OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15

April 12, 2006
Daniel E. Shearouse, Clerk
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Donald M. Brandt, Individually and as the Personal Representative of the Estate of Janice N. Brandt, Deceased, Appellant,

v.

Elizabeth K. Gooding and Gooding & Gooding, P.A., Respondents.

Appeal from Allendale County
Paul M. Burch, Circuit Court Judge

Opinion No. 26135
Heard January 20, 2005 – Filed April 10, 2006

AFFIRMED

Jack B. Swerling, of Columbia; and Richard A. Harpootlian, of Columbia, for Appellant.

Amanda G. Steinmeyer and Daniel A. Speights, both of Speights & Runyan, of Hampton; and Joel W. Collins, Jr., and Joseph S. McCue, both of Collins & Lacy, of Columbia, for Respondents.

CHIEF JUSTICE TOAL: This is a legal malpractice action. The trial court granted summary judgment, found the plaintiff to be in contempt, and dismissed the complaint as a sanction. In addition, the trial court sentenced the plaintiff to six months imprisonment, issued a restraining order, and awarded court costs and attorneys' fees to the defendant. The plaintiff appealed. We hold that the trial court properly granted summary judgment, and properly issued criminal and civil contempt sanctions. Additionally, the court correctly awarded costs. Therefore, we affirm.

FACTUAL / PROCEDURAL BACKGROUND

This legal malpractice action arose out of a land transaction in Allendale County. Donald M. Brandt (Brandt) sued Elizabeth K. Gooding, the law firm of Gooding & Gooding (Gooding), the lender, Edisto Farm Credit Service (Edisto Farm), and Ronald L. Summers (Summers), Senior Vice President of Edisto Farm, for breach of fiduciary duty, negligence, and civil conspiracy stemming from Gooding's representation of Brandt in the land transaction.[1]

In 1999, the court dismissed the claims against Summers and Edisto Farm. The court found that those parties were sham parties named in the complaint by Brandt to establish venue in Orangeburg County. As a result, venue was transferred to Allendale County.

During discovery, Brandt produced a document (Edisto Farm Letter), which appeared to have been sent by Summers of Edisto Farm to Brandt on September 18, 1995. Brandt also provided the letter to his malpractice expert, Professor John Freeman. The letter was introduced in Professor Freeman's deposition and used by him to opine that Gooding had committed malpractice. Brandt first caused the document to enter the case on April 3, 2001 when he provided a supplemental response to a request to produce. In addition, Brandt introduced the deposition into evidence in the case as an

[1] Brandt also sued the Lombard Corporation (Lombard) in Aiken County. Lombard was a partner in the land transaction with Brandt. The parties settled.

attachment to his Memorandum in Support of Motion for Reconsideration on January 18, 2002.

The document, if authentic, would have imputed knowledge to Gooding of a conflict of interest related to the representation of Brandt in the land transaction. But Gooding claimed that the document was fraudulent, and as a result, requested a hearing to determine whether the document was authentic. In addition, Gooding asked the court to issue a citation of contempt if the document proved to be a forgery. However, the circuit court judge delayed a contempt hearing until it could be determined if the document was authentic.

In subsequent motions before a second circuit court judge (trial court), Gooding moved for summary judgment, dismissal of the cause of action, and contempt. At the hearing on the second motions, Gooding presented the testimony of Marvin Dawson (Dawson), an expert in document examination and authenticity. Dawson opined that the letter was fraudulent.

Dawson testified that the Edisto Farm Letter was printed on a type of paper that was not developed until 2000, almost five years after the letter allegedly was sent. In addition, Dawson found that the letter did not contain the appropriate watermark. In a report, Dawson cited numerous inconsistencies and characteristics indicating that the document was a forgery.

Although Brandt was not represented by counsel, Brandt cross-examined Dawson as to the authenticity of the document. Brandt testified that he could not find anyone to represent him. He did, however, bring a potential expert witness to court, but decided not to put the witness on the stand.

The trial court found Brandt introduced a fraudulent document into a court proceeding. As a result, the trial court dismissed the complaint with prejudice as a sanction. In addition, the trial court granted summary judgment. The trial court also held Brandt in criminal contempt for perpetrating a fraud upon the court and sentenced him to six-months

imprisonment. Finally, the trial court awarded court and attorneys' fees to Gooding. Subsequent to the trial court's finding that the Summers letter was fraudulent, Professor Freeman withdrew his opinion, stating:

> The Court's meticulously detailed Order finds that the Brandt letter was "fabricated, forged and fraudulent," and the [sic] Mr. Brandt committed a fraud on the Court in bringing the evidence forward . . . it appears to me that my services were used in an attempt to perpetrate a fraud on the Court.
>
> . . . .
>
> . . . I have no choice but to withdraw and disaffirm my opinion testimony offered in the Gooding case.

Brandt filed a motion for reconsideration. The trial court suspended the sentence pending review. Upon review, the trial court sustained its earlier ruling and Brandt was taken into custody. Another motion for reconsideration was filed and denied. Brandt appealed.

This Court certified the following issues for review from the court of appeals pursuant to Rule 204(b), SCACR:

I. Did the trial court have the authority to hold a contempt proceeding even though the first judge ruled that a contempt hearing should be delayed?

II. Did the trial court err in granting summary judgment?

III. Did the trial court err in dismissing the complaint as a sanction for civil contempt of court?

IV. Did the trial court err in holding Brandt in *direct* criminal contempt?

V. Did the trial court err in issuing a restraining order?

VI. Did the trial court err in awarding attorneys' fees and costs?

LAW / ANALYSIS

I. Authority of the Trial Court

Brandt argues that the trial court did not have subject matter jurisdiction to grant summary judgment or cite him for contempt of court.[2] We disagree.

When determining whether to grant summary judgment, a court must examine both the facts and the law. *Royster Co. v. Eastern Distribution, Inc.*, 301 S.C. 18, 20, 389 S.E.2d 863, 864 (1990). Because a court must conduct the examination of law and facts, such an examination constitutes a trial. *Id.* As a result, a summary judgment motion, when granted, constitutes the final determination of all the issues that exist between the parties. *Id*. *See also Baird v. Charleston*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) (holding that summary judgment is an adjudication on the merits).

In support of his argument that the trial court did not have the authority to rule on contempt, Brandt relies on authority that prohibits one circuit court judge from reversing the standing order of another circuit court judge. For

[2] The circuit court has subject matter jurisdiction in this matter. *See Johnson v. S.C. Dept. of Labor Licensing and Regulation*, Op. No. 26015 (S.C. Sup. Ct. filed July 25, 2005) (Shearouse Adv. Sh. No. 30 at 41) (outlining the history of this Court's restrictive view of subject mater jurisdiction); *Dove v. Gold Kist*, 314 S.C. 235, 442 S.E.2d 598 (1994) (stating that subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong); S.C. Const. Art. V, § 11 (stating that the circuit court is the general trial court and has original jurisdiction in civil and criminal matters). As a result, we address the issue with regard to whether the circuit court had the authority to rule on the issue of summary judgment and contempt.

example, in *Cook v. Taylor*, this Court held that a circuit court judge does not have the authority to reverse another circuit court judge's determination of the proper mode of trial. 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979). Moreover, a circuit court judge cannot deny the use of an amended complaint in light of an order of another circuit judge that permitted use of the amended complaint. *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 603, 340 S.E.2d 546, 547 (1986).

In the present case, the first judge issued an order on Gooding's motion for a rule to show cause as to whether the Edisto Farm Letter was authentic. If the letter was proven to be a forgery, Gooding wanted to go forward with contempt proceedings against Brandt. The first judge dismissed the petition without prejudice because a contempt proceeding was premature until after the document's authenticity was determined. In addition, the first judge established a procedure to examine the document and examples of similar documents from Edisto Farm. In essence, the first judge took the logical steps to leave the issue of contempt to be addressed after such a determination had been made. Gooding then brought subsequent motions before the trial court with testimony from an expert that the document was a forgery. In the second battery of motions, Gooding moved for summary judgment, for citation of contempt, and for dismissal of the complaint. After a hearing, the trial court granted summary judgment, dismissed the complaint, and held Brandt in contempt of court.

Because the first judge delayed a contempt hearing, the trial court did not reverse a standing order of the first judge. Instead, the trial court acted in accordance with the steps outlined by the first judge and ruled on the issue of contempt after the document's authenticity could be determined. Accordingly, we hold that the trial court had the authority to grant summary judgment.

II. Summary Judgment

Brandt contends that the trial court erred in granting summary judgment in favor of Gooding. We disagree.

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997). In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Id.* The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

In a legal malpractice action, a plaintiff must prove that (1) the defendant was negligent, (2) the defendant's negligence proximately caused the plaintiff's injuries, and (3) damages resulted. *Summer*, 328 S.C. at 42, 492 S.E.2d at 58.

In the present case, the trial court granted summary judgment on the ground that Gooding did not proximately cause Brandt any injury. In addition, the trial court found that because the case against Lombard in the Aiken County matter settled, Gooding was released from any liability. Further, the trial court found Brandt could not show damages. To the contrary, Brandt *profited* from the sale of outparcels from the land purchased in the transaction involved in this legal malpractice action.

Because Brandt did not suffer any injury, we hold that the trial court did not err in granting summary judgment.

III. Civil Contempt

Brandt contends that the trial court erred ordering civil contempt and dismissing the complaint as a sanction for the contempt. We disagree.

Courts have the power to punish for both civil and criminal contempt. *In re Brown*, 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998). On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion. *Stone v.*

Reddix-Smalls, 295 S.C. 514, 516, 369 S.E.2d 840, 840-41 (1988) (citing *Means v. Means*, 277 S.C. 428, 431, 288 S.E.2d 811, 812-813 (1982)).

A defendant may move to dismiss the plaintiff's complaint on the ground that the plaintiff has no right to relief based on the facts and the law. Rule 41, SCRCP; *Shepard v. S.C. Dept. of Corrections*, 299 S.C. 370, 372, 385 S.E.2d 35, 36 (Ct. App. 1989). Furthermore, a complaint may be dismissed with prejudice for failure to comply with these rules or any other order of the court. Rule 41(b), SCRCP

In the present case, the trial court found Brandt to be in contempt of court for introducing a fraudulent document. In response, the trial court dismissed the complaint as a sanction for perpetrating a fraud upon the court.

We hold that the trial court did not abuse its discretion in dismissing the complaint as a sanction for civil contempt. Dismissal of the complaint is a proper sanction against a complainant who submits fraudulent documents to the court. Therefore, we affirm the trial court's decision.

IV. Criminal Contempt

Brandt contends the trial court erred in holding him in direct criminal contempt. We disagree.

It is within the trial court's discretion to punish by fine or imprisonment all contempts of authority before the court. S.C. Code Ann. § 14-5-320 (1976). In addition, courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice. *State ex rel. McLeod v. Hite*, 272 S.C. 303, 305, 251 S.E.2d 746, 747 (1979).

Direct contempt involves contemptuous conduct in the presence of the court. *State v. Kennerly*, 337 S.C. 617, 620, 524 S.E.2d 837, 838 (1999). A person may be found guilty of direct contempt if the conduct interferes with judicial proceedings, exhibits disrespect for the court, or hampers the parties or witnesses. *State v. Havelka*, 285 S.C. 388, 389, 330 S.E.2d 288 (1985).

Direct contempt that occurs in the court's presence may be immediately adjudged and sanctioned summarily. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 (1994).

"South Carolina courts have always taken a liberal and expansive view of the 'presence' and 'court' requirements." *Kennerly*, 337 S.C. at 620, 524 S.E.2d at 838. The "presence of the court" extends beyond the mere physical presence of the judge or the courtroom to encompass all elements of the system. *Id*.

This Court has recognized that depositions are judicial proceedings and are within the "presence of the court." *Matter of Golden*, 329 S.C. 335, 496 S.E.2d 619 (1998). In *Golden*, the Court held that "although a deposition is not conducted in a courtroom in the presence of a judge, it is nonetheless a judicial setting." Because there is no presiding authority, it is even more incumbent upon attorneys to conduct themselves in a professional and civil manner during a deposition. *Id*. at 343, 496 S.E.2d at 623.

In the present case, the record shows that Brandt presented a fraudulent document to the court. The document was introduced at the deposition of Professor John Freeman. In addition, the deposition was introduced into evidence in the case as an attachment to his Memorandum in Support of Motion for Reconsideration. Further, the record shows that Brandt was the sole cause of the introduction of the document into this case when he provided a supplemental response to the request to produce one day before Professor Freeman's deposition. We hold that the introduction of the document into the deposition constituted an introduction of the document into the presence of the court, warranting a citation for direct contempt.

Therefore, we hold that the trial court did not err in citing Brandt for direct criminal contempt.

V. Restraining Order

Brandt argues that the trial court abused its discretion by issuing a restraining order. We disagree.

The decision of whether to issue a restraining order is within the trial judge's discretion. *State v. Hill*, 266 S.C. 49, 52, 221 S.E.2d 398, 399 (1976).

In the present case, the record indicates that the judge did not abuse his discretion when he issued a restraining order. Brandt testified that he would spend ten years and a million dollars to get justice against Summers and Edisto Farm Credit. Further, Brandt used threatening conduct toward parties involved in the litigation. For example, Brandt told Ronald Summers, after he was dismissed from the lawsuit, that he "wasn't out of the woods yet."

The issuance of a restraining order was arguably necessary to prevent Brandt from harassing Gooding and other parties involved in the litigation. Therefore, we hold that the trial court did not abuse its discretion.

VI. Fees and Costs

Brandt contends that the trial court erred in awarding attorneys' fees and costs. We disagree.

An award of attorneys' fees and costs is a discretionary matter not to be overturned absent abuse by the trial court. *Donahue v. Donahue*, 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). An award for civil contempt is appropriate when a party has caused unnecessary litigious activity as a result of the contemptuous behavior. *Curlee v. Howe*, 277 S.C. 377, 386, 287 S.E.2d 915, 920 (1982).

In the present case, Brandt presented a fraudulent document. The introduction of this document unnecessarily prolonged this case. Therefore, the award of fees and costs is an appropriate award because of the unnecessary litigation directly related to the introduction of the letter. Accordingly, we affirm the award.

CONCLUSION

In sum, we hold that summary judgment was proper. Additionally, the citations for civil and criminal contempt were proper. Finally, the trial court did not abuse its discretion in issuing a restraining order and awarding attorneys' fees and costs. Accordingly, the ruling of the trial court is affirmed.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Collins Entertainment Corporation, Respondent,

v.

Coats and Coats Rental Amusement, d/b/a Ponderosa Bingo and Shipwatch Bingo, Wayne Coats, individually, and American Bingo & Gaming Corporation, Defendants,

Of whom American Bingo & Gaming Corporation is Petitioner.

Appeal From Charleston County
Roger M. Young, Circuit Court Judge

Opinion No. 26136
Heard April 19, 2005 – Filed April 10, 2006

AFFIRMED

C. Mitchell Brown, Zoe Sanders Nettles, and William C. Wood, all of Nelson Mullins Riley & Scarborough, of Columbia, for Petitioner.

Stephen L. Brown, Edward D. Buckley, Jr., Matthew Kiel Mahoney, all of Young Clement Rivers & Tisdale, of

Charleston, and Timothy G. Quinn, of Columbia, for Respondent.

JUSTICE WALLER: We granted a writ of certiorari to review the Court of Appeals' opinion in Collins Ent. Corp. v. Coats & Coats Rental Amuse., 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003). The sole issue on certiorari is whether the Court of Appeals erred in utilizing the "lost volume seller" doctrine to calculate damages. We affirm.

FACTS

In 1996, Collins Entertainment Corporation (Collins) contracted to lease video poker machines to two bingo hall operations known as Ponderosa Bingo and Shipwatch Bingo.[1] The six-year lease required that any purchaser of the premises assume the lease. In 1997, American Bingo and Gaming Corporation (American) purchased the assets of the bingo parlors. American failed to assume the lease and removed Collins' machines from the premises. Collins brought this action against American alleging unfair trade practices, civil conspiracy, and intentional interference with contract. The matter was referred to a master in equity for trial. The master found American liable for intentional interference with contract and awarded Collins actual damages of $157,449.66 and punitive damages of $1,569,013.00.[2] The Court of Appeals affirmed. Collins Ent. Corp. v. Coats & Coats Rental Amuse., 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003).

ISSUE

Did the Court of Appeals err in utilizing the "lost volume seller" doctrine to hold Collins did not have a duty to mitigate its damages?

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[1] The parlors were owned by Coats and Coats Rental Amusements, and the Coats' son, Wayne Coats. The Coats were named in the complaint, but are not parties to this appeal.

[2] The master dismissed the civil conspiracy claim, and found for American on the unfair trade practices claim.

DISCUSSION

Comment f to Section 347 of the Restatement (Second) of Contracts states, in part, "if the injured party could and would have entered into the subsequent contract, even if the contract had not been broken, and could have had the benefit of both, he can be said to have lost volume and the subsequent transaction is not a substitute for the broken contract." This theory of damages has come to be known as the "lost volume seller" doctrine.[3] A lost volume seller is one whose willingness and ability to supply is, as a practical matter, unlimited in comparison to the demand for the product. Thus, "[t]he lost volume seller theory allows [for the] recovery of lost profits despite resale of the services that were the subject of the terminated contract if the seller . . . can prove that he would have entered into both transactions but for the breach." Gianetti v. Norwalk Hosp., 833 A.2d 891 (Conn. 2003). See also Comeq, Inc. v. Mitternight Boiler Works, 456 So.2d 264, 268-69 (Ala. 1984) (the reason for the rule is based on the idea that the lost volume seller would have received two profits, not just one, if the buyer had not breached, so that a recovery of both profits is necessary to put the seller in as good a position as if there had been no breach). Although the lost volume seller theory is commonly understood to apply to contracts involving the sale of

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[3] The term "lost volume seller" was coined by Professor Robert J. Harris in his article A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared, 18 Stan.L.Rev. 66 (1965). As noted by the Fourth Circuit Court of Appeals in Famous Knitwear Corp. v. Drugfair Inc., 493 F2d 251 (4th Cir. 1974):

> Assume a contract for the sale of a washing machine with a list price of $500. Buyer breaches, and seller resells that washing machine at the same list price that buyer had been willing to pay. However, the resale buyer is one of seller's regular customers who had intended to purchase a washing machine from him anyway. If the seller's total cost per machine was $300, he stood to gain an aggregate profit of $400, that is, $200 profit from each of two sales. Clearly the [UCC] 2-708 contract-market differential formula is inadequate in this situation since it gives no damages to the seller who has lost a $200 profit because of the breach. In such a case the damage award should be the lost profit, that is, $200, for this will place the seller in as good a position as performance would have done.

Famous Knitwear, 493 F.2d at 254, n. 5 *citing* J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code, 7-9, at 226-27 (1972).

goods, it applies with equal force to contracts involving the performance of personal services. Id. *citing* 22 Am.Jur.2d 592, Damages § 509 (1988). Whether a seller is a lost volume seller is a question of fact. Bill's Coal Co. v. Board of Public Utilities, 887 F.2d 242, 245 (10th Cir.1989); Rodriguez v. Learjet, Inc., 833 A.2d 891, 897 (Kan. 1997); Restatement (Second) of Contracts § 347, Comment f (1979).

American asserts adoption of the lost volume seller doctrine eliminates a seller's duty to mitigate damages. It contends we should adopt the position advanced by the Pennsylvania Supreme Court in Northeastern Vending Company v. PDO, Inc., 606 A.2d 936 (Pa. 1992), in which the court declined to adopt the lost volume seller doctrine stating, summarily, that it would erode the duty to mitigate damages.[4] We decline to adopt the Pennsylvania approach because we do not find the doctrine erodes the duty to mitigate damages. On the contrary, the doctrine realizes that in certain situations, even where a buyer **does** mitigate, if the seller would have made the second sale in any event, then the "lost volume" measure of damages places him in the same position he would have been had the buyer not repudiated.[5] As the Court in Davis Chemical v. Diasonics Inc., 826 F.2d 678, 683, n. 3 (7th Cir. 1987), stated, "by definition, a lost volume seller cannot mitigate damages through resale. Resale does not reduce a lost volume seller's damages because the breach has still resulted in its losing one sale and a corresponding profit." See also Storage Technology Corp. v. Trust Co., 842 F.2d 54, 56 n. 2 (3rd Cir.1988) (pointing out that resale does not make a lost-volume seller whole); Matthews, *infra*, 51 U. Miami L.Rev. at 1214 (noting that the

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[4] It appears Pennsylvania is the only jurisdiction which rejects the concept of the lost volume seller. See Gianetti v. Norwalk Hosp., 779 A.2d 847 (Conn. 1997), *rev'd in part on other grounds* 833 A.2d 891 (2003).

[5] As stated by one commentator, the "Northeastern court's concern over the potential idleness of the lost volume seller is completely unwarranted. . . . as a general rule, the nonbreaching party has a duty to mitigate its damages by entering into a similar contract. However, the important qualification to this rule is that if the subsequent contract would have been made regardless of the breach, then that contract is not taken into consideration to minimize the damages. This is exactly the rule articulated by the second Restatement of Contracts and which the Northeastern court chose to ignore." Daniel Matthews, Should the Doctrine of Lost Volume Seller Be Retained: A Response to Professor Breen, 51 U. Miami L.Rev. 1195, 1214 (1997) (hereinafter Matthews article).

philosophical heart of the lost volume theory is that the seller would have generated a second sale irrespective of the buyer's breach such that it follows that the lost volume seller cannot possibly mitigate damages).

Further, we find the legislature's adoption of S.C. Code Ann. § 36-2A-528(2) is consistent with adoption of the lost volume seller doctrine. Section 36-2A-528(2) (dealing with leased goods)[6] tracks the language of S.C. Code Ann. § 36-2-708(2) (seller's damages for sales). Section 36-2-708 clearly tracks the provisions of the Uniform Commercial Code section (UCC § 2-708(2)) upon which the lost volume seller doctrine is premised. See generally, Jerald B. Holisky, Finding the Lost Volume Seller; Two Independent Sales Deserve Two Profits Under Illinois Law, 22 J. Marshall L. Rev. 363 (Winter 1988) (recognizing that the lost profit seller doctrine emanates from UCC 2-708(2)); Jonathan J. Lautt, Contract Law: A Clean Start for Lost Volume Lessees, 34 Washburn L.J. 136 (Fall 1994) (recognizing that section 82-2-708 (2) of the Kansas Statutes codifies the lost volume recovery for the sale of goods). By adoption of S.C. Code Ann. § 36-2A-528(2), we find the Legislature has tacitly approved of the lost volume seller doctrine.

American next asserts there is insufficient evidence in the record to demonstrate that Collins is a lost volume seller. We disagree. There is no one set test to determine whether one is a lost volume seller. According to one commentator:

> Professor Harris has developed three main requirements that a lost volume seller must meet: (1) the person who bought the resold entity would have been solicited by the plaintiff had there been no breach or resale; (2) the solicitation would have been successful; and (3) the plaintiff could have performed that additional contract.

[6] That section provides, in part, "[i]f the measure of damages . . . is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance . . . together with any incidental damages . . .due allowance for costs reasonably incurred and due credit for payments or proceeds of distribution.

> Most American courts and commentators have adopted these requirements.[7]

Saidov, The Methods for Limiting Damages Under the Vienna Convention on Contracts for the Sale of Goods, 14 Pace Int'l L. Rev. 307 (Fall 2002), *citing* Jerald B. Holisky, Finding the Lost Volume Seller: Two Independent Sales Deserve Two Profits under Illinois Law, 22 J. Marshall L. Rev. 363, 375 (1998).

Here, there is testimony in the record which indicates that Collins had surplus machines on hand and that, had another location been available, it could and would have supplied those locations with video machines. Further, Collins did place 19 of the 20 machines which were removed from Shipwatch and Ponderosa into other premises. As found by the Master, it is patent that Collins had excess inventory with which to supply and rotate machines through all of its customers.

American argues there has been no showing by Collins that the specific type of machines removed from the Shipwatch and Ponderosa were available at its warehouses, such that it has failed in its burden to demonstrate it had excess capacity. We disagree. Initially, although American argued there was

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[7] Other "tests" have been adopted. For example, in Sunrich v. Pacific Foods of Oregon, 2004 WL 1124492 (D. Or. 2004), the District Court for the District of Oregon held that "[a]s an alleged lost volume seller, Pacific therefore bears the burden of establishing that its production capacity was such that, if Sunrich had not breached the Packing Agreement, Pacific would have been able to meet Sunrich's requirements, as well as the needs of alternative buyers." See also Van Ness Motors v. Vikram, 535 A.2d 510, 511 (N. J. Super. 1987) (recognizing that "[m]ost other jurisdictions have held that to qualify as a 'lost volume' seller under Section 2-708(2), the seller needs to show **only** that it could have supplied both the breaching purchaser and the resale purchaser); Iran v. Boeing Co., 771 F.2d 1279 (9th Cir. 1985); Teradyne, Inc. v. Teledyne Industries, 676 F.2d 865, 868 (1st Cir.1982); Autonumerics, Inc. v. Bayer Industries, 696 P.2d 1330, 1340-41 (Ariz. App.1984); National Controls, Inc. v. Commodore Business Machines, Inc., 163 Cal.App.3d 688, 696-98, 209 Cal.Rptr. 636, 641-43 (1985). An even more lenient test, as set forth by the Georgia Court of Appeals, requires that "[the seller] must prove that even though he later resold the repudiated contract goods, the sale to the third party would have been made regardless of the buyer's breach so that the seller would have realized two profits from two sales. The **key inquiry is the sellers' ability to provide the product to both the breaching buyer and the resale buyer**. Unique Designs, Inc. v. Pittard Machinery Co., 409 S.E.2d 241, 243 (Ga. 1991) (emphasis supplied).

insufficient evidence of excess capacity below, it made no argument with respect to the specific types of machines at issue. Accordingly, as this specific argument was not raised below, it is not preserved. In any event, Collins presented testimony from its assistant comptroller for accounting that, although there were ten machines in each location (i.e., the Shipwatch and Ponderosa), a total of 48 machines rotated through the locations. Livingston also testified that "we had machines in the warehouse that could have easily replaced these 48 at the 130 locations." Livingston's testimony is sufficient to establish that Collins had more supply capacity of these machines than it had demand. Moreover, the lease agreement between Collins and Coats and Coats Rental gives Collins the right to furnish "all video game terminals and all coin operated music and amusement machines, to include a special multi-player Black Jack/Poker unit." We find no requirement (other than one multi-player poker unit) that Collins place any particular machines on the premises, such that Collins was free to have utilized any of its machines at the Ponderosa and Shipwatch. Accordingly, Collins was not required to demonstrate excess capacity as to a specific type of machine.

CONCLUSION

Contrary to the arguments raised by American, we find adoption of the lost volume seller doctrine does not eliminate a seller's duty to mitigate his damages. The doctrine simply recognizes that, in situations in which the seller has excess capacity and would, in any event, have made both sales, the lost volume measure of damages is necessary to place the seller in the same position he would have been had the buyer not repudiated. Further, there is sufficient evidence to demonstrate that Collins was, in fact, a lost volume seller in this case. Accordingly, the opinion of the Court of Appeals utilizing the lost volume seller doctrine is affirmed.[8]

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[8] The dissent contends adoption of the lost volume seller doctrine is inappropriate, claiming the doctrine does not apply to tort claims. However, American never argued below that the doctrine did not apply to Collins' claim for tortious interference with contract. Although American argued, generally, against adoption of the lost volume seller doctrine, it did not raise the argument now advanced by the dissent. Accordingly, in my opinion the dissent errs in raising and addressing this issue sua sponte. See State v. Cutro, 332 S.C. 100, 107, 504 S.E.2d 324, 327 (1998) (Toal dissenting) (issue which is procedurally barred should not be raised sua sponte by this Court); Rule 226(d)(2), SCACR (issue must have been raised in initial arguments to Court of

AFFIRMED.

MOORE, J., concurs. PLEICONES, J., concurring in a separate opinion. TOAL, C.J., dissenting in a separate opinion in which BURNETT, J., concurs.

Appeals). See also Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review).

Moreover, as noted by Justice Pleicones' concurrence, the only issue on certiorari is whether or not to adopt the lost-volume seller doctrine, and whether it applies in this case. The issue of double recovery as addressed in Justice Toal's dissent is not before this Court.

JUSTICE PLEICONES: I concur in the majority's express adoption of the lost-volume-seller doctrine and in the result. A lost-volume seller, or lessor, cannot mitigate his damages, so there is no duty to try. Evidence in the record supports the finding that Collins is a lost-volume lessor. I write separately because my analysis differs from the majority's on some issues.

In note 8, the majority asserts that the issue whether the lost-volume-seller doctrine can apply in contract but not tort, an issue addressed in the dissent, is not preserved. I disagree. The issue is within the ambit of the main issue in the case ... whether the doctrine ever applies. I nonetheless disagree with the dissent that the lost-volume-seller doctrine can apply in breach-of-contract cases but not in tortious-interference cases.

As noted in the dissent: "The nexus between the two causes of action [breach of contract and tortious interference with contract] is the breach of the contract, for ... breach of the contract is an element of both causes of action. This is the element from which the injured party's actual damages flow on both the contract and tort claims." Collins Music Co. v. Smith, 332 S.C. 145, 147, 503 S.E.2d 481, 481 (Ct. App. 1998) (quoting Ross v. Holton, 640 S.W.2d 166, 173 (Mo. Ct. App. 1982)). In sum, contract damages are part of tortious-interference damages. The nature of the claim, whether contract or tort, does not affect the method of determining the damages flowing from the plaintiff's loss of contract expectations, and the lost-volume-seller doctrine merely provides one such method. There is no reason that the doctrine cannot apply in a tortious-interference case.

With respect to the dissent's conclusion that Collins has received a double recovery, I agree, but the writ of certiorari that we granted did not encompass the issue. The only issues before us are whether the lost-volume-seller doctrine can apply in South Carolina and whether it applies in this case.

For the reasons above, I concur in the result reached by the majority.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view, the "lost volume seller" doctrine should not be adopted and applied in this case. Moreover, in my view, the court of appeals erred in affirming the trial court's calculation of damages. Therefore, I would reverse and remand.

The lost volume seller doctrine is a measure of damages applied in cases involving breach-of-contract claims. *See, e.g., Gianetti v. Norwalk Hosp.*, 833 A.2d 891 (Conn. 2003); *Jetz Serv. Co., Inc. v. Salina Properties*, 865 P.2d 1051 (Ct. App. Kan. 1993).

The present case, however, involves an allegation of tortious interference with contract.[1] As its name implies, tortious interference with contract is a tort, requiring the plaintiff to establish, among other things, intentional procurement of the contract's breach. *See, e.g.*, *Camp v. Spring Mortg. Co.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993); *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 192-93, 336 S.E.2d 472, 473 (1985). Consequently, damages for tortious interference of contract "are not measured by contract rules." *Collins Music Co., Inc. v. Smith*, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998) (quoting *Ross v. Holton*, 640 S.W.2d 166 (Mo. Ct. App. 1982)).

Because the lost volume seller doctrine applies in breach-of-contract cases only, and because the present case involves a tort, the court of appeals, in my view, erred in adopting and applying the doctrine.

Moreover, in my view, the court of appeals erred in affirming the trial court's calculation of damages. A plaintiff may not recover twice for the same injury. *Riddle v. City of Greenville*, 251 S.C. 473, 478, 163 S.E.2d 462, 464 (1968); *Collins Music Co., Inc. v. Smith*, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998). In *Smith*, Collins brought an action against one party for breach of contract and against a second party for tortious interference with contractual relations. The jury awarded $10,000 in actual

[1] This cause of action is also referred to as "intentional interference with contract." *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 192, 336 S.E.2d 472, 473 (1985).

damages on the breach-of-contract claim and $10,000 in actual damages for the tortious-interference claim. After granting the defendants' motions to amend the judgment, the trial court entered a single judgment of $10,000. The court of appeals affirmed. *Id.*

In affirming the award of a single judgment, the court explained as follows:

> While the causes of action [of breach and tortious interference] involve separate and distinct wrongful acts committed by different parties, there are important commonalities which affect the damages question. The *nexus between the two causes of action is the breach of the contract*, for . . . breach of the contract is an element of both causes of action. *This is the element from which the injured party's actual damages flow on both the contract and tort claims.* This does not mean, however, that the measure of actual damages on both causes of action are coextensive.
>
> Under the contract claim the injured party can recover actual damages for the direct and natural consequences of the breach, or for damages that were within the contemplation of the contracting parties. The damages recoverable for intentional interference are not measured by contract rules. The injured party can recover from the tortfeasor: the pecuniary loss of the benefits of the contract; consequential losses for which the interference is the legal cause; and, emotional distress or actual harm to reputation if they are reasonably to be expected to result from the interference. Thus, *the actual damages under the contract claim and tort claim will be coextensive only with respect to the lost benefits of the contract which were a direct and natural consequence of the breach*, or within the contemplation of the contracting parties.

> [The injured party] cannot collect double recovery (once from each defendant) for actual damages which are coextensive under the contract and tort claims.

Id. at 147-48, 503 S.E.2d at 482 (quoting *Ross v. Holton*, 640 S.W.2d 166 (Mo. Ct. App. 1982) (internal citations omitted)) (emphasis added).

In the present case, Collins was awarded actual damages for the breach-of-contract claim in the amount of $232,628.00,[2] plus $66,255.00 in pre-judgment interest. Collins was also awarded $157,449.66[3] in actual damages for the tortious-interference claim, plus $1,569,013.00 in punitive damages.

In my view, Collins should not have received two separate actual damages awards for a single breach of contract. By awarding damages under both the breach-of-contract and tortious-interference claims, the trial court improperly awarded Collins the lost benefits of the contract twice. Because the evidence regarding damages was the direct and natural consequence of a single breach, Collins was not entitled to the full amount of actual damages under both causes of action.

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[2] This award was calculated based on the terms of the contract signed by Collins and the other defendants, Coats and Coats Rental Amusements and Wayne Coats. The contract provides that in the event of a breach, Collins shall be "entitled to liquidated damages in an amount equal to Collins' average weekly share of the contents of the coin boxes, prior to said breach, multiplied by the number of weeks remaining in the unexpired term of this agreement."

[3] Like the award for breach of contract, the award for tortious interference was calculated by taking Collins' average revenue experience prior to the breach, multiplied by the number of weeks remaining in the contract. The difference in this award, though, is that license fees and other operating expenses were deducted from the final amount.

While I disagree that the lost volume seller doctrine is applicable in a tort case, I would urge that if the doctrine is to be adopted that the doctrine be applied correctly.

Generally, the lost volume seller doctrine allows for the recovery of the lost profits resulting from the breach by showing that the party would have been able to enter into the beached contract and a subsequent contract even if there was no breach. *Unique Designs, Inc. v. Pittard Machinery Co.*, 200 Ga.App. 647, 649, 409 S.E.2d 241, 243 (Ga. Ct. App. 1991). However, the majority's application of the doctrine allows for the double recovery from the *same* breach. In essence, the application of the doctrine by the majority allows for the recovery of one set of damages for the breach-of-contract and second recovery in tort for the tortious-interference with contract claim resulting from the *same* breach but brought about by joint actors.

As outlined above, in the present case, Collins settled its claim for breach of contract against Coats. In addition, Collins sought damages against American Bingo for tortious interference of contract. As a result, any recovery from American Bingo would have to be set off against any recovery from Coats. *See* Restatement 2d Torts § 774(2) (stating that payments made by the third person in settlement of the claim must be credited against the liability for causing the breach and go to reducing the damages for the tort). Accordingly, I write to prevent a *third* recovery on the part of Collins.

In addition, I disagree with the concurrence that the issue of double recovery is not before the Court. In my opinion, the issue arrives before this Court within the issue of when and how the lost volume seller doctrine is applied. As a result, I believe the Court should hold that the any recovery from American Bingo represents a double recovery and this amount should be offset from the Coats' settlement.

Therefore, in my view, the court of appeals erred in using the lost volume seller doctrine to affirm the damages award. Moreover, in my view,

the trial court's calculation of damages was incorrect. Consequently, I would reverse and remand this case for a re-calculation of damages.[4]

BURNETT, J., concurs.

[4] On remand, the court should also reconsider the award of punitive damages. *See McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 545 S.E.2d 286 (2001) (there must be an award of actual or nominal damages for a verdict of punitive damages to be supported).

The Supreme Court of South Carolina

In the Matter of
Pamela Buchanan-Lyon, Respondent.

ORDER

The Office of Disciplinary Counsel has filed a petition requesting respondent be transferred to incapacity inactive status pursuant to Rule 17(b), RLDE, Rule 413, SCACR,[1] and requesting appointment of an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. Respondent consents to being transferred to incapacity inactive status and to the appointment of an attorney to protect her clients' interests.

IT IS ORDERED that respondent is placed on incapacity inactive status until further order of the Court.

IT IS FURTHER ORDERED that Susan I. Johnson, Esquire, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s),

[1] See Rule 28, RLDE, Rule 413, SCACR.

and any other law office account(s) respondent may maintain. Ms. Johnson shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Ms. Johnson may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment.

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

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

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

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

Columbia, South Carolina
April 6, 2006

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Essie Simmons, Respondent,

v.

Rubin Simmons, Appellant.

Appeal From Charleston County
Paul W. Garfinkel, Family Court Judge

Opinion No. 4043
Submitted October 1, 2005 – Filed November 14, 2005
Withdrawn, Substituted, and Refiled April 10, 2006

REVERSED

Donald Jay Budman, of Charleston, for Appellant.

Paul E. Tinkler, of Charleston, for Respondent.

CURETON, A.J.: Rubin Simmons (Husband) appeals the denial of his motion for relief from judgment arguing the family court lacked subject matter jurisdiction when it entered a divorce decree effecting an equitable division of Husband's Social Security benefits. We reverse.[1]

FACTS

On August 24, 1990, Husband and Essie Simmons (Wife) were divorced by decree. The decree adopted an agreement between the parties as to alimony, equitable division, retirement benefits, and health insurance, among other things. In pertinent part, the agreement reads as follows:

> (b) The parties anticipate that Husband may be entitled to certain Social Security benefits, although neither is certain as to the amount of such benefits. In the event that Husband elects to receive such benefits at the age of 62, then and in that event, Wife shall receive one-third (1/3) of each monthly benefit check to which Husband is entitled, from and following the Husband's attainment of the age of 62 years and his election to receive such benefits. Husband shall not, however, be obligated to elect to receive early benefits. In the event that Husband waits to elect to receive Social Security benefits until the age of 65 years, then and in that event, Wife shall receive one-half (1/2) of each monthly benefit check to which Husband is entitled, from and following the Husband's attainment of the age of 65 years and his election to receive such benefits. In either event, <u>any payments to Wife under the terms of this provision regarding division of Social Security benefits shall be construed only as a property settlement</u>, and shall not

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

in any way be considered or construed as alimony.

(Emphasis added).

This court denied Husband's appeal from the divorce decree "to 'revise and set aside the decree as it pertain[ed] to the award of alimony, and the equitable distribution of the property.'" Simmons v. Simmons, No. 92-UP-104 (Ct. App. May 28, 1992).[2] Husband attained the age of 62 in 1994 and the age of 65 in 1997. In December 2003, because Husband had failed to remit any portion of his Social Security benefits as required by the agreement, Wife filed a petition for a rule to show cause, requesting Husband account to her for the accrued Social Security benefits due her. Husband then filed a Rule 60(b)(4), SCRCP, motion requesting relief from judgment, asserting the family court lacked subject-matter jurisdiction to divide his Social Security benefits. The family court denied Husband's motion.[3] This appeal followed.

STANDARD OF REVIEW

In appeals from the family court, this court has authority to find the facts in accordance with our own view of the preponderance of the evidence. Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996). This broad scope of review, however, does not require us to disregard the findings of the family court. Stevenson v. Stevenson, 276 S.C. 475, 477, 279 S.E.2d 616, 617 (1981). We are mindful that the family court, who saw and heard the witnesses, was in a better position to evaluate their credibility and assign comparative weight to their testimony. Bowers v. Bowers, 349 S.C. 85, 91, 561 S.E.2d 610, 613 (Ct. App. 2002). Nevertheless, we are not constrained by the family court's conclusions as to questions of law. See Moriarity v. Garden Sanctuary Church, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000); See also McDuffie v. McDuffie, 308 S.C. 401, 410, 418 S.E.2d 331, 333 (Ct. App. 1992).

[2] In that appeal, Husband did not raise the issue of subject-matter jurisdiction.
[3] The family court order indicated it denied a motion to compel by Wife, but the record on appeal does not indicate the pertinence of the motion.

LAW/ ANALYSIS

Husband asserts the family court erred in denying his motion for relief from judgment because the Social Security Act (the Act) provides Social Security benefits "shall not be transferable or assignable." 42 U.S.C. § 407(a) (1998). Further, Husband claims the property settlement agreement approved in the divorce decree amounts to an assignment of future Social Security benefits and thus, is violative of the Act. Therefore, he argues the family court lacked subject matter jurisdiction to divide his Social Security benefits. We reluctantly agree.

As a preliminary matter, "Subject matter jurisdiction refers to the court's 'power to hear and determine cases of the general class to which the proceedings in question belong.'" Watson v. Watson, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995) (quoting Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994)). Section 20-7- 420(2) of the South Carolina Code (Supp. 2003) grants the family court the exclusive jurisdiction "[t]o hear and determine actions: [f]or divorce a vinculo matrimonii . . . and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage." (emphasis added); S.C. Code Ann. § 20-7-473 (Supp. 2003) (stating the family court does not have jurisdiction to apportion nonmarital property).

Under Rule 60 (b)(4), SCRCP, a court may set aside a judgment more than one year after its rendition if it is void for lack of subject-matter jurisdiction. Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995); McDaniel v. U.S. Fidelity Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996). Although, Rule 60(b) requires the motion be made within a reasonable time after the entry of the judgment, wife has not claimed Husband's motion was untimely.

Under the Supremacy Clause of the United States Constitution, Article VI, South Carolina law must defer to the Act's statutory scheme for allocating benefits. See Hisquierdo v. Hisquierdo, 439 U.S. 572, 582 (1979) (ruling states must defer to the federal statutory scheme for allocating

Railroad Retirement Act benefits insofar as terms of federal law require). The Act provides a comprehensive scheme as to how Social Security benefits are to be awarded to divorced spouses. Cruise v. Cruise, 374 S.E.2d 882, 883 (N.C. Ct. App. 1989) (finding the trial court's order requiring husband to share one-half of his benefits with wife contradicted the Supreme Court's rationale in Hisquierdo).

The Act also provides:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the monies paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a). The Act further declares that "[n]o other provision of law . . . may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." 42 U.S.C. § 407(b). While § 659 of the Act permits reassignment of Social Security benefits to fulfill alimony obligations, it expressly excludes from the definition of alimony "any payment or transfer of property by an individual to the spouse or a former spouse of the individual in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." 42 U.S.C. § 659(i)(3)(B)(ii). See Gentry v. Gentry, 938 S.W. 2d 231 (Ark. 1997) (discussing this provision).

South Carolina courts have not directly considered whether family courts may divide Social Security benefits in property distributions. However, the United States Supreme Court found § 407(a) imposed a "broad bar against the use of legal process to reach all Social Security benefits." Philpott v. Essex County Welfare Bd., 409 U.S. 413, 417 (1973). Furthermore, other jurisdictions have consistently held the Act preempts state courts from treating Social Security benefits as property. See Gentry, 938

S.W.2d at 232; Johnson v. Johnson, 726 So. 2d 393, 394-95 (Fla. Ct. App. 1999); In re Marriage of Boyer, 538 N.W.2d 293, 295 (Iowa 1995); Sherry v. Sherry, 701 P.2d 265, 270 (Idaho Ct. App. 1985) (citing Flemming v. Nester, 363 U.S. 603 (1960)); Cruise, 374 S.E.2d at 884; Kluck v. Kluck, 561 N.W.2d 263, 270 (N.D. 1997); Kirk v. Kirk, 577 A.2d 976, 980 (R.I. 1990); In re the Marriage of Zahm, 978 P.2d 498, 501 (Wash. 1999). The thrust of these decisions is that state courts are without power to take any action to enforce a private agreement dividing future payments of Social Security when such an agreement violates the statutory prohibition against transfer or assignment of future benefits.

Clearly, the import of the Act's antiassignment clause is to make social security nonmarital in property divisions. Kluck, 561 N.W.2d at 270. Because the Act preempts state law, the family court lacked subject matter jurisdiction to divide Husband's Social Security benefits in a property distribution. See S.C. Code Ann. § 20-7-473(5) ("[t]he court does not have jurisdiction or authority to apportion nonmarital property."). Inasmuch as the family court did not have subject matter jurisdiction over Husband's Social Security benefits, it could not approve the settlement agreement dividing such benefits. See Boulter v. Boulter, 930 P.2d 112 (Nev. 1997) (holding an agreement incorporated into a divorce decree purporting to require husband to pay one-half of his Social Security benefits to his former wife was invalid and neither the Nevada Supreme Court, nor the trial court could order its enforcement.); Gentry, 938 S.W.2d at 232 (finding agreement to divide social security benefits "amounts to a transfer or assignment of future benefits prohibited by Section 407 and therefore was invalid and unenforceable when signed"). It is axiomatic that an order entered by a court without subject matter jurisdiction is utterly void. Coon v. Coon, 356 S.C. 342, 347, 588 S.E.2d 624, 627 (Ct. App. 2003), aff'd as modified, 364 S.C. 563, 614 S.E.2d 616 (2005). Moreover, a lack of subject matter jurisdiction may be raised at any time. Hallums v. Bowens, 318 S.C. 1, 3, 428 S.E.2d 894, 895 (Ct. App. 1993). Additionally, a court lacking subject-matter jurisdiction cannot enforce its own decrees. Id.

In her petition for rehearing, Wife argues the holding in Coon is in conflict with our holding in this case. We disagree. In Coon, our supreme

court held that the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C.A. § 1408 (1998) "expresses no intention on Congress's part to pre-empt state court jurisdiction," and that the extent of the family court's jurisdiction over military retirement benefits is a matter of South Carolina law. 364 S.C. at 568, 614 S.E.2d at 618. Unlike USFSPA, Congress has in the Social Security Act expressed its intent to pre-empt state court jurisdiction regarding Social Security benefits.

In Hisquierdo, the United States Supreme Court held that the Supremacy Clause precluded California's community property laws from overcoming the Federal Railroad Retirement Act. 439 U. S. at 582. The court equated railroad retirement benefits to Social Security benefits and concluded federal railroad retirement benefits were not subject to distribution in divorce. Id. Likewise, in Philpott, the United States Supreme Court held that the provisions of § 407 barring the use of "any legal process" to reach social security benefits bars all claims, to include a claim of the state of New Jersey. 409 U.S. at 417.

In her petition for rehearing, Wife also argues Price v. Price, 325 S.C. 379, 480 S.E.2d 92 (Ct. App. 1996) is identical to the case sub judice. We believe the cases are distinguishable. We note that Price concerned the division of military retirement benefits, which are not expressly exempt by statute from being classified as marital property for equitable division purposes. On the other hand, Social Security benefits are expressly excluded under §§ 407 and 659 of the Act from being classified as marital property.

Finally, Wife argues, and as the family court found, that § 407 was not implicated by the facts of this case because the case sub judice does not involve the transfer or assignment of Social Security benefits. The family court reasoned that "once [Husband] received his benefits, he is free to dispose of such funds as he deems fit" without the intervention of the Social Security Administration. This argument is without merit. Clearly, the divorce decree itself purports to divide Husband's Social Security benefits pursuant to the agreement of the parties. Moreover, the fact that Husband voluntarily agreed to pay Wife part of his Social Security benefits is of no significance. See Gentry, 938 S.W.2d at 233 (finding a property settlement

agreement, which awarded wife one-half of her husband's future Social Security benefits as he received them, was unenforceable although voluntarily entered); Boulter, 930 P.2d at 114 (holding the Act's prohibition against transferring future benefits preempted state action approving an agreement between a husband and wife to split their future Social Security benefits equally); See also Ellender v. Schweiker, 575 F.Supp. 59 (S.D.N.Y. 1983) (Congress's clear interpretation of prohibition against transfer or assignment of benefits compels strict interpretation of that clause to prohibit voluntary, as well as involuntary transfers or assignments).[4] By analogy our supreme court, in discussing the limitation on military retirement benefits under § 1408(e)(1), stated the "limitation applies whether the non-military spouse receives payments directly from the Department of Defense, from the service member spouse, or a combination of the two." Coon, 364 S.C. at 567, 614 S.E.2d at 617.

CONCLUSION

Although we are sympathetic to Wife's claim, Social Security benefits simply cannot be divided in an equitable distribution award. Because Congress preempted the Social Security arena, state courts do not have subject-matter jurisdiction to mandate distribution of such benefits whether by agreement or otherwise. Therefore, the family court's denial of Husband's Rule 60(b)(4), SCRCP, motion is hereby

REVERSED.

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[4] A 2003 amendment to 38 U.S.C. § 5301 dealing with veterans' benefits states: "This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefits by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be . . . such agreement shall be deemed to be an assignment and is prohibited."

HUFF AND WILLIAMS, JJ., CONCUR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Queen's Grant II Horizontal Property Regime, Appellant-Respondent,

v.

Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc., Respondent-Appellant.

Appeal From Beaufort County
Thomas Kemmerlin, Master – In – Equity
Curtis L. Coltrane, Master – In – Equity

Opinion No. 4101
Heard January 10, 2006 – Filed April 10, 2006

AFFIRMED IN RESULT IN PART, REVERSED IN PART, DISMISSED IN PART, AND REMANDED

Edward E. Bullard, of Hilton Head Island, for Appellant-Respondent.

Joseph R. Barker, of Hilton Head Island, for Respondent-Appellant.

KITTREDGE, J.: We are presented with cross-appeals involving the Queen's Grant II Horizontal Property Regime on Hilton Head Island in Beaufort County, South Carolina. Queen's Grant II is part of a series of horizontal property regimes in a resort known as Palmetto Dunes. Queen's Grant II appeals from an order dismissing two of its three causes of action. On appeal, Queen's Grant II limits its challenge to the dismissal of its claim for prospective declaratory relief regarding the efficacy of an amendment to restrictive covenants concerning assessments for maintenance in Palmetto Dunes. Greenwood Development Corporation, the owner of Palmetto Dunes, appeals: (1) from the denial of its motion for summary judgment as to Queen's Grant II's claim for breach of contract for failure to repair a road within the Queen's Grant II regime; and (2) from the denial of its motion for attorney fees and costs. We affirm in result in part and reverse in part with respect to the dismissal of Queen's Grant II's declaratory judgment claim. We affirm the denial of Greenwood Development's motion for attorney fees and costs. We elect not to entertain, and thus dismiss, Greenwood Development's interlocutory appeal from the denial of its summary judgment motion, and we remand.[1]

Although this case involves many issues, primarily related to restrictive covenants and tangentially to horizontal property law, the essence of our holding is that a developer may reserve to himself, in his sole discretion, the right to amend restrictive covenants running with the land or impose new restrictive covenants running with the land, provided five conditions are met: (1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants; (2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development; (3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants; (4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and as

[1] Judge Thomas Kemmerlin presided over all motions except Greenwood Development's request for attorney fees and costs. On Judge Kemmerlin's retirement, Judge Curtis L. Coltrane was assigned to hear the motion for fees and costs.

otherwise may be provided by law; and (5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy.

FACTS / PROCEDURAL HISTORY

I.

Palmetto Dunes is a real estate resort development that includes multiple horizontal property regimes located on Hilton Head Island in Beaufort County, South Carolina. The development consists of various single and multi-family residences, commercial establishments, and resort facilities. The initial developer of Palmetto Dunes was Palmetto Dunes Resort, Inc. (Palmetto Dunes Resort), a subsidiary of Phipps Land Company, Inc.

Between 1968 and 1972, Palmetto Dunes Resort filed and recorded various covenants relating to contemplated single-family and multi-family developments throughout Palmetto Dunes. The Declaration of Covenants,[2] recorded in 1972, sets forth various rights, conditions, and restrictions concerning "all multi-family dwelling areas within Palmetto Dunes," including "lands conveyed in the future in Palmetto Dunes." The Queen's Grant II Horizontal Property Regime became subject to the Declaration of Covenants when it was created in 1974. The 1972 Covenants imposed restrictions throughout Palmetto Dunes, including, for example, covenants respecting ocean front property, lagoons, ponds, lakes, and golf courses.

Under the 1972 Covenants, Palmetto Dunes Resort agreed to maintain "community areas" in the resort, but only to the extent "such maintenance and services can be provided with the proceeds." Such services were to be

[2] The document containing the 1972 Covenants is entitled "DECLARATION OF RIGHTS, RESTRICTIONS, CONDITIONS, ETC., WHICH CONSTITUTE COVENANTS RUNNING WITH CERTAIN LANDS OF PALMETTO DUNES RESORT, INC." It was recorded on September 13, 1972, in the office of Register of Deeds for Beaufort County in Deed Book 201 at page 1522. We refer to this document as the Declaration of Covenants or the 1972 Covenants.

funded by assessing all multi-family unit owners in the resort. Paragraph 22 of the 1972 Covenants provided:

> In order to provide a permanent fund to maintain, landscape and repair private streets (except those located within a privately owned lot), walkways and like community areas, maintain the beachfront, lagoons and other bodies of water in a clean and orderly condition, provide for pest control when needed and in general provide those services important to the development and preservation of an attractive community appearance, and further, to maintain the privacy, security and general safety of the residential communities in Palmetto Dunes, each owner of a multi-family dwelling unit shall pay annually to [Palmetto Dunes Resort] the sum of Sixty ($60.00) Dollars per residential unit, said sum to be placed in an account and to be used exclusively for the purposes hereinabove noted. From and after January 1, 1974, this annual payment may be increased each year by the percentage of increase in the consumer price index for the previous year, or at the option of [Palmetto Dunes Resort] may be increased each year up to five (5) percent of the maximum authorized payment for the previous year.

Queen's Grant II (Queen's Grant) is one of the multi-family horizontal property regimes within Palmetto Dunes. Queen's Grant consists of 81 condominium units and comprises just a small part of Palmetto Dunes. Queen's Grant was created in 1974 when Palmetto Dunes Resort recorded a master deed (Master Deed) subjecting the property to the South Carolina Horizontal Property Act, S.C. Code Ann. §§ 27-31-10 to 300 (1991 & Supp. 2005).[3] The Master Deed provides for the administration of the Queen's Grant regime in accordance with its bylaws.

[3] The Master Deed was recorded on June 24, 1974, in the office of Register of Deeds for Beaufort County in Deed Book 221 at page 1327.

The Master Deed references the 1972 Covenants and provides that "nothing contained [in the Master Deed] shall limit the rights of Palmetto Dunes Resort, Inc., its successors or assigns, as set forth in the aforesaid Declaration." The Declaration of Covenants reserved to Palmetto Dunes Resort, or its successors, the right to modify or impose additional covenants at any time in its sole discretion. The Declaration of Covenants further provided that any modifications to prior covenants would apply only to units sold after the amended covenants were recorded. Additionally, the Declaration of Covenants reserved to Palmetto Dunes Resort a thirty-day right of repurchase ("at the same price at which the highest bona-fide offer has been made for the property") in the event any unit owner should decide to sell.

Queen's Grant, as a multi-family dwelling area within Palmetto Dunes, was subject to the assessments under the 1972 Covenants to fund Palmetto Dunes Resort's maintenance obligations throughout the resort. Additionally, the Master Deed creating Queen's Grant and the regime's bylaws assign to Queen's Grant the responsibility for the maintenance of the property within its regime.[4] The bylaws created the "Council of Co-Owners," consisting of the unit owners within the Queen's Grant regime. The Council, in turn, is governed by a "Board of Administration."[5] This Board, on behalf of the regime, has many duties, including the "[c]ollection of assessments from the co-owners . . . [and the] [c]are, upkeep and surveillance of the [Queen's Grant] Property and the Common Elements." The bylaws further authorize the imposition of "periodic assessments" on "[a]ll co-owners" to meet all

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[4] In a prior action involving these (and other) parties, the Queen's Grant regimes brought suit for construction defects in common elements of the regimes. The trial court dismissed the action, finding the regimes lacked standing. The supreme court reversed and found the regimes had standing, noting that the master deeds and bylaws imposed on the regimes the duty of maintaining the common elements. Queen's Grant Villas Horizontal Prop. Regimes I-IV v. Daniel Int'l Corp., 286 S.C. 555, 556, 335 S.E.2d 365, 366 (1985) ("A property regime has standing to bring an action for construction defects in common elements that the regime has the duty to maintain.").

[5] The Board, per the bylaws, had to be composed entirely of unit owners within the regime once all apartments were conveyed. The last unit within Queen's Grant was sold in 1977.

regime "common expenses." Queen's Grant thus is obligated to perform within its regime "[a]ll maintenance, repair and replacement to the common elements as defined in the Master Deed." The Master Deed defines the "common elements" broadly to include virtually every aspect of regime maintenance, including "the land on which the Apartments are constructed, . . . [p]arking facilities located on the Property, . . . [and] [a]ll roads, walkways [and] paths."

Palmetto Dunes Resort conveyed the last of the units in Queen's Grant in 1977. In 1979, Palmetto Dunes Resort (through its parent company, Phipps Land Development) was sold to Greenwood Development, an unaffiliated company. As successor in interest, Greenwood Development continued under the name "Palmetto Dunes Resort" and acquired all rights of its predecessor, including those under the 1972 Covenants.

Greenwood Development determined the assessments under the 1972 Covenants were insufficient to fund its maintenance duties throughout the resort. Greenwood Development, in the exercise of its right to amend the covenants, consequently recorded amended covenants in 1981—the 1981 Covenants[6]—applicable to all multi-family dwelling areas in Palmetto Dunes.[7] Tracking language from the 1972 Covenants, Greenwood Development made the 1981 Covenants applicable "to lands conveyed in the future in Palmetto Dunes by deeds or other instruments hereafter made which make reference to this Declaration of Covenants." The 1981 Covenants are

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[6] The document containing the 1981 Covenants is entitled "DECLARATION OF RIGHTS, RESTRICTIONS, CONDITIONS, ETC., WHICH CONSTITUTE COVENANTS RUNNING WITH CERTAIN LANDS WITHIN PALMETTO DUNES RESORT." The document is subtitled, "CONSOLIDATED MULTI-FAMILY RESIDENTIAL COVENANTS OF GREENWOOD DEVELOPMENT CORPORATION." It was recorded on January 19, 1981, in the office of Register of Deeds for Beaufort County in Deed Book 314 at page 505. We refer to this document as the 1981 Covenants.

[7] We recognize that the Limited Covenants, recorded in 1982, apply only to single-family residential units and thus are inapplicable to the present dispute. It appears Queen's Grant initially challenged the 1982 Covenants, confusing them with the 1981 Covenants.

substantially similar to the 1972 Covenants, but the 1981 Covenants increase the annual maintenance assessment. Article IV of the 1981 Covenants provides, in relevant part:

> In order to provide a permanent fund to maintain, landscape and repair private streets (except those located within a privately owned lot), walkways and like community areas, maintain the beachfront, lagoons and other bodies of water in a clean and orderly condition, repair damage caused by beach erosion, provide for pest control when needed and in general provide those services important to the development and preservation of an attractive community appearance, and further, to maintain the privacy, security and general safety of the residential communities in Palmetto Dunes Resort, each owner of a multi-family dwelling unit shall pay annually to Greenwood the sum of Two Hundred ($200.00) Dollars per multi-family unit or apartment, said sum to be placed in an account and to be used exclusively for the purposes hereinabove noted. From and after January 1, 1982, this annual payment may be increased each year by the percentage of increase in the Consumer Price Index for the previous year, or at the option of Greenwood may be increased each year up to ten (10%) percent of the maximum authorized payment for the previous year.

The 1981 Covenants left unchanged the proviso that the responsibility for maintenance and services is limited "to the extent such maintenance and services can be provided with the proceeds of the assessments." Greenwood Development's right of repurchase of the units was also left intact in the 1981 Covenants.

The 1981 Covenants—specifically the increased assessments—were applied to Queen's Grant units sold after the covenants were recorded. By 2002, all but fourteen Queen's Grant units had been transferred, and the new owners were being assessed at the higher rate. Beyond recording the 1981

Covenants, Greenwood Development additionally sought to target—provide actual notice of—the 1981 Covenants' application to individual units as they were sold by two methods: (1) by specific reference to and incorporation of the 1981 Covenants into deeds transferring title; and (2) by reference to the covenants or the increased assessments in waiver agreements (Waiver Agreements) signed by the new owners.

The Waiver Agreements were so named because they purported to waive Greenwood Development's preemptive right of repurchase under the covenants. However, both methods were not utilized in all cases. In some cases, only Waiver Agreements were utilized—referencing the 1981 Covenants or the higher rate of assessment—and in other cases, there was no Waiver Agreement, as only deeds provided notice of the 1981 Covenants. Regarding units sold and purchased after the recording of the 1981 Covenants, thirty-one units have deeds and Waiver Agreements referencing the 1981 Covenants; five units have only deeds that reference the 1981 Covenants; twenty-six units have Waiver Agreements that reference the 1981 Covenants; and five units "reference the higher assessment of the [1981 Covenants], but not the [1981 Covenants] themselves . . . ."

II.

This lawsuit arose from a dispute over responsibility for a $175 road repair invoice.[8] In December of 2000, Queen's Grant paid $175 for the road repair and demanded payment from Greenwood Development, but Greenwood Development refused. Queen's Grant then brought an action for breach of contract seeking to recover the $175. Queen's Grant expanded the dispute to challenge Greenwood Development's ability to amend the 1972 Covenants and enforce assessments under the 1981 Covenants; Queen's Grant sought a return to the lower assessment under the 1972 Covenants. This relief was sought in the form of a declaratory judgment that Greenwood

[8] This street is located in the Queen's Grant regime, but we are unable to determine its precise location from the record.

Development lacked the authority to amend the covenants in 1981, and therefore each co-owner in the regime should be assessed in the future pursuant to the lower fee in the 1972 Covenants. The declaratory judgment claim—seeking only prospective relief—is an equitable claim. Finally, Queen's Grant sought a refund in an action at law of all assessments collected in excess of that due under the 1972 Covenants.

Greenwood Development filed two motions for summary judgment. The first motion requested summary judgment on Queen's Grant's first cause of action relating to the road repair. Greenwood Development's second motion sought summary judgment as to the second and third causes of action regarding the maintenance assessment. The circuit court issued an order granting Greenwood Development's second motion, but refused to grant its first motion.[9] The motions for reconsideration by both parties were denied. Greenwood Development's motion for attorney fees and costs was also denied.

Queen's Grant appeals only from the dismissal of its second cause of action seeking declaratory relief as to the unit owners' responsibility for future assessments under the 1981 Covenants. Greenwood Development cross-appeals, claiming the circuit court erred in two respects: (1) in failing to grant it summary judgment as to the breach of contract action concerning the road repair invoice; and (2) in failing to award it attorney fees and costs.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the circuit court under Rule 56(c), SCRCP. Pittman v. Grand Strand Entm't, Inc., 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). Summary judgment is proper when there is

[9] Queen's Grant asserts that it withdrew its cause of action for a refund of allegedly excessive assessments under the 1981 Covenants before the circuit court issued its ruling. There is nothing in the record to support this assertion. Queen's Grant continued to oppose the dismissal of this cause of action, even after the circuit court granted summary judgment. The circuit court's ruling as to the assessment refund is the law of the case.

no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id. On appeal, when factual matters are in dispute, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party. Id. However, when the facts are not in dispute, the question before the court is one of law. Dawson v. S.C. Power Co., 220 S.C. 26, 32, 66 S.E.2d 322, 325 (1951) (holding that when only one reasonable inference can be drawn from a contested issue of fact, the question becomes one of law for the court).

LAW/ANALYSIS

I.

Queen's Grant's Appeal

Queen's Grant acknowledges it has maintenance responsibilities on two fronts: (1) the payment of assessments to Palmetto Dunes Resort for maintenance of Palmetto Dunes' properties beyond its regime; and (2) the maintenance of its own regime property, including the common elements. Queen's Grant's appeal does not involve its maintenance obligations within its regime. See S.C. Code Ann. § 27-31-190 (1991) (providing that each co-owner must contribute toward the maintenance of the regime common areas). Queen's Grant further does not challenge the obligation of its owners (as originally imposed in the 1972 Covenants) to pay to Greenwood Development assessments for maintenance of the common areas beyond the Queen's Grant regime.[10] Queen's Grant simply wants to limit those assessments to the rate as established in the 1972 Covenants. Queen's Grant, therefore, appeals from the entry of summary judgment dismissing its second

[10] Covenants that require property owners to pay to a developer or homeowners' association assessments that have a beneficial effect on the value of the owners' properties touch and concern land and therefore "run with the land." Harbison Cmty. Assoc., Inc. v. Mueller, 319 S.C. 99, 102, 459 S.E.2d 860, 862 (Ct. App. 1995). It is undisputed that the assessments under the respective covenants to fund Greenwood Development's maintenance obligations of Palmetto Dunes "run with the land."

cause of action seeking a declaratory judgment that all unit owners in the regime be assessed prospectively at the lower rate under the 1972 Covenants.

Although the circuit court concluded the 1981 Covenants are valid, a review of the order granting summary judgment reveals that the circuit court primarily based its decision on the equitable doctrines of estoppel and laches.[11]

A. Circuit Court's Grant of Summary Judgment

1. Estoppel

"Estoppel arises when a party, relying upon what another has said or done, changes his position to his detriment." Gibbs v. Kimbrell, 311 S.C. 261, 268, 428 S.E.2d 725, 729 (Ct. App. 1993). A claim of estoppel includes elements for the party asserting estoppel and the party estopped. E.g., Provident Life and Accident Ins. Co. v. Driver, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct. App. 1994) (listing the elements of equitable estoppel: as to the estopped party, a misrepresentation or nondisclosure, intent to induce the other party to act, and actual or constructive knowledge of the true facts; and as to the party claiming estoppel, lack of knowledge, or means of acquiring knowledge of the true facts, reasonable reliance, and prejudicial change of position).

As the circuit court found, it is a well-established principle in South Carolina that estoppel by silence arises when one party observes another dealing with his property in a manner inconsistent with his rights and makes no objection while the other party changes his position based on the party's silence. Seabrook Island Property Owners Association v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (Ct. App. 1987), supports the circuit court's adoption of Greenwood Development's estoppel defense as to Queen's Grant's now-abandoned refund claim. In Pelzer, the owners' association sued to collect an unpaid annual assessment. Id. at 345, 356 S.E.2d at 412. The landowner counterclaimed and sought a refund of assessments paid for the years 1976

[11] The circuit court's discussion regarding the statute of limitations applies only to the claim for a refund of assessments, which was asserted as an action at law seeking damages.

through 1983 on the basis that the assessment was invalid. Id. This court found in favor of the landowner in that the assessment violated the applicable restrictive covenants and bylaws, yet the court concluded the landowner was not entitled to a refund of the excess assessments paid in prior years. Id. at 348, 356 S.E.2d at 414. The landowner's inability to recover the excessive assessments rested in his estoppel by silence. As the court observed:

> [Pelzer] acquiesced in the method of assessment and paid the charges. The Association expended the moneys for purposes authorized by the by-laws. Pelzer received the benefit of those expenditures. He cannot now return the benefits or restore the Association to its former position. . . . If a party stands by and sees another dealing with his property in a manner inconsistent with his rights and makes no objection while the other changes his position, his silence is acquiescence and it estops him from later seeking relief.

Id.

The Pelzer court's treatment of the estoppel defense clearly applies to Queen's Grant's efforts in the trial court to recover allegedly excessive assessments for the past two decades, a claim now abandoned. But the estoppel defense does not summarily dispose of the declaratory judgment claim of Queen's Grant for prospective relief. There are genuine issues of material fact concerning the application of estoppel to these facts. For example, the record does not support a finding as a matter of law that Greenwood Development would be prejudiced by an adverse ruling in the declaratory judgment cause of action (that the assessments under the 1981 Covenants were not authorized), thereby requiring future assessments under the 1972 Covenants. In this regard, both the 1972 Covenants and 1981 Covenants provide that Greenwood Development is responsible for providing services only to the extent the funds from unit owners covered such services. Because the element of detrimental reliance may be lacking (as well as other elements), the estoppel defense does not entitle Greenwood Development to summary judgment on the declaratory judgment cause of action.

2. Laches

The circuit court alternatively found that laches bars Queen's Grant's declaratory judgment cause of action seeking only prospective relief. "'Laches' is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" Gordon v. Drews, 358 S.C. 598, 612, 595 S.E.2d 864, 871 (Ct. App. 2004) (quoting Muir v. C.R. Bard, Inc., 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct. App. 1999)). "Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice." Gordon, 358 S.C. at 612, 595 S.E.2d at 871 (quoting Brown v. Butler, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001)).

We again confront the circuit court's blanket finding of prejudice against Greenwood Development, a finding in which Greenwood Development may seek refuge only as to the claim for a refund of past assessments. For the same reason the circuit court could not properly find estoppel and grant Greenwood Development summary judgment as to the claim for prospective relief, the court erred in relying alternatively on laches to dismiss the declaratory judgment cause of action.

3. The Validity of the 1981 Covenants

We now turn to the merits of Queen's Grant's challenge to the validity of the 1981 Covenants. The circuit court in its conclusions of law ruled that "the assessment imposed under the [1981] Covenants is, as a matter of law, a valid assessment imposed pursuant to Greenwood Development's rights, as a successor and assign of [Palmetto Dunes Resort], pursuant to the plain and unambiguous provisions of the [1972] Covenants permitting the amendment of the [1972] Covenants." We concur with the circuit court, with the exception of five units in Queen's Grant.

In South Carolina, an owner of a fee or leasehold interest in certain real property may declare the property to be subject to a horizontal property regime. S.C. Code Ann. § 27-31-30 (Supp. 2005). The term horizontal is a misnomer, for a "condominium is actually a vertical property regime composed of horizontal slices of airspace . . . within the vertical column." Sea Watch Stores Ltd. Liab. Co. v. Council of Unit Owners of Sea Watch

Condo., 691 A.2d 750, 753 n.1 (Md. Ct. Spec. App. 1997). When land is submitted to a horizontal property regime, no new property is created, even though the structure as completed may include many floors of condominium units. Id. at 753. Instead, condominium statutes, like South Carolina's Horizontal Property Act, merely created a new way to own and regulate airspace. Id. Condominium apartments may be bought and sold like real property. See S.C. Code Ann. §§ 27-31-40 and 60 (1991). Ownership in a condominium may be subject to deed restrictions and covenants like any other real property. See Sea Watch, 691 A.2d at 753-54.

The creation of a horizontal property regime is accomplished through compliance with the South Carolina Horizontal Property Act. Section 27-31-40 of the South Carolina Code provides that once property is submitted to a condominium horizontal property regime, individual apartments may be owned, conveyed and encumbered independently of other apartments, subject to the same general principles of law governing real property. See 4 S.C. Jur. Condominiums § 9 (2005). Apartments, for horizontal property purposes, are defined in section 27-31-20(a) (1991) as "a part of the property intended for any type of independent use . . . including one or more rooms or enclosed spaces . . . ." Each "co-owner," or owner of an apartment in a regime, acquires "condominium ownership," and owns his or her individual apartment, and has a common right to share, with other co-owners, in the common areas of the property. S.C. Code Ann. § 27-31-20(c) and (d) (Supp. 2005); § 27-31-60.

Property, whether subject to the Horizontal Property Act, may, of course, be governed by restrictive covenants. Real covenants have been defined as "agreement[s] . . . to do, or refrain from doing, certain things with respect to real property." 20 Am. Jur. 2d Covenants, Conditions, and Restrictions § 1 (2005). Therefore, covenants, "in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract." Id. (citing Seabrook Island Prop. Owners Assoc. v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (Ct. App. 1987)). Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. 17 S.C. Jur. Covenants § 2 (2005) (citing Hoffman v. Cohen, 262 S.C. 71, 202 S.E.2d 363 (1974) and Manning v. City of Columbia, 297 S.C. 451, 377 S.E.2d 335 (1989)). However, restrictive covenants affecting real property cannot be properly and fully understood without resort to property law.

Restrictive covenants differ from contracts in that they "run with the land," meaning that they are enforceable by and against later grantees. 17 S.C. Jur. Covenants § 18 (2005). Restrictive covenants that require grantees to pay assessments for the upkeep of a particular parcel of property are held to be real covenants which "touch and concern" land, and therefore, run with the land. Epting v. Lexington Water Power Co., 177 S.C. 308, 314-317, 181 S.E.2d 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.

There are several ways in which restrictive covenants may be created. The most common means are: (1) by deed; (2) by declaration; and (3) by implication from a general plan or scheme of development. 17 S.C. Jur. Covenants § 60. The initial restrictive covenants applicable to Palmetto Dunes were created by the Declaration of Covenants when Palmetto Dunes Resort executed and recorded the 1972 Covenants. See Smith v. Comm'rs of Pub. Works of City of Charleston, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct. App. 1994); 17 S.C. Jur. Covenants § 8.

Restrictive covenants will be enforced unless they are indefinite or contravene public policy. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987). Moreover, a developer may generally reserve to himself the right to amend restrictive covenants in his sole discretion, and may do so without the consent of the grantee, so long as he exercises that right in a reasonable manner. Flamingo Ranch Estates, Inc. v. Sunshine Ranches Homeowners, Inc., 303 So. 2d 665, 666 (Fla. Dist. Ct. App. 1974) (citing Johnson v. Three Bays Props. #2, Inc., 159 So. 2d 924, 925 n.1 (Fla. Dist. Ct. App. 1964)), cited with approval in Wright v. Cypress Shores Dev. Co., Inc., 413 So. 2d 1115, 1123-24 (Ala. 1982); Rossman v. Seasons at Tiara Rado Assocs., 943 P.2d 34, 37 (Colo. Ct. App. 1996); Markey v. Wolf, 607 A.2d 82, 94 (Md. Ct. Spec. App. 1992); Appel v. Presley Cos., 806 P.2d 1054, 1056 (N.M. 1991); Scoville v. SpringPark Homeowner's Assoc., Inc., 784 S.W.2d 498, 509 n.7 (Tex. App. 1990); Lakemoor Cmty. Club, Inc. v. Swanson, 600 P.2d 1022, 1025 (Wash. Ct. App. 1979).[12] However, when a subdivision developer is divested of all

[12] In the area of condominium and property regime law, Florida case law is cited approvingly in jurisdictions throughout the country. Indeed, when faced with unresolved questions in horizontal property law, courts often look

interest in the subdivision, a reserved right to amend restrictive covenants is extinguished. Armstrong v. Roberts, 325 S.E.2d 769, 770 (Ga. 1985). Additionally, when a developer fails to expressly reserve a right to amend the covenants, amendments are not allowed. Heritage Fed. Sav. & Loan Ass'n v. Eagle Lake & Golf Condos., 318 S.C. 535, 541, 458 S.E.2d 561, 565 (Ct. App. 1995); Shipyard Prop. Owners' Assoc. v. Mangiaracina, 307 S.C. 299, S.E.2d 795 (Ct. App. 1992).

The centerpiece of Queen's Grant's Complaint and appeal is its challenge to the amended covenants in 1981, specifically the increased assessment to fund Greenwood Development's maintenance obligations. Queen's Grant presses three arguments in its effort to invalidate the 1981 Covenants and return to lower assessments under the 1972 Covenants. First, because all units in the Queen's Grant regime had been sold prior to Greenwood Development's acquisition of Palmetto Dunes in 1979, Greenwood Development "cannot impose covenants/restrictions on property that it does not own." Final Appellant's brief of Appellant-Respondent at 19. Second, because the Master Deed of "Queens Grant II makes no reference to the 1981 Covenants, … [t]he 1981 Covenants are therefore void." Id. at 18-19. Third, the 1981 Covenants may not be sanctioned pursuant to the so-called Waiver Agreements for a variety of reasons, primarily grounded in contract law principles and the claim that the preemptive repurchase right reserved to the Declarant[13] violates the rule against perpetuities. Id. at 22.

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to Florida law. See Douglas Scott MacGregor, South Carolina Condominium Law § 1.01 (William S. Jula ed. 1986) ("Florida is the undisputed leader in the development of condominium law, and its cases are frequently cited in other states and are generally considered to have persuasive value."). Queen's Grant does not challenge the general right of Greenwood Development to amend the 1972 Covenants; Queen's Grant's challenge in this regard is limited to the claim that the 1981 amendments are ineffective as to its co-owners because the last Queen's Grant unit was sold in 1977.

[13] The term "declarant" is often used in documents related to restrictive covenants and the creation of horizontal property regimes, as well as the corresponding rights and responsibilities of an owner-developer. In the context of horizontal property law, a declarant is "a grantor that establishes or joins in the creation of a declaration of condominium." 15A Am. Jur. 2d Condominiums § 1 (2005).

a. All Condominium Units in the Queen's Grant Regime Were Sold Prior to Greenwood Development's Acquisition of Palmetto Dunes

Queen's Grant argues that Greenwood Development lacked authority to amend the restrictive covenants because it bought Palmetto Dunes after all the units in the Queen's Grant regime had been sold, and thus Greenwood Development "cannot impose covenants/restrictions on property that it does not own." This argument is unavailing, for Queen's Grant misapprehends the *purpose* of the assessment under the 1972 Covenants and the 1981 Covenants, as well as Greenwood Development's unquestioned ownership of property within Palmetto Dunes. The assessment at issue relates to Greenwood Development's maintenance responsibilities in the resort well beyond the confines of Queen's Grant. Greenwood Development's lack of a direct ownership interest in the property of Queen's Grant in no manner impedes its continuing rights as Declarant under the 1972 Covenants, including its ability to amend the covenants. As noted, Palmetto Dunes does not merely consist of a single horizontal property regime, and Queen's Grant comprises just a small part of Palmetto Dunes.

Queen's Grant asks us to follow the rule that a developer of a subdivision who reserves authority respecting restrictive covenants running with the land loses that authority when he divests himself of his interest in the subdivision. Armstrong v. Roberts, 325 S.E.2d 769, 770 (Ga. 1985). This rule has no application here, for Greenwood Development maintains a substantial interest in Palmetto Dunes. Queen's Grant's narrow view—limiting the analysis to the confines of its regime—is myopic and fails to recognize Greenwood Development's interest in Palmetto Dunes and its corresponding obligation to maintain resort properties far beyond the Queen's Grant regime. The unchallenged 1972 Covenants and the challenged 1981 Covenants relate to Greenwood Development's maintenance responsibilities for resort property (beyond the confines of the Queen's Grant regime) in which it clearly does have an ownership interest.

Moreover, Greenwood Development's predecessor, Palmetto Dunes Resort, reserved the right to amend the restrictive covenants in its sole

discretion. Palmetto Dunes Resort owned the development at the time the original covenants were recorded, including rights in the property such as easements, right of ways, and lands held in trust within each regime. Greenwood Development acquired all Palmetto Dunes Resort's rights and obligations when it purchased the development. Palmetto Dunes Resort's interest in Palmetto Dunes did not evaporate when the last unit in Queen's Grant was sold. We conclude as a matter of law that Palmetto Dunes Resort had an interest in the property of Palmetto Dunes when it sold its interest to Greenwood Development. Greenwood Development acquired that property interest. Accordingly, the sale of all units in the Queen's Grant regime prior to Greenwood Development's 1979 purchase did not foreclose its right to amend the 1972 Covenants.

b. The Master Deed

We next address whether the failure of the Master Deed to reference the 1981 Covenants renders those covenants void. Queen's Grant's challenge here focuses on the Horizontal Property Act.[14] The Act requires a master deed. S.C. Code Ann. §§ 27-31-20(i), 27-31-30, and 27-31-100. The Act requires that the master deed include a comprehensive list of particulars, including a "description of the full legal rights and obligations, both currently

[14] We note that the Horizontal Property Act may not be controlling here (at least not exclusively) because Greenwood Development's maintenance obligations under the 1972 Covenants and 1981 Covenants do not relate to the regime property of Queen's Grant; as noted, these obligations relate to resort property outside of the Queen's Grant regime. Because the covenants concern responsibility for maintenance of resort property beyond the Queen's Grant regime, Greenwood Development is akin to a "master association" and is not subject to the Horizontal Property Act with regard to such property. See Scott v. Sandestin Corp., 491 So. 2d 334 (Fla. Dist. Ct. App. 1986). Courts in other jurisdictions have recognized that assessments by master associations for maintenance of property outside the regime are separate from assessments by the condominium association for maintenance of its own common elements. Hobson v. Hilltop Place Cmty. Assoc., 453 A.2d 841, 842 (N.H. 1982).

existing and which may occur, of the apartment owner, the co-owners, and the person establishing the regime." S.C. Code Ann. § 27-31-100(f). It is Queen's Grant's contention that for restrictive covenants to be enforceable against unit owners in a regime under the Act, those covenants must be expressly included in the Master Deed. According to Queen's Grant, "the 1972 Covenants are the only valid covenants that are binding upon the co-owners of the Queens Grant II regime." (Final Appellant's brief of Appellant-Respondent, 18-19). Queen's Grant further points to the language in the Master Deed that its "provisions [shall not be] amended unless all of the co-owners and the mortgagees of all the mortgages covering the Apartments unanimously agree to such . . . amendment."[15]

To the extent the covenants may be governed by the Act, we believe Queen's Grant reads section 27-31-100(f) too narrowly, and fails to consider critical provisions of the Master Deed, as well as other sections of the Act. Paragraph SIXTEENTH of the Master Deed provides in part:

> [E]ach co-owner shall comply with the provisions of this Master Deed and authorized amendments thereto, the Declaration of Covenants, . . . applicable to all Multi-Family Residential Areas in Palmetto Dunes . . . and the Regime By-laws . . . *provided that nothing contained herein shall limit the rights of Palmetto Dunes Resort, Inc., its successors and assigns, as set forth in the aforesaid Declaration.*

(Emphasis added).

It was not necessary to amend the Master Deed for the 1981 Covenants to apply to units sold thereafter when the subsequent purchasers received notice of the 1981 Covenants in the manner prescribed by those covenants. The Master Deed therefore, as a matter of law, satisfies general principles of

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[15] Cf. Heritage Fed. Sav. & Loan Ass'n v. Eagle Lake & Golf Condos., 318 S.C. 535, 541, 458 S.E.2d 561, 565 (Ct. App. 1995) (holding a regime developer has the authority to amend the master deed without the consent of property owners so long as the developer specifically reserves that right in the master deed).

property law, including the requirement of the Act—section 27-31-100(f)—that the master deed include a "description of the full legal rights and obligations, both currently existing and which may occur, of the apartment owner, the co-owners, and the person establishing the regime." Cf. Douglas Scott MacGregor, South Carolina Condominium Law § 2.04(C) (S.C. Bar Assoc. 2000) ("The SCHPA[,] unlike most condominium acts, has no requirements regarding the placement of use restrictions.").

This finding comports with other provisions of the Act. Section 27-31-170, for example, allows for the inclusion of restrictive covenants outside of a master deed: "Each co-owner shall comply strictly . . . with the covenants, conditions and restrictions set forth in the master deed or lease *or in the deed or lease to his apartment*." (Emphasis added). The emphasized language of this statute refutes Queen's Grant's interpretation of section 27-31-100(f) that only covenants expressly referenced in a master deed are enforceable. We hold that because the Master Deed reserves all rights under the Declaration of Covenants, section 27-31-170 permits the inclusion of lawfully amended covenants in individual Queen's Grant deeds. Heritage Fed. Sav. & Loan Assoc., 318 S.C. at 541, 458 S.E.2d at 565 ("S.C. Code Ann. § 27-31-100(f) permits a developer to reserve certain rights provided he states those rights with specificity in the master deed."). This lines up with the triggering language in the 1981 Covenants[16] that the covenants would apply to multi-family dwellings conveyed in the future (following the recording of the covenants) "*by deeds* or other instruments hereafter made which make reference to this Declaration of Covenants." 1981 Covenants (emphasis added).

c. The Waiver Agreements

We next turn to the Waiver Agreements as the basis for imposing the increased assessments on the unit owners in Queen's Grant. The 1981 Covenants provide the procedure for making the assessments applicable to multi-family dwellings "conveyed in the future." The 1981 Covenants apply to multi-family dwellings where the covenants are referenced "by deeds *or other instruments hereafter made which make reference to this Declaration*

[16] The 1972 Covenants contain the same provision.

of Covenants." 1981 Covenants (emphasis added). We begin with the premise that in construing restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); Seabrook Island Prop. Owners Assoc. v. Marshland Trust, Inc., 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004). Greenwood Development chose the language by which the 1981 Covenants would become applicable to new unit owners. We find the award of summary judgment to Greenwood Development inappropriate where it failed to strictly comply with the method of notice it prescribed in the 1981 Covenants. There are five units in which Greenwood Development seeks to impose the increased assessments based solely on Waiver Agreements that do *not* reference the 1981 Covenants. Those units are 501, 523, 530, 533, and 544. We reverse the grant of summary judgment as to these five units. Beyond the technical noncompliance with the language in the 1981 Covenants (limiting applicability to "instruments . . . which make reference to" the covenants), there remain unanswered questions. For example, the parties dispute whether the 1981 Covenants themselves are in the chain of title for units within Queen's Grant. We cannot answer this and other questions to the exacting summary judgment standard on the record before us.

In those instances where Greenwood Development relies on the Waiver Agreements—which *do* reference the 1981 Covenants—to impose the increased annual assessment, we find the 1981 Covenants enforceable. Queen's Grant asserts the Waiver Agreements are "contracts" and are void for lack of consideration,[17] for lack of mutual assent and for violating the rule against perpetuities. We believe the matter is governed by property, not contract, law.

The issue is notice of the amended covenants (in accordance with the triggering language in the 1981 Covenants), not a bargained-for consideration

[17] At common law, a "covenant" generally referred to a contract under seal. 20 Am. Jur. 2d Covenants, Conditions, and Restrictions § 2 (2005). In South Carolina, some distinctions between contracts under seal and other contracts remain, such as the rule that a covenant under seal may not be set aside for lack of consideration in the absence of fraud. Id.; Jackson v. Walters, 246 S.C. 486, 493, 144 S.E.2d 422, 425 (1965).

to gain a purchaser's consent to the increased assessment. Consent is not an issue, for the Declaration of Covenants allows for amendments to the covenants in the sole discretion of the Declarant. This discretion is limited not by a prospective owner's objection or acquiescence to paying a higher assessment, but by the law—covenants must be neither indefinite nor contravene public policy. Wells, 294 S.C. at 270, 363 S.E.2d at 894; accord Woodside Village Condo. Assoc., Inc. v. Jahren, 806 So. 2d 452, 461 (Fla. 2002) (holding that unit owners were on notice that their rights were subject to change via properly adopted amendments); McElveen-Hunter v. Fountain Manor Assoc., Inc., 386 S.E.2d 435, 436 (N.C. Ct. App. 1989), aff'd, 399 S.E.2d 112 (N.C. 1991) (holding that where the condominium documents so allow, occupancy and leasing restrictions in an amendment to the declaration may bind even unit owners who bought their units before the amendment was adopted). There is no claim by Queen's Grant that the 1981 Covenants are indefinite or contravene public policy. Moreover, Queen's Grant does not challenge the reasonableness of the assessment increase in 1981.

The final argument in connection with the Waiver Agreements is Queen's Grant's contention that the contingent, nonvested preemptive right to repurchase units (as reasserted in the 1981 Covenants) violates the rule against perpetuities. Queen's Grant concludes that the waiver of an unenforceable right cannot serve as valuable consideration to support the Waiver Agreements. According to the rule against perpetuities, a nonvested property interest is invalid unless "(1) when the interest is created, it is certain to vest or terminate no later than twenty-one years after the death of an individual then alive; or (2) the interest either vests or terminates within ninety years after its creation." S.C. Code Ann. § 27-6-20 (1991).[18] Nonvested property interests tend to restrain the free alienability of property and interfere with its beneficial use. 61 Am. Jur. 2d Perpetuities and Restraints on Alienation § 6 (2005). This court has had occasion to invalidate a right of first refusal in a deed where the contingent, nonvested interest attempted to reserve to the holder of the preemptive right—the grantor—a perpetual option to repurchase the property for the original

[18] The common law rule is as follows: "No interest is good unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest." Abrams v. Templeton, 320 S.C. 325, 327, 465 S.E.2d 117, 119 (Ct. App. 1995).

consideration. Webb v. Reames, 326 S.C. 444, 446-47, 485 S.E.2d 384, 385 (Ct. App. 1997). Greenwood Development cites to numerous cases from other jurisdictions upholding repurchase provisions similar to that in the 1981 Covenants, and rejecting application of the rule against perpetuities, where the right to repurchase the property is for the same price the owner is willing to sell to a third party. Weber v. Texas Co., 83 F.2d 807, 808 (5th Cir. 1936), Cambridge Co. v. East Slope Inv. Corp., 700 P.2d 537, 542 (Colo. 1985); Shiver v. Benton, 304 S.E.2d 903, 906-07 (Ga. 1983); cf. S.C. Code Ann. § 27-6-60(B) (holding that under the Uniform Statutory Rule Against Perpetuities, courts must reform a disposition that was created before July 1, 1987 by inserting a savings clause that preserves the transferor's plan of distribution "within the limits of the rule against perpetuities"). We decline to resolve this issue because there is no justiciable controversy surrounding the right of first refusal provision. This record is devoid of any attempt at any time by Greenwood Development to exercise its right of repurchase. See Peoples Fed. Sav. & Loan Assoc. of S.C. v. Resources Planning Corp., 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) ("Absent a pending sale or offer for sale, or purchase or offer to purchase, or the presence of a third party challenging right of first refusal, there is no justiciable controversy.") In any event, because we have determined that the Waiver Agreements served their intended notice function, we find Queen's Grant's various contract law based challenges misplaced.

While the Waiver Agreements may have been inartfully named, they did serve the purpose of giving each prospective owner notice of the applicability of the 1981 Covenants, even if those covenants were not in the grantee's deed. Harbison Cmty. Assoc., Inc. v. Mueller, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995) ("A covenant is enforceable against a subsequent grantee, even if not in the grantee's deed, if the grantee has actual or constructive notice of the covenant."). As the record reflects, all but fourteen unit owners had notice of the increased assessments through references in their deeds or in the Waiver Agreements.[19] For those units in which Greenwood Development relies solely on the Waiver Agreements which reference the 1981 Covenants, the so-called agreements satisfied the

[19] Greenwood Development has consistently assessed the fourteen remaining units at the lower rate included in the 1972 Covenants.

triggering provision in the 1981 Covenants and served their intended notice function.

In sum, because the Declaration of Covenants reserved to Palmetto Dunes Resort, and hence Greenwood Development as successor, the right to amend the restrictive covenants, purchasers of units in the Queen's Grant regime accepted their respective deeds subject to this right. Excepting the five Queen's Grant units discussed above, we affirm the grant of summary judgment and reject the balance of Queen's Grant's multiple challenges to the validity of the 1981 Covenants. The increased assessments under Article IV in the 1981 Covenants are enforceable, save the exception noted above.

II.

Greenwood Development's Appeal

Greenwood Development appeals from the denial of its motion for summary judgment as to the breach of contract claim concerning the road repair invoice and its motion for attorney fees and costs.

A. Circuit Court's Denial of Summary Judgment

Although we may entertain appeals from interlocutory orders not ordinarily appealable when they are companion to reviewable issues,[20] we

[20] Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (entertaining a discretionary appeal of a motion to dismiss in the interest of judicial economy because a related issue in a cross-appeal was properly before the court); Brown v. County of Berkeley, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) (holding that interlocutory orders may be considered on appeal when they are companion to reviewable issues, but finding the motions to dismiss unreviewable because they lacked a sufficient "nexus or companionship" to justify the exercise of immediate appellate review); Morris v. Anderson County, 349 S.C. 607, 610-11, 564 S.E.2d 649, 651 (2002) (holding that the appellate court may, as a matter of discretion, consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation, but declining to address the appeal based on concerns of creating an impermissible advisory ruling); Pitts v.

believe the purposeful decision of the circuit court to avoid any consideration of the motion dictates restraint. We dismiss Greenwood Development's appeal as interlocutory.

The circuit court order is not conducive to appellate review. The circuit court order is as follows:

> The case comes before me upon [Greenwood Development's] well pled summary judgment motion, and when I read the motion, it was my first thought that I should grant the motion. However, after reading the cause of action attacked, I realized the case can probably be tried upon a submission of the record to me without testimony, so I see no need to grant summary judgment when it will be almost as simple to hear the case on the merits, so the Motion for Summary Judgment is denied.

Greenwood Development advances the following arguments on its appeal: (1) the circuit court erred in failing to grant summary judgment because the bylaws placed the obligation to maintain the roads on Queen's Grant; (2) the circuit court erred in failing to grant summary judgment because under the 1981 Covenants Greenwood Development has no obligation to maintain the roads; and (3) Queen's Grant's cause of action is barred by the statute of limitations and equitable estoppel. These arguments are not properly before this court because the circuit court has yet to rule on them.

We do recognize that the bylaws (by incorporation of the Master Deed) place on Queen's Grant the duty to maintain "[a]ll roads" within its regime. We further recognize that under the 1972 Covenants and 1981 Covenants,

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Jackson Nat'l Life Ins. Co., 352 S.C. 319, 338, 574 S.E.2d 502, 511-12 (Ct. App. 2002) (entertaining an appeal from a denial of summary judgment because it was so closely connected with other issues properly before the court).

Greenwood Development is responsible for maintaining "private streets (except those located within a privately owned lot)." In its Complaint, Queen's Grant uses the term "private street" to describe the road that was repaired. As noted, we cannot determine the precise location of the "road" or "private street" which is the subject of Queen's Grant's breach of contract action. As urged by Greenwood Development, simply knowing the road is somewhere within the Queen's Grant regime may be dispositive. We believe it best, however, to have the circuit court, in the first instance, address this issue and determine if the road or street in question falls under Queen's Grant's duties under the Master Deed and bylaws or somehow is the responsibility of Greenwood Development under the applicable 1981 Covenants.

In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-780 (2004). Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments. Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004). The rationale for the rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error. Id. Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.

This case well illustrates the wisdom of the rule. In the approximate 2700 page record of this case, not a single page can be found containing a transcript of any proceeding before the circuit court. Nothing in the record indicates the precise location of the road involved in the $175 repair. Moreover, while Greenwood Development asserts that Queen's Grant has assumed responsibility for maintaining this particular road, the circuit court purposely avoided addressing the substance of Greenwood Development's arguments. The appealed order clearly was not intended to be a final ruling on any of the issues Greenwood Development raises. The circuit court denied Greenwood Development's motion only for reasons of judicial economy, finding that a trial upon a submission of record would be the most efficient resolution. What Greenwood Development is asking this court to do is serve as a trial court in finding facts based upon the record as submitted. That, we decline to do.

We dismiss Greenwood Development's appeal from the denial of its summary judgment motion and remand to the circuit court for further proceedings.

B. Denial of Motion for Attorney Fees and Costs

Greenwood Development's final argument on appeal is that the circuit court erred in refusing to award it attorney fees and costs. Construing the relevant language in the 1981 Covenants, the circuit court found that Queen's Grant did not violate the covenants by bringing its action.

"The general rule is that attorney's fees are not recoverable unless authorized by contract or statute." Seabrook Island Prop. Owners' Assoc. v. Berger, 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct. App. 2005). Greenwood Development relies solely on Section 7-10 of the 1981 Covenants to support its claim for attorney fees and costs. That provision provides:

> Enforcement. Greenwood shall have the right, but shall not be obligated, to proceed at law or in equity to complete compliance to the terms of this Agreement or to prevent violation or breach in any event. Violators shall be personally obligated to reimburse Greenwood in full for all its direct and indirect costs, including, but not limited to, legal fees incurred by Greenwood in maintaining compliance with this declaration, and such obligation shall constitute a lien upon the violator's property in accordance with Section 8-8.

The question presented is whether Queen's Grant may be considered a "violator" in filing and pursuing its Complaint, primarily seeking prospective declaratory relief.

Greenwood Development contends that Queen's Grant is a "violator" by seeking a declaratory judgment that its co-owners should be assessed under the 1972 Covenants, rather than the 1981 Covenants, and further seeking reimbursement of alleged past overages. "Violator" is not a defined

term in the 1981 Covenants. Greenwood Development asserts that by bringing a legal action, Queen's Grant has "flown in the face of" the 1981 Covenants. "Violation" has been defined, in relevant part, as "1. An infraction or breach of the law; a transgression. . . . 2. The act of breaking or dishonoring the law; a contravention of a right or duty." Black's Law Dictionary (8th ed. 2004).

In interpreting restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); Seabrook Island Prop. Owners Assoc. v. Marshland Trust, Inc., 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004). The rule of strict construction governing restrictive covenants, however, does not preclude their enforcement, for the rule should not be applied so as to defeat the plain and obvious purpose of the instrument. Hamilton v. CCM, Inc., 274 S.C. 152, 158, 263 S.E.2d 378, 381 (1980); Hoffman v. Cohen, 262 S.C. 71, 76, 202 S.E.2d 363, 366 (1974); Palmetto Dunes Resort, a Div. Of Greenwood Dev. Corp. v. Brown, 287 S.C. 1, 6, 336 S.E.2d 15, 18-19 (Ct. App. 1985). Greenwood Development cannot point to any specific provision of the 1981 Covenants that Queen's Grant has violated. By its terms, the covenant authorizes Greenwood Development to bring legal action to enforce the terms of the agreement, and to be awarded legal fees for "maintaining compliance" with the covenants. We decline Greenwood Development's invitation that we sanction an award of attorney fees and costs under the isolated phrase "maintaining compliance." This phrase must be examined in the context of the entire provision and the rule of construction that any ambiguity must be strictly construed against the party seeking enforcement. The provision allows for the recovery of attorney fees *only* against "violators" of the covenants. Because Queen's Grant may not be fairly characterized as a "violator" of the covenants, we affirm the circuit court's denial of Greenwood Development's motion for attorney fees. Accord Schneider v. Drake, 44 P.3d 256, 262 (Colo. Ct. App. 2001) (finding a declaratory judgment action alone insufficient to constitute a violation of the applicable covenants).[21]

[21] We do not reach the underlying question of whether the attorney fee provision is enforceable at all. There is no attorney fee provision in the 1972 Declaration of Covenants. The provision was added in 1981 presumably pursuant to Greenwood Development's rights as Declarant to impose

CONCLUSION

The increased assessments under the 1981 Covenants are valid and enforceable as to applicable units in the Queen's Grant II Horizontal Property Regime, and the order of the circuit court granting Greenwood Development summary judgment as to Queen's Grant claim for declaratory relief is affirmed in result in part. The grant of summary judgment is reversed in part, and the matter is remanded, as relates to the five units that are subject only to Waiver Agreements that do not expressly reference the 1981 Covenants. We dismiss as interlocutory Greenwood Development's appeal from the denial of summary judgment as to its breach of contract action concerning the road repair invoice and remand the matter to the circuit court. We affirm the denial of Greenwood Development's motion for attorney fees and costs.

AFFIRMED IN RESULT IN PART, REVERSED IN PART, DISMISSED IN PART, AND REMANDED.

STILWELL and WILLIAMS, JJ., concur.

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additional covenants running with the land "within the multi-family residential areas in Palmetto Dunes." Because Queen's Grant is not a "violator" and Greenwood Development is thus not entitled to an award of attorney fees, we need not decide whether a declarant may unilaterally impose a one-sided attorney fee provision under the guise of a covenant running with the land. Cf. Harbison Cmty. Assoc., Inc. v. Mueller, 319 S.C. 99, 102, 459 S.E.2d 860, 862 (Ct. App. 1995) (covenants that touch and concern the land have a beneficial effect on the property and are said to "run with the land"); 20 Am. Jur. 2d Covenants, Conditions, and Restrictions § 1 (2005) (defining a restrictive covenant as "an agreement . . . to do, or refrain from doing, certain things with respect to real property").

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cody Discount, Inc., Respondent,

v.

Audrey Merritt, Appellant.

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

Opinion No. 4102
Submitted February 1, 2006 – Filed April 10, 2006

AFFIRMED in part, REVERSED in part, and REMANDED

Jeffrey Falkner Wilkes, of Greenville, for Appellant.

Laura W. H. Teer, & Robert C. Childs, of Greenville, for Respondent.

WILLIAMS, J.: Audrey Merritt appeals a master-in-equity's decision holding that Cody Discount, Inc. was entitled to evict her from its real property following her default on an installment land contract. We affirm in part, reverse in part, and remand.

FACTS

On October 27, 1987, Audrey Merritt entered into an installment land contract with Martin and Wilma Baker to purchase a manufactured home and a 100 x 170 foot lot for $44,500. The Bakers informed Merritt that she did not need to file the contract until the property was paid for in full. The contract contained clauses that made the purchase contingent on payments of $450 dollars a month and maintenance of credit life insurance on the premises. The contract further stated that failure to comply with these conditions would entitle the seller to repossess the premises and retain all payments as rent.

Merritt testified the Bakers later informed her the insurance provision would be satisfied as long as she maintained insurance on the premises themselves. Accordingly, she never purchased the credit life policy called for in the contract. She also submitted payments after they were due on several occasions, but the Bakers always accepted the payments and never declared the contract in default. Although she was behind on payments to the Bakers, all past due amounts were satisfied when the Bakers later sold the property to Riley and Doris Jones in May 1989.

After the Joneses purchased the property, Merritt continued making payments of $450 a month. Merritt admitted she also made late payments from time to time to the Joneses, but, as with the Bakers, the Joneses always accepted the payments and never declared her in default. Cody Discount later purchased the property through a bond for title from Mr. Jones in March 2000. However, the property was not actually in Cody Discount's name until Cody took out a mortgage to pay for the property in May 2002.

From March 2000 until January 2002, Ms. Merritt continued to make her payments to Mr. Jones who would, in turn, endorse them over to Cody Discount. In January 2002, Merritt made her last payment to Mr. Jones. At this time, she and Mr. Jones were in negotiations about a payoff amount. Merritt testified that she was going to pay off the house with settlement money stemming from her first husband's death.

Shortly after Cody Discount acquired title to the property, it brought an action in magistrate's court to have Merritt evicted from her property based on her payment history. Soon after the hearing, Janet Cody, as President of Cody Discount, sent Merritt a letter stating that as of October 15, 2002, Merritt had an outstanding balance of $793.17. The letter further explained that interest would continue to accrue and a late fee of $20 would be added each pay period until the balance was paid in full.

On December 20, 2002, Merritt sent a response to Cody Discount via certified mail expressing her desire to pay the balance and tendering a check for $833.17. Although Janet Cody received the letter, the check was never cashed because Cody Discount alleged Merritt owed more than she tendered. It is somewhat unclear exactly how much Cody Discount alleges Merritt still owes as there are several different amounts appearing in the record. For instance, there is the previously mentioned letter drafted by Janet Cody which states a balance of $737.17, Cody Discount's complaint, which states Merritt was delinquent in the amount $793.17 but owed $1,247 dollars in late fees ($2040.17), while at trial it appears Cody Discount was trying to evict Merritt for owing $2,873.[1]

In addition to Merritt's late payments, Cody Discount argued before the master that it would be impossible for it to convey the property to Merritt as intended in the original contract. This claim of impossibility arises from a series of ordinances passed by Greenville County in 2000, which prevent mobile homes from having direct access to a public street or highway and require them to have access via an interior roadway. Although Merritt has always accessed the property over the same drive and Cody Discount was aware of her contract to purchase the mobile home and lot when they entered into the bond for title with Mr. Jones, Janet Cody stated that she never thought about having to deed her a right of way to use the drive. Through her testimony, Janet Cody made it clear that she did not want to grant Merritt an easement down the existing road because it would "ruin the value of our

[1] Janet Cody attributed the incorrect balances to miscalculations based on a faulty amortization schedule.

property."[2] Cody did state that she would be willing to grant Merritt an easement around the property, but Merritt would have to construct a road because none currently exists in that location.

On October 26, 2004, the master-in-equity issued an order ruling partially in each party's favor. Although the master found Merritt defaulted in making payments to each of the owners, he also noted that Merritt had almost paid the entire original balance on the contract. The master went on to rule that forfeiture of the mobile home should be relieved, but forfeiture of the lot should be granted based on the previously mentioned defaults and the fact that Cody Discount could not deed the lot to Merritt without granting her additional interests that would significantly affect its property's value.

STANDARD OF REVIEW

Actions to foreclose or cancel an instrument are actions in equity. Wilder Corp. v. Wilke, 324 S.C. 570, 576, 479 S.E.2d 510, 513 (1996) (citations omitted). In an action in equity, while this Court is free to take its own view of the preponderance of the evidence, this does not require us to disregard the findings of the trial judge who saw and heard the witnesses and, accordingly, was in a better position to judge their credibility. Donnan v. Mariner, 339 S.C. 621, 626, 529 S.E.2d 754, 757 (Ct. App. 2000).

LAW / ANALYSIS

On appeal, Merritt argues the master-in-equity erred in holding that "it was fair and equitable that [her] right in the real property should be forfeited and further, that any forfeiture should not be relieved." We agree.

[2] The existing road runs though the middle of the approximately 10-acre parcel Cody Discount purchased from the Joneses. Although Janet Cody on more than one occasion suggested that granting Merritt an easement would devalue her property, no evidence was presented to quantify the alleged decrease in value.

The courts of South Carolina have long held that forfeitures or penalties are not favored in either law or equity. Lewis v. Premium Inv. Corp., 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002); Ducworth v. Neely, 319 S.C. 158, 162, 459 S.E.2d 896, 899 (Ct. App. 1995); see also Litchfield Co. of South Carolina, Inc. v. Kiriakides, 290 S.C. 220, 349 S.E.2d 344 (Ct. App. 1986); Alexander v. Herndon, 84 S.C. 181, 65 S.E.2d 1048 (1909). Concomitantly, "a provision in an installment land contract declaring forfeiture in the event of purchaser default can, in particular circumstances, constitute a penalty." Lewis, 351 S.C. at 172, 568 S.E.2d at 364.

In Lewis, our supreme court held that in certain contractual instances where a stipulated sum (in the event of default) constitutes a penalty, "it would be inequitable to enforce the forfeiture provision without first allowing the purchaser an opportunity to redeem the installment contract by paying the entire purchase price." Id. As noted in the master's order, there are a number of case-specific factors to consider in making such a determination. These factors include the amount of equity the purchaser has accumulated, the length and number of defaults, the amount of forfeiture, the speed in which equity is sought, and the amount of money the purchaser would forfeit in relation to the purchase price of the property. Id. at 174, n.5, 568 S.E.2d at 364, n.5.

Presumably based in part on these factors, the master-in-equity found that Cody Discount's right to obtain ownership of Merritt's home should be relieved, but that its right to repossess the land should not be relieved. While we agree with the master as to the mobile home, after a review of the record we find the master should have granted Merritt the right to redeem the installment contract by paying the remainder of the purchase price. While Cody Discount makes much of the fact that granting Merritt an easement across the preexisting road, as her only means of access to the property, would "significantly" affect the value of its property, there is no evidence in the record to quantify such a claim.

Although it is true that Merritt has made late payments on and off since the inception of the land sale contract, it is also true that all of the property owners, including Cody Discount, continued to accept the payments without

declaring her in default. It was only when Merritt was within approximately $1,000 of paying off an original contract price of $44,500 that Cody Discount decided it would no longer be advantageous for them to transfer the property and thus they brought the current action.

As such, we affirm the master's decision as to the mobile home, reverse as to forfeiture of the lot, and remand for a determination of the amount Merritt owes to redeem the property.

AFFIRMED in part, REVERSED in part, and REMANDED. [3]

BEATTY, SHORT and WILLIAMS, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ellis Arthur and Barbara Arthur as Wife, next friend, and companion, Appellants,

v.

Sexton Dental Clinic, and Leigh Westraad and Lisa Ann Eagerton, as personal representatives of the Estate of Dr. H.L. Eagerton, Jr. and his associates A-Z; SC JUA, Respondents.

Appeal From Florence County
James E. Brogdon, Jr., Circuit Court Judge
J. Michael Baxley, Circuit Court Judge

Opinion No. 4103
Heard September 13, 2005 – Filed April 10, 2006

AFFIRMED

Ellis and Barbara Arthur, of Myrtle Beach, pro se, for Appellants.[1]

Saunders M. Bridges, Jr. and Amy Anderson Wise, of Florence, for Respondents.

BEATTY, J.: In this medical malpractice action, Ellis Arthur and Barbara Arthur (Appellants) appeal the circuit court's order, arguing the court erred in: (1) failing to set aside a scheduling order; (2) limiting discovery; (3) denying their Batson motion; and (4) excluding certain witnesses at trial. We affirm.

FACTS

On May 8 1995, Ellis Arthur visited the Sexton Dental Clinic with a toothache. Dr. Sojourner examined Arthur and extracted Arthur's tooth. Arthur returned to the Sexton Dental Clinic on May 10, 1995, because he continued to experience pain. Dr. Hester examined Arthur, did not see any problems, and sent Arthur home. Arthur began to experience trismus,[2] and therefore returned to the Sexton Dental Clinic once again on May 12, 1995. Dr. Sojourner examined Arthur, discovered an infection, and prescribed antibiotics. Arthur was hospitalized on May 16 for the infection and remained hospitalized for approximately two weeks. Arthur continues to suffer from pain in his throat and jaw. In addition, he has trouble swallowing food, and cannot speak clearly.

[1] Although Appellants were represented by counsel at trial and through oral argument before this court, we note they are now proceeding pro se in this appeal.

[2] Trismus is a spasm of the jaw muscles that makes it difficult to open the mouth.

On April 30, 1998, Arthur and his wife filed this action against the Sexton Dental Clinic, Dr. Eagerton,[3] and some associates (Respondents) for medical malpractice. Shortly after answering the Appellants' complaint, Respondents' counsel served Appellants with interrogatories and requests for the production of documents. When responses were not completed in a timely manner, Respondents moved to compel Appellants to answer the discovery. After a hearing, Circuit Court Judge Sidney Floyd granted the motion and ordered Appellants to respond within sixty days and to specifically address information regarding their expert witnesses.

On July 26, 2000, Respondents retained new counsel. The new counsel soon became concerned regarding the limited amount of discovery that had been completed in the two years since the case was filed. As a result, counsel forwarded a proposed scheduling order to Circuit Court Judge James E. Brogdon, Jr., the Chief Administrative Judge, on November 9, 2000. Counsel also forwarded a copy of the proposed scheduling order to Appellants' counsel. A few days later, Judge Brogdon's law clerk called Appellants' counsel to discuss the proposed scheduling order and left a voicemail message concerning the order. In addition, Respondents' counsel mailed Appellants' counsel a letter inquiring whether Appellants would agree to the proposed scheduling order and stating that if Appellants did not consent, Judge Brogdon would schedule a conference to discuss the matter. After receiving no response from Appellants' counsel, Judge Brogdon signed the scheduling order on December 19, 2000. The order, which was filed on January 4, 2001, limited discovery to forty-five days.

On September 19, 2001, Circuit Court Judge J. Michael Baxley held a hearing concerning the parties' pending motions. The motions included the following: (1) Respondents' motion to compel discovery; (2) Respondents' motions for summary judgment; (3) Appellants'

[3] The complaint alleged Dr. Eagerton extracted Arthur's tooth. At trial, however, Arthur testified Dr. Sojourner extracted his tooth. Respondents denied Dr. Eagerton ever treated Arthur. Dr. Eagerton is now deceased. He passed away after the trial.

motion to set aside the scheduling order; (4) Appellants' motion to amend the pleadings to include additional doctors; and (5) Appellants' motion to compel the depositions of certain witnesses. At the beginning of the hearing, Judge Baxley notified the parties that he planned to defer Appellants' motion to set aside the scheduling order to Judge Brogdon. Judge Baxley stated "I am not the chief administrative judge" and "I'm going to defer to him and I'll let you go back in the back and have a telephone conference with Judge Brogdon." Appellants objected, arguing the "scheduling order is a matter that needs to be heard and ruled on by the Court because . . . the other motions . . . fall from that." Judge Baxley refused to hear the scheduling order motion. However, he heard Respondents' motions and Appellants' motion to amend the pleadings. He deferred Appellants' motion to compel depositions until Judge Brogdon ruled on the scheduling order motion.

Prior to the telephone conference with Judge Brogdon, Judge Baxley denied Respondents' motion for summary judgment. Judge Baxley, however, granted Respondents' motion to compel discovery and ordered Appellants to produce dental records, prescription records, tax returns, and an itemized statement of damages within ten days. In addition, Judge Baxley denied Appellants' motion to amend the pleadings stating, "[i]t would be significantly prejudicial to these new parties and to the existing defendants to allow this amendment at this very late hour."

During the telephone conference, Judge Brogdon denied Appellants' motion to set aside the scheduling order. After the telephone conference, Judge Baxley resumed the proceeding and heard Appellants' motion to compel the deposition of certain witnesses. Because the witnesses were not properly identified prior to the end of discovery as provided in the scheduling order, Judge Baxley denied this motion. Appellants were, however, permitted to depose Dr. Eagerton.

On January 14, 2002, Judge Brogdon presided over the jury trial in the case. During jury selection, Appellants challenged two of Respondents' peremptory strikes based on Batson v. Kentucky, 476

U.S. 79 (1986). Judge Brogdon held a Batson hearing and ruled the strikes were proper given there was no showing of pretext.

After the Batson hearing, Appellants' counsel renewed his motions. Judge Brogdon considered these motions as well as Respondents' pre-trial motions, which included: (1) Respondents' motion seeking to exclude certain evidence due to Appellants' failure to comply with discovery within the ten-day time frame set forth in Judge Baxley's order; and (2) Respondents' motion to exclude the testimony of Appellants' witnesses, Dr. Fish, Dr. Graham, and Dr. Chewning. Judge Brogdon granted Respondents' motion and, as a consequence, excluded evidence Appellants failed to timely produce. Specifically, Judge Brogdon excluded the testimony of Drs. Fish, Graham, and Chewning.

Ultimately, the jury rendered a verdict in favor of Respondents. Judge Brogdon denied Appellants' post-trial motions. This appeal followed.

DISCUSSION

I. Discovery

Appellants contend the circuit court erred in issuing the scheduling order outside the presence of Appellants' counsel. In the alternative, Appellants assert the circuit court erred in failing to set aside the scheduling order and declining to extend the time for discovery.[4] We disagree.

"The trial court's rulings on discovery matters will not be disturbed on appeal absent a clear abuse of discretion." Belk of Spartanburg, S.C., Inc. v. Thompson, 337 S.C. 109, 126-27, 522 S.E.2d

[4] Although Appellants raise three separate issues, we have consolidated the related issues under one heading in the interest of clarity and brevity.

357, 366 (Ct. App. 1999). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

Under certain conditions, the South Carolina Rules of Civil Procedure permit trial courts to issue scheduling orders for discovery. Rule 16(a)(5) provides that upon motion of the parties, the court "may in its discretion or upon motion of any party direct the attorneys for the parties to appear before it" for a pre-trial hearing to consider the limitation of time allowed for discovery. In addition, Rule 26(f) provides the following:

> [T]he court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorneys for any party if the motion includes: (1) A statement of the issues as they then appear; (2) A proposed plan and schedule of discovery; (3) Any limitations proposed to be placed on discovery; (4) Any other proposed orders with respect to discovery; and (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Rule 26(f), SCRCP. The court may combine a pre-trial hearing, authorized by Rule 16, and a discovery conference, authorized by Rule 26(f). Id.

In this case, Respondents' counsel forwarded a proposed scheduling order to Judge Brogdon on November 9, 2000, along with a brief letter explaining his concerns regarding the limited amount of

discovery that had been completed.[5] After unsuccessfully attempting to contact Appellants' counsel, Judge Brogdon signed the scheduling order on December 19, 2000, and filed it on January 4, 2001. Although Judge Brogdon did not hold a discovery conference or a pre-trial hearing, we find no reversible error.

Initially, we reject Appellants' contention that Judge Brogdon was required to hold a hearing on the issuance of the scheduling order. Our review of the above-cited rules of civil procedure reveals that the decision of whether to conduct a hearing is a matter left to the discretion of the trial judge. This interpretation of the rules is supported by analysis of Rule 16 of the Federal Rules of Civil Procedure, a rule that is similar to our state court rule. Rule 16, SCRCP editor's note ("This Rule 16 is similar to the Federal Rule" with limited exceptions.). Specifically, secondary authority has stated that a scheduling conference is not mandatory and the issuance of a

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[5] We note that it is questionable whether Respondents' counsel's letter combined with the attached proposed scheduling order constituted a motion under Rule 7(b), SCRCP. Rule 7(b) provides that motions "shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Although the letter and proposed order were not necessarily the equivalent of a formal motion, the letter was in writing and it expressed counsel's concerns regarding discovery. The attached proposed scheduling order also set forth the relief sought by Respondents. In addition, Respondents' counsel mailed a copy of the letter and the proposed order to Appellants' counsel. Because the circuit court and the parties were aware of the substance of Respondents' request, we do not believe Appellants were prejudiced by the absence of a formal motion. Cf. DM Co. v. Nycoil Co., 273 S.C. 496, 499, 257 S.E.2d 499, 500 (1979) (holding judgment by default was precluded where oral response to pleadings, which did not comply with strictures of circuit court rules, at a rule to show cause hearing was sufficient to comply with substantive requirement of the rules given plaintiff had actual notice of both the existence and contents of defendant's response to plaintiff's Complaint).

scheduling order does not require formal communication. See 6A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1522.1 (2d ed. Supp. 2005) (analyzing Rule 16, FRCP, and stating, "A scheduling conference may be requested by the judge or the parties, but it is not mandatory. Indeed, Rule 16(b) specifically provides that if the request for a conference is not made within 120 days after the action is filed, the scheduling order will be issued without a conference, although after some communication with the parties. That communication may be very informal. As explained in the Advisory Committee Note, the scheduling order may be issued after consultation with the parties by telephone or mail, rather than in person.").

Furthermore, within the context of this procedure, Appellants' counsel was given sufficient time to object to the proposed scheduling order and request a hearing before the order was issued. Nearly two months elapsed between the time the proposed order was submitted and when it was filed. Despite this time period, Appellants' counsel admitted at oral argument that he did not respond to the circuit court's inquiry regarding the order.

Based on the specific facts of this case, we find Judge Brogdon did not abuse his discretion in issuing the scheduling order without a hearing. Because we conclude Judge Brogdon properly issued the scheduling order, we also agree with his decision declining to set aside the order. Furthermore, we find Judge Baxley properly deferred this decision to Judge Brogdon. See Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One circuit court judge does not have the authority to set aside the order of another.").

In conjunction, we agree with Judge Baxley's decision declining to extend the time for discovery beyond that which was set in the scheduling order. Appellants brought this action against Respondents in April of 1998. The scheduling order, filed on January 4, 2001, gave the parties until February 19, 2001, an additional forty-five days to complete discovery. In view of this extensive time frame for discovery, we cannot discern nor can Appellants explain how they were

prejudiced or that a "manifest injustice" was created by the judge's decision to limit the time for discovery given the case had been pending for nearly three years. Accordingly, we find Judge Baxley did not abuse his discretion regarding the rulings on discovery.

II. Batson Motion

Appellants argue the circuit court erred in allowing Respondents to exercise preemptory strikes which excluded all African-American males from the jury in violation of Batson v. Kentucky, 476 U.S. 79 (1986). We disagree.

The trial court must conduct a Batson hearing when members of a racial or gender group are struck and the opposing party requests a hearing. State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999). During the hearing, the proponent of the strikes must present racially-neutral explanations. Id.; State v. Adams, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). "Unless a discriminatory intent is inherent in the proponent's explanation, the reason offered will be deemed race-neutral." Payton v. Kearse, 329 S.C. 51, 55, 495 S.E.2d 205, 207 (1998). The burden then shifts to the party challenging the strikes to show the explanations were merely pretextual. Haigler, 334 S.C. at 629, 515 S.E.2d at 91; Adams, 322 S.C. at 124, 470 S.E.2d at 372. Our supreme court has explained:

> Pretext generally will be established by showing that similarly situated members of another race were seated on the jury. Under some circumstances, the race-neutral explanation given by the proponent may be so fundamentally implausible that the judge may determine, at the third step of the analysis, that the explanation was mere pretext even without a showing of disparate treatment.

Payton, 329 S.C. at 55, 495 S.E.2d at 208.

The opponent of the strike carries the ultimate burden of persuading the trial court the challenged party exercised strikes in a discriminatory manner. Adams, 322 S.C. at 124, 470 S.E.2d at 372. Whether a Batson violation has occurred must be determined by examining the totality of the circumstances, and appellate courts review the trial court's ruling with a clearly erroneous standard. State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001).

In this case, Respondents struck three Caucasians and three African-Americans from the jury. Appellants challenged two of the strikes pursuant to Batson. The trial judge conducted a Batson hearing. During the hearing, Respondents offered race-neutral reasons for the strikes. Respondents struck one potential juror due to the residential area where he lived. Specifically, Respondents stated the potential juror appeared to live in the same general area as the Appellants and also seemed to be close in age to the Appellants. In addition, Respondents noted the potential juror wore an "unusual piece of jewelry around his neck." Respondents struck the second potential juror because he was a minister. Respondents' counsel explained: "I look at pastors or preachers or reverends very carefully because . . . [they] are inclined to award money maybe under the theory of the milk of human kindness." The trial judge found both strikes were proper and found no showing of pretext on either strike.

We agree with the trial judge that the reasons Respondents offered to explain the strikes were facially race-neutral. See State v. Rayfield, 357 S.C. 497, 502, 593 S.E.2d 486, 489 (Ct. App. 2004), cert. granted (Mar. 3, 2005)(recognizing that "[o]ur courts, as well as other jurisdictions, have consistently found a prospective juror's demeanor and appearance as nondiscriminatory reasons for exercising a peremptory challenge of the juror"); see also State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) (finding place or type of employment may be race-neutral reason for strike).

Thus, the burden shifted back to Appellants to prove pretext. Appellants did not show that similarly situated Caucasians were seated on the jury nor did Appellants offer any evidence showing

Respondents' explanations were fundamentally implausible. Instead, Appellants simply disagreed with the legitimacy of Respondents' explanations. Thus, Appellants failed to meet their burden.[6]

III. Exclusion of Witnesses

Appellants argue the trial judge erred in excluding their expert, Dr. Fish, and their witnesses, Dr. Chewning and Dr. Graham, from trial.[7] Appellants contend the court failed to consider the factors set forth in Jumper v. Hawkins, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001), before excluding their witnesses. We disagree.

As a threshold matter, it is undisputed that Appellants failed to specifically name the above-listed witnesses in their answer to Respondents' interrogatories within the time limits established by the scheduling order. Given Appellants failure to strictly comply with the

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[6] In their brief, Appellants note they raised a Batson challenge regarding the "abnormal excusing [of] a black male juror from the panel after all voir dire and other inquires into the jury selection process had been concluded." Appellants, however, failed to provide arguments or supporting authority for this assertion. Thus, the issue is deemed abandoned on appeal. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting where a party fails to cite authority or where the argument is simply a conclusory statement, the party is deemed to have abandoned the issue).

[7] We reject Respondents' claim that Appellants failed to preserve this issue for review because Appellants did not proffer the testimony of the witnesses at trial. After the trial judge granted Respondents' motion to exclude the witnesses, Appellants asked if they could note for the record that they intended to call the excluded witnesses. Judge Baxley replied, "Sure you may." Appellants then noted each witness Appellants would have called if the trial judge had allowed the witness' testimony.

scheduling order, the trial judge had the discretionary authority to impose the appropriate sanction if any was warranted. Thus, the question becomes whether the judge abused his discretion in excluding Appellants' three witnesses. See Laney v. Hefley, 262 S.C. 54, 58, 202 S.E.2d 12, 14 (1974) (applying former Circuit Court Rule 90 governing interrogatories and finding that "what sanctions, if any, are to be imposed where there is a failure to fully comply with the rule" is left largely to the discretion of the trial judge); Dunn v. Coca-Cola Bottling Co., 307 S.C. 426, 432, 415 S.E.2d 590, 593 (Ct. App. 1992), rev'd on other grounds, 311 S.C. 43, 426 S.E.2d 756 (1993) (stating "[t]he decision of whether or not to allow a witness to testify who was not previously listed on answers to interrogatories rests within the sound discretion of the trial judge"); see also Callen v. Callen, 365 S.C. 618, 627, 620 S.E.2d 59, 64 (2005) (finding family court failed to exercise discretion in ruling on defendant's motion to exclude plaintiff's witness where court failed to make appropriate inquiry).

In Jumper, this court specifically addressed the authority of a trial judge to exclude the testimony of an expert witness. We held a trial judge is required to consider and evaluate the following factors prior to excluding a witness:

(1) the type of witness involved;
(2) the content of the evidence emanating from the proffered witness;
(3) the nature of the failure or neglect or refusal to furnish the witness' name;
(4) the degree of surprise to the other party, including the prior knowledge of the name of the witness; and
(5) the prejudice to the opposing party.

Jumper, 348 S.C. at 152, 558 S.E.2d at 916.

Although we recognize that the trial judge excluded the testimony of Dr. Fish, Dr. Chewning, and Dr. Graham without specifically enunciating the Jumper factors, we believe his failure to do so is not sufficient to constitute reversible error. Based on our review

of the record, we find the judge considered the requisite factors and made the appropriate inquiry before ultimately excluding the challenged witnesses.

Initially, we note Respondents' counsel prefaced his argument concerning his motion in limine by directing the judge's attention to Jumper. Furthermore, in the course of the extensive discussion on this motion the judge either heard through arguments of counsel or elicited information sufficient to satisfy each Jumper factor.

In terms of Dr. Fish, the judge was aware that Appellants sought to call him as an expert witness. The judge was also apprised of Dr. Fish's testimony. Appellants' counsel explained that he intended to call Dr. Fish in response to the contradictory information the Respondents elicited in their deposition of Appellants' initial expert witness. Appellants' claimed the testimony of their first expert witness was inconsistent because the witness did not have access to all of Arthur's medical records. Additionally, as part of their return to Respondents' written motion in limine, Appellants submitted an affidavit in which Dr. Fish summarized his expert opinion.

As to the third and fourth Jumper factors, there is evidence that Appellants failed to or neglected to furnish Respondents with the name and information of Dr. Fish until after the discovery deadline. Appellants' filed their Complaint on April 30, 1998. They did not list Dr. Fish as an expert witness in their original or supplemental answers to Respondents' interrogatories. In a letter to Respondents dated February 16, 2001, Appellants first mentioned enlisting Dr. Fish as an expert witness. In a follow-up letter to Respondents dated March 2, 2001, Appellants identified Dr. Fish as another expert. This letter, however, was beyond the February 19, 2001 deadline set by the scheduling order. This delay is inexplicable given Appellants' counsel told the judge during the motion in limine hearing that "[t]his witness was set up ever since 1999 on this case."

This late notification inevitably created significant surprise to Respondents. In a letter dated March 7, 2001, Respondents notified

Appellants that they took the position that Dr. Fish was not a named expert because he was not identified before the discovery deadline. After the case was set for date certain on January 14, 2002, Respondents' again informed Appellants by letter dated October 23, 2001, of their position regarding Dr. Fish and requested Appellants respond if they were in disagreement. Appellants offered no response until the case was called for trial.

Finally, given these circumstances, Respondents were prejudiced by the fact that they did not have time to depose Dr. Fish prior to trial given Appellants identified him as a definite witness after the discovery deadline and failed to provide any additional information regarding this out-of-state expert.

As to Dr. Graham and Dr. Chewning, we initially question whether Appellants preserved for our review any argument concerning the exclusion of these witnesses. A review of their brief reveals that Appellants only specifically referenced Dr. Fish by name. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting where a party fails to cite authority or where the argument is simply a conclusory statement, the party is deemed to have abandoned the issue). Because, however, the argument was made to the trial judge and the Appellants generally discuss these two witnesses, we have decided to address the issue on the merits.

Similar to the judge's decision to exclude Dr. Fish, we also find the judge properly excluded Dr. Graham and Dr. Chewning. With respect to the first and second Jumper factors, Appellants informed the judge that Dr. Graham and Dr. Chewning were treating physicians of Arthur and had access to his medical records. Appellants further explained that Dr. Chewning was a "subsequent caretaker" of Arthur and had "in essence saved that man's life." However, Appellants informed the judge that neither witness could testify to the events of May 8, 1995, because they were not present when the tooth extraction took place.

In terms of Appellants' failure to furnish Respondents with the names of these witnesses, the record reflects that neither witness was specifically listed in response to Respondents' interrogatories. Instead, Appellants indicated in their response that they would "permit review of [the following] medical records regarding treatment and cost" from Carolina Hospital Systems, Graham Clinic, and Dr. Chewning.

Finally, there is evidence that Respondents were significantly surprised and prejudiced by Appellants' decision to call these two witnesses at trial given Respondents did not receive notice that these witnesses had been subpoenaed until the Friday before the trial that was scheduled for Monday. Due to the late notification, Respondents were unable to depose either witness before trial.

Accordingly, we find the trial judge did not abuse his discretion in excluding Appellants' three witnesses. In reaching this decision, the judge did not exclude the witnesses solely on the ground of Appellants' failure to comply with the time limits of the scheduling order. Instead, the judge made the appropriate inquiry and considered the requisite factors. Cf. Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003) (reversing decision of trial court to exclude plaintiffs' witnesses where "the trial court made no specific finding of prejudice to the respondents, other than finding the late disclosure would necessitate further discovery" and the "trial court advised the parties that there had been no disobedience of any order of the court, and that it had not imposed any sanctions"); Jumper, 348 S.C. at 151, 558 S.E.2d at 916 (reversing trial court's decision to exclude plaintiff's expert witness where the court failed to learn and analyze all of the details and information about the witness and the court relied solely on the limits established by the pre-trial discovery order).

CONCLUSION

For the reasons stated herein, we find the circuit court did not err in its rulings regarding the issuance of the scheduling order as well as discovery. Moreover, we find the circuit court did not abuse its

discretion in excluding three of Appellants' witnesses at trial and did not err in denying Appellants' Batson motion.

AFFIRMED.

GOOLSBY and SHORT, JJ., concur.