues that are still remaining," and he pointed out that Patricia Grand was operating an Icee machine near the pool bar. Patricia Grand agreed that the Icee operation would cease. The agreement was put on the record and the court approved it. Further, the court ordered the parties to put the agreement in writing and have it signed by all the parties.

The parties were unable to agree on the wording of the written agreement. Patricia Grand alleged the parties' agreement only dealt with its sale of Icees at the pool bar and MacGuire's sale of food and beverages at the "demised property," including the pool bar, the restaurant, and the lounge. MacGuire believed the agreement not only resolved the pool bar issue but also provided that Patricia Grand agreed not to compete in any food or beverage sales "on site," or at any location on the entire hotel property. At the hearing to determine the terms of the settlement agreement, the circuit court reviewed the portion of the transcript where the parties outlined the settlement agreement and heard arguments from both counsels. The court determined that the parties were only discussing competition in the form of Icee sales at the pool bar, part of the "demised premises." After the hearing, the circuit court signed an order "Ending Action & Amending Lease," which, in addition to amending the lease to demise the pool bar area to MacGuire, provided that Patricia Grand agreed not to sell "any food or beverage on the demised premises and will not sell, or franchise to any entity the right to sell, any frozen drink commonly referred to as an 'Icee.'" The circuit court denied MacGuire's motion to reconsider, and this appeal followed.

STANDARD OF REVIEW

This appeal revolves around the specific terms of the parties' modified lease agreement, and thus, the matter sounds in contract. Generally, an action to construe a contract is one at law. See Barnacle Broad., Inc. v. Baker Broad., Inc., 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000) (noting that an action to construe an unambiguous written contract is one at law). In an action at law, tried without a jury, this court is limited merely to the correction of errors of law and the circuit court's factual findings will not be disturbed unless wholly unsupported by the evidence or controlled by an error of law. Id.

LAW/ANALYSIS

I. Meeting of the minds

MacGuire argues there was no meeting of the minds with respect to the terms of the settlement agreement. Thus, it argues, there was no settlement agreement and the circuit court should have resumed the trial of the case.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). MacGuire points to the Fourth Circuit Case of Ozyagcilar v. Davis, 701 F.2d 306 (4th Cir. 1983), for the proposition that courts do not have the power to impose a settlement agreement where there was not a meeting of the minds between the parties. In Ozyagcilar, a student at the University of South Carolina sued the University over patent rights to a new chemical process the student claimed to have invented. Just prior to trial, the parties informed the court that they had reached an agreement, an outline of their agreement was made part of the record, and the case was dismissed with prejudice. The student's attorney informed the court that if a dispute arose as to the terms and meaning of the agreement, the court would resolve the matter. When the parties attempted to draft a formal settlement, the parties disputed the meaning of a clause in the outline. After reviewing briefs and affidavits and

without a hearing, the district court issued an order interpreting the agreement, despite the student's argument that there had not been a meeting of the minds.

The Fourth Circuit reversed and remanded the matter. The court noted that although the district court had the power to enforce complete settlement agreements, "it does not have the power to impose, in the role of arbiter, a settlement agreement where there was never a meeting of the parties' minds." Ozyagcilar, 701 F.2d at 308. The court noted that "[w]here there has been no meeting of the minds sufficient to form a complete settlement agreement, any partial performance of the settlement agreement must be rescinded and the case restored to the docket for trial." Id. The Fourth Circuit found the district court erred by not conducting a hearing to determine whether there had been a meeting of the minds as to the settlement agreement, and if so, to determine the terms and conditions of the settlement agreement. Id.

This issue is not preserved for appellate review. Although MacGuire moved the court to reconsider its order, his motion requested that the court change the order to include a covenant for Patricia Grand not to compete on the entire hotel property. MacGuire did not argue that since the parties differed in their interpretation of the settlement agreement, then there was no meeting of the minds and the trial of the matter should proceed. Whether or not proceeding to trial would have been the appropriate thing to do, MacGuire did not request it and the circuit court did not rule upon it. Thus, it is not a matter that is appropriate for our review. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (holding that an issue must be raised to and ruled upon by the trial court in order to be preserved for appellate review). Further, the present case differs from Ozyagcilar in that the circuit court actually had a hearing to determine whether a settlement agreement existed and to determine the terms of the agreement.

Nevertheless, because MacGuire did not preserve the issue of whether the circuit court should have rescinded the agreement and proceeded to trial, we decline to address it.

II. Terms of the settlement agreement

MacGuire argues the circuit court erred in finding the parties' agreement only concerned the sale of food and beverages at the pool bar, restaurant, and lounge. MacGuire argues the words used at the hearing were clear and unambiguous that the agreement concerned the hotel "site," and thus the parties agreed that Patrica Grand would not sell food or beverages anywhere on the hotel property. In the alternative, MacGuire argues that should the terms of the agreement be considered ambiguous, then it should be interpreted in MacGuire's favor. We disagree.

As previously stated, the circuit court's role in determining the actual terms of the settlement agreement between the parties is similar to the court's role in interpreting the terms of a contract. In interpreting contracts, the court should ascertain and give legal effect to the parties' intentions. Gilbert v. Miller, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct. App. 2003) ("The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the lease."). Where the language of the contract is clear and unambiguous, the court must construe the contract according to the terms the parties used as understood in their plain, ordinary, and popular sense. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

Thus, "where an agreement is clear and capable of legal construction, the courts [sic] only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." Messer v. Messer, 359 S.C. 614, 628, 598 S.E.2d 310, 317 (Ct. App. 2004). "In the enforcement of an agreement, the court does not have the authority to modify terms that are clear and unambiguous on their face." Id. at 621, 598 S.E.2d at 314; Ebert v. Ebert, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995). However, where "the language of a settlement agreement is susceptible of more than one interpretation, it is the duty of the court to ascertain the intentions of the parties." Mattox v. Cassady, 289 S.C. 57, 60, 344 S.E.2d 620, 622 (Ct. App. 1986).

At trial, the parties announced that they had reached a settlement agreement. The following exhange took place:

> [MacGuire's attorney]: Now my client is in food sales, obviously, food and beverage. There's the problem that they've been experiencing is competition and its our understanding that the agreement is is [sic] that [Patricia Grand] will not sell any food **on site** and that they will not compete with the Icee sales.
>
> [Court]: What is that?
>
> [MacGuire's attorney]: The Icee; they have a frozen drink ice cream machine right outside of the pool bar window.
>
> [Patricia Grand's attorney]: The Icee operation will cease, your honor.
>
> . . .
>
> [Court]: Now if for some, now just so that the court's clear, what you're talking about is the current operations of both sides as far as what your client operates and does currently the competition might cease but obviously your client is not then seeking to include that in automatically in his operation?
>
> [MacGuire's attorney]: I'm sorry, include –
>
> [Court]: The Icee or whatever it is that you thought was competition. If it's not already being done it's not something to be done in the future without the

> parties agreeing to it. What your client can do now is what he is doing now –
>
> [MacGuire's attorney]: Right.
>
> [Court]: -- not in addition to that. So if some operation is being ceased on one side the other side can't automatically just pick that up and start doing it without agreement of both parties just so that we're clear about that because I don't want us coming back next week or some other time about this, all right.
>
> [MacGuire's attorney]: And let me just say for the record just so that we are clear on that, my client has always engaged in the sale of the Icees.
>
> [Court]: All right, but what I'm saying is what the parties as I understand the parties agreement he can do what he's doing now, not anything new; anything new would be based on further discussions, if necessary.
>
> [MacGuire's attorney]: Yes, sir . . . .

(emphasis added).

MacGuire points to its attorney's use of the word "on site" in the hearing before the circuit court to support its argument that the agreement was for Patricia Grand not to compete in food and beverage sales on the entire hotel property. Patricia Grand argues the entire purpose of the hearing was to deal with food and beverage sales at the pool bar, and it is clear from the hearing transcript that the pool bar and Icee sales at the pool bar were the only issues discussed.

We agree with Patricia Grand. Although MacGuire's attorney informed the circuit court that the parties agreed that Patricia Grand would

cease selling food "on site," this statement was made in the context of its complaint that Patricia Grand was selling Icees in direct competition at the pool bar. The parties discussed that the agreement would be that MacGuire would be exclusively selling food and beverages at the pool bar and that the competing sale of Icees by Patricia Grand would cease. The court clarified that the Icee sales would cease by Patricia Grand and that MacGuire could continue doing what it had done in the past, i.e., sell food and beverages at the pool bar, restaurant, and lounge. The court went on to say that MacGuire could not "do anything new."

Considering the plain meaning of the words the parties used at the time of the hearing, it appears the parties had a meeting of the minds and that the agreement only related to the lease of the pool bar and the cessation of Icee sales at the pool bar. No mention was made of complete ban of food or beverage sales from the entire hotel property.

Further, even if one looks to the isolated use of the words "on site" as creating an ambiguity in the agreement, we find no error in the circuit court's interpretation of the agreement. The court reviewed the transcript of the hearing wherein the parties outlined the agreement, and the court ascertained that the parties were only focusing on competing sales at the pool bar and the Icee sales. We find no error with this interpretation of the agreement based on the parties' expressed intentions at the hearing. Mattox, 289 S.C. at 60, 344 S.E.2d at 622 (noting that the court has a duty to ascertain the intent of the parties when the language of a settlement agreement is susceptible of more than one interpretaion).

Thus, we find no error with the circuit court's interpretation of the agreement to forbid Patricia Grand from selling food and beverages only at the demised locations of the pool bar, restaurant, and lounge.

CONCLUSION

Based on the foregoing, the order documenting the agreement of the parties is

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.